



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-052

Application of the BOARD OF EDUCATION OF THE VALLEY CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Neelanjan Choudhury, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Benjamin M. Kopp, 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 district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to fund an independent neuropsychological evaluation at a cost not to exceed \$5000. The parent cross-appeals from that part of the IHO's decision which determined that the district's evaluations were appropriate. The appeal must be dismissed. The cross-appeal must be sustained to the extent indicated.

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 in this matter attended kindergarten through second grade (the 2016-17, 2017-18, and 2018-19 school years) at a Board of Cooperative Educational Services (BOCES) 6:1+2 special class placement located in an out-of-district public school due to his special education needs related to a diagnosis of autism (Parent Exs. F; I; Dist. Ex. 30; see Parent Ex. V; Dist. Exs. 31-33). Although the student was not due for a reevaluation until March 2019, in March 2018 the CSE decided to accelerate the re-evaluation schedule due in part to the parent's opinion that the student required a more restrictive program, and her concerns about the appropriateness of the BOCES 6:1+2 special class placement, the student's present levels of performance, and his progress (Tr. pp. 37-38, 422-23; see Parent Ex. E at pp. 2-3). As a result, the district conducted evaluations of the student including an occupational therapy (OT) evaluation in July 2018, a

psychological evaluation in October 2018, an educational evaluation in October 2018, and a speech-language evaluation in November 2018 (Parent Ex. O; Dist. Exs. 22-24; 26). The district also prepared addendums to the OT and speech-language evaluations of the student in January and February 2019 at the parent's request (see Tr. pp. 324-25, 367, 370, 464; Dist. Exs. 27-29).

The CSE convened on December 19, 2018, January 17, 2019, and February 8, 2019 to review the results of the district's evaluations (Dist. Ex. 33 at pp. 1-3). According to the CSE meeting information attached to the IEP developed at the February 2019 meeting, the parent requested independent speech-language, OT, psychological, and educational evaluations of the student (id. at p. 2). The meeting information also indicated that the parent requested a physical therapy (PT) and neuropsychological evaluation, and that the district granted the parent's request for an independent PT evaluation (id.).¹

In an email to the district's director of special education dated February 19, 2019, the parent reiterated her disagreement with the district evaluations, and requested that the district reconsider her request for assistive technology, OT, adapted physical education, speech-language, educational, psychological, and neuropsychological IEEs (Parent Ex. QQ at p. 2).²

A. District's Due Process Complaint Notice

In a due process complaint notice dated March 5, 2019, the district requested an impartial hearing, challenging the parent's request for psychological, educational, OT, and speech-language IEEs at district expense (IHO Ex. I at p. 4). The district asserted that it had conducted psychological, educational, speech-language, and OT re-evaluations with the student; however, the parent informed the CSE during its February 8, 2019 meeting that she did not agree with the evaluations (id. at p. 5). The district brought the due process complaint notice in order to defend its evaluations and requested that an IHO deny the parent's request for psychological, educational, speech-language, and OT IEEs (id. at p. 6).

B. Events Post-Dating the District's Due Process Complaint Notice

1. Subsequent CSE Meetings

The CSE reconvened on June 7 and June 20, 2019 to continue to review a May 27, 2019 district PT evaluation report and to develop the student's IEP for the 2019-20 school year (Dist.

¹ A PT evaluation of the student was conducted on May 27, 2019, and while the PT evaluation report was not made part of the hearing record, the results of the evaluation were recorded on the June 2019 IEP (Dist. Ex. 34 at pp. 1-2).

² The parties use the terms "test," "evaluation," and "assessment" interchangeably; however, State regulation defines an individual evaluation as any "procedures, tests or assessments used selectively with an individual student" and includes a physical examination, a social history, other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs, and as relevant here, "an individual psychological evaluation, except where a school psychologist has determined pursuant to section 200.4(b) of this Part that a psychological evaluation is unnecessary to evaluate a student of school age" (8 NYCRR 200.1[aa]). By this definition, the "individual evaluation" is not a specific test or assessment, rather it is the result of multiple tests and assessments, each utilizing the tools deemed appropriate by the evaluator.

Ex. 34 at p. 1). The CSE determined that the student continued to be eligible for special education and related services as a student with autism, and recommended a 12-month program in a BOCES 6:1+2 special class placement with a full-time 1:1 aide, and that he receive daily, 30-minute sessions of individual OT and speech-language therapy (id. at pp. 14-15; see Dist. Ex. 33 at p. 1). The CSE also recommended various supplementary aids and services, program modifications, assistive technology, and that the parents receive two 60-minute sessions per week of individual, home-based parent counseling and training (Dist. Ex. 34 at pp. 14-15). For the 12-month portion of the school year, the CSE recommended the BOCES 6:1+2 special class placement and that the student receive three 30-minute sessions per week of individual OT and speech-language therapy (id. at p. 17).

2. Parent's Due Process Complaint Notice

The parent filed a due process complaint notice dated August 23, 2019, requesting an impartial hearing, and asserting that the district had failed to either respond to her requests for a neuropsychological evaluation, or provide an evaluation (IHO Ex. II at pp. 2, 3).³ As a basis for the request for a neuropsychological evaluation, the parent asserted that the district's October 2018 psychological and educational evaluations did not address the student's "degree of autism symptomology or its effect(s) on the progress he should have made" or "whether something internal other than autism affects his ability to make academic progress" (id. at p. 2). For relief, the parent requested that an IHO authorize an independent neuropsychological evaluation to be conducted by a specific evaluator, at the rate of \$5,000 (id. at p. 3). The parent also requested an IHO order the district to fund transportation costs to and from the IEE appointments, as well as an order to reconvene a CSE meeting within 10 days after receipt of the evaluation reports to consider the information in the student's IEP (id.). The parent further requested that an IHO consolidate her impartial hearing with the pending impartial hearing initiated by the district, as the issues substantially overlapped in circumstances, events, evidence, and witnesses (id. at 2).

In an order dated September 24, 2019, the IHO noted that on September 4, 2019, both parties requested that the two due process complaint notices be consolidated, and upon review of the pertinent regulations and effects that consolidation would have on the parties, ordered that the district's and parent's due process complaint notices be consolidated into one impartial hearing (IHO Order on Consolidation at pp. 1-3).

C. Impartial Hearing Officer Decision

A two-day impartial hearing convened on October 1, 2019 and concluded on October 15, 2019 (Tr. pp. 1-493). In a decision dated February 14, 2020, the IHO found that the district's psychological, educational, speech-language, and OT evaluations were appropriate (IHO Decision at p. 18). The IHO further found that since the district did not file a due process complaint notice specifically challenging the parent's request for a neuropsychological evaluation, the parent was entitled to a neuropsychological IEE (including an observation of the student in the school), and

³ The parent asserted that she requested a neuropsychological IEE at the February 2019 CSE meeting and later renewed her request in a February 19, 2019 email to the district's director of special education (IHO Ex. II at p. 2).

ordered the district to fund the IEE to be conducted by a licensed neuropsychologist of the parent's choosing, at a rate not to exceed \$5,000 (id.).

IV. Appeal for State-Level Review

The district appeals. In its request for review, the district asserts that the IHO erred in ordering a neuropsychological IEE because: the IHO incorrectly concluded that the district was required to challenge the parent's request for an IEE when the district had not previously obtained its own neuropsychological evaluation beforehand; the plain language of the regulations and applicable caselaw warrant a finding that the parent is not entitled to a neuropsychological IEE; the IHO determined the district's psychological and educational evaluations were appropriate and therefore, a neuropsychological evaluation would be improper to grant in light of the parent's disagreement with the district's psychological and educational evaluations; the IHO did not make a determination that a neuropsychological evaluation was necessary to evaluate the student in all areas of suspected disability; and, finally, even assuming the district was required to file a due process complaint notice to challenge the parent's request for a neuropsychological IEE, the parent's filing of her own due process complaint notice concerning the neuropsychological IEE and its subsequent consolidation with the district's previously filed due process complaint notice into one impartial hearing, allowed the IHO to adjudicate both matters in one hearing.

In an answer, the parent asserts general admissions and denials. The parent also cross-appeals the IHO's determinations that the district's psychological, educational, speech-language, and OT evaluations were appropriate, and requests that an SRO order the district to fund an IEE for each of those four evaluations, in addition to the neuropsychological evaluation that the IHO already ordered the district to fund.

V. Applicable Standards

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a re-evaluation or if the student's parent or teacher requests a re-evaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a re-evaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a re-evaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services

needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

When a parent disagrees with a district evaluation, he or she may request an IEE at public expense, and the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 2019 WL 3021232, at *3 [3d Cir. July 10, 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).⁴ An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]).

VI. Discussion

A. District Re-Evaluations

In her cross-appeal, the parent asserts that the IHO erred in finding overall that the district's evaluations of the student were appropriate based on his needs and abilities at the time the evaluations were conducted. Specifically, the parent asserts that the IHO erred in finding that all of the "evaluators took the same steps in a process," noting that only one evaluator contacted the parent for information and that the evaluators were not familiar with assessments that would have been appropriate to use with the student based on his needs. The parent further alleges that the IHO's finding was based on the erroneous assumption that all of the student's abilities were known, and that the evaluators appropriately selected and used standardized measures that were made for students with needs similar to the student in this matter.

1. Psychological and Educational Re-Evaluations

With respect to the district's psychological re-evaluation, in a cross-appeal the parent asserts that the school psychologist's "reliance on teacher reports as the sole result-producing measure rendered that evaluation inappropriate for lack of [a] variety of sources." The parent also asserts that the district failed to attempt any IQ assessment, including nonverbal components, with the student and that despite selecting a specific assessment in part due to its clinical sample of children with ADHD, "the evaluator failed to assess [the student] for conditions related to his fleeting attention." Additionally, the parent argues that the "tools" the school psychologist selected

⁴ The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year re-evaluation period in some cases (see D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 179 [D. Conn. 2019]).

did not assess the student's "current degree" of autism "symptomology" for comparison with a prior evaluation.

With respect to the district's educational re-evaluation, the parent asserts in a cross-appeal that the IHO erred in finding that it was appropriate, specifically because the educational evaluator failed to attempt to use appropriate standardized assessments and therefore no scores could be derived; she did not realize the student was nonverbal until she began to evaluate him; she failed to ensure assessment accuracy in that she did not follow test protocols, record test scores or attempt assessments the student could have completed; and she failed to follow her own procedures to prevent bias.

The district contends on appeal that the IHO incorrectly concluded that the district was required to challenge the parent's request for an independent neuropsychological evaluation when the district had not previously obtained its own neuropsychological evaluation of the student first. The district also asserts that the IHO did not reach a finding that a neuropsychological evaluation was necessary to evaluate the student in all areas of suspected disability; further, the IHO concluded that the district's psychological and educational evaluations of the student were appropriate, therefore, granting a neuropsychological evaluation would be improper in light of the parent's disagreement with the district's psychological and educational evaluations.

As discussed in detail below, review of the evidence in the hearing record showed that the district's October 2018 psychological and educational re-evaluations of the student did not provide sufficient information for the CSE to identify the student's special education needs and develop an appropriate educational program. Furthermore, the hearing record reflected that the evaluators did not attempt to use appropriate measures with the student during those two evaluations. Accordingly, the hearing record supports the parent's request for an independent neuropsychological evaluation.

First, turning to the district's October 2018 psychological re-evaluation report, review of the document shows that the district's school psychologist attempted to administer the Differential Ability Scales, Second Edition (DAS-II) to the student; administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3) Teacher Form, and the Behavior Assessment System for Children, Third Edition (BASC-3) to the student's then-current and former special education teachers; and conducted a classroom observation, teacher consult and a review of records (Parent Ex. O at pp. 1, 4, 7).⁵ According to the school psychologist, the DAS-II—which was described as "an individually administered clinical instrument designed to assess the cognitive abilities of children between the ages of 2½ and 18"—was attempted in October 2018, but was discontinued due to the student's inability to follow the standardized testing protocol and his inconsistency with responses (*id.* at p. 3). Specifically, the school psychologist reported that she attempted the first

⁵ The first and seventh pages of the district's psychological evaluation report reflect conflicting information regarding which edition of the BASC was administered to the student's special education teacher; the protocol admitted into the hearing record indicated that the third edition of the BASC was administered (compare Parent Ex. O at pp. 1, 7, with Dist. Ex. 2 at p. 3). Additionally, the evaluation report did not include the correct names of two assessments; the correct name of the assessment attempted with the student is the Differential Ability Scales-Second Edition (DAS-II), and the assessment administered to the student's special education teachers is titled the Adaptive Behavior Assessment System, Third Edition (ABAS-3) (compare Parent Ex. O at p. 1, with Dist. Exs. 1 at p. 1; 6 at pp. 1, 3). The correct assessment names and acronyms will be used in this decision.

subtest of the assessment, the verbal comprehension subtest, and that the student was able to point to the eyes, mouth, and ears on a picture of a teddy bear, but when asked a second time, he continued to point to the eyes for the remainder of the body parts (*id.*). The school psychologist shared that the student's teacher reported that the student knew the different parts of the body because in class he followed along to songs related to body parts (*id.*). According to the school psychologist, the second part of the verbal comprehension subtest involved a box of different items that she lined up and then requested the student give to her one at a time (*id.*). She reported that the student picked up the car when he was asked to, but played with it and did not hand it to her as she requested (*id.*). The student was able to give the school psychologist the horse and plastic watch; however, when asked to put the horse in the box, he continued to play with the toy car (*id.*). The third section of the verbal comprehension subtest involved a tray of various wooden figures; the student took each figure out of the tray, "tapped it on the table and placed it back in the tray like a puzzle," and did not complete the directives in that section (*id.*). The second subtest of the DAS-II—picture similarities—was attempted, and the student was able to correctly complete the first few items; however, after the ninth item the student began handing the cards back to the school psychologist instead of matching them to a picture in the stimulus book (*id.*). The school psychologist explained that "[d]ue to [the student's] inability to follow the standardized testing protocol and his inconsistency with responses, testing ceased" and "a longer observation and teacher consultation" was conducted (*id.* at p. 3).

The teacher reported to the school psychologist that the student was using sign language for "pretzel, cracker, chip, and ball"; he used word approximations for "bubbles," and "bathroom"; and with prompting he would say approximations for "hi" and "bye" (*id.*). Additionally, the school psychologist reported from the teacher that the student did not present with behavioral issues in the classroom, he preferred to engage in parallel play, and would not actively seek out peers to play with (*id.* at pp. 3-4). Finally, the teacher reported to the school psychologist that the student could identify pictures from a deck of approximately 70 cards presented in an array of six or eight, by the label, attribute (i.e. point to something red) and function (i.e. point to something that flies) (*id.* at p. 4). She further explained that the student could not identify his own name when in an array with other students' names, nor could he identify himself in a class picture (*id.*). The school psychologist opined that this might not be the case if he was asked to complete these tasks at a different time (*id.*).

The October 2018 psychological re-evaluation report included the results of the administration of the ABAS-3—which used "a behavior rating format to assess adaptive behavior and related skills"—completed by the student's former teacher in June 2018, and then-current teacher in October 2018 (Parent Ex. O at p. 4).⁶ The evaluation report indicated that both the former and the current teacher rated the student's performance in the extremely low range for global adaptive functioning with a global adaptive composite (GAC) score of 53, and that "[a] lot of [the student's] skill deficits can be attributed to symptoms associated with his diagnosis of [a]utism" (*id.* at p. 6). The former teacher reported that the student was mostly nonverbal and benefitted from constant supervision and frequent reinforcement (*id.*). The school psychologist

⁶ The hearing record showed that the psychologist sent both the ABAS-3 and the BASC-3 forms to the parent; however, she experienced difficulty completing the forms; therefore the evaluator did not receive information from the parent prior to the conclusion of the re-evaluation (Tr. pp. 58, 63-64, 69, 101-105; Parent Ex. O at p. 4; Dist. Exs. 10-13; 15).

reported that both teachers rated the student in the extremely low range in the conceptual domain (communication, functional academics, and self-direction) and noted that they both rated that the student always arrived to school on time (id.). The student's former teacher rated the student as almost never being able to complete routine classroom tasks within a reasonable time; however, the current teacher reported that the student was almost always able to do so (id. at pp. 6-7). According to the report, both teachers rated the student's leisure and social skills in the extremely low range; however, they also reported that the student had always had good relationships with teachers and other adults (id. at p. 7). The school psychologist reported that the student's former teacher rated the student as being unable to engage in a variety of fun activities instead of just one or two; however, his current teacher reported that he could do that, indicating progress in that area (id.). In the practical domain (community use, school living, health and safety, and self-care), the school psychologist reported that the teachers rated the student's performance to be in the extremely low range for all areas except for self-care, which the student's former teacher rated as in the low range, and current teacher rated as in the below average range (id.). The school psychologist opined that self-care "seem[ed] to be the strongest area" for the student, and noted that he was always able to use the restroom without help, use a fork to eat solid food, drink liquid without spilling, wash his hands with soap and water, and sometimes open a tab top can, milk carton, or screw top bottle (id.).

The October 2018 psychological re-evaluation report contained the results of a June 2018 administration of the BASC-3, which was described as "an observation rating scale" used to "assess a multitude of children's behaviors and emotions" (Parent Ex. O at p. 7). According to the school psychologist, this assessment was only completed in June 2018 by the student's former teacher, because as of October 2018 his current teacher had not reported that the student exhibited any behaviors in the classroom (Tr. p. 102; Parent Ex. O at p. 7). The school psychologist reported that the student's "scores ranged from [a]verage to [c]linically [s]ignificant"; with most of the clinically significant scores found in the adaptive skills area (id. at p. 8). The former teacher reported that the student could work with all staff members, transitioned nicely, was nonverbal in school, and worked best when demands were low and the reinforcement was high (id.). The school psychologist noted again "that many of the low scores [were] associated with [the student's] diagnosis of [a]utism" (id.). She further analyzed the scores from the BASC-3, which indicated that the student had difficulty concentrating; was almost always easily distracted; and had difficulty in academic areas related to reading, math, and spelling (id. at pp. 8-9). The student's former teacher reported that the student did not quickly join group activities, but he did not isolate himself from others or actively avoid other children (id. at p. 9). Finally, the student's former teacher indicated that the student did not initiate conversations or always respond appropriately when asked a question; however, he never refused advice, was often easy to please, adjusted well to change, and was easily calmed when angry (id.). At the end of the report, the school psychologist summarized the student's current educational program and placement, reiterated that "valid cognitive scores could not be attained," repeated the range of results from the ABAS-3 and BASC-3, and indicated that "[d]iscussion will ensue to determine appropriate programming, modifications, and accommodations for [the student] at his upcoming CSE meeting" (id.).

Regarding the parent's claim on appeal that the district school psychologist's "reliance on teacher reports as the sole result producing measure rendered" the district's psychological re-evaluation inappropriate due to a "lack of variety of sources," review of the evidence in the hearing record does not support that assertion. The school psychologist who administered the October

2018 psychological re-evaluation testified that according to State regulations, an individual psychological evaluation was used "basically to evaluate whether or not a student needs -- qualifies and needs special education services," and would entail obtaining an observation, and if possible, "some kind of an IQ test or some kind of an ability score"; depending on the student, the evaluation may also include behavioral and adaptive testing (Tr. p. 96). According to the school psychologist, she conducted an observation of the student in his classroom for over an hour, a consultation with his teacher, and a record review of the student's previous IEPs and previous evaluations that had been completed (Tr. pp. 96-97, 100; Parent Ex. O at pp. 1-4). She also gained information about the student from her attempt to administer a portion of the DAS-II to him (Parent Ex. O at p. 3). The student's former and current teacher both completed the ABAS-3, described as a measure of adaptive skills consisting of approximately one hundred questions that the teacher and/or parent fills out, and the student's former teacher completed the BASC-3, which was another questionnaire for teachers and parents that measured different behaviors that a student might exhibit including adaptive skills (Tr. pp. 48-50; 58-59; Parent Ex. O at pp. 4, 7).⁷ Although the district was not successful in obtaining completed ABAS-3 and BASC-3 information from the parent regarding the student's performance at home as part of the psychological re-evaluation, the evaluation report did reflect information from a variety of measures completed by the school psychologist and two teachers familiar with the student's performance, and therefore I decline to find that the psychological re-evaluation was inappropriate on that basis (see Parent Ex. O at p. 4; Dist. Exs. 10-13; 15).

Next, regarding the parent's claim that the district's psychological re-evaluation lacked assessments of the student's nonverbal and attention skills, the school psychologist testified that she had consulted with the school psychologist who evaluated the student in preschool (preschool evaluator) to obtain background information and to decide what assessments would be appropriate to administer to him (Tr. pp. 41-42). She testified that because of the student's "fleeting attention issues," she wanted a test that would be interesting and "catch his attention," so in consultation with the preschool evaluator, she decided to administer the DAS-II because it had "a lot of manipulatives," was "hands on," and had shorter subtests, as she wanted to keep him interested in order to get valid scores (Tr. pp. 43-44, 71). She further explained that "[a] lot of the other IQ tests were . . . a little too standardized for him," and "[a] lot of them were verbal and I [knew] he [was] not very verbal" (Tr. p. 44). According to the school psychologist, the DAS-II had "actual pieces to it," "so it's fun, it's kind of engaging" and that it was "[t]hings he c[ould] see instead of me just verbally [] saying something and asking for a response" (Tr. p. 44). The school psychologist further stated that she chose to administer the DAS-II because it was an assessment that could be given to students who "have lower skills" and it provides verbal, nonverbal, and spatial reasoning scores (Tr. p. 70).

Turning to the cognitive assessments the school psychologist decided not to administer to the student, she testified that no other standardized tests were appropriate because of the student's inattention and inability to attend "to even the DAS" (Tr. p. 72). The school psychologist stated that she and the student's preschool evaluator decided against administering the Test of Nonverbal Intelligence (TONI), because while it would be appropriate to use with a student who was

⁷ The school psychologist further explained that she chose the ABAS-3 and BASC-3 in order to obtain information about "any type of behaviors that were coming out in the school setting or in the home setting" (Tr. p. 59).

nonverbal, it was "not very entertaining" and due to the student's inattention, "it wasn't really a right fit for him" (Tr. pp. 42-43). According to the school psychologist, other standardized IQ tests such as the "WISC" were not appropriate to use with the student because there are an "extensive amount of subtests" that must be completed in order to obtain the verbal, spatial reasoning, perceptual reasoning, and working memory scores and overall IQ (Tr. p. 72). She opined that the student would not be able to complete the WISC because of his lack of attention and limited verbal skills (Tr. pp. 72-73). The school psychologist testified that even though the "WPPSI"—which has a "little bit of an overlap" with the WISC but is for younger students—uses manipulatives like the DAS-II, it was deemed inappropriate to administer to the student because it is "more structured in a standardized way" in that directions can be given only a certain amount of times (Tr. pp. 73-74, 115-16). She also testified that even though the "WASI" is an abbreviated intelligence scale with only four or five subtests, which may have been helpful given the student's lack of attention, it still has a verbal component which made it inappropriate to use with him (Tr. pp. 88-89). Additionally, she opined that although the nonverbal components of both the WPPSI and the WASI use manipulatives, those components would not have been appropriate to administer to the student because of the self-directed behavior she observed the student engaging in with the items from the DAS-II (Tr. pp. 89-90, 125-26). The school psychologist further opined that other cognitive assessments, such as the "Kaufman Cognitive Assessment" were not appropriate to administer due to verbal components and because the student was nonverbal; neither was the "Stanford Binet," which she stated took "longer" than the DAS-II because it has more subtests and the student's attention was fleeting; she "was trying to get as much out of him as [she] could while he was really focused" (Tr. pp. 75-76). She also testified that the "Woodcock-Johnson" cognitive assessment was not appropriate to use with the student due to the level of concentration that was needed, the ability to understand multiple step directions, and produce verbal responses (Tr. pp. 76-77).

However, the hearing record shows that the school psychologist was not able to complete administration of the DAS-II with the student (Tr. pp. 85-87; Parent Ex. O at p. 3). She testified that she did not attempt to administer several of the subtests in the DAS-II because some required verbal responses, and she discontinued the assessment because she felt it was too strenuous and "he kind of had enough by that point" (Tr. pp. 85-88). The school psychologist opined that because the student was unable to purposefully respond to her, the results would have been the same if she had attempted to complete the testing or to try a different assessment on another date (Tr. pp. 87-88). She acknowledged that other cognitive assessments, including the DAS-II, had nonverbal components and both the WPPSI and WASI nonverbal subtests could have been administered separately from the verbal subtest (Tr. pp. 70, 89, 110-11, 118-19). But, because the student "play[ed] with the blocks rather than actually doing what I asked him to do" on one section of the DAS-II verbal comprehension subtest, the school psychologist "speculated" that the student would be unable to complete the nonverbal components of other cognitive assessments (Tr. pp. 89-90, 119, 125-26; Parent Ex. O at p. 3). Yet, a DAS-II measure of the student's nonverbal reasoning demonstrated that the student "was able to get the first few items correct including some that were not exact matching pictures" indicating that he may have been able to participate in other measures of his nonverbal abilities but was not provided the opportunity to do so (Tr. p. 91; Parent Ex. O at p. 3).

Additionally, the school psychologist's testimony indicated that she was aware of the student's attention difficulties prior to her evaluation, and the psychological re-evaluation report

indicated that the student's teachers rated his attention problems on the BASC-3 to be in the "At-Risk" range, which, according to the report, "may identify a significant problem that may not be severe enough to require formal treatment but is concerning enough to require monitoring" (Tr. pp. 36-37, 42-43, 45; Parent Ex. O at pp. 7-8). Further analysis of the BASC-3 indicated that the student "ha[d] trouble concentrating" and was "almost always easily distracted" (*id.* at p. 8). The school psychologist also testified that the student's attention difficulties were in part the reason that she did not attempt to administer different cognitive assessments to him, yet no other formal or informal measures of the student's attention skills, including an inventory of what activities held the student's attention and were motivating to him, were conducted (Tr. pp. 72-77, 115; Parent Ex. O at p. 8).

Finally, to the extent the parent asserts that the psychological re-evaluation failed to assess the student's autism "symptomology" in comparison to a prior evaluation, the hearing record shows that in April 2016, the Childhood Autism Rating Scale, Second Edition (CARS-2)—"a standardized tool that helps to identify the presence or absence of characteristics typically associated with an autism spectrum disorder"—was administered to the student's teacher (Parent Ex. V at pp. 6-8; *see* Tr. pp. 111-13; Parent Ex. O at pp. 6, 8). The CARS-2 results provided information about 14 different characteristics of autism, with an overall "[g]eneral [i]mpressions" rating (Parent Ex. V at pp. 6-8). Although repetition of this specific assessment as part of the district's re-evaluation of the student was not required, attempting testing in some areas that were previously assessed using the CARS-2, including the student's intellectual functioning and his need for "[p]ersistent and forceful attempts" to gain his attention, may have been useful in light of the difficulty the district experienced obtaining this information through other means.

Overall, review of the evidence in the hearing record supports the conclusion that the district's psychological evaluation of the student was incomplete to the extent that it failed to attempt any measures of the student's nonverbal abilities and attention deficits.

Turning to the district's educational re-evaluation, the hearing record shows that it was conducted by an educational evaluator in October 2018 as part of the student's triennial evaluation (Dist. Ex. 24 at p. 1). The October 2018 educational re-evaluation report indicated that the educational evaluator had selected the following assessments to use with the student: the Kaufman Test of Educational Achievement, Third Edition Brief (KTEA-3 Brief), the Bracken School Readiness Assessment - Third Edition (BSRA-3), and the Brigance Comprehensive Inventory of Basic Skills II (CIBS-II); however, she reported that only the KTEA-3 Brief was attempted but discontinued as the student "was unable to complete any of the tasks due to his limited abilities" (*id.* at p. 2).⁸ The report further indicated that the BSRA-3 and CIBS-II "could not be validly administered; therefore, standard scores and percentile ranks as compared to students of the same age were not obtained" (*id.*). Rather, for approximately 30 minutes, the educational evaluator conducted an "observational evaluation" of the student to assess his academic abilities, using verbal directions, picture cards, and the student's communication device (*id.*).

The October 2018 educational re-evaluation report reflected teacher reports that the student was "doing well" in the BOCES 6:1+2 special class program, in that he was "showing progress in

⁸ Throughout the hearing record these assessments were referred to by the first word in the name (i.e. Kaufman, Bracken, Brigance); however, for the purpose of this decision the full acronyms will be used.

communicating with intent, following classroom routines independently, and showing interest in toys and books" (Dist. Ex. 24 at p. 1). Additionally, with teacher prompting and support the student's eye contact and verbalizations were improving, and the student did not display behavioral difficulties during school (id.). The educational evaluator described in her report that the student transitioned independently to a quiet space in the classroom and complied when asked to sit in the chair (id. at p. 2). With prompting from his aide, the student whispered "hhhhhi" (e.g. "hi") and "bye" (id.). She further described that the student's attention was fleeting throughout the evaluation, he required prompting, refocusing, and redirection to attend to task, he appeared tired, yawning often, engaged in minimal eye contact with the educational evaluator, and did not always appear to understand what was being asked of him (id.). Finally, she described that with the use of his communication device the student was able to respond and point to several stimulus pictures (id.).

The educational evaluator reported that the student demonstrated difficulty identifying body parts such as eyes and nose; however, his teacher stated that the student knew his body parts, yet even with her support he did not correctly identify them during the assessment (Dist. Ex. 24 at p. 2). The educational evaluator described in her report that the student demonstrated knowledge of colors with the support of his communication device as well using "direct match with color cards and his communication device" (id. at p. 3). She reported that the student correctly identified six picture cards placed in an array of three or four, and responded to questions such as "[w]hich one flies," "[w]here does water come from," and "[w]hich one is red" when the cards were placed in a field of three (id.). The educational evaluator reported that the student did not identify himself in a picture using his communication device, or identify numbers, letters in isolation, or his name (id.). Finally, the educational evaluator concluded that the student "lack[ed] visual attention and require[d] verbal and/or visual prompts to sustain attention to task," and that "[e]ven with this support, [the student's] focus was inconsistent" (id.). Furthermore, she reported that the student's communication skills were minimal—although he was able to state several wants and needs using his communication device—and his school readiness skills were also inconsistent (id.).

The educational evaluator testified that she chose the KTEA-3 Brief—a norm-referenced measure of core academic skills—because it "covered the academic areas that needed to be covered" for the student's evaluation, and she thought if "there needed to be more, [she] could have gone back afterwards" and administered additional subtests (see Tr. pp. 153-54). She explained that the KTEA-3 Brief was a test she used with students from kindergarten to high school and she felt that it was her "top tier test"; however, if the student had severe autism she would use the BSRA-3 "as a guideline," and she also brought the CIBS-II, but that was not a standardized test (Tr. p. 165). According to the educational evaluator, the BSRA-3 is a standardized educational assessment that measures school readiness that she used for preschool or kindergarten students (Tr. p. 164). She explained that even though the student had aged out of this assessment she felt it could be used as "a guide to see what abilities [the student] had" and "not necessarily as a standardized assessment" (Tr. p. 164). However, because the student was unable to identify colors on the BSRA-3 stimulus book, but the student's teacher reported that the student knew his colors and had them in his communication device, she decided to do an observational assessment using the device he was familiar with (Tr. p. 166; see Dist. Ex. 9). The educational evaluator testified that the CIBS-II is a non-standardized, score based inventory of basic skills; however, she did not attempt administering the CIBS-II to the student because it is a primarily verbal test (Tr. pp. 169-70). Review of testimony shows that the educational evaluator discussed several other assessments

(e.g. "WIAT-III," Test of Early Reading Abilities, Test of Early Math Abilities, Key Math, "TOWL," "CTOPP," Gray Oral Reading Test, etc.); however, she explained that "due to [the student's] lack of attention, minimal eye contact, being nonverbal, there was just no way [she] could administer a different assessment" (see Tr. pp. 173-79). She further testified that if she felt that she could have administered another assessment, she would have gone back another time, but did not due to his "limited" verbal, academic, and cognitive abilities (see Tr. pp. 173, 178-79, 194).

Regarding the parent's arguments in her cross-appeal, which generally assert that the educational evaluator failed to adequately prepare to assess the student and selected assessments that were inappropriate to use with him, the educational evaluator testified that before the re-evaluation, she looked at the alerts, grade level, and placement on his current IEP, which guided her in determining which assessments to administer (Tr. pp. 140-41). She clarified that the only thing she looks at prior to an educational evaluation is the student's IEP for special alerts because she does not "like to go into a test being tainted or biased so I look at the information that's just pertinent," such as allergies or behavioral issues, because she "like[d] to go in with a clean slate" (Tr. pp. 152-53, 180-81).⁹ The educational evaluator testified that she chose her assessments based on the student's diagnosis of autism as well as his placement in a BOCES program, specifying that his attendance at a BOCES program gave her "an idea where his academic functioning was" (Tr. p. 141). She further testified that she only knew that the student was in a self-contained classroom with a 1:1 aide, clarifying that being in a 6:1+2 class meant to her that the student needed a lot of support and that academically he was "probably functioning significantly below level" or could have behavioral difficulties (Tr. pp. 143). The student's teacher informed the educational evaluator that the student was nonverbal, and indicated that she did not think the student was going to be able to complete the assessments the educational evaluator had brought (Tr. p. 146). The educational evaluator testified that "[i]t was kind of self-evident once I saw [the student] that I realized what he would be able to accomplish and what he couldn't" (*id.*). Additionally, the educational evaluator reported that she had never met the student prior to the re-evaluation; however, upon meeting him she realized that he was nonverbal and how severe his disability was, specifically noting that his lack of focus, lack of understanding directions, and the support he needed to go to the testing area showed her "how limited he was" (Tr. p. 204).

Not surprisingly, the educational evaluator testified that she could not administer the KTEA-3 Brief to the student because he was unable to do the tasks he was directed to do, he lacked attention or his attention was fleeting; the evaluator opined that the student did not understand some of the questions asked (Tr. p. 156; see Dist. Exs. 4; 24 at p. 2). Additionally, as discussed above, she did not administer the other assessments she had brought with her for various reasons (Tr. pp. 166, 169-70; Dist. Ex. 24 at p. 2). Although the educational evaluator testified that she was confident that the tests she attempted to administer to the student "were the best choices available" to her at the time, those measures did not yield sufficient information about the student's then-current skills and needs (Tr. p. 178). She further testified that despite what she knew about the student after her initial testing attempt, there were no other evaluative tools that she could think of that she could have tried with the student on a different date (Tr. pp. 178-79). Therefore, the result of the educational evaluation was that there was very little information about the student's

⁹ The educational evaluator testified that once she completes an educational evaluation, she reviews a student's entire file including prior reports, IEPs, comments from meetings, and meeting notes (Tr. pp. 197-98).

educational or pre-readiness skills in the educational re-evaluation report for a CSE to review and consider in developing the student's IEP. Contrary to the IHO's finding, review of the hearing record supports the position that the assessment measures selected by the educational evaluator were not appropriate based upon the student's needs, and more specifically, they did not yield adequate information regarding the student's skills and deficits.

Based on the above, the CSE lacked sufficient functional, developmental, and academic information about the student to formulate an IEP based on assessments of the student in all areas related to his suspected disabilities (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b][3], [6][vii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]).

Turning to the parent's request for an independent neuropsychological evaluation, the private neuropsychologist who conducted an "academic and related services record review" in order to determine if the student should receive an independent evaluation opined that the student required new psychological and educational evaluations in order to determine the extent of his special education needs and how best to address them (see Parent Ex. VV at pp. 1-4). Specifically, the neuropsychologist opined that the student required a new psychological evaluation because, among other things, the district's psychological re-evaluation did not use appropriate standardized assessments given the student's "unique set of features of autism," did not attempt to administer nonverbal, receptive language or visual reasoning subtests to gain information about the student's cognitive skills, and did not incorporate measures from the parent or anyone outside of the school setting (id. at pp. 1-3). Therefore, the private neuropsychologist concluded that a neuropsychological evaluation was "necessary for [the student], in order to answer the question of why he is not progressing, despite his history with only partial symptoms of autism, which should enable him to function at a higher level" (id. at p. 4). Additionally, the private neuropsychologist opined that the district's educational re-evaluation was "problematic in that the results and data presented [were] not consistent" with the information provided in the January 2019 IEP meeting notes, specifically pertaining to letter and sound recognition (id.). The private neuropsychologist stated that the educational re-evaluation attempted various tasks from which no scores could be derived and that it did not consider the student's lack of progress, which she opined should have been assessed more often and with consideration of his degree of disability (id.). She further opined that the student required a new educational evaluation "particularly because of the 2018 evaluation's minimal and inconsistent reports of scores" (id.). The private neuropsychologist indicated that if the parent prevailed at the hearing, she was available to conduct either a psychoeducational or a neuropsychological evaluation at public expense, which would include psychoeducational assessment tools (id.).

As discussed in detail above, review of the hearing record supports a finding that the district's October 2018 psychological and educational re-evaluations of the student were insufficient. The parent based her request for an independent neuropsychological evaluation on the insufficiency of those evaluations (see IHO Ex. II at p. 2); accordingly, the parent is entitled to the requested independent neuropsychological evaluation at district expense. Additionally, having determined that the district's evaluations were not sufficient, it is unnecessary to address the district's argument that the IHO's award of an independent neuropsychological evaluation was improper because the IHO did not find fault with the district's evaluations.

2. Speech-Language Re-Evaluation

In a cross-appeal, the parent asserts that the IHO erred in finding that the district's speech-language re-evaluation of the student was appropriate, because in general the evaluator did not select assessments to measure all of the student's areas of need, did not follow the test protocols or seek any information from the parent, and despite two addendums, the report did not provide the CSE with sufficient information about the student's skills, or provide any recommendations.

The hearing record reflects that a speech-language re-evaluation of the student was completed on November 20, 2018 as part of the student's re-evaluation, and that addendums to the report were added on January 28, 2019 and February 8, 2019 (Dist. Exs. 26; 28; 29).¹⁰ The speech-language pathologist who completed the re-evaluation described in her report that the student greeted her after receiving verbal prompts, and that he presented with a short attention span requiring cuing at times to follow directions and remain on task (Dist. Ex. 29 at p. 1). She further explained that the student was given short movement breaks as needed throughout the test administration (*id.* at pp. 1-2). The speech-language pathologist indicated that the student was happy and laughed when he knew he was being silly, and that verbal redirection was typically successful in reorienting him back to the targeted activity (*id.* at p. 2). The student was observed to follow simple one-step directions with and without visual cues and demonstrated understanding of the transition phrase "all done" (*id.*). She opined that the student's performance during the test administration appeared to be a "true representation of his current skill level" (*id.*).

According to the speech-language re-evaluation report, formal standardized testing using the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) was attempted; however, due to the student's "inability to follow standardized instructions," the speech-language pathologist was unable to formally administer and score the subtests (Dist. Ex. 29 at p. 2). Specifically, she described that during administration of the sentence comprehension subtest, the student was given a field of four choices and asked to point to the picture that matched the clinician's statement (e.g. "Point to 'I can eat this'") (*id.*). She explained that the student was unable to complete the examples given for that subtest; therefore, testing was discontinued, and no formal scores were obtained (*id.*). The linguistic concepts subtest was attempted, and the student was able to identify the example target items (i.e. point to the house); however, he was unable to complete the test items involving more complex linguistic directives (i.e. point to the house and the ball) and after four incorrect responses testing ceased and no formal scores were obtained (*id.*). For the following directions subtest, the student needed to be able to recognize shapes and follow directions (i.e. point to the big black circle); however, because the student was unable to identify shapes this subtest was not attempted (*id.*). The speech-language pathologist explained that she had the student's teacher complete the pragmatics profile subtest of the CELF-5 "in order to identify verbal and nonverbal pragmatic deficits that may negatively influence social and academic communication" (*id.*).¹¹ The reported results showed that the student was identified as: "being

¹⁰ The speech-language pathologist testified that the February 2019 addendum to the report did not contain any "new" information (Tr. p. 324). For the purpose of this decision I will cite to the February 2019 speech-language re-evaluation report (Dist. Ex. 29).

¹¹ The speech-language pathologist described the pragmatics profile of the CELF-5 as "a checklist of verbal and non-verbal intentions that are typically expected skills for social and school interactions" (Dist. Ex. 29 at p. 2).

able to often make/respond to greetings to and from others using verbal and nonverbal skills" and having difficulty maintaining eye contact, demonstrating appropriate use of nonverbal strategies (i.e. facial expressions, body language and gestures), and asking for, giving and responding to information (id.).

The speech-language re-evaluation report contained the results of an administration of the Peabody Picture Vocabulary Test–Fourth Edition (PPVT-4) which is a test of listening comprehension for spoken words and was used to measure the student's vocabulary acquisition (Dist. Ex. 29 at p. 2). In November 2018, the student achieved a standard score of 35, which fell within the very low range of functioning (id.). In the February 8, 2019 addendum, the speech-language pathologist included a list of approximately 17 items the student was able to identify and approximately 18 items that he was not able to identify during test administration (id. at p. 3).

According to the speech-language re-evaluation report, because the student was nonverbal articulation testing was not completed (Dist. Ex. 29 at p. 3). Specifically, the February 2019 addendum indicated that articulation testing was not brought to the evaluation and would not have been attempted because it would have required the student to verbally label pictures of vocabulary items (id.). The speech-language pathologist reported that a November 2018 progress report indicated that the student was making gradual progress in his ability to produce the following sounds in isolation given models and visual and auditory support strategies: p, b, m, t, d, w, sh, j, k, h (id.). Additionally, the progress report indicated that the student was able to produce voiceless consonants (i.e. p, t, h, sh) in combinations with vowel sounds "oo," "ee," "ah" given models and visual and tactile supports (id.). Finally, the report reflected that the student was also making attempts to say words such as "hi," "bye," "fa" for "frog," and "baw" for "ball" (id.).

Regarding the student's communication device, the speech-language pathologist reported that the student was currently using a mini iPad with the Proloquo2Go program and noted that he needed assistance to turn the device on and off; however, he could access the home button spontaneously to get to the main page (Dist. Ex. 29 at pp. 3-4). She described in the report that the device contained pages, each containing approximately 15 icons, from the following categories: core vocabulary; food and drink items; school tools; colors; numbers; locations; therapy services; and leisure and play items (id. at p. 3). The speech-language pathologist indicated that she observed the student using the device "in the areas of functional communication (i.e. making needs/wants known, answering a variety of questions, greeting, ask questions, participate in conversations, identification of icons when prompted, ability to navigate across pages, and ability to fix a communication breakdown)" (id.).¹² The speech-language pathologist described that the student was able to use the device to say "hi" and "bye" when prompted, and to answer questions about colors, identify various food items, and use the "more" button to indicate when he wanted more of an item or activity (id. at pp. 3-4). The speech-language pathologist explained that she provided verbal, visual, and tactile prompting to expand the student's response to "I want more" in order to assess if he could complete the motor sequence necessary to expand his responses; however, the student required a significant amount of prompting to complete the task

¹² The February 2019 speech-language re-evaluation report included a chart the speech-language pathologist added at the parent's request, which was created from the information contained in the narrative of the report "in order to demonstrate skills [the student] was able to complete or unable to complete during today's assessment on his device" (Tr. pp. 324-25; Dist. Ex. 29 at pp. 4-5).

(id. at p. 3). According to the speech-language pathologist, the teacher reported that the student did not typically use the device to engage with others and that the use of the device was typically initiated by an adult asking him to identify his wants and needs, to make requests for foods or other items, and to identify targeted vocabulary (id. at pp. 3-4). During the evaluation, the speech-language pathologist encouraged the student to tap the message screen in order to make his needs known, but he did not appear to understand the cause and effect behind speaking the whole message to get what he wanted (id. at p. 4). She further reported that the student was not able to repair a communication breakdown after she purposely handed him an item different from the one he requested and he did not use the device to request items placed out of reach instead of grabbing for them (id.). Additionally, the student required repeated exposures to learn a new sequence or new icon and the corresponding cause/effect (id.).

The speech-language re-evaluation report contained additional information from the November 2018 progress report, which noted, at that time, the student was demonstrating gradual progress in his ability to utilize his voice, sign language and/or his communication device to gain attention, greet, and request desired objects (Dist. Ex. 29 at p. 5).¹³ Additionally, the speech-language pathologist reported from the progress report that the student was able to respond to personally identifying questions (i.e. "what is your name?" "how old are you?") given moderate assistance (i.e. verbal prompts, gestural cues, hand over hand assistance) to navigate to the correct page and button on the device (id.). Furthermore, per the progress report, the student was able to navigate two to three screens on his communication device with moderate faded assistance for highly preferred items or activities; however, he required maximum supports to utilize his device functionally (id.). Finally, the report included a list provided by the student's teacher of approximately 70 items that the student was able to receptively identify by using either language building cards or pointing to his own body parts (id.). The speech-language pathologist concluded that the student's "current device and program" should continue to be used "to promote a variety of communicative tasks" including expressing his wants, needs, thoughts, feelings, and questions, and to maintain social relationships as well as enjoy social interaction (id. at p. 4).

Turning to the parent's allegations on appeal that the speech-language assessments were not appropriate and failed to yield information in all of the student's need areas, the speech-language pathologist who administered the re-evaluation testified that she brought the CELF-5 and the PPVT-4 to the evaluation because she had read in the student's IEP that he was nonverbal and she wanted tests that would assess how well he understood language rather than relying on expressive language (Tr. pp. 246, 248-49). She further testified that the student was able to complete the test examples with cueing, but when she administered the test items, he did not understand what to do, therefore she was unable to obtain standardized scores (see Tr. pp. 249-60; Dist. Ex. 8). In her testimony, the speech-language pathologist discussed each of the subtests of the CELF-5 beginning with the sentence comprehension subtest wherein she described that the student did not understand that he needed to point to the named object, so the speech-language pathologist made a clinical judgement to discontinue that subtest (Tr. pp. 259-60; see Dist. Ex. 8 at p. 3). She explained that the linguistic concepts subtest looked at semantic vocabulary such as prepositions, ordinals and multiple step directions; however, because the student was not able to follow the directions, testing was discontinued (Tr. pp. 260-63; see Dist. Ex. 8 at p. 4). Both the

¹³ The November 2018 speech-language progress report was not included in the hearing record (Tr. pp. 308-11).

word classes and the following directions subtests assess receptive language skills, by either asking the student to point to pictures that go together in a group or to follow directions of varying complexity; however, neither were attempted because the student had exhibited difficulty with pointing in previous subtests and he could not complete the examples provided, respectively (Tr. pp. 264-66). The speech-language pathologist testified that she did not administer the word structure, formulated sentences, and recalling sentences subtests because those assessed expressive language, which she opined would have been inappropriate for this student (Tr. pp. 263, 268-69). Additionally, the understanding spoken paragraphs subtest was based primarily on reading comprehension and required a verbal response, therefore it was not attempted (Tr. p. 270). Finally, the speech-language pathologist testified that she had the student's then-current teacher complete the pragmatics profile subtest in order to obtain information about the student's functional communication within the classroom from someone who was familiar with his skills (Tr. pp. 271-72).

With regard to articulation skills, the speech-language pathologist testified that because the student was nonverbal, she did not administer a formal assessment; the information included in her report was provided by the student's speech-language pathologist after the re-evaluation was completed (Tr. pp. 290-93). Additionally, the speech-language pathologist who conducted the reevaluation stated that there were no articulation tests that would have been appropriate to administer to the student (Tr. pp. 293-94).

Regarding the student's communication device, the speech-language pathologist testified that the student was using the Proloquo2Go program on his iPad (Tr. pp. 273-74). She stated that most of the student's use of his communication device was teacher directed, and that she utilized the device to see how he was using it (Tr. p. 274). Specifically, the speech-language pathologist described that she used the device to see if the student knew his colors by asking him the color of the Legos they were playing with and to see if he could repair a communication breakdown when she handed him a different color than what he requested (Tr. p. 275). She indicated that the student was not able to repair the communication breakdown at that time and further explained that she wanted to see if the student would utilize the device to say that was not what he wanted and to make the request again, which he was unable to do (Tr. pp. 275, 288-89). The speech-language pathologist specifically noted that since the student was nonverbal and using a communication device she wanted to see if she could gain information about his receptive language skills (Tr. p. 257). However, she further testified that she "really was interested in getting more of a functional assessment based on how he was using the device" (*id.*).

The speech-language pathologist testified that when she conducts an evaluation, she brings a variety of testing that she thinks would be appropriate for the student (Tr. p. 257). She further indicated that there were other standardized tests for the student's age range; however, she felt the ones she brought were the most appropriate to get information from him at that time (Tr. p. 287). Specifically, she opined that because the student was nonverbal, the tests she chose provided enough different levels of questioning (i.e. simple pointing to directions or listening to complex directions) that they would give a picture of the student's receptive language skills (Tr. p. 287). The speech-language pathologist opined that because the student was unable to complete the assessments, she made the decision not to administer any other standardized testing because she "did not feel that...at the time it would give [her] any additional information" about the student (Tr. pp. 286-87). Moreover, the speech-language pathologist testified that she was unable to obtain

standardized scores because the student could not follow the rules of standardized testing; therefore she opined that it was more beneficial for him and his educational team and all the evaluators if she obtained a more functional assessment to determine his current skills and how he uses them best in the classroom (Tr. pp. 278-79). Finally, the speech-language pathologist testified that after she completed the evaluation, she requested and received updated information from the student's current speech-language pathologist about what he was working on, and added that information to her evaluation report in order to "really get the whole picture" and to highlight the skills he was exhibiting in the classroom (Tr. pp. 289-90).

Although in this instance the hearing record shows that the district's speech-language pathologist attempted to gain information about the student's communication skills, review of the re-evaluation report reflects limited specifics regarding his pragmatic, receptive, and expressive language, and articulation skills (see Dist. Ex. 29). While not improper to include information in an evaluation report about a student's current skill level obtained from the current clinician, the majority of the information contained in the report regarding the student's pragmatic language and articulation skills was provided by teacher report and by a November 2018 speech-language progress report that the speech-language pathologist reviewed after her assessment of the student was completed, rather than by direct attempts to elicit that information during the evaluation (see Dist. Ex. 29).¹⁴ Furthermore, the speech-language pathologist opined that based on the student's behavior during the evaluation, additional standardized language testing would not provide any additional information (Tr. pp. 278-79, 286-87, 294-95; Dist. Ex. 29 at pp. 2-3). However, the hearing record contained information that showed the student had participated in standardized testing in the past, specifically, the August 2018 and June 2018 IEP—which the speech-language pathologist testified she reviewed after she evaluated the student—reflected results from a March 2016 administration of the Preschool Language Scale – Fifth Edition (PLS-5) (see Tr. pp. 323-24; Dist. Exs. 30 at p. 5; 31 at p. 5). Furthermore, the speech-language pathologist testified that the PLS-5 would have assessed the student's receptive and expressive language skills and agreed that it was normed for the student's age at the time of the re-evaluation, and that she did not have a particular reason for not administering that assessment (Tr. pp. 318-19).

Therefore, as discussed above, the hearing record supports the finding that the district's speech-language re-evaluation of the student was inadequate, and that the parent is entitled to an independent speech-language evaluation at district expense.

3. OT Re-Evaluation

According to the parent's cross-appeal, the IHO erred in determining that the district's OT re-evaluation was appropriate because of the discrepancies among the versions of the report, which required the IHO to make "credibility determinations," and because it lacked standardized assessments and measures of the student's sensory processing, visual perceptual, visual motor, "day-to-day participation," and fine motor needs. Additionally, the parent asserts that the re-

¹⁴ Additionally, the speech-language pathologist testified that she did not attempt to obtain information about the student's communication skills from the parent and was not aware of the student's "work" with American Sign Language (Tr. pp. 313, 327-28).

evaluation was insufficient in that it failed to provide specific recommendations regarding OT services.

The July 2018 OT re-evaluation report reflects that the occupational therapist was unable to complete standardized testing due to the student's "inability to follow standardized instructions," therefore, the Educational Assessment of School Youth (EASY) was used in conjunction with clinical observation, teacher and therapists' reports to assess the student's then-current level of functioning (Dist. Ex. 22 at p. 1).¹⁵ The occupational therapist opined that the student's performance on that day "appeared to be a true representation of his skill level" and that he attempted all tasks presented to him, although he required "constant" verbal, visual, or auditory prompting to sustain attention and participation (*id.*). Additionally, the evaluator explained that the student was "diagnosed with features of an [a]utism [s]pectrum [d]isorder and that his OT goals focused on developing hand strength to promote functional grasp patterns, developing visual motor skills to improve pre-writing skills and improving overall attention to adult directed activities (*id.*).

With regard to gross motor function, the July 2018 OT re-evaluation report reflected, based on teacher report and clinical observation, that the student was able to independently negotiate the school environment, including but not limited to the classroom, playground, cafeteria, and bathroom (Dist. Ex. 22 at p. 1). The occupational therapist reported that the student required supervision on the playground due to decreased safety awareness; however, he exhibited age appropriate gross motor skills and adequate muscle tone, and his range of motion was within functional limits (*id.*).

Next, regarding vision and visual tracking skills, the occupational therapist reported that the student experienced "significant difficulty" when he was "briefly screened for the coordinated use of his two eyes together to visually track a moving stimulus" (Dist. Ex. 22 at p. 1). She explained that children who have difficulty with visual tracking may experience problems keeping their place when reading, sustaining visual attention, working with columns and numbers, and exhibit poor visual attention in general, which could result in distractibility and difficulty concentrating on visual stimuli (*id.*). According to the report, the student was not motivated to participate in pre-writing activities, and the occupational therapist observed that the student exhibited "poor visual attention" during those tasks" (*id.*). Additionally, the occupational therapist reported that the student's eye contact was fleeting and inconsistent; however, it improved with a preferred activity such as bubbles (*id.*).

The July 2018 OT re-evaluation report described the student's fine motor skills, noting that he did not present with a consistent hand preference and was observed alternating hands constantly

¹⁵ The hearing record contains multiple documents related to the administration of the EASY: a July 2018 handwritten EASY form containing notes taken contemporaneously with the OT re-evaluation, a July 2018 typed EASY form, and a January 2019 typed EASY form addendum (Tr. pp. 371-72; Parent Ex. Q; Dist. Exs. 23; 27). The occupational therapist testified that the January 2019 addendum corrected prior versions of the report to reflect that the student had received a diagnosis of an autism spectrum disorder, and that the student used foot orthotics (Tr. pp. 367, 370). The addendum did not include new information from the student's teacher or current occupational therapist (Tr. pp. 389-90). Contrary to the parent's assertion on appeal, review of the documents does not generally reflect significant inconsistencies between them such that those discrepancies rendered the OT re-evaluation deficient on that basis, and required the IHO to make a credibility determination (compare Parent Ex. Q, with Dist. Ex. 23 and Dist. Ex. 27).

with no true dominance (Dist. Ex. 22 at p. 1). The report further indicated that the student demonstrated weak and immature grasp patterns when using a variety of writing implements and manipulating small objects such as blocks and pegs (id.). The occupational therapist reported that the student imitated a vertical line on two isolated occasions, but he did not imitate, copy or trace other lines and shapes, and, as he was not motivated to complete such tasks, he did not tolerate hand over hand assistance to participate in those activities (id. at pp. 1-2). The occupational therapist further reported that the student oriented scissors to his right hand, but he did not demonstrate bilateral coordination in order to manipulate the paper and cut simultaneously, and although he snipped the paper three times, he did not consistently use his other hand as a stabilizer (id. at p. 1). According to the report, the student manipulated objects using both hands at midline and was observed crossing midline spontaneously (id.). Finally, the report indicated that even though the student exhibited weak and immature grasp patterns, he "was able to: string 5 blocks, place 10 pegs into a pegboard, squeeze/pull/squish theraputty, scribble on paper and match 10 inset puzzle pieces to board" (id. at p. 1-2).

With regard to visual motor and visual perceptual skills, the occupational therapist reiterated that the student presented with poor eye contact and visual attention to nonpreferred activities, which she opined was hindering his success in those tasks (Dist. Ex. 22 at p. 2). She noted that the student was easily distracted by external stimuli and was observed looking around the room frequently; however, he responded to visual and auditory prompting to redirect attention (id.). Furthermore, the occupational therapist reported that the student matched objects by color from an array of four although he did not point to the desired color when prompted, and matched and pointed to a circle, but no other shapes (id.). The student was also observed to complete a 10 piece inset puzzle with faded verbal cueing, and when prompted, point to his mouth, eyes, nose, ears, tongue, head, and feet (id.).

In the area of self-help skills, the July 2018 OT re-evaluation report reflected information from the student's teacher that he was able to indicate when he needed to use the restroom, wash his hands with verbal prompting and pointing, use a fork and spoon with assistance to scoop or spear food, doff and don his jacket with assistance needed to initiate the zipper, and doff his socks and shoes when given the set up for right left orientation (Dist. Ex. 22 at p. 2). Additionally, the occupational therapist explained that per the teacher's and his current occupational therapist's report, the student demonstrated an aversion to teeth brushing, but that he would tolerate limited brushing to a count of 10 on each side with hand over hand assistance (id.).

According to the occupational therapist's report in the area of sensory processing, the student presented "as sensory seeking evidenced by his need for increased movement, inattention to task and seeking out additional tactile, visual, auditory, vestibular and proprioceptive input" (Dist. Ex. 22 at p. 2). A sensory diet was utilized with the student throughout the day, with improvement noted in his ability to attend following input (id.). The occupational therapist noted, again per teacher and current therapist's report, that the student loved to be moving and explore his surroundings, preferred deep pressure and a firm touch, enjoyed sensory activities such as swinging, body socks, and joint compressions with lotion (id.). Additionally, the occupational therapist described that the student enjoyed dropping objects to see or hear them fall, which interfered with his participation during the re-evaluation (id.). Finally, despite that the student was easily distracted by external stimuli and required frequent redirection to task, his current occupational therapist reported overall improvement in his ability to sit and attend (id.). She

concluded that the student demonstrated delays in sensory processing, fine motor, and visual motor skills, and recommended OT services to continue for the upcoming 2018-19 school year, upon review by the CSE (id.).

Turning to the parent's allegations about the OT re-evaluation brought on appeal, the occupational therapist who conducted the July 2018 OT re-evaluation testified that based on her prior knowledge of the student and her clinical judgement, she felt standardized testing was not appropriate to use with the student (Tr. pp. 361-62; see Tr. pp. 352-53).¹⁶ Specifically, the occupational therapist testified that assessments such as the "WRAVMA" the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, the Motor Free Visual Perception Test, the "Beery-Buktenica" and the "Peabody" assessments were not appropriate for the student, as they required a child to remain seated for approximately 20-30 minutes and sustain visual attention to complete tasks, or were not appropriate due to his age (Tr. pp. 362-65). She testified that she relied on teacher report for information about the student's daily living skills, specifically, how he managed in the cafeteria, used a fork and spoon, and his toileting, dressing, sensory, and attention needs within the classroom (Tr. pp. 376-77, 389, 392).

The occupational therapist testified that she brought the EASY, paper, crayons, markers, pencils, string and blocks, puzzles, other fine motor manipulatives and putty to the re-evaluation (Tr. pp. 359-60). She described the EASY as a non-standardized, "informal checklist that assesses developmental tasks as they relate to school function" (Tr. pp. 360-61). The occupational therapist explained that she would typically bring one motor based and one visual perceptual based assessment to an evaluation; however, having worked with this student prior to the re-evaluation, she felt the EASY was the most appropriate tool (Tr. p. 381; see Dist. Ex. 22 at p. 1). She specifically noted that she selected the EASY for the student due to his "inability to follow verbal directives consistently" and because "standardized testing is very specific instruction that you have to give in order for it to be standardized" (Tr. pp. 381-82). The occupational therapist explained that because the EASY was not a standardized assessment she could administer tasks in ways that worked for the student; for example, the vertical lines the student drew were done on paper taped to the wall, after unsuccessful attempts to administer the task while he was seated at a table (Tr. pp. 372-73, 375-76). As discussed in detail above and contrary to the parent's allegation on appeal, and although not the standardized measure the parent may have preferred, the EASY provided the occupational therapist with functional, specific information about the student's fine motor, visual perceptual, visual motor, self-help, and sensory processing obtained through direct observation and teacher report (see Dist. Exs. 22; 27).

Finally, the parent alleges that the OT re-evaluation was inadequate in part because although it recommended the provision of OT services, it did not provide specifics regarding whether services should be direct or indirect and did not identify a specific frequency or duration for OT services. However, State Regulation does not require that an evaluation include a specific recommendation, rather, an evaluation must "gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program" (8

¹⁶ The occupational therapist explained that she did not typically review student records prior to an evaluation, instead she testified that she only looks at "the very top of the IEP medical alerts or medical precautions" and the date of birth (Tr. p. 380).

NYCRR 200.4[b]). Considering, among other things, the results of the student's most recent evaluation, the CSE is then tasked with developing the student's educational program (see 8 NYCRR 200.4[d][2]).

Based on the above, the hearing record supports the IHO's finding that the OT re-evaluation provided the district with sufficient evaluative information regarding the student to develop the student's IEP, and the parent is not entitled to an OT IEE.

VII. Conclusion

Overall, the hearing record supports finding that the district's October 2018 psychological and educational re-evaluations and the district's November 2018 speech-language re-evaluation were not sufficient. Accordingly, the IHO's order directing the district "to fund an independent neuropsychological evaluation (which includes an observation of the Student in the school) to be provided by a licensed neuropsychologist of the Parent's choosing, at a rate not to exceed \$5,000.00" is upheld and, in addition, the parent is entitled to an independent speech-language therapy evaluation at district expense. Review of the district's July 2018 OT re-evaluation indicates that it was proper and the parent is not entitled to an independent OT evaluation at district expense.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated February 14, 2020, is modified by reversing that portion which found that the district's the district's October 2018 psychological evaluation, October 2018 educational evaluation, and November 2018 speech-language evaluation were appropriate, and

IT IS FURTHER ORDERED that the district shall fund an independent neuropsychological evaluation of the student, including an observation of the student in school, to be provided by a licensed neuropsychologist of the parent's choosing, at a rate not to exceed \$5,000.00, and

IT IS FURTHER ORDERED that the district shall provide the parent with an independent speech-language evaluation of the student at public expense in accordance with the body of this decision.

Dated: Albany, New York
June 1, 2020

STEVEN KROLAK
STATE REVIEW OFFICER