



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-190

Application of the UNION FREE SCHOOL DISTRICT OF THE TARRYTOWNS for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Keane & Beane, P.C., attorneys for petitioner, by Stephanie M. Roebuck, Esq. and Suzanne E. Volpe, Esq.

The Law Offices of Lauren A. Baum, P.C., attorneys for respondents, by Kristen M. Chambers, 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 found that the district failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of her son's tuition at Carmel Academy (Carmel) during the 2018-19 and 2019-20 school years. The parent cross-appeals from the IHO's determination that the student was not eligible for 12-month services during summer 2018. The appeal must be sustained in part and the matter must be remanded to an IHO for further administrative proceedings, as outlined below. The cross-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

According to the parent, as a young child the student demonstrated cognitive delays in that he would learn colors and numbers and then forget them (Dist. Ex. 24 at p. 1). 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 transferred into the district in summer 2015 prior to the start of fourth grade (2015-16 school year) and continued there through sixth grade (2017-18 school year) where he received special education and related services as a student with a learning disability (see Dist. Exs. 2; 4; IHO Ex. I ¶ 10).^{1, 2} 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). The CSE recommended supports for the student's management needs, supplementary aids and services/program modifications/accommodations, testing accommodations, and developed 13 annual goals (id. at pp. 5-11). The June 2018 CSE determined that the student was not eligible to receive 12-month services during summer 2018 (id. at p. 10).

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).

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). From September 2018 to December 2018, a neuropsychologist conducted an independent neuropsychological evaluation of the student, culminating in a report dated January 21, 2019 (see

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 IHO Exhibits in this matter consist primarily of direct testimony of witnesses by affidavit, which are not paginated, but rather use paragraph numbers to demarcate witness' testimonial statements (see IHO Exs. I-XVI). For ease of reference in this decision, citations to these IHO Exhibits will use paragraph numbering rather than citations to specific pages.

Dist. Ex. 34).³ The student attended Carmel in the Providing Alternative Learning Strategies (PALS) program during the 2018-19 school year and received OT and speech-language therapy (see Parent Exs. D; E; F).⁴

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.*). The CSE recommended supports for the student's management needs, supplementary aids and services/program modifications/accommodations, testing accommodations, and developed 13 annual goals (*id.* at pp. 5-11). Finally, the June 2019 CSE determined that the student was not eligible for 12-month services during summer 2019 (*id.* at p. 10).⁵

The parent signed an enrollment contract with Carmel on August 13, 2019 for the student to attend Carmel for the 2019-20 school year (Parent Ex. N at pp. 1-6). 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).

A. Due Process Complaint Notice

By due process complaint notice dated September 27, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A). More specifically, the parent raised a number of allegations related to the May 2018 CSE meeting and the resultant IEP: that the CSE did not have sufficient evaluative information; that the parent was denied meaningful participation in the decision making process and CSE decisions were based on district policies rather than the student's individual needs; that the IEP did not reflect the student's present levels of performance; that the student's management needs were incomplete; that the IEP did not reflect the student's social/emotional needs or the parent's concerns regarding bullying; that the annual goals did not address the student's needs and were too vague and generic; that the recommendation for ICT services in ELA and math was not sufficiently supportive; that the student required small group and 1:1 instruction and constant redirection and the IEP did not include the appropriate level of 1:1 support; and that the IEP did

³ The parent identified the evaluator and, after preliminary discussions, sought funding for an IEE from the district which the district agreed to provide (Tr. pp. 1181-82).

⁴ 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).

⁵ In a prior written notice dated June 19, 2019, the CSE informed the parent that the student did not meet the criteria for 12-month school year services and that the CSE had determined that the student did not require OT services during summer 2019 (see Dist. Ex. 70 at p. 1).

not include assistive technology (Parent Ex. A at pp. 4-7). The parent further alleged that the CSE reconvened in June 2018 to consider 12-month services for the student; however, the parent asserted that the June 2018 CSE predetermined the outcome of the meeting (id. at p. 7). According to the parent, the June 2018 CSE relied on informal assessments in deciding not to recommend 12-month services and the parent challenged that determination (id.). In addition, the parent alleged that the CSE reconvened in September 2018 after she raised concerns regarding the student's annual goals (id. at pp. 7-8). The parent repeated allegations regarding the lack of parent participation and the CSE making decisions based on policy; the lack of evaluative information, indicating that the district did not conduct updated OT or speech-language evaluations; the inappropriateness of ICT services for the student; and the student's need for 1:1 support (id. at p. 8). The parent also alleged that the September 2018 IEP did not identify the student's present levels of performance, asserting that it was identical to the May 2018 IEP and repeating the same challenges to the IEP (id. at pp. 8-10). As relief, the parent requested direct funding or reimbursement for the cost of the student's tuition at Carmel for the 2018-19 school year and compensatory education for the missed 12-month services (id. at p. 11).

The parent filed a second due process complaint notice dated January 17, 2020 asserting that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. B).⁶ The parent alleged that she was denied meaningful participation in the development of the student's program, that the May 2019 CSE did not consult with the parent, educators, school administrators, and neuropsychologist in making recommendations for the student, and that the CSE did not recommend 12-month services which, the parent asserted, were necessary to prevent regression (id. at pp. 2-3). According to the parent, she was concerned that the recommendation for a 15:1 special class was too large a setting for the student and that the class the student would have attended in the district would not have been appropriate because of the grouping of the other students in the class (id. at pp. 2, 4). The parent alleged that a 15:1 special class was not sufficiently supportive (id. at p. 2). The parent asserted that the CSE met again in June 2019 but alleged that the CSE did not have sufficient evaluative information, asserting that the district did not assess the student's speech-language needs or conduct a functional behavioral assessment (FBA) to identify the cause of the student's issues with attention (id. at p. 4). The parent also alleged that the CSE did not consider reports from the student's then-current placement at Carmel and did not consider an updated neuropsychological report provided by the parent (id. at pp. 4, 5). According to the parent, the June 2019 IEP did not identify the student's present levels of performance in the areas of writing, math, reading ability, speech-language, and OT, and did not include measurable annual goals to address the student's needs (id. at p. 5). The parent further contended that despite agreeing to recommend 1:1 support, such support was not reflected in the June 2019 IEP (id.). As relief, the parent requested direct funding or reimbursement for the cost of the student's tuition at Carmel for the 2019-20 school year and compensatory education for the missed 12-month services (id. at p. 6).

⁶ The September 2019 and January 2020 due process complaint notices were consolidated in April 2020 (Tr. p. 38; IHO Decision at p. 1).

B. Impartial Hearing Officer Decision

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). In a decision dated November 5, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that Carmel was an appropriate placement for both school years, and that equitable considerations weighed in favor of awarding relief (IHO Decision at pp. 1-48).

More specifically, for the 2018-19 school year, the IHO agreed with the parent's assertion that the district failed to evaluate the student in all areas of suspected disability, noting the lack of an updated speech-language evaluation and that there were indications that the student had difficulties with sensory integration and fine motor skills that needed to be addressed by an occupational therapist (IHO Decision at pp. 19-21). The IHO further found that because the student was not appropriately assessed, the present levels of performance were not accurate, and therefore, the annual goals could not be appropriate for the 2018-19 school year (id. at p. 23).⁷ With respect to the parent's allegations that she was denied meaningful participation in the development of the student's programming, the IHO noted the extensive communications between the parent and district and found that the district "went above and beyond to accommodate Parent, and include her in all conversations" (id. at p. 21-22). Similarly, the IHO determined that the hearing record did not contain evidence that the district predetermined the student's programming (id. at pp. 28-29). With respect to 12-month services, the IHO considered the parent's allegations that the independent evaluator noted that the student regressed over short breaks and that the district relied on inappropriate assessments but found that the decision not to recommend 12-month services for the 2018-19 school year was not unreasonable (id. at pp. 25-27). However, for the 2019-20 school year, the IHO found that Carmel presented evidence of the student's regression and determined the student required 12-month services (id. at pp. 27-28).

Regarding the recommendation for ICT services for the 2018-19 school year, the IHO noted that based on the district's witness' testimony the recommended program may have been appropriate for the student, but found that there was "considerable credible evidence" from the independent evaluation and from Carmel that the student "would be unable to function in a larger classroom with less support" (IHO Decision at p. 23). The IHO also reviewed the student's progress during the 2017-18 school year and the recommendations made during the 2018-19 school year (id. at pp. 29-32). The IHO noted that speech-language therapy and OT were not recommended by the district, and she agreed with the parent's allegation that the district "failed to provide necessary related services to address Student's unique needs" (id. at p. 32).

Turning to the 2019-20 school year, the IHO found that the district's reliance on the independent evaluation taking the place of the district's reevaluation of the student was concerning, finding that the district did not list the report in any of the student's IEPs and did not adopt any of the recommendations (IHO Decision at pp. 33-35). The IHO also noted that neither the May 2019 CSE nor the June 2019 CSE discussed the evaluation report, although it was available to both (id. at p. 35). The IHO further noted that the independent evaluator and staff from Carmel were not

⁷ The IHO found that the annual goals for the 2019-20 school year were appropriate because they were based on reports from Carmel and the independent evaluator (IHO Decision at pp. 23-24).

listed as CSE attendees (id. at pp. 35-36). The IHO found that the district did not recommend speech-language therapy or OT despite requests from the student's providers to provide the student with those services (id. at pp. 35, 37).

Overall, the IHO 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 (IHO Decision at pp. 38-39). The IHO then 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). The IHO specifically addressed the district's arguments that Carmel was not the student's least restrictive environment (LRE), that the student did not make progress at Carmel, and that Carmel did not provide specially designed instruction and rejected each argument (id. at pp. 42-44). With respect to equitable considerations, the IHO 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).⁸ The IHO 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). The IHO 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, up to \$32, 691 and \$33,350 respectively, less any financial awards granted by Carmel (id. at p. 48).

IV. Appeal for State-Level Review

Both parties appeal from the IHO's determinations. In an amended request for review, the district asserts that the IHO erred by finding that: the district failed to evaluate the student in all areas of suspected disability, the CSE failed to appropriately review and consider an independent neuropsychological evaluation report, the present levels of performance were not accurate such that annual goals the CSE developed for the 2018-19 school year were not appropriate, the district failed to prove that its recommended programs for the student for the 2018-19 and 2019-20 school years were appropriate, the CSE's determination that the student was not eligible for 12-month services was unreasonable, and that Carmel was an appropriate placement for the student for the 2018-19 and 2019-20 school years. The district also argues that the IHO inappropriately and repeatedly relied on the independent neuropsychological evaluation results and testimony of the evaluator, even when the CSE was not in possession of the report, and also inappropriately required the district to invalidate the evaluator's conclusions to justify why it did not adopt all of the recommendations contained in the report. Further, the district asserts that the IHO erroneously discounted the district's LRE obligations when finding against the CSE's recommended programs, and lastly, that the IHO incorrectly awarded tuition reimbursement to the parent, as equitable considerations do not support an award of tuition reimbursement for the school years at issue.

⁸ 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 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).

In an answer with cross-appeal, the parent responds to the allegations raised in the district's request for review asserting, among other things, that the IHO correctly concluded that the district denied the student a FAPE for the 2018-19 and 2019-20 school years and that the CSE failed to appropriately review and consider the independent neuropsychological evaluation. The parent cross-appeals from the IHO's determination that the student did not require 12-month services during the 2018-19 school year. The parent requests that the student be awarded 1:1 compensatory educational services for any 12-month services missed that the student should have received.

In an answer to the cross-appeal, the district argues against the parent's request for compensatory educational services and reasserts its position that it offered the student a FAPE for the 2018-19 and 2019-20 school years.

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" (Andrew 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 Andrew 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]).⁹

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-

⁹ 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" (Andrew F., 137 S. Ct. at 1000).

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

The district raises factual and legal errors contained within the IHO's decision as a basis for overruling the decision. In particular, the district asserts that the IHO's determination that the district failed to appropriately evaluate the student in all areas of suspected disability was based on erroneous factual findings regarding the evaluative information used to develop the student's program for the 2018-19 school year. In addition, the district asserts that the IHO erred in basing her decision—regarding the sufficiency of the district's evaluations and the appropriateness of the recommended program—on an independent neuropsychological evaluation completed in January 2019 that was not available to the district at the time it developed the student's program for the 2018-19 school year.

The evidence in this case shows that the parent made her decision to place the student at Carmel for the 2018-19 school year just after the June 2018 CSE meeting (see Parent Ex. C). As the parent's challenges to the district's program for the 2018-19 school year were directed at the May 2018 and June 2018 CSE meetings and the resultant IEPs (see Parent Ex. A), the focus of the IHO's factual analysis for the 2018-19 school year should have been on the May 2018 and June 2018 CSE meetings and the information that was available to them at the time the recommendations were made. 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]).

The IHO concluded that prior to the January 2019 neuropsychological evaluation, the only evaluation reports "submitted by the [d]istrict" were the March 22, 2016 speech-language evaluation, the April 13, 2016 education evaluation, the January 3, 2018 independent assistive technology evaluation, and the January 10, 2018 OT evaluation (IHO Decision at pp. 19-20; see Dist. Exs. 20; 23; 30; 31). However, the parties agree that the IHO's summary of the evaluative information in the hearing record in this sentence of her decision was incomplete (Amnd. Req. for Rev. p. 3; Ans. with Cross-Appeal p. 3). Omitted from the IHO's list of evaluative information was a psychological evaluation and a social history conducted in April 2016 (Dist. Exs. 22; 24). However, just after the next sentence of the IHO's decision, the IHO went on to reference results from the April 13, 2016 psychological evaluation (compare IHO Decision at p. 20, with Dist. Ex. 22). Accordingly, it does not appear that the IHO erred in interpreting what information was available to the district.

With the exception of the assistive technology evaluation report, the scores from the reports listed above were reflected in the June 2018 IEP (compare Dist. Ex. 10 at pp. 2-3, with Dist. Exs. 20; 22; 23; 30; 31). The June 2018 IEP also reflected results from a January 11, 2018 sensory profile and results from the administration of two writing subtests of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student on December 1, 2017 (compare Dist. Ex. 10 at pp. 2-3, with Dist. Exs. 29; 31; 32).¹⁰ Except for the recommendation for access to a Chromebook with Google Read and Write, which was a recommendation contained in the assistive technology report, there is no reference to the assistive technology evaluation report in the April, May, or June 2018 IEPs (see Dist. Exs. 8; 9; 10 at p. 10; 30 at p. 5; 67; 68). The hearing record suggests that teacher, occupational therapist, and parent reports were provided verbally at the April and May 2018 CSE meetings (see Dist. Ex. 10 at pp. 2, 5; IHO Exs. IV ¶¶ 21, 26; V ¶¶ 32-33).

In their testimony by affidavit, two of the student's special education teachers during the 2017-18 school year stated that they prepared teacher reports dated November 1, 2017 in preparation of the January 2018 CSE meeting (compare IHO Ex. IV ¶¶ 18-20 and IHO Ex. V ¶ 30, with Dist. Ex. 28 at pp. 1-14). In addition, one of the teachers testified that she prepared reports dated April 17, 2018 and May 18, 2018 that were provided to the parent "in the CSE meeting packet" (IHO Ex. V ¶31). Even though these specific teacher reports were not listed in the IEP as being relied on by the June 2018 CSE, information from the reports is reflected in the student's academic achievement, functional performance, and learning characteristics portion of the June 2018 IEP (compare Dist. Ex. 10 at pp. 2, 4, with Dist. Ex. 49 at p. 2 and Dist. Ex. 53 at p. 2). For example, the teacher's comments following the reading skills section and the writing skills sections of the May 2018 academic report match those found in the reading and writing sections of the academic achievement, functional performance, and learning characteristics portion of the June 2018 IEP (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 53 at p. 2).

In her decision, the IHO recounted the results of the student's speech-language, educational, psychological, assistive technology, OT, writing subtests, and sensory profile measures; specifically, that the March 2016 speech-language evaluation yielded scores in the average range for receptive, expressive, and articulation skills, and below average scores for

¹⁰ The June 2018 IEP referenced that the CSE considered results from an April 19, 2018 career assessment, which the hearing record does not appear to include (see Dist. Ex. 10 at p. 2).

pragmatic language skills, and that the January 2018 OT evaluation determined that the student's scores were in the average range for fine motor skills and visual motor integration (IHO Decision at pp. 19-21). However, improperly intermixed with the IHO's recounting of the evaluative information available to the CSE, the IHO referenced the January 2019 independent neuropsychologist's evaluation report, finding that it had recommended both speech-language and OT services (*id.* at pp. 20-21). Additionally, the IHO cited to Carmel reports, as indicating the student had a continued need for speech-language therapy, but, as with the January 2019 independent neuropsychological report, the Carmel reports were based on the student's performance during the 2018-19 school year, after the June 2018 CSE had developed the student's IEP (IHO Decision at p. 20; *see* Parent Exs. F; Q). The IHO's separate findings regarding the student's present levels of performance and annual goals were also based on the IHO's findings regarding the sufficiency of the evaluative information (IHO Decision at p. 23). In addition, the IHO specifically tied her finding regarding the appropriateness of the recommendation for ICT services for the 2018-19 school year to what she described as "considerable credible evidence, both from Carmel and the independent evaluation" (IHO Decision at p. 23).

Rather than determining the adequacy of the evaluative information available to the June 2018 CSE, the IHO used evaluation results not available to the CSE to retroactively make findings regarding the sufficiency of the then available evaluative information and the program the CSE recommended for the student (IHO Decision at pp. 20-21). Accordingly, the IHO's determinations on the above issues must be overturned and an assessment must be made as to 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.

With respect to the remaining evidence in the hearing record that was before the CSE, I find that there is also a lack of clarity by the IHO and the parties as to what information the CSE had before it and relied upon when developing its recommendations. In particular, the April 27, 2018 and May 31, 2018 prior written notices did not include a list of the evaluations or reports the CSE considered in the development of the IEP (*see* Dist. Exs. 67; 68), as required under State and federal regulation (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]). In addition, although District Exhibits 72 and 73 are indicated on the IHO's exhibit list as dated April 27, 2018, these exhibits as they appear in the hearing record are actually "dated" Fall 2017, and each have a "Print date" of April 27, 2018 (*see* Dist. Exs. 72; 73). Due to the IHO's improper reliance on the January 2019 neuropsychological evaluation and Carmel reports that were not available to the June 2018 CSE, and the overlooked manner in which exhibits were dated, remand of this matter 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 is appropriate (*see* Educ. Law § 4404[2]; 8 NYCRR 279.10[c]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; *see also* D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Upon remand, the parties must be given an opportunity to be heard regarding how the materials relied on by the CSE were dated unless both parties are willing to stipulate to such fact with sufficient clarity. The IHO must then render a new determination based upon a prospective analysis using materials that were available to the CSE.

1. 12-Month Services

In a cross-appeal, the parent asserts that the IHO erred in determining that the student did not qualify for 12-month services, as the hearing record supports that the student substantially regressed during school breaks and the CSE relied on insufficient and inaccurate evaluative information to deny services during summer 2018.

State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1][v]). "Substantial regression" is defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>).

Generally, with respect to what information the district considered in determining whether the student required 12-month services, the assistant superintendent testified that the district relied on Aimsweb testing results, curriculum-based measures (CBM), and teacher devised worksheets or tests (see Tr. pp. 249-51; IHO Ex. I ¶ 1). Specifically, the assistant superintendent testified that the May 31, 2018 CSE discussed the student's eligibility to receive extended school year services and whether there was substantial regression identified during the course of the school year; agreeing that it was not the CSE's practice to include the extended school year discussions in the body of the IEP (Tr. pp. 262-63; IHO Ex. I ¶¶ 29, 42; see Dist. Ex. 9 at pp. 1-12).¹¹ According to the assistant superintendent, during the May 2018 CSE meeting "the teaching team reported that [the student] did not show any regression after breaks," and that the parent had been provided with "data regarding regression" (IHO Ex. I ¶ 42; see Dist. Exs. 55; 71 at pp. 42-43). To his knowledge, district staff had not collected any data that indicated the student could not recoup his skills within a 40-day period after the summer break (Tr. p. 264).

The student's special education teacher for ELA during the 2017-18 school year testified that she administered CBM reading assessments to the student after school breaks "to determine whether he could recoup his reading skills" (IHO Ex. V ¶¶ 3, 4, 28). She stated that assessments administered after the December 2017, February 2018, and April 2018 school breaks yielded scores above or very close to the scores achieved prior to the school vacation (IHO Ex. V ¶ 29; see Dist. Exs. 74-77). According to the teacher, during the May 2018 CSE meeting she reported that the student "did not present with the need" for extended school year services "in the area of reading based upon my CBM testing" (IHO Ex. V ¶ 38). The student's special education teacher for math during the 2017-18 school year testified that she or the student's case manager "administered normed math assessments" to the student to measure progress "or to monitor if [the student] suffered from a loss of skills over breaks so that the CSE could make a determination as to whether

¹¹ Although the May 31, 2018 IEP is not considered one of the IEPs in dispute in this case, the assistant superintendent testified that the initial discussion regarding the student's eligibility for 12-month services during summer 2018 took place during that CSE meeting (see IHO Ex. I at paragraphs 29, 42).

[the student] suffered from substantial regression for the purposes of offering extended school year services" (IHO Ex. IV ¶ 30). Administration of the Aimsweb math test to the student in fall 2017 and spring 2018 yielded scores within the average range, albeit with the spring 2018 score reflecting a lower national performance percentage (IHO Ex. IV ¶ 31; see Parent Exs. DD; EE).

In his direct testimony by affidavit, the assistant superintendent stated that the parent expressed disagreement with the recommendations of the May 2018 CSE, therefore, a program review was held on June 7, 2018 to review the CSE's recommendations (IHO Ex. I ¶ 43; Dist. Ex. 10 at pp. 1-13). The assistant superintendent testified that the topic of discussion at this meeting centered around the decision not to recommend 12-month services, and that "[t]he teachers reiterated that [the student] did not present with skill regressions such that [12-month] services would be recommended" (IHO Ex. I ¶ 44).

In the answer with cross-appeal, the parent cites to evidence that she believes contradicts the IHO's finding that the CSE correctly determined the student did not qualify for 12-month services during summer 2018, including extended school year data from the 2018-19 school year, the January 2019 neuropsychological evaluation report, and testimony from one of the student's teachers at Carmel from the 2018-19 school year—the majority of which post-dates the May and June 2018 CSE's determinations regarding 12-month services (Answer with Cross-Appeal at pp. 9-10; see Parent Ex. I; Dist. Ex. 34; IHO Ex. XV ¶¶ 7, 12). The extended school year data the parent refers to clearly included dates subsequent to the June 2018 CSE meeting and therefore, does not appear to have been available for the CSE's consideration at that time (see Parent Ex. I). The parent's impermissible reliance on retrospective evidence to make the argument does not persuade me that this aspect of the IHO's determination should be overturned. Although I have remanded the matter as described above, the evidence supporting the IHO's determination regarding 12-month services is sufficiently clear and does not require a new determination. Regardless of which particular documents were or were not before the May and June 2018 CSEs, none of those documents lead to the conclusion that the student was likely to experience substantial regression that would require the CSE to add 12-month services to the student's IEP during summer 2018.

B. 2019-20 School Year

1. Consideration of the Independent Neuropsychological Evaluation

Turning to the following school year, the district asserts on appeal that the IHO erred in determining that the CSE failed to appropriately review the results and adopt the recommendations of the January 2019 independent neuropsychological evaluation when developing the student's special education programming and placement recommendations.

On May 28, 2019 the CSE convened for the student's annual review (Dist. Ex. 12; IHO Ex. I ¶ 51). New evaluative information (since the September 2018 IEP) that was listed in the May 28, 2019 IEP included: 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 (compare Dist. Ex. 11 at pp. 2-3, with Dist. Ex. 12 at pp. 2-3; see Dist. Exs. 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).¹²

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). The June 19, 2019 prior written notice indicated that the CSE had "reviewed an updated [OT] evaluation," and "considered the reports and evaluations listed under the Evaluations/Reports section of the June 2019 IEP" (see Dist. Ex. 70).

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).

At a couple of points in the decision, the IHO determined that the student's May and June 2019 IEPs did not list the neuropsychological evaluation report in the evaluation section of the IEP, did not refer to test results, and that the district did not adopt any of the recommendations from the neuropsychological evaluation report; however, in a separate section of the decision, the IHO inconsistently stated that "[w]hile the [d]istrict adopted some of [the neuropsychologist's] recommendations, it failed to adopt her recommendations for a program" (IHO Decision at pp. 33-34, 38).

Initially, in order to satisfy its obligation to consider the private evaluation, the CSE was not required to simply adopt the recommendations of the neuropsychologist (J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]). To be sure, the IHO acknowledged that a CSE was not per se required to adopt the recommendations in the evaluation report of a private expert, but the IHO went further and found

¹² 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.

that the January 2019 neuropsychological evaluation was conducted "as the [d]istrict evaluation," and that there were no "objective evaluations to contradict [the evaluator's] findings," (IHO Decision at p. 36). However, as discussed above, the neuropsychological evaluation report was not the only evaluative information considered by the CSEs (Dist. Exs, 11 at pp. 2-3; 12 at pp. 2-3; 35; 38).

A review of the evidence in hearing record shows that the IHO made a factual error to the extent that the decision concludes that the district did not adopt any of the recommendations contained in the January 2019 neuropsychological evaluation report. The June 2019 IEP shows that the CSE did in fact include some of the recommendations from the January 2019 neuropsychological report, albeit not verbatim, such as that the student receive specific reading instruction, and small, special class placements for all academic areas of instruction and to address executive functioning deficits (compare Dist. Ex. 13 at p. 8, with Dist. Ex. 34 at pp. 29, 32, 34). Supports and program modifications generally reflected in both the neuropsychological report and the June 2019 IEP to address the student's attention included verbal redirection, reduction in the length of writing assignments, and fewer problems on mathematic assignments, as well as additional time to complete assignments (compare Dist. Ex. 13 at p. 8, with Dist. Ex. 34 at pp. 29, 31, 33). Other similar recommendations found in the neuropsychological report and reflected in the June 2019 IEP included breaking down assignments into smaller, more manageable parts with all assignments being scaffolded and supported in all academic areas (compare Dist. Ex. 13 at p. 8, with Dist. Ex. 34 at p. 30). More specifically, the neuropsychological report included a recommendation for the student to have "access to technology" that enabled "him to read independently"; likewise, the June 2019 CSE recommended that the student have access to a computer (Chromebook) with "Google Read and Write" (compare Dist. Ex. 13 at p. 10, with Dist. Ex. 34 at pp. 30, 32, 35). The June 2019 CSE recommended that the student have "access to word processor" with text to speech software for writing assignments requiring four sentences or longer, and the neuropsychological report recommended that the student should be allowed access to dictation software and keyboarding for writing assignments (compare Dist. Ex. 13 at p. 9, with Dist. Ex. 34 at pp. 32, 35). Similarly, the June 2019 CSE recommended that the student be provided "with scaffolded note sheets or copies of class notes as needed" and the neuropsychologist recommended that the student not "be required to take notes in class" (compare Dist. Ex. 13 at p. 9, with Dist. Ex. 34 at p. 31). Both the neuropsychologist and the June 2019 CSE recommended that the student take frequent breaks; that the student have extended time for tests and assignments; that all tests be administered with minimal visual and extraneous noises and distractions; and the June 2019 CSE specifically recommended noise cancelling headphones for the student to reduce distractions (compare Dist. Ex. 13 at pp. 8-9, 11, with Dist. Ex. 34 at pp. 31-32). The June 2019 CSE recommended that to ensure the student understood directions given, the directions should be multi-sensory, repeated for the student, and, further, that the student should repeat back instructions given; to ensure the student was attending in the classroom, the IEP provided refocusing and redirection (compare Dist. Ex. 13 at pp. 8-10, with Dist. Ex. 34 at pp. 33, 34). Similarly, the IEP and the neuropsychological report indicated that teachers should "check in" with the student to ensure that he was able to adequately attend to and comprehend oral communication in the classroom (compare Dist. Ex. 13 at p. 33, with Dist. Ex. 34 at pp. 33-34). The neuropsychologist had reviewed older IEPs of the student and was critical of a determination to place the student in among other things, an ICT setting, but when planning for the 2019-20 school year, the CSE had also reached the conclusion to move toward placing the student in a more

restrictive placement without nondisabled peers in smaller, specialized class placements for all of his academics (Dist. Exs. 13 at p. 8; 34 at 2,3, 9, 28).¹³

Therefore, review of the June 2019 IEP shows that it included a number of the neuropsychologist's recommendations, including specialized reading and academic instruction in a small class setting, remediation for executive functioning deficits, and assistive technology supports and strategies, and while the CSE may not have adopted all of the independent neuropsychologist's recommendations, the evidence in the hearing record shows provides ample support showing that her report was considered by the CSE (compare Dist. Ex. 13 at pp. 5, 8-11, with Dist. Ex. 34 at pp. 29-36).

2. Related Services

On appeal the district asserts that the IHO erred in determining that the program offered to the student for the 2019-20 school year was not appropriate. Upon examination of the decision, in addition to finding that the district failed to adopt the program recommendations from the January 2019 neuropsychological evaluation report, the IHO determined that the district failed to recommend speech-language therapy and OT despite the neuropsychologist's and the student's related services providers' "documentation recommending the continuation of th[ose] services"; however, upon review, aside from the neuropsychologist's report, none of the other documentation the IHO cited included recommendations for speech-language therapy or OT services (compare IHO Decision at pp. 37-39, with Parent Exs. F; Q at p. 13; PP; XXX, and Dist. Exs. 34; 36; 41).¹⁴

¹³ It was evident that the neuropsychologist, like all of the student's teachers, both public and private, wants the student to succeed, but I could understand if a CSE was skeptical of some conclusions, such as indicating that "[t]he level of training, experience, and sophistication required of his teachers and the other professionals supporting him in an academic setting is far beyond what is 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, she 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 is designed for students with ADHD/ executive dysfunction and this support is embedded within academic instruction, currently the student's needs for intervention and support in 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. At one point, she indicated that in the past it was possible for the student to move from grade to grade and through aspects of the curriculum with prompting and redirection, but that it was a "slog" and hardly ideal (id. at p. 25). Overall the neuropsychologist sent a very complex message to the CSE that at times focused on ensuring that the student had access to intellectually stimulating curriculum that was at or above grade level, yet at the same time acknowledging that the student has severe deficits in attention, executive function, and metacognitive control and would do better with functional activities like developing a flyer or using a tape measure to learn fractions, which are not grade-level activities (id. at pp. 27-28). The point is that ambitious goals are likely appropriate, but it is likely very difficult to program for the student in a manner that achieves everything the neuropsychologist is seeking, especially in a short timespan given the student's pace. 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 prospectively 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 neuropsychologist into the student's IEP.

¹⁴ The January 2019 neuropsychologist's evaluation report included a specific recommendation that the student

Further, the IHO cites to testimony of the student's occupational therapist at Carmel during the 2018-19 school year as support that the student continued to require OT services, yet the June 2019 IEP does not reflect that she participated at the CSE meeting (IHO Decision at p. 37; compare Dist. Ex. 13 at p. 1, with IHO Ex. XIII ¶¶ 1, 2, 5).

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). Although 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). As noted above, 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, yet there is no indication this information was available to the June 2019 CSE (IHO Ex. XIII ¶ 15).

Turning to speech-language therapy services, the June 2019 IEP indicated that a "Speech/Language Progress Summary" dated May 31, 2019 was considered, but as discussed above, no speech-language therapy evaluation or report appears to have been admitted into the hearing record with that date (see Dist. Ex. 13 at p. 2). Although it is unclear what information was available to the June 2019 CSE regarding the student's speech-language skills, out of an abundance of caution the evidence regarding recommendations for speech-language therapy will

receive OT services (Dist. Ex. 34 at p. 31). She determined that the student had a language-based learning disability and deficits in areas including phonological processing, auditory attention and memory, rapid naming, language processing, verbal fluency, word retrieval, spelling, written language, social communication (see id. at pp. 16-18, 25). Although these may be areas addressed by speech-language therapy, the neuropsychologist did not specifically recommend that the student receive that service, rather, recommended instruction by teachers specifically trained in educating students with dyslexia and language-based learning disabilities (see id. at pp. 26-36).

be reviewed. 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 hearing record shows that prior to the June 2019 CSE meeting, the most recent speech-language therapy progress report in the hearing record 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).¹⁵ The May 21, 2019 Carmel Academy End of Year Progress Report did not provide speech-language therapy goals or a specific recommendation 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).¹⁶ Neither the June 2018 nor the June 2019 IEPs include 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).

Therefore, as it is unclear what information the June 2019 CSE had available to it related to the student's speech-language skills and needs, and the evidence in the hearing record does not support the IHO's conclusion that, but for the neuropsychologist's report, recommendations were made that the student receive OT and speech-language therapy services, this issue is remanded to the IHO to consider the appropriateness of the 2019-20 recommendations absent these services.

3. 12-Month Services

The district appeals the IHO's finding that based on the evidence presented by Carmel, the student showed regression during the 2018-19 school year such that the student required 12-month services for summer 2019 (IHO Decision at pp. 27-28). At the time the May 2019 CSE convened, the assistant superintendent who chaired the meeting opined that there was not sufficient data from Carmel necessary to discuss 12-month services for summer 2019 (Tr. pp. 242-43; IHO Ex. I ¶ 58).

¹⁵ 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).

¹⁶ The hearing record did not contain testimony from the student's 2018-19 Carmel speech-language pathologist (see IHO Exs. I-XVI).

The CSE reconvened on June 19, 2019 to discuss 12-month services and determined, following the neuropsychologist's review of her report and a lengthy discussion about 12-month services, that the data Carmel presented regarding the student's reading comprehension and writing skills did not indicate substantial regression and the student was not eligible for 12-month services (Tr. pp. 243-45, 248-51; IHO Ex. I ¶¶ 59, 62-64; Dist. Ex. 13 at p. 1-12).

The Carmel data reviewed at the June 2019 CSE meeting was relayed to the district in an email dated June 11, 2019 from the student's Carmel special education teacher (see Dist. Ex. 71 at pp. 69-70; IHO Ex. XV ¶¶ 3, 7).¹⁷ The Carmel special education teacher participated at the June 2019 CSE meeting and testified that she shared her opinion with the CSE that the student exhibited "drastic retention issues" (IHO Ex. XV ¶¶ 43-44). According to the Carmel special education teacher, district staff did not feel the level of assessment Carmel had conducted was comparable to the type of assessment the district used—the Aimsweb—and that comparing the assessments was "comparing apples and oranges" (id. ¶ 45). Regarding the Carmel data, the assistant superintendent testified that the Carmel special education teacher "confus[ed] lack of progress for regression after breaks" and that the tests Carmel used "did not present the CSE with the ability to compare" the student's comprehension and math skills "clearly" because different tests were used in the comparisons (IHO Ex. I ¶¶ 62-64; see Dist. Ex. 71 at pp. 69-70). Additionally, the district does not contest that the student lost ground or regressed after short breaks, such as weekends or holidays. The May 2019 IEP noted that the student lost skills during weekends and that it could take 2-3 days to re-acquire those skills (Dist. Ex. 12 at p. 4). The assistant superintendent testified that he did not ask about weekend regression because he was concerned with whether the student exhibited substantial regression and the student's recouping of those skills (Tr. p. 243).

Review of the data provided to the district by Carmel shows that the district's position is correct insofar as there is not a meaningful basis for comparison; for example, regarding reading comprehension, in April 2018 the student's Read 180 "lexile score" was 920, in September 2018 results of the "Gates test" showed a second grade equivalency, and his "F&P showed limited comprehension of 5th grade material," which by January 2019 had improved to comprehension of sixth grade reading material (Dist. Ex. 71 at p. 69; see Dist. Ex. 8 at p. 5).¹⁸ Using the results of those different measures, the Carmel special education teacher concluded that in June 2018 the student satisfactorily comprehended sixth grade reading material, but by September 2018 had difficulty comprehending fifth grade material, and did not show comprehension of sixth grade material before January 2019, such that the length of recoupment showed "significant regression" (Dist. Ex. 71 at pp. 69-70). However, there is not a sufficient basis in the hearing record, as presented to the June 2019 CSE, to show that those assessment measures can be correlated, or compared in order to determine whether the student experienced substantial regression over the

¹⁷ The January 2019 neuropsychological evaluation report also indicated that the student regressed and forgot what he had previously mastered; however, it appears the report was based on the same information noted by the Carmel special education teacher as the report referenced the student ending both the 5th and 6th grade at the same Fountas & Pinnell reading level as support for finding regression (Dist. Ex. 34 at pp. 4, 45). The evaluator also reported that the student's mother indicated the student's academic skills and mastery always regressed over the summer and that she had frequently requested summer services (id. at p. 4).

¹⁸ According to the student's IEP, in April 2018 his Read 180 lexile level was 957 (Dist. Ex. 8 at p. 5). Additionally, "F&P" appears to refer to the Fountas and Pinnell reading assessment (id.).

prior summer.¹⁹ Further, some of the data does not show that the student substantially lost skills: regarding the student's reading proficiency, using his Read 180 "lexile level" of 920, the student's June 2018 Fountas & Pinnell reading level was "estimated" to be "V", that by September 2018 he had "regressed" to a Fountas & Pinnell instructional level V, and did not "recoup" Fountas & Pinnell level W until April 2019 (Dist. Ex. 71 at p. 69; see Dist. Ex. 10 at pp. 1, 4).²⁰ Regarding math skills, the Carmel data reflected that he worked on multiplication and division during fifth grade, and fractions, decimals, ratios, rates, algebraic expressions, equations, and percent during sixth grade (Dist. Ex. 71 at p. 70).

Under these circumstances, the June 2018 CSE was justified in questioning the data presented by Carmel in support of the parent's position that the student was exhibiting substantial regression over the summer. As the data showing regression was suspect, the June 2018 CSE's determination that the student did not need 12-month services in order to prevent substantial regression was reasonable and the district did not deny the student a FAPE on this basis.

VII. Conclusion

Having found that the IHO's determinations that the student was denied a FAPE for the 2018-19 and 2019-20 school years were based on faulty premises, the IHO's decision must be overturned and the matter must be remanded for reconsideration by the IHO in line with the above. In addition, having determined that the district did not deny the student a FAPE by not recommending 12-month services for the 2018-19 or 2019-20 school years, the IHO need not further address the merits of the parent's claims related to 12-month services. The IHO must allow the parties a further opportunity to be heard on which information was precisely before the CSE and avoid retrospective analysis of the student's IEPs in light of the rule requiring a prospective analysis of a student's IEP as called for by R.E.

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

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS DISMISSED.

¹⁹ The parent included a summary prepared by the parent and the Carmel special education teacher in an attempt to correlate the various data points to grade equivalency in reading comprehension for the purpose of showing that the student's reading comprehension regressed over the 2018 summer and was not fully recouped until the end of the 2018-19 school year (Parent Ex. I; IHO Ex. XIV ¶ 38). However, there is no indication in the hearing record that this summary of information was provided to the district in advance of the June 2018 CSE meeting (see Dist. Ex. 71 at pp. 69-81). In addition, the student's grade equivalency as reported showed variability across the different testing; the special education teacher reported that the "Gates test" showed a grade equivalency in reading comprehension of 3.8 in September 2018 and 9.2 in April 2019, while the Fountas and Pinnell showed limited comprehension of 5th grade reading materials in September 2018 and satisfactory comprehension of 6th grade reading materials in January 2019, and the WIAT-III showed the student was reading below average at the 7th grade level in January 2019 (Parent Ex. I at p. 1; see Dist. Ex. 34 at p. 43).

²⁰ As noted by the Carmel special education teacher, the student was not tested using Fountas & Pinnell during the 2017-18 school year (Dist. Ex. 71 at p. 69).

IT IS ORDERED that the IHO's decision dated November 5, 2020 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a determination on the parent's claims related to the 2018-19 and 2019-20 school years.

Dated: **Albany, New York**
 March 31, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER