



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-077

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Union Free School District of the Tarrytowns

Appearances:

Keane & Beane, P.C., attorneys for respondent, by Stephanie M. Roebuck, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Carmel Academy (Carmel) for the 2018-19 and 2019-20 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student, as a part of the same proceeding, has been the subject of a prior State-level administrative appeal, which remanded the matter to the IHO for further proceedings (see Application of the Bd. of Educ., Appeal No. 20-190). The current appeal arises from the IHO's decision issued after remand based on essentially the same hearing record that was available at the time of the initial appeal; accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will only be repeated as relevant to this appeal.

As stated in the prior appeal, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) at four years of age for which he was prescribed medication, and he subsequently received a diagnosis of a learning disability (Dist. Exs. 24 at p. 1; 30 at p. 1). Specifically, the student has a history of difficulty with word reading and decoding, reading

fluency, spelling, expressive writing, math fluency and calculation, fine motor/handwriting weakness, nonverbal memory, processing speed, word retrieval, rapid naming, categorization, and global problems with executive functioning (see Dist. Ex. 34 at p. 2). In addition, the student demonstrated severe problems with sustained attention and distractibility which significantly interfered with his ability to remain focused and engaged and to complete written work (*id.*).

The student attended district schools beginning in the fourth grade (2015-16 school year) and continuing through the sixth grade (2017-18 school year) where he received special education and related services as a student with a learning disability (see generally Dist. Exs. 2-8).¹ During the 2017-18 school year, the CSE convened multiple times to modify the student's IEP, and his special education programming generally consisted of integrated co-teaching services, counseling, occupational therapy (OT), and a special class placement for language arts instruction (see Dist. Exs. 5; 7; 8).

On May 31, 2018 and June 7, 2018, CSEs convened for an annual review and to develop the student's IEP for the 2018-19 school year (seventh grade) (Dist. Exs. 9 at p. 1; 10 at pp. 1-13). The June 2018 CSE recommended that the student receive a 10-month program consisting of one 45-minute period per day of integrated co-teaching (ICT) services in each of English language arts (ELA), mathematics, science, and social studies (Dist. Ex. 10 at pp. 1, 8). In addition, the CSE recommended one 45-minute period per day of 5:1 "non-integrated" resource room services and one 30-minute session per six-day cycle of counseling in a small group (*id.* at p. 8).

In a letter dated June 13, 2018, the parent notified the district of her intention to unilaterally place the student at Carmel for the 2018-19 and 2019-20 school years and seek public funding for that placement (Parent Ex. C at pp. 1, 11). The parent also requested that the district provide the student with transportation services (*id.* at p. 11). The parent signed an enrollment contract with Carmel on July 16, 2018 for the student to attend Carmel for the 2018-19 school year (Parent Ex. H at pp. 1-6).²

On September 21, 2018, the CSE reconvened and subsequently added two study skills annual goals to the student's IEP (compare Dist. Ex. 10 at p. 6, with Dist. Ex. 11 at pp. 1, 6-7).

During the 2018-19 school year the parent sought a neuropsychological evaluation, which yielded diagnoses of a "language based learning disability (Dyslexia, Combined Dysphonetic and Dyseidetic Types) marked by deficits in both phonological and visual processing, visual memory, auditory attention, rapid naming, cognitive set shifting, sequential processing, and rather severe symptoms of [attention deficit hyperactivity disorder] (ADHD) and executive dysfunction" together with a developmental coordination disorder (dysgraphia), an unspecified neurodevelopmental disorder, and dysthymia (Dist. Ex. 34 at pp. 16, 19-20, 23).

¹ The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

² The Commissioner of Education has not approved Carmel as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

On May 28, 2019 and June 19, 2019, CSEs convened for the student's re-evaluation/annual review and to develop the student's IEP for the 2019-20 school year (Dist. Exs. 12 at p. 1; 13 at pp. 1-12). The June 2019 CSE recommended a 10-month 15:1 special class placement consisting of one 45-minute period per day in each of ELA, mathematics, science, and social studies instruction (id. at pp. 1, 8). In addition, the CSE recommended a daily, 45-minute 5:1 special class for reading, one 45-minute period per day of 5:1 "non-integrated" resource room services, and two 30-minute sessions per month of counseling in a small group (id.).

In a letter dated August 19, 2019, the parent notified the district of her intention to unilaterally place the student at Carmel for the 2019-20 school year and seek public funding/reimbursement for the cost of the private school, as well as her request that the district provide the student with transportation to Carmel (see Parent Ex. J at pp. 1-4).

For both the 2018-19 and 2019-20 school years at Carmel the student was enrolled in the Providing Alternative Learning Strategies (PALS) program, the special education program at Carmel (IHO Exs. VI at pp. 1-2, 4, 5; VII at pp. 3, 5-6; see Parent Exs. E; H; K; N).

By due process complaint notice dated September 27, 2019, and due process complaint notice dated January 17, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Exs. A-B).³ Relevant to the instant appeal, the parent requested findings that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, and for reimbursement of the student's tuition at Carmel for the 2018-19 and 2019-20 school years (Parent Exs. A at p. 11; B at p. 6).

A. November 5, 2020 Impartial Hearing Officer Decision and Appeal

The parties proceeded to an impartial hearing on April 14, 2020, which concluded on August 6, 2020, after 10 days of proceedings (Tr. pp. 1-1592).

Overall, in a decision dated November 5, 2020, the IHO who presided over the impartial hearing (IHO 1) found that the district denied the student a FAPE for both the 2018-19 and 2019-20 school years in that the district did not evaluate the student in all areas of suspected disability, did not recommend an appropriate program for either school year, and failed to recommend necessary speech-language therapy and OT (November 5, 2020 IHO Decision at pp. 38-39). IHO 1 assessed the appropriateness of the parent's unilateral placement of the student at Carmel for the 2018-19 and 2019-20 school years and found Carmel was an appropriate placement (id. at pp. 39-44). With respect to equitable considerations, IHO 1 analyzed the contentious relationship between the parties, but noted that the parent obtained scholarships used towards the student's tuition and based on this, declined to further reduce any relief awarded (id. at pp. 44-46).⁴ IHO 1

³ The September 2019 and January 2020 due process complaint notices were consolidated in April 2020 (IHO Ex. IV[R] at p. 1). Any IHO exhibits with an "R" designation refer to those exhibits entered into evidence on remand.

⁴ The IHO noted that it was unclear from the hearing record if one scholarship awarded to the student was already calculated in the amount being requested for tuition for the 2019-20 school year and directed that the amount

addressed the parent's other requests for relief and directed the district to provide round-trip transportation to Carmel but declined to award compensatory education for 12-month services (id. at p. 47). IHO 1 directed the district to reimburse the parent for the cost of the student's tuition and expenses at Carmel for the 2018-19 and 2019-20 school years and provide round-trip transportation of the student to and from Carmel for the 2018-19 and 2019-20 school years (id. at p. 48).

The district appealed, and asserted that IHO 1 erred in finding that it failed to evaluate the student in all areas of suspected disability; that the CSE failed to appropriately review and consider an independent neuropsychological evaluation report; that the present levels of performance were not accurate such that annual goals the CSE developed for the 2018-19 school year were not appropriate; that the district failed to prove that its recommended programs for the student for the 2018-19 and 2019-20 school years were appropriate; and that the CSE's determination that the student was not eligible for 12-month services was unreasonable (see Application of the Bd. of Educ., Appeal No. 20-190). With respect to how IHO 1 reached her decision, the district asserted that IHO 1 erred in relying on the independent neuropsychological evaluation results and testimony of the evaluator even when the CSE was not in possession of the report (id.). In the prior appeal, the district also asserted that IHO 1 erred in finding that Carmel was an appropriate placement for the student for the 2018-19 and 2019-20 school years and that IHO 1 incorrectly awarded tuition reimbursement to the parent as equitable considerations did not support an award of tuition reimbursement (id.).

The parent cross-appealed from IHO 1's determination that the student did not require 12-month services during the 2018-19 school year and requested that the student be awarded 1:1 compensatory educational services for any 12-month services missed that the student should have received (see Application of the Bd. of Educ., Appeal No. 20-190).

In a decision dated March 31, 2021, a State Review Officer concluded that IHO 1 erred in relying on the results from the January 2019 neuropsychological evaluation and Carmel reports that were not available to the June 2018 CSE, and therefore, the IHO's finding that the district denied the student a FAPE for the 2018-19 school year was overturned and remanded to the IHO to determine what evaluative information the June 2018 CSE considered in developing the student's IEP for the 2018-19 school year (see Application of the Bd. of Educ., Appeal No. 20-190). Upon remand, the SRO directed the IHO to render a new determination based on a prospective analysis using the evaluative information that was available to the June 2018 CSE (id.).

The SRO upheld IHO 1's determination that, during summer 2018, the student was not likely to experience substantial regression requiring the CSE to recommend 12-month services (see Application of the Bd. of Educ., Appeal No. 20-190). Furthermore, the SRO sustained the district's appeal from IHO 1's determination that the student needed 12-month services to prevent substantial regression for summer 2019; according to the SRO, the information presented by

awarded would be reduced by the amount of the scholarship unless the parent provides the district with proof that it was already reflected in the tuition (IHO Decision at pp. 46, 48).

Carmel to the June 2019 CSE meeting as to regression was suspect and the CSE was reasonable in questioning it and deciding not to recommend 12-month services (*id.*).

The SRO also found that IHO 1 erred in her conclusion that the July 2019 CSE did not adopt any of the recommendations contained in the January 2019 neuropsychological evaluation report (see Application of the Bd. of Educ., Appeal No. 20-190). The SRO directed that upon remand, "the IHO should discuss the programming that the district did provide and apply the Andrew F. standard, that is whether the student's IEP [presented an] educational program reasonably calculated to enable the child to make progress appropriate in light of his circumstances and explain why it did or did not, rather than focus solely on whether or not the district was required to adopt the programming recommendations of [the] neuropsychologist into the student's IEP" (*id.*).

Further, the SRO remanded the case to determine what information the June 2019 CSE had available to it related to the student's speech-language and occupational therapy (OT) skills and needs, and to consider the appropriateness of the 2019-20 recommendations absent these services (see Application of the Bd. of Educ., Appeal No. 20-190).

B. Impartial Hearing Officer Decision on Remand

A new IHO (IHO 2) was appointed to hear the matter after remand, as the IHO 1 was unavailable to hear the case (see IHO Decision at p. 3). After remand, IHO 2 conducted two prehearing conferences with the parties to clarify the issues to be determined on remand (Oct. 4, 2021 Tr. pp. 1-19; March 16, 2022 Tr. pp. 1-20; IHO Decision at pp. 2-4).⁵ The parties agreed to provide IHO 2 with the hearing record from the proceeding prior to remand (Oct. 4, 2021 Tr. pp. 8, 10-11; see IHO Decision at p. 4). In addition, both parties submitted letter briefs with respect to the issues before IHO 2 on remand (IHO Decision at p. 4; IHO Exs. II[R]-III[R]). Moreover, the parties agreed that no additional evidence or testimony was required to be submitted (IHO Decision at p. 4).⁶ IHO 2 was clear in her decision that the SRO did not remand IHO 1's previous findings on the appropriateness of Carmel, equitable considerations, or compensatory education, and therefore those issues were not before her on remand (*id.* at p. 3).

IHO 2 set forth the issues on remand for the 2018-19 school year, as follows:

1. Assess the sufficiency of the information the June 2018 CSE had at the time it developed the [student's] IEP for the 2018-[]19 school year.
2. Determine what evaluative data the June 2018 CSE considered and assess the [p]arent's allegations related to the 2018-[]19 10 month school year programming without reliance on information not available to the [d]istrict at

⁵ Any reference to transcripts on remand shall be cited with a hearing date followed by the page number(s).

⁶ Due to COVID-19, during the initial hearing, both parties presented direct affidavit testimony of all of their witnesses (see IHO Exs. I-XVI), who were also available during the initial impartial hearing for further examination. State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

the time of the CSE meeting. The IHO must render a new determination based upon a prospective analysis using materials that were available to the CSE.

(IHO Decision at pp. 3-4, 20).

IHO 2 concluded that the hearing record established that the May and June 2018 CSEs "had sufficient information before them to develop the [student's] IEP for the 2018-[]19 school year and that the [d]istrict provided [the student] with [a] FAPE and that the IEP and program was reasonably calculated to confer an educational benefit to [the student]" (IHO Decision at pp. 21, 25).

In connection with the 2019-20 school year, the IHO again set forth the issues to be decided on remand, as follows:

1. The SRO found that the IHO made a factual error in finding that the [d]istrict did not adopt any recommendations from the January 2019 neuropsychological.
2. The IHO should discuss the programming that the [d]istrict provided and apply the Andrew F. standard.
3. The IHO should consider the appropriateness of the 2019-[]20 program absent speech language therapy and occupational therapy.

(IHO Decision at pp. 4, 21).

In connection with the 2019-20 school year, IHO 2 similarly held that the hearing record demonstrated that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at p. 21). IHO 2 found that although the May 2019 CSE did not review the January 2019 neuropsychological evaluation report, the neuropsychologist participated in the June 2019 CSE meeting, the neuropsychological evaluation was discussed at the June 2019 CSE meeting, and the June 2019 IEP incorporated some of the recommendations of the neuropsychological evaluation (id. at p. 27). Ultimately IHO 2 held that the June 2019 CSE "had sufficient information" to develop an IEP for the student for the 2019-20 school year and the goals, program, and accommodations provided the student with a program "reasonably calculated to confer an educational benefit to [the student] and [to] make progress appropriate in light of his circumstances" (id. at p. 31). With respect to related services, IHO 2 found that there was no specific recommendation for speech-language therapy and the May and June 2019 CSEs were permitted to follow the recommendation from the district's OT evaluation indicating that OT services were not required (id. at pp. 30-31).

Finding that the district offered the student a FAPE for both the 2018-19 and 2019-20 school years, IHO 2 dismissed the parent's due process complaint notices (IHO Decision at p. 32).

IV. Appeal for State-Level Review

In an amended request for review, the parent appeals from IHO 2's determinations. The parent asserts that IHO 2 erred in finding that the district offered the student a FAPE for the 2018-19 and 2019-20 school years. The parent further asserts that IHO 2 erred in misinterpreting and misapplying the testimonial and documentary evidence and that IHO 2 erred in finding that the June 2018 and May and June 2019 CSEs had sufficient information to develop IEPs for the student.

The parent also alleges that IHO 2 misapplied the law in determining that the June 2019 CSE was not required to review and discuss the neuropsychological evaluation. Additionally, the parent contends that IHO 2 erred in finding that the June 2019 CSE incorporated many of the neuropsychologist's recommendations for support, modifications, and testing accommodations in the student's June 2019 IEP.

Lastly, since the parent claims that IHO 2 erred in finding that the district offered the student a FAPE for the 2018-19 and 2019-20 school years, the parent seeks a determination that IHO 2 erred in failing to consider the appropriateness of the PALS program at Carmel, and thereby improperly denied tuition reimbursement for the student's attendance at Carmel during the 2018-19 and 2019-20 school years.

In an answer, the district generally denies the material allegations contained in the parent's request for review. The district argues that IHO 2 properly determined that the program recommended for the student for the 2018-19 and 2019-20 school years offered the student a FAPE in the least restrictive environment (LRE).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are

alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. 2018-19 School Year

Upon careful review, the hearing record reflects that IHO 2, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2018-19 school year (IHO Decision at pp. 21, 25, 32). IHO 2 accurately recounted the facts of the case, addressed all of the specific issues identified on remand, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2018-19 school year, and applied that standard to the facts at hand (id. at pp. 19-32). The decision shows that IHO 2 carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of IHO 2 (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss the parent's allegations on appeal, the conclusions of IHO 2 are hereby adopted.

1. Student's Progress during the 2017-18 School Year

In her request for review the parent asserts that for the 2017-18 school year, the district was aware that the student was struggling to make progress in his then-current program, consisting of a special class for ELA and ICT services for math, science, and social studies. According to the parent, considering the student's lack of progress, academically and towards meeting his annual goals, the recommendation for a less supportive program consisting of ICT services for all classes, with the support of a resource room, was inappropriate (Req. for Rev. at pp. 6-7).

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686

F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available _____ at <https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

Initially, the student's recommended special education services changed throughout the 2017-18 school year. In September the student received ICT services in social studies and science, attended 15:1 special classes for ELA and math, and received OT once weekly and counseling bi-monthly (see Dist. Ex. 6 at pp. 9-10). In January 2018 the CSE recommended that the student transition from the 15:1 special class for math to a general education math class with ICT services and a 1:1 aide was added to the student's ICT classes (Dist. Ex. 7 at pp. 9, 10). In April 2018, the student's OT was discontinued, the recommendation for a 1:1 aide was removed, and a recommendation for a 15:1 special class for academic support was added to the student's schedule three times per six-day cycle (IHO Ex. I at ¶ 28; Dist. Ex. 8 at p. 10).

A review of the student's sixth grade report card shows that he received passing grades throughout the 2017-18 school year (Dist. Ex. 44). However, the student's grades in three of his four core academic classes declined as the year went on (id.). In English 6, the student attained a first quarter grade of 92 and a fourth quarter grade of 81, in math 6 he received a first quarter grade of 93 and a fourth quarter grade of 73, and in science, he received a first quarter grade of 88 and a fourth quarter grade of 66 (id.). Overall, the student's final average in his core classes was 87 in ELA, 81 in social studies, 76 in math, and 80 in science (id.).

In addition, the student's 2017-18 progress report indicated that by the end of the year the student had achieved five out of 18 annual goals, was progressing gradually on four goals, and was progressing inconsistently on one goal (Dist. Ex. 47 at pp. 2-6). The student had progressed satisfactorily toward two goals (id. at pp. 2, 4). In addition, although two of the student's math goals were not applicable to the fourth quarter based on class material, the student progressed satisfactorily toward these goals through the third quarter (id. at pp. 4-5). The student was also progressing satisfactorily toward three social/emotional goals that were discontinued at the parent's request (id. at pp. 5-6).

2. Evaluative Information

In addition to the student's progress as discussed above, the May and June 2018 CSEs had additional evaluative information regarding the student. Turning to the sufficiency of the available evaluative information, IHO 2 found that the evidence in the hearing record demonstrated that the May and June 2018 CSEs "had sufficient information" to develop the student's IEP for the 2018-19 school year and that the recommended program offered the student a FAPE as it "was reasonably calculated to confer an educational benefit to [the student]" (IHO Decision at pp. 10, 21). Ultimately, IHO 2 credited the testimony of the district witnesses, the evidence regarding the student's progress during the 2017-18 school year, and the information in front of the May and June 2018 CSE meetings for the 2018-19 school year in finding that the CSEs "had sufficient information" to develop the student's IEP for the 2018-19 school year (*id.* at pp. 23, 25).

IHO 2 noted that a "major reason" for the remand was IHO 1's improper reliance on the neuropsychological evaluation in considering the issue of FAPE for the 2018-19 school year (IHO Decision at p. 24). Reviewing the prior SRO decision, the matter was remanded, in part, "to determine what evaluative information the June 2018 CSE considered and to address the parent's allegations related to the 2018-19 10-month school year programming without reliance on information not available to the district at the time of the CSE meetings" (Application of the Bd. of Educ., Appeal No. 20-190). To the extent that the parent continues to argue that the results of the neuropsychological evaluation can be used to challenge the recommendations for the 2018-19 school year (see IHO Ex. III[R]; IHO Decision at p. 24), this argument was addressed in the prior appeal and that State-level administrative decision is the law of the case (see Application of the Bd. of Educ., Appeal No. 20-190), and the issue cannot be revisited (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]).

In reviewing the programming offered to the student, the focus of the inquiry must be on the information that was available at the time the student's IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress]).

Turning to the question of what evaluative information was available to the May and June 2018 CSEs, after remand, the parties discussed this issue and came to an agreement as to what information was before the May and June 2018 CSEs (March 16, 2022 Tr. pp. 7-18). As agreed to by the parties, the May 2018 CSE had before it, oral reports from the parent and the student's teachers, a January 11, 2018 sensory profile (Dist. Ex. 32), a January 10, 2018 OT reevaluation

(Dist. Ex. 31), a December 1, 2017 academic evaluation (Dist. Ex. 29), an April 13, 2016 psychological evaluation (Dist. Ex. 22), an April 13, 2016 educational evaluation (Dist. Ex. 23), a March 22, 2016 speech-language evaluation (Dist. Ex. 20), and April and May 2018 teacher reports (Dist. Exs. 49; 53) (Tr. pp. 12-13; Dist. Ex. 9 at pp. 2-3). The June 2018 CSE had before it, all of the same evaluative information before the May 2018 CSE, plus an April 27, 2018 OT summary and an April 19, 2018 career assessment (Tr. p. 12-13; Dist. Ex. 10 at pp. 2-3); however, neither the OT summary nor the career assessment were included in the hearing record and counsel for the district concedes that it does not appear these were actually considered by the June 2018 CSE (Tr. p. 12-13). In addition, with respect to the fall 2017 Aimsweb reports (Dist. Exs. 72, 73), the parties agreed that those reports were not in front of the May or June 2018 CSEs (Tr. pp. 15-17); however, counsel for the district asserted that the Aimsweb data was discussed at the CSE meetings (Tr. pp. 15-16). Review of the May and June 2018 IEPs reflects that the student's Aimsweb scores were reported as to math; however, the IEPs only reported the student's lexile scores in the Read 180 program (Dist. Exs. 9 at pp. 3, 4); 10 at pp. 3, 4).

Turning to the tests and assessments reviewed as part of the available evaluative reports, review of the May and June 2018 IEPs shows that the May and June 2018 CSEs had before them results from the following: a January 11, 2018 Sensory Profile School Companion, a January 10, 2018 Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI-6), a January 10, 2018 Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), a December 1, 2017 Wechsler Individual Achievement Test, Third Edition (WIAT-III), an April 13, 2016 Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV COG), an April 13, 2016 Woodcock-Johnson-IV Tests of Achievement (WJ-IV ACH), a March 22, 2016 Test of Pragmatic Language, Second Edition (TOPL-2), a March 10, 2016 Goldman Fristoe Test of Articulation, Third Edition (GFTA-3), a March 2, 2016 Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) (compare Dist. Ex. 9 at pp. 2-3 with Dist. Ex. 10 at pp. 2-3; see Dist. Exs. 20, 22-23, 29, 31-32).

The March 2016 speech-language evaluation report indicated that the student exhibited average speech sound production abilities on the GFTA-3 (Dist. Ex. 20 at p. 3). As measured by the CELF-5, the student scored in the above average to average range on subtests of core language abilities (word classes, formulated sentences, recalling sentences, and semantic relationships) and his score indicated that there were no deficits in his general language abilities (*id.* at pp. 3-4). The student also demonstrated average abilities on the receptive language index, comprised of the word classes, following directions, and semantic relationships subtests (*id.* at p. 2). While the student exhibited no deficits in his receptive language skills, the evaluator noted that the student requested repetition of words on every test item that did not include a visual cue, and also requested directions to be read slowly, and he required extended time to provide responses (*id.* at pp. 4, 5). In addition, the student repeated directions out loud before and during the directed task (*id.* at p. 4). The evaluator noted that the student needed assistance to understand what was being asked of him, needed explanation of the example items and repetition of most subtest items, and reminded the evaluator to that he needed test items presented slowly (*id.* at p. 5). The student demonstrated average abilities on the expressive language index, comprised of the formulated sentences, recalling sentences, and sentence assembly subtests, which indicated there was no deficits in his expressive language abilities (*id.* at p. 2). He was able to present grammatically appropriate and detailed sentences related to the visuals provided (*id.* at p. 5). Although the student's scores were in the average range he expressed frustration and some difficulty during testing (*id.* at pp. 4-6).

On the TOPL-2, the student's pragmatic language usage score fell in the below average range (Dist. Ex. 20 at pp. 2, 6). The student demonstrated strengths related to purpose, topics and audience as evidenced by his understanding of adjusting to an audience's point of view and attending to new information (id. at p. 6). He was able to introduce topics in a respectful manner and understood when a topic needed to be maintained (id.). The student was aware of using language for the purpose of informing, explaining, requesting, apologizing, describing, and regulating (id.). The student exhibited weakness in physical context, visual-gestural, abstractions, and pragmatic evaluation as evidenced by his difficulty attending to the setting/event/context characteristics, and he struggled with monitoring facial expressions, body language, and gestures (id.). The student struggled with abstractions such as explaining proverbs or metaphors and had difficulty monitoring, evaluating, and appraising how effective pragmatic language is (id. at pp. 6-7).

The April 2016 psychological evaluation report described the student as cooperative and noted that he was able to complete all tasks presented to him (Dist. Ex. 22 at p. 1). On the Woodcock-Johnson IV Tests of Cognitive Abilities - (WJ-IV COG) the student's general intelligence ability (GIA) score was 78 (standard score), which fell in the low range of intellectual functioning (id. at p. 2). The examiner who administered the WJ-IV COG explained that due to the degree of scatter across the student's profile of scores, his GIA score was attenuated and should not be viewed as the most representative of his overall ability (id.). On the comprehension-knowledge cluster, which measured acquired knowledge and the ability to verbally communicate it the student performed in the low average range on the oral vocabulary subtest, and the average range on general information subtest (id. at p. 3). On the long-term retrieval cluster, which measured the ability to store information and fluently retrieve it, the student performed in the low average range on both the story recall and visual-auditory learning subtests (id.). On the visual processing cluster, which measured the ability to encode, synthesize, and discriminate visual stimuli and employ visual information in task performance, the student performed within the average range on visualization subtest and picture recognition subtest (id.). On the auditory processing cluster, which measured the ability to perceive, analyze, and synthesize patterns among auditory stimuli, the student performed in the average range on the phonological processing and nonword repetition subtests (id.). On the fluid reasoning subtest, which measured the broad ability to reason, form concepts, and solve problems using unfamiliar information or novel procedures, the student performed in the average range on the number series and concept formation subtests, and low average on the analysis-synthesis subtest (id.). On the cognitive processing speed cluster, which measured the ability to quickly perform both simple and complex tasks, the student performed in the average range on the pair cancellation subtest, but very low on letter pattern matching due to his slower response style (id. at p. 4). Finally, the student performed in the average range on all subtests of the short-term working memory cluster, which measured the ability to apprehend and hold information in immediate awareness and use it to carry out a goal (id.).

The evaluator who conducted the April 2016 educational evaluation indicated that while the student was cooperative and completed all tasks presented to him, his pace was slow, writing tasks were laborious, and his effort and motivation decreased on these tasks (Dist. Ex. 23 at p. 1). At times, the student rested his head on his desk but sat up when prompted (id.). The evaluator noted that due to these behaviors, the testing results might underestimate the student's true ability (id.).

The evaluator reported that on the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) basic reading skills cluster the student's score fell in the low average range, due to his reduced sight word vocabulary and ability to apply phonics and structural analysis skills (Dist. Ex. 23 at p. 3). On the reading comprehension cluster, the student performed in the average range on the reading vocabulary subtest, and much stronger on passage comprehension than on the reading recall subtest (id.). The student's ability to summarize what he had read was a weakness (id.). With respect to the math calculation skill cluster, the student performed much better on the calculation subtest than on the timed fluency subtest due to his slower response style (id.). For the math reasoning cluster, he performed in the solidly average range on the applied problems subtest but low average on number matrices (id.). On the written expression cluster, the student performed in the low average range on the writing samples subtest, and very low on the timed fluency subtest (id.). The evaluator noted that the student found both subtests difficult, resulting in a substantial decline in his motivation and effort (id.). On additional writing related tests the student's ability to spell orally presented words was average; however, the evaluator noted that the student's spelling contained awkward and difficult to read letters (id. at p. 4). The student performed in the low range on a subtest that required him to spell nonsense words and displayed low average editing skills (id. at p. 4). The student had difficulty identifying inappropriate word usage and did not notice several misspelled words (id.). On the reading fluency cluster, the student performed in the very low range on both the oral reading and timed reading fluency subtests (id. at p. 3). The evaluator indicated that prosody and automaticity were areas of weakness for the student (id. at p. 3). On the phoneme-grapheme knowledge cluster, the student presented with low average word attack skills (id. at p. 4). Lastly, on the academic knowledge cluster, the student exhibited average knowledge on broad topics of science and social studies, and low average knowledge in humanities such as art, music, and literature (id.).

On December 1, 2017, the district school psychologist conducted an assessment of the student's writing as part of an educational update requested by the CSE (Dist. Ex. 29). According to the school psychologist, when the student was informed that he would be completing writing tasks, he indicated that he preferred to use a computer for writing (id. at p. 1). The school psychologist described the student as "notably distracted" and needing "constant redirection," and noted that at times he interjected spontaneous conversation that had nothing to do with the task at hand (id.). However, at these times, he was easily redirected (id.). The school psychologist reported that the student had difficulty initiating tasks and at times he asked for clarification of instructions (id.). According to the school psychologist, the student worked "inordinately slowly" and struggled to produce an essay of 30 words, which he was ultimately unable to complete (id. at p. 2). On the sentence composition subtest of the WIAT-III, the student scored in the lower limits of the average range (id.). Specifically, the student was asked to combine two to three sentences into a single written sentence, preserving the meaning of the original sentences (id.). The student was able to produce basic, legible sentences but sometimes omitted commas and used inconsistent capitalization and poor sentence structure (id.). The student made similar errors in semantics, grammar, and mechanics on the sentence building subtest in which he was expected to write six separate sentences, each using a specific target word (id.). On the essay composition subtest, the student was unable to complete a 30-word essay about his favorite game in ten minutes (id.). The school psychologist reported that the student scored in the upper borderline range on the spelling subtest (id. at pp. 2-3). Based on her assessment, the school psychologist recommended that the student be provided with graphic organizers, along with models and exemplars to aid in the composition writing process; she noted that the student might benefit from access to a word

processor to type written work and thereby increase written production; and she noted that speech to text software might help the student to increase written output and productivity (*id.* at p. 3).

The January 2018 OT reevaluation report indicated that the student's fine motor skills appeared to be mature, as he used a repertoire of grasps to secure school related utensils (Dist. Ex. 31 at p. 1). According to the report, the student was able to cut with scissors using a mature scissor grasp with good accuracy and bilateral coordination (*id.*). The BOT-2 was administered to assess the student's motor proficiency (*id.*). The student's fine motor control was slightly below average at the 16th percentile, and the report indicated that the student had some difficulty copying geometric shapes (*id.* at p. 2). The student's performance on the VMI-6 and Beery-Buktenica Developmental Test of Visual Perception showed that his visual motor integration and visual perceptual skills were in the average range in relation to his same-age peers (*id.* at pp. 1-3). With respect to writing, the report indicated that the student used a mature tripod grasp, and his writing was legible with appropriate sizing and spacing when he took his time (*id.* at p. 3). The student preferred using voice-to-text technology for essays longer than seven sentences (*id.*). The report indicated that, overall, the student exhibited age-appropriate skills in the area of OT but presented with some inattentive and impulsive behaviors which impacted his performance (*id.* at pp. 3-4).

Further considered by the June 2018 CSE was a sensory profile assessment conducted in January 2018 by the district's occupational therapist (*see* Dist. Ex. 32). The January 2018 sensory profile assessment indicated that the student exhibited a "definite difference" (two standard deviations from the norm) in the movement aspect of sensory processing (Dist. Ex. 32 at p. 1). Specifically, the student tended to rest his head on his desk, seek out movement, be "on the go," fidget and move around more than other students, and find excessive reasons for approaching the teacher (*id.*). The student exhibited a "probable difference" (one standard deviation from the norm) in the auditory and touch aspects of sensory processing (*id.*). Specifically, the student appeared to miss oral directions more than other students, appear oblivious within an active environment, and appeared distracted in noisy environments (*id.*). Further, the student tended to come too close to others' personal space when talking, touch others to the point of irritating them, and be "fidgety or disruptive" when standing in line or close to other people (*id.*). The student exhibited "typical performance" in the visual and behavioral aspects of sensory processing (*id.*). However, the student missed directions, had trouble keeping materials organized, and was distracted by activity around him (*id.*). The sensory profile assessment report suggested that the student would benefit from movement breaks throughout the day to help him stay organized and focused (*id.* at p. 2).

In an April 2018 teacher report, the student's ELA special education teacher reported that the student "made gains" in reading and his lexile level was on "grade level" (Dist. Ex. 49 at p. 2). She indicated that the student was able to compare and contrast information, make inferences and find the main idea independently in the Read 180 software (*id.*). However, the ELA special education teacher noted that the student required continued practice to sequence events, draw conclusions, and find the solution to a problem (*id.*). She noted that the student read at a literal level and required support to make a deeper connection to the text (*id.*). His ability to make a connection between two texts was inconsistent (*id.*). With respect to writing, the ELA special education teacher reported that the student was able to write simple sentences independently and with support was able to write complex sentences (*id.*). When the student took his time, he was able to include correct punctuation and grammar in his writing pieces (*id.*). According to the ELA

special education teacher, the student had great ideas and his oral responses were thoughtful and relevant, but he needed prompting to expand on his ideas in written form (id.). The teacher indicated that the student had been developing his typing skills and used a Chromebook for short answer and extended responses in class and at home (id.). With regard to the student's classroom performance, the student's ELA special education teacher indicated that the student required prompting to copy homework into his agenda book and could work productively in small groups, but when on his own, he needed "frequent prompting to complete the assignment" (id. at p. 1). In terms of study skills, the teacher stated that although the student completed his homework on time he required "frequent reminders" to follow all directions and check and edit his work (id.). The ELA special education teacher indicated that the student needed to check his work and edit his writing for correct grammar, spelling, and punctuation (id.). Lastly, the district's special education teacher reported the use of the following accommodations with the student: added wait time, additional time to complete tasks, extended time on tests, directions broken down/repeated, frequent breaks, seating in close proximity to the teacher, small group/1:1 support with reminders to stay focused and on task, and use of graphic organizer, writing checklists, and rubrics (id. at p. 3).

The student's ELA special education teacher completed a second teacher report on May 18, 2018 (Dist. Ex. 53). With regard to the student's classroom performance, the ELA special education teacher indicated that the student's attention and focus had declined from "satisfactory" to "poor" and his willingness to follow adult directives/rules had declined from "good" to "satisfactory" (id. at p. 1). His study skills, reading skills, and writing skills in ELA were reported to be generally the same as in April 2018, with a few differences noted (id. at pp. 1-2). In reading, the teacher "agree[d]" that the student was able to comprehend texts on a literal basis, whereas previously she had "strongly agree[d]" with this statement (compare Dist. Ex. 53 at p. 2, with Dist. Ex. 49 at p. 2). In addition, the ELA special education teacher "agree[d]" that the student could abstract evidence that was relevant to a task whereas previously she had "disagree[d]" with this statement (compare Dist. Ex. 53 at p. 2, with Dist. Ex. 49 at p. 2). The teacher commented that the student's lexile level, which was lower than the previous month, was on grade level (Dist. Ex. 53 at p. 2). She noted that the student was able to identify relevant and irrelevant details from text and to draw conclusions with minimal support (id.). Turning to writing, the ELA special education teacher "agree[d]" that the student could address a claim with appropriate evidence and noted that he could use a graphic organizer to independently organize his thoughts for writing (id.). In addition, the student was able to identify relevant details to support a topic with minimal support and create a cohesive paragraph (id.). In the May 2018 teacher report, the ELA special education teacher also commented on the student's social emotional development (id. at p. 3). The district's special education teacher reported that the student was friendly and engaged in class discussions but required "frequent reminders" to stay on the topic and remain focused (id.). Due to the student's impulsivity, he shouted out answers in class and needed reminders to raise his hand (id.). Lastly, the ELA special education teacher noted that when the student was focused and on task, he was able to work effectively in a small group with his peers and could often be the leader of the group (id.).

The resultant June 2018 IEP reflected the scores from the evaluations and reports reviewed by the CSE while the narrative section of the present levels of performance reflected information provided by the student's teachers (Dist. Ex. 10 at pp. 2-4). The description of the student's reading

and writing abilities echoed the information provided by the student's ELA special education teacher in her reports to the CSE (compare Dist. Ex. 10 at p. 4, with Dist. Exs. 49; 53). With respect to mathematics, the IEP indicated that the student's skills were in the average range but that he struggled with his division facts, and while comfortable with mathematics the student often made mistakes due to his focusing struggles (Dist. Ex. 10 at p. 4). The student "mastered his multiplication facts up to 12," but struggled with division (id.). According to the IEP, the student's Aimsweb test scores indicated that he was "performing above all students in the current 6th grade self contained class" and performing in the average range based on national norms (id.). With regard to study skills, the IEP stated that the student had "significant difficulty with organization of his notes, materials, and locker" (id.). The student had assistance from a teaching assistant or teacher aide for checking-out at the end of the school day but as the year progressed became more independent with completing this task (id.). The IEP indicated that the student needed reminders in each class to copy his homework into his planner and a staff member to check that the information was copied correctly so that the student did not "miss key elements" of assignments (id.). According to the IEP, the student's counselor described him as "respectful, empathetic and confident" and noted that he participated when focused but was "very easily distracted by internal and external stimuli" (id. at p. 5). The IEP indicated that the student actively participated in counseling but had difficulty accepting responsibility when his comments, actions, or opinions negatively affected his peers (id.). With regard to motor development, the IEP indicated that the student received a weekly OT consult and that sensory strategies/tools had been put in place by the student's teachers, but he did not use them (id.). The IEP stated that the student had a difficult time identifying appropriate distances between himself and other students and the appropriate level of force needed to engage in activities (id.). However, the IEP stated that there were "not motor or sensory needs required at this time" (id.).

3. Program Recommendation

To address the student's needs the June 2018 CSE recommended that the student receive ICT services in each of his core general education classes for one 45-minute session daily (Dist. Ex. 10 at p. 8). In addition, the CSE recommended that the student receive one 45-minute session daily of group resource room services along with one 30-minute session per six-day cycle of small group counseling (id.). With respect to special factors, the IEP indicated that the student required an assistive technology device or service and the CSE recommended that the student have access to a computer (Chromebook) with "Google Read and Write" during writing assignments (id. at pp. 6, 10).

The June 2018 IEP included numerous supplementary aids and services, program modifications and accommodations including refocusing and redirection, frequent breaks, directions repeated, pre-teaching and reteaching, special seating arrangements to minimize distractions, support for organizational skills, use of a graphic organizer, modified homework assignments, additional time to complete assignments, and access to an additional set of textbooks at home (Dist. Ex. 10 at pp. 8-9). The June 2018 IEP also called for the student's assignments to be broken down into smaller more manageable tasks and for the student to be provided with a copy of class notes (id. at pp. 8-9). In addition, the IEP also provided for numerous testing accommodations (id. at p. 11). The June 2018 IEP included annual goals for study skills, reading, writing, mathematics, and social/emotional development (id. at pp. 6-7).

According to the district's assistant superintendent of pupil services who served as the CSE chairperson, given the discussions of the student's needs and goals, the June 2018 CSE recommended ICT services for ELA, math, science, and social studies, as well as five 45-minute sessions per week of resource room, and related services of counseling one time per six-day cycle for 30 minutes in a small group for the student for the 2018-19 school year (Dist. Ex. 10 at p. 8; IHO Ex. I at p. 11). The district's assistant superintendent of pupil services testified that the CSE justified the reduction in the intensity of the student's ELA services from a special class to a general education class with the support of ICT services given the improvement in the student's reading skills (IHO Ex. I at p. 11). The assistant superintendent opined that while the student's writing skills still required support, the special education teacher in the ICT program could have addressed those needs (id.). Additionally, he noted that the CSE recommended a daily resource room program to address the student's needs in writing, organization, and to provide re-teaching for topics the student needed help with (IHO Ex. I at p. 11).

The student's math teacher for the 2017-18 school year (sixth grade) agreed with the recommendation for ICT services for math for the 2018-19 school year (seventh grade) (IHO Ex. IV at pp. 8-9). The student's ELA teacher for the 2017-18 school year (sixth grade) testified via affidavit that the recommendation for ICT services for ELA, although less supportive than her special class, would be manageable for the student (IHO Ex. V at p. 12). She testified that the student would have had two teachers in the class and the special education teacher would help to keep the student focused on lessons and assignments (id.). With the support of the two teachers, the student's ELA special education teacher indicated that the student "could work alongside his mainstream peers" (id.). She testified that the recommended resource room would further assist the student in reinforcing what he learned in the ELA class with ICT services (id.). The student's ELA special education teacher stated that she recommended that the student move to an ICT class because the student would benefit from his peers and the student could "manage the class with the support from the co-teacher in the classroom" together with the modifications on his IEP (Tr. pp. 610-13). She further testified that the student would have benefited from the "content in the seventh grade curriculum" and the "overall class structure" (Tr. p. 614). The teacher reported that the student would have been able to receive one-to-one support in the resource room (Tr. p. 616). The IHO credited the testimony of the student's teachers that although the student's attention and organization affected his learning in any size group, the teachers agreed that the student could make progress in an ICT setting (IHO Decision at p. 23). The IHO further relied on the testimony of the student's sixth-grade special education teacher that the student would have had the support of two teachers in the classroom and the special education teacher would have helped to focus the student and, in addition, the resource room program would have reinforced the concepts the student learned in the classes in which the student received ICT services (id.).

Considering the above, although the student was not making linear progress throughout the 2017-18 school year leading up to the recommended programming for the 2018-19 school year, the hearing record supports finding that the June 2018 CSE reviewed extensive information regarding the student's needs, accurately described his present levels of performance in the June 2018 IEP, formulated annual goals to address his needs, and offered placement in general education class with the support of ICT services and a resource room. Overall, based on the information available to the June 2018 CSE, the recommended program was reasonably calculated to have provided the student with a FAPE in the LRE. Accordingly, the IHO's decision is supported by the evidence in the hearing record and will be upheld.

B. 2019-20 School Year

Prior to reaching the substance of the parent's appeal from IHO 2's decision, in the prior appeal, the SRO noted that he:

could understand if a CSE was skeptical of some conclusions [made by the neuropsychologist], such as indicating that "[t]he level of training, experience, and sophistication required of [the student's] teachers and the other professionals supporting him in an academic setting [wa]s far beyond what [wa]s typically available in either public or private school settings, even within programs for students with learning differences" (Dist. Ex. 34 at pp. 24-25 [emphasis added]). That is tantamount to saying that almost no one can educate the student, and I do not believe that is realistic. In the evaluation report provided to the CSE, the neuropsychologist was critical not only of past programming by the district but of almost everyone, including Carmel, indicating that "[w]hile the Carmel Academy PALS program [wa]s designed for students with ADHD/ executive dysfunction and this support [wa]s embedded within academic instruction, currently [the student's] needs for intervention and support i[n] this area exceeds Carmel's expertise" (*id.* at p. 25). Thus, while the neuropsychologist offered additional insight as to the underlying causes of the student's deficits, some aspects of her report were over the top to the point of indicating that only certain teachers could be successful in educating the student.

Application of the Bd. of Educ., Appeal No. 20-190, n. 13

Additionally, having stated his concerns regarding the neuropsychological evaluation report, the SRO directed the IHO upon remand "to discuss the programming that the district did provide and apply the Andrew F. standard, that is whether the student's [] educational program [was] reasonably calculated to enable the child to make progress appropriate in light of his circumstances and explain why it did or did not, rather than focus solely on whether or not the district was required to adopt the programming recommendations of [the] neuropsychologist into the student's IEP" (Application of the Bd. of Educ., Appeal No. 20-190, n. 13).

After remand, IHO 2, for the most part, followed the directives from the prior SRO decision; she stated the issues to be addressed for the 2019-20 school year as applying the Andrew F. standard to a discussion of the programming recommended by the district for the 2019-20 school year and considering whether the program recommended for the 2019-20 school year was appropriate absent recommendations for speech-language therapy and OT (IHO Decision at pp. 4, 25-31). Review of IHO 2's decision shows that she reviewed the program recommendation for the 2019-20 school year and found that it was appropriate to meet the student's identified needs (*id.* at pp. 25-31). IHO 2 noted the parent's concerns about the student participating in special classes and a resource room in the district with students who were behind him academically; however, in reviewing the appropriateness of the recommendation for all academics to be taught in a 15:1 special class, IHO 2 weighed the student's need for support during academics and the benefit of

the smaller classes helping the student transition back into the district against the parent's concern that the classes may be too restrictive as the student was in co-taught classes for science and social studies at Carmel (*id.* at pp. 26, 30). In addition, although consideration of the neuropsychological evaluation report by the June 2019 CSE was already addressed in the prior appeal, IHO 2 found that the hearing record demonstrated that the neuropsychological evaluation report was not available to the May 2019 CSE and was first discussed at the June 2019 CSE meeting (*id.* at p. 27). IHO 2 then addressed the parent's argument that the June 2019 CSE did not adequately consider the report and found that the CSE considered the report, but the report did not require any revisions to the May 2019 IEP (*id.* at pp. 27-28). Finally, the IHO reviewed the information available to the CSE's regarding the student's need for OT and speech-language therapy and determined that the CSEs were justified in not recommending OT or speech-language therapy for the student (*id.* at pp. 30-31).

Although the prior SRO was clear in directing that the focus of the remand proceeding should have been on whether the student's educational program was reasonably calculated to enable the child to make progress appropriate in light of his circumstances rather than on whether the district was required to adopt the recommendations from the neuropsychological evaluation report, the parent continues to frame her arguments as a failure to follow the neuropsychologist's recommendations. Review of the amended request for review shows that the parent continues to argue that the district did not develop an appropriate IEP for the student's 2019-20 school year because the district did not utilize the neuropsychologist's recommendations for multi-sensory instructional programs for reading, academic subjects in small classes with students of similar intelligence to the student, corresponding goals to improve reading, writing, and math skills, and OT and speech-language therapy services (Amended Req. for Rev. at p. 7). The parent asserts that the June 2019 CSE, which reviewed the neuropsychological evaluation report, did not make any changes from the May 2019 CSE, which did not consider the report (*id.* at p. 10). The parent further asserts that all members of the CSE were required to thoroughly review the neuropsychological evaluation report and that recommendations for placement in a special class (with other students of "lower intelligence" than the student), resource room, and a Wilson reading program were "wholly inconsistent with the recommendations in [the neuropsychologist's] evaluation" (*id.* at pp. 9, 10).

Accordingly, while the issue of whether the June 2019 CSE appropriately considered the neuropsychological evaluation report in developing the student's program has already been addressed in a State level appeal, in order to address the parent's substantive arguments I will conduct a review of the information available to the June 2019 CSE, including the report and the recommendations made by the neuropsychologist, and based on that information determine if the recommendations made by the June 2019 CSE were appropriate to address the student's needs. However, I will not further address whether the June 2019 CSE considered the report.

1. Program Recommendation

As described in the prior State level appeal, the May 2019 CSE considered an OT progress summary, parent report and observations, a speech-language progress summary, and teacher reports—all dated May 31, 2019; a March 27, 2019 classroom observation; and a March 1, 2019 social history update, along with information that was available to the prior CSEs (Dist. Ex. 12 at pp. 2-3; *see* Dist. Exs. 10; 11; 35; 38). The assistant superintendent served as the CSE chairperson

during the meeting, and testified that the resultant May 2019 IEP present levels of performance "came from the reports of [the student's] teachers at Carmel Academy" (IHO Ex. I ¶ 51).⁸

The CSE reconvened on June 19, 2019 (Dist. Ex. 13 at p. 1). The June 2019 IEP continued to reflect the same evaluative information as the student's May 2019 IEP, with the exception of including additional results from a June 2019 OT evaluation (compare Dist. Ex. 12 at pp. 2-3, with Dist. Ex. 13 at pp. 2-4; see Dist. Ex. 41).

In his direct testimony by affidavit, the assistant superintendent who served as the CSE chairperson at the June 2019 CSE meeting testified that the neuropsychologist attended the meeting by telephone to discuss her evaluation findings (IHO Ex. I ¶ 59; see Dist. Ex. 13 at p. 1). He further stated that the neuropsychologist "reviewed the findings of her report for the CSE. Her report was consistent with what the CSE knew of [the student]" including that he had attention needs, overall cognitive skills in the average range but with weak processing speed, and deficits in reading and writing (IHO Ex. I ¶ 60; see Dist. Ex. 34 at pp. 19-20, 39, 42, 44-46). Likewise, the district school psychologist who attended the June 2019 CSE meeting testified that the neuropsychologist participated and presented "the report on her testing" (IHO Ex. II ¶ 14).

The neuropsychological evaluation was conducted between September and December 2018, and the resultant report was dated January 21, 2019 (Dist. Ex. 34 at p. 1). The report described the student as neurologically "complex" and indicated that he demonstrated a language-based learning disability (dyslexia), with deficits in phonological and visual processing, visual memory, auditory attention, executive functioning, and "severe symptoms of ADHD" (Dist. Ex. 34 at p. 16). The report noted that the student's deficits were more complicated than most students the neuropsychologist had evaluated, and that the level of expertise needed to educate him was beyond what was available in both Carmel and the district's schools (id. at pp. 25-26).

The January 2019 neuropsychological evaluation report included 17 academic recommendations, nine recommended strategies to employ in the classroom, and recommendations for providing language support during learning as well as support during instruction in reading and writing, and during testing (Dist. Ex. 34 at p. 29-36). The neuropsychologist opined that based on the student's neurological profile he required "very small classes and a high teacher to student ratio" with "a great deal of structure and 'scaffolding' where needed" (Dist. Ex. 34 at p. 29). The neuropsychologist recommended that the student be immersed in a "positive peer culture" with opportunities for social interactions and to build self-esteem and stated that the student should not be in classes with students with emotional/behavioral disorders or with students who were "intellectually challenged" (id.). More specifically, the neuropsychologist recommended the student attend a school with academic interventions that followed an "evidenced-based, multi-sensory curriculum, such as [] Orton-Gillingham or Lindamood-Bell" and she detailed what she considered to be the key principles of multi-sensory

⁸ It appears that the dates identified for the May 31, 2019 reports, which post-date the May 29, 2019 CSE meeting, were typographical errors, and the hearing record does not otherwise contain exhibits with May 31, 2019 dates (see Dist. Ex. 12 at p. 2). The hearing record does contain Carmel teacher reports prepared in April 2019, on May 21, 2019, and after the third trimester of the 2018-19 school year (see Parent Exs. F; Q; UU; Dist. Ex. 40). However, it is unclear from the hearing record what Carmel reports the May 2019 CSE considered during the meeting.

instruction (*id.* at pp. 29-30). Next the neuropsychologist recommended that the student be evaluated regularly by "a pediatric/neurologist psychiatrist" for medication management pertaining to the student's ADHD (*id.* at p. 30). In order for the student to sustain his attention, the neuropsychologist recommended that he "have access to books and textbooks in a digital format for longer reading assignments" (*id.*). Next, the neuropsychologist recommended that the student have access to technology that would help him read independently and the ability to request that any written information be read to him (*id.*). Additionally, she recommended that the student listen to books or be read to while he followed along with the written text to help improve his reading accuracy and fluency (*id.* at p. 31). Moreover, the neuropsychologist recommended that the student have "access to keyboarding" for writing assignments, quizzes, and tests to include dictation software, a keyboard, and spell-check (*id.* at p. 32). The neuropsychologist further recommended that due to the student's attending, spelling, and writing difficulties he should not be required to take notes in class rather he should be permitted to give answers orally until his writing skills were developed (*id.* at pp. 31-32). It was recommended that the student receive education about his "unique learning style" and be supported in learning to advocate for himself and manage his "distractibility, fatigue, or frustration" (*id.* at p. 31). The neuropsychologist recommended that the student be provided with frequent breaks to help him "maintain his mental energy" together with instruction on strategies to help improve self-regulation (*id.*). She also recommended direct instruction pertaining to executive functioning and "metacognition skills," to be worked on collaboratively with the student (*id.* at pp. 31-32). The neuropsychologist recommended that the student receive extended time and extended break accommodations for tests and assignments, especially standardized tests, and that he be allowed to take tests in a quiet, distraction free environment (*id.* at pp. 31-32). She suggested that the student may have difficulty with foreign language requirements and indicated that for students with language based learning disabilities foreign language requirements may be replaced with another elective (*id.* at p. 32). The neuropsychologist recommended that when "possible" music should be incorporated into the student's learning (*id.* at p. 33). Finally, the neuropsychologist made several specific recommendations for strategies in the classroom in connection with following directions and managing organizational demands; language support during learning; reading support; writing support; and testing the student's knowledge (*id.* at pp. 33-36).

The June 2019 IEP indicated that although the student was a hard worker he did not "always work efficiently" (Dist. Ex. 13 at p. 4). The IEP noted that the student was doing classwork and homework more independently with modifications but he continued to require repetition and reinforcement (*id.*). The IEP stated that the student could "lose information over the course of the weekend and take 2-3 days to re-acquire those skills" (*id.*). In connection with reading, the IEP indicated that at the end of the school year the student's reading proficiency was at a sixth-grade level and his comprehension was at a ninth-grade level (*id.*). The student required teacher support in organizing his writing and "to guide verbal and written expression of ideas in a clear, concise manner" (*id.*). However, the student's inability to focus for long periods of time impacted his ability to stay on task, as well as his ability to "work consistently" (*id.*). According to the IEP, for the 2018-19 school year, the student was following a modified seventh-grade math curriculum; he was able to achieve passing grades on assessments (70s and 80s) but required "a lot of teacher support" to attain those grades (*id.*). The student required "a lot of [one-to-one] attention," small group instruction, "continuous redirection," and extra time on tests (*id.*).

With respect to the student's social development, the June 2019 IEP indicated that he adjusted "very well" to Carmel and had "positive peer interactions" (Dist. Ex. 13 at p. 5). In terms of the student's physical development, the IEP stated that the student was easily distracted and was not always "aware of his body in space which c[ould] result in spacing issues in the classroom" (*id.*). According to the IEP, the student did not demonstrate any physical or developmental needs (*id.*). With regard to management needs, the IEP indicated that the student required "consistent redirection to stay on task" (*id.*). The IEP noted that at Carmel the student had a behavior plan requiring him to be ready to learn after one to two prompts (*id.*). Consistent with the previous school year, the IEP noted that the student continued to have a "significant delay in writing, attention, and organizational skills which inhibit[ed] progress in general education without support" (compare Dist. Ex. 10 at p. 5, with Dist. Ex. 13 at p. 5).

The June 2019 CSE recommended that the student attend a 5:1 special class for reading daily; 15:1 special classes for math, science, social studies, and ELA daily; and a 5:1 resource room program daily (Dist. Ex. 13 at pp. 1, 8). While the neuropsychologist recommended that the student attend a "small class," she did not specify a recommended number of students or class ratio, accordingly, the CSE's recommendations appear to comport with her report. In addition, similar to the neuropsychologist's recommendation that the student receive direct instruction to improve his ability to self-reflect and self-monitor, the CSE recommended that the student receive two 30-minute sessions of counseling per month to work on "self-regulation strategies and self-monitoring checklists" (*id.* at pp. 7-8). Furthermore, many of the supplementary aids and services, program modifications, and accommodations recommended by the June 2019 CSE were the same or similar to those recommended by the neuropsychologist; they included: additional time to complete assignments and double class time for writing assignments; breakdown of assignments into smaller, more manageable parts including scaffolding; refocusing and redirection during instruction and for assignments; copy of class notes; access to word processor with text-to-speech software; organizational skills support; directions repeated with access to book share; check for understanding to ensure the student is attending; frequent breaks – three minute break for every 20 minutes of class work; directions repeated to ensure understanding; use of graphic organizer; and pre-teaching and reteaching of new concepts and skills (*id.* at pp. 8-10). The June 2019 CSE also recommended access to a computer during writing assignments with Google Read and Write (*id.* at p. 10). Lastly, the June 2019 CSE recommended testing accommodations, including: extended time for all tests, use of break periods for all tests, on-task focusing prompts for all tests, direction read for all tests, flexible schedule for all tests, use of computer to record responses for all tests, use of text-to-speech software, revised test format for fill in the blank assessments, test administration in setting with minimal distractions, and modified method of presentation of test questions (Dist. Ex. 13 at p 11).

In addition, based on the student's needs, the June 2019 IEP included 13 annual goals for the student: one study skills goal that targeted his ability to learn and demonstrate new learning strategies; two reading goals that targeted the student's ability to provide examples of explicit text-based evidence to support inferences and analysis, and to state the theme of a text using key details for support, five writing goals that targeted the student's ability to write sentences with appropriate grammar and syntax, use correction punctuation and capitalization in writing assignments, spell selected words correctly in writing assignments, and write a paragraph with evidence to support his claim; two math goals that targeted the student's ability to show all work involved in solving equations and solve two-step equations using one of the four basic operations, and three

social/emotional/behavioral goals that targeted the student's ability to accept or politely decline assistance, remain focused for 10 minutes using self-regulation strategies and self-monitoring checklists, and display assertive communication skills to express his need for assistance (Dist. Ex. 13 at pp. 6-7).

Considering the above, the hearing record supports upholding the IHO's determination that the June 2019 CSE's recommendation—for placement of the student in a 5:1 special class for reading, a 15:1 special class for math, science, social studies, and ELA, and a 5:1 resource room—was appropriate to meet the student's needs for the 2019-20 school year.

2. Related Services

The parent asserts that the program recommended for the student for the 2019-20 school year did not include speech-language therapy and OT, as recommended by the January 2019 neuropsychological evaluation report, resulting in a failure to offer the student a FAPE. The parent further asserts that the student was receiving related services of OT and speech-language therapy at Carmel, and the Carmel providers and the independent neuropsychological evaluation report recommended he continue receiving the related services.

Prior to reaching the parent's arguments, it must be noted that the decision from the prior appeal identified the information available to the June 2019 CSE regarding the student's performance in the areas of OT and speech and determined that the hearing record was "unclear [as to] what information the June 2019 CSE had available to it related to the student's speech-language skills and needs"; accordingly, the SRO remanded the matter "to consider the appropriateness of the 2019-20 recommendations absent [OT and speech-language therapy] services" (Application of the Bd. of Educ., Appeal No. 20-190).

As addressed in the prior appeal, with respect to OT services, the June 2019 IEP reflected test results from a June 18, 2019 OT evaluation, which indicated that the evaluating occupational therapist participated in the June 2019 CSE meeting, and included information from portions of the recent OT report in the physical development section of the IEP (see Dist. Exs. 13 at pp. 1-2, 5; 41). According to the June 2019 IEP, the student was easily distracted by external stimuli, at times was not aware of his body in space, demonstrated right hand dominance, utilized a dynamic tripod grasp to secure a pencil, adequately controlled his pencil through maze activities, colored within the lines, folded paper, and cut with scissors with good accuracy, coordination, and control (see Dist. Exs. 13 at p. 5; 41 at p. 3). In addition, the IEP indicated that the student demonstrated no difficulty copying various geometric shapes with fair accuracy, that the student's handwriting was legible when copying from a model, his handwriting presented with good sizing and spacing, and although the student tended to only use three fingers when typing, he was able to place his fingers on the home row keys, and type eight words per minute with 87 percent accuracy (see Dist. Ex. 13 at p. 5; 41 at p. 3). Further, the June 2019 IEP noted that "[t]here are no physical or developmental needs of the student at this time" and similarly, the June 2019 OT report stated that the student's "fine motor, visual motor and visual perceptual skills appear to be age appropriate according to standardized testing" (compare Dist. Ex. 13 at p. 5, with Dist. Ex. 41 at p. 4). Additionally, the assistant superintendent testified that at the June 2019 CSE meeting the occupational therapist reported to the CSE about his recent OT evaluation of the student and

informed the CSE that the student did not have any fine motor needs, his handwriting was legible, and his typing skills were adequate (IHO Ex. I ¶ 61).

In contrast, during the 2018-19 school year the student received OT services at Carmel two times per week and occasionally he had an extra session (Tr. p. 1140; IHO Ex. XIII at pp. 1-2). The occupational therapist began seeing the student in the Fall 2018 and found "[s]ignificant difficulties" with "attention, regulation, writing, executive function skills and organization" (Tr. p. 1117; IHO Ex. XIII at p. 2). In the beginning of the 2018-19 school year, the occupational therapist focused on interventions to address the student's attention and processing and during the latter part of the school year the student "was more willing to learn keyboarding skills and attempt[] writing and strategies to improve" (IHO Ex. XIII at ¶ 10). The occupational therapist testified that the student made progress with OT services in the areas of his executive functioning and attention (id. at ¶ 11-14). The student's Carmel occupational therapist opined that at the end of the 2018-19 school year, the student "still had difficulties in the areas of executive functioning skills, regulation, attention, writing, and typing" and continued to require OT (id. at ¶ 15). However, there is no indication in the hearing record that the Carmel occupational therapist participated in the June 2019 CSE meeting or made any recommendations to the CSE (see Dist. Ex. 13 at p. 1), although she did testify that at the end of the 2018-19 school year she assumed the student would continue with OT services (Tr. pp. 1143-44). Additionally, while the 2018-19 Carmel Academy End of Year Progress Report included an update on the student's performance during OT services, there was no specific recommendation for the continuation of OT services for the 2019-20 school year (Parent Ex. Q at p. 13).

Turning to speech-language therapy services, the assistant superintendent testified that in developing the student's special education program for the 2017-18 school year, the CSE determined that the student no longer required direct speech-language services and recommended the student receive one consultation session per month of speech-language therapy (Tr. pp. 166-68; IHO Ex. I ¶ 18; Dist. Exs. 5 at pp. 5, 10; 6 at pp. 6, 11; 7 at pp. 5, 10-11; 8 at pp. 5-6, 12).

The June 2019 IEP indicated that a "Speech/Language Progress Summary" dated May 31, 2019 was considered, but the hearing record did not include a speech-language therapy evaluation or report with that date (see Dist. Ex. 13 at p. 2). The hearing record shows that prior to the June 2019 CSE meeting, the most recent speech-language therapy progress report was produced by Carmel and dated March 11, 2019 (Dist. Ex. 36). Review of the report shows that it did not include a recommendation for speech-language services and the Carmel speech-language pathologist who prepared this report did not participate at the June 2019 CSE meeting (compare Dist. Ex. 13 at p. 1, with Dist. Ex. 36). The student's 2018-19 Carmel schedule indicated that he received one 40-minute session of speech-language therapy on Thursdays, one 50-minute session of speech-language therapy on "Long Friday" morning as well as one 40-minute session of speech-language therapy on "Long Friday" afternoons, and one 50-minute session of speech-language therapy on "Short Friday" mornings (Parent Ex. E at pp. 1-2).⁹ The May 21, 2019 Carmel Academy End of Year Progress Report did not provide speech-language therapy goals or a specific recommendation

⁹ The schedule did not include an explanation of how many times per year Fridays were "short" or "long" therefore, it is unclear how frequently the student received speech-language therapy; additionally, a note at the top of the schedule indicated that "therapy times may change throughout the year based on student need" (see Parent Ex. E at pp. 1-2).

for speech-language therapy (see Parent Exs. F at pp. 1-2; UU at pp. 1-8; Tr. pp. 1403-04). According to an additional 2018-19 Carmel Academy End of Year Progress Report, the speech-language pathologist noted that "[The student] will continue working on this program in the fall to further address his goals" without any specific recommendation to continue speech-language therapy for the next school year (Parent Ex. Q. at p. 13).¹⁰ Neither the June 2018 nor the June 2019 IEPs included updated speech-language testing, present levels of performance as they pertain to speech-language development, speech-language therapy goals, or recommendation for speech-language therapy services (see Dist. Exs. 10; 13).

After remand, IHO 2 reviewed the parent's argument that the district failed to recommend OT or speech-language therapy for the student (IHO Decision at pp. 30-31). IHO 2 acknowledged that the student received OT and speech-language therapy at Carmel but held that the progress reports "do not recommend that [the student] continue to receive those services, nor were [there] any evaluations to support continuing services" (*id.* at pp. 30-31). IHO 2 pointed out that the neuropsychologist did recommend OT but did not recommend speech-language therapy (*id.* at p. 31). She also found that the district did conduct an OT evaluation of the student at the parent's request, which found that the student did not require OT services (*id.*). She then noted that a speech-language evaluation was not able to be completed as the student was not available (*id.*). IHO 2 also noted that for the 2017-18 school year the district's speech therapist found that the student did not require direct speech services based on his progress and that after the student was recommended for a monthly speech consultation for the 2017-18 school year, that service was removed for the 2018-19 school year (*id.* n. 22). IHO 2 concluded that the district considered the parent's request for OT and speech-language therapy, but the CSE was not required to follow the recommendations of the neuropsychologist nor base their decision on the fact that the student received those services at Carmel (*id.* at p. 31). IHO 2 found that the recommended program, without the related services of speech-language therapy and OT, was reasonably calculated to confer an educational benefit to the student (*id.*).

In her evaluation, the neuropsychologist recommended that the school attended by the student "should provide an occupational therapist with expertise in children with ADHD and issues with self-regulation" with a focus on "helping [the student] develop strategies to better regulate his feelings of restlessness, needs for movement, and concrete strategies to self-soothe, focus, and manage internal tension" (Dist. Ex. 34 at p. 31). The neuropsychologist did not make a specific recommendation for OT services in her report; however, in her direct affidavit testimony the neuropsychologist testified that the student needed OT "to accommodate the fine motor issues, to help improve his ability to get things out on paper, and through a keyboard" (IHO Ex. XIV at p. 17). In addition, she testified that the student "struggles" with regulating his behavior and attention and differed OT strategies would need to be explored over the years to determine strategies that would meet his needs (*id.* at p. 18).

Further, although the neuropsychologist did not make a specific recommendation for speech-language therapy services, she did recommend "[l]anguage support during learning" (Dist. Ex. 34 at p. 33). The neuropsychologist stated that the "goal of each lesson or task should be

¹⁰ The hearing record did not contain testimony from the student's 2018-19 Carmel speech-language pathologist (see IHO Exs. I-XVI).

clearly stated before instruction begins," that "instruction should connect to and build on previous information" the student has mastered, the student "needs information to be reviewed frequently with new information added gradually," and the student benefits from visual cues (*id.* at p. 34). The neuropsychologist testified by affidavit that the student needed "specialized" speech-language therapy to assist with the student's "word finding, verbal fluency, and word retrieval" issues (IHO Ex. XIV at p. 18). The neuropsychologist opined that the student needed "interventions that are used with students with [a] brain injury or neurological issues that impair word retrieval or rapid naming ability" (*id.*). She went on to further conclude that the interventions he needed were "not typical" because he required help to "learn strategies to gain better access to language information either in his memory or that he is seeing in print" (*id.*).

With respect to related services, although the June 2019 CSE was still waiting for the completion of a speech-language evaluation, based on the information that was available to the June 2019 CSE at the time of the meeting, there is not enough support in the hearing record to depart from the IHO's finding that the June 2019 CSE offered the student a program that was reasonably calculated to provide the student with an educational benefit without including a recommendation for OT or speech-language therapy.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision that the district offered the student a FAPE for the 2018-19 and 2019-20 school years, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 24, 2022**

**STEVEN KROLAK
STATE REVIEW OFFICER**