



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-054

### **Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

#### **Appearances:**

The Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for relief in the form of additional special education teacher support services (SETSS) at an enhanced rate. The appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

During the 2014-15 school year, the student attended a program for four-year-old students at a private preschool (Parent Ex. E at pp. 1-2). In October 2014, a Committee on Preschool Special Education (CPSE) determined that the student was eligible for special education programs and services as a preschool student with a disability and developed an IEP (Dist. Ex. 19). The CPSE recommended a program consisting of eight hours per week of special education itinerant teacher (SEIT) services and two 45-minute sessions per week of individual occupational therapy (OT) (Tr. p. 181; Dist. Ex. 19 at p. 1). During the 2014-15 school year, the student attended a

private preschool program and received the SEIT and OT services recommended by the CPSE (Dist. Exs. 13; 16 at p. 1; 19 at p. 1; Parent Ex. E at pp. 2-3).<sup>1</sup>

In March 2015, a CSE convened to conduct the student's "turning five" review and to develop an individualized education services program (IESP) for the 2015-16 school year (Tr. p. 182; Dist. Ex. 9 at pp. 1, 7-8, 10). Finding the student eligible for special education and related services as a student with an other health-impairment, the March 2015 CSE recommended five periods per week of direct individual special education teacher support services (SETSS) to be provided to the student in the general education classroom, two 45-minute sessions per week of individual OT, and two 30-minute sessions per week of group counseling (Dist. Ex. 9 at p. 7). In spring 2015, in response to "extreme" behaviors such as biting a teacher and having outbursts "when things didn't go the way that she was expecting them to," such as when given consequences for her behaviors, the private school recommended that the student be evaluated (Tr. pp. 185-87). In May 2015, the parent obtained a private developmental pediatrics evaluation, which determined that the student met criteria for a diagnosis of an autism spectrum disorder (ASD) (Parent Ex. E).

In a letter dated July 29, 2015, the parent requested that the CSE reconvene to consider additional concerns and information—specifically that the student received a diagnosis of "high functioning ASD"—that warranted changes to the student's educational program, including her need for instruction using applied behavior analysis (ABA) methods and a "more intensive special education program" (Parent Ex. D). The parent testified that the CSE reconvened in August 2015, in response to the concerns expressed in her letter (Tr. pp. 189-92). According to the parent, the CSE determined that a psychoeducational evaluation of the student was required and that the CSE could not continue the meeting that day (Tr. pp. 191-92, 205). In September 2015, the district obtained a speech-language evaluation and a psychoeducational evaluation of the student (Dist. Exs. 5; 6).

On September 7, 2015, the parent filed a due process complaint notice (Parent Ex. A). On October 19, 2015, a pendency hearing was conducted, after which the IHO issued an order, dated October 27, 2015, which determined that the student's pendency (stay-put) placement, by agreement of the parties, was based on the October 2014 CPSE IEP and consisted of eight hours per week of individual SEIT services and two 45-minute sessions per week of individual OT (Interim IHO Decision at p. 2; Tr. pp. 4-6).

On November 23, 2015, the CSE reconvened, determined that the student was eligible for special education and related services as a student with autism, and recommended that she receive five periods per week of SETSS in the general education classroom, two 45-minute sessions per week of individual OT, two 30-minute sessions per week of speech-language therapy in a group, two 30-minute sessions per week of counseling in a group, and one 60-minute session per month of parent counseling and training (Dist. Ex. 2 at pp. 1, 10-11).<sup>2</sup>

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<sup>1</sup> A CPSE convened in May 2015 to develop the student's IEP for summer 2015 and recommended that she receive two 45-minute sessions per week of individual counseling at her private preschool (Dist. Ex. 18 at pp. 1, 24).

<sup>2</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

## **A. Due Process Complaint Notice**

By amended due process complaint notice, dated January 26, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year and that the March and November 2015 IESPs were both procedurally and substantively flawed and were not appropriate or reasonably calculated to address the student's academic and social/emotional needs (Parent Ex. C). The parent alleged, as relevant to this appeal, that both CSEs were missing mandated members (id. at pp. 2-3). The parent also asserted that the March 2015 CSE did not conduct updated evaluations (id. at p. 2). Further, the parent alleged that the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student (id. at pp. 2, 4). The parent alleged that the group counseling and goals in the IESPs were insufficient to address the student's needs (id.). The parent also argued that the IESPs failed to recommend a sensory diet and that the recommendations for OT were insufficient to address the student's needs relating to regulation and focus (id.). The parent also alleged that the CSEs' decision to decrease the student's special education support from eight hours of SEIT services per week to five periods of SETSS was not sufficient to address the student's needs (id. at pp. 3, 4). With respect to her request that the CSE reconvene, the parent asserted that the district cancelled the scheduled August 2015 CSE meeting and had not evaluated the student or reconvened by the time the school year began (id. at p. 3). The parent also alleged that the recommendation for group counseling and speech-language therapy services contained in the November 2015 IESP was inadequate and that the student required individual services (id. at p. 4). For relief, the parent requested that the student receive 15 hours of SEIT or "enhanced rate" ABA SETSS services, three sessions per week of speech-language therapy (two individual and one group), and three sessions per week of individual OT (id.). The parent also requested the completion of an FBA and BIP for the student (id.). Finally, the parent requested that a sensory diet be added to the student's IESP (id.).

## **B. Impartial Hearing Officer Decision**

The impartial hearing reconvened on December 8, 2015, and concluded on June 2, 2016, after four additional days of proceedings (Tr. pp. 10-218). In a decision dated July 11, 2016, the IHO concluded that the district did not deny the student a FAPE (IHO Decision at p. 11). The IHO found that both the March 2015 and November 2015 CSE meetings consisted of "duly constituted teams" (id.). The IHO found that the CSE gave "full consideration" to the parent's concerns and to the evaluative information (id.). Next, the IHO noted that the student was performing well academically and found that the recommendation for five hours of SETSS was sufficient (id. at p. 12). The IHO further found that the parent did not establish any basis for her claim that the recommended five hours of SETSS would not be adequate (id. at p. 13). The IHO also determined that the recommendation for group speech-language therapy was appropriate and recommended by the evaluator (id. at p. 12). Additionally, the IHO noted, the hearing record did not demonstrate a need for the student to receive services on a 12-month basis (id. at p. 13). The IHO found that the possible need for an FBA and BIP was discussed at the November 2015 CSE meeting, the information available to the CSE indicated the student's behaviors had improved in school, and that no proof was offered demonstrating the need for an FBA or BIP (id.). Finally, with respect to the parent's request for a sensory diet for the student, the IHO found that the IEP addressed the student's sensory needs and noted that the occupational therapist did not recommend a sensory diet

for the student (*id.*). Having found that the district offered an appropriate program, the IHO denied the parent's request for relief (*id.* at pp. 13-14).

#### **IV. Appeal for State-Level Review**

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE. The parent alleges that the IHO disregarded the fact that the district did not finalize the student's IESP before the beginning of the school year in September 2015 and that a "usable" IESP was not in place until November or December 2015. The parent next alleges that the IHO's determination that the parent did not establish that five hours of SETSS was inadequate to meet the student's needs constituted an impermissible shifting of the burden of proof and was against the weight of the evidence. Further, the parent alleges, the district did not establish the appropriateness of its recommendation for five hours of SETSS per week. The parent also alleges that the CSE's recommendation of group speech-language and counseling services for the student resulted from the CSE's failure to fully consider all evaluations and resulted in an IESP that was not reasonably calculated to enable the student to receive educational benefits. Finally, the parent alleges that the IHO erred in not granting the parent's request for an enhanced rate to be paid to the student's SETSS provider because the district failed to provide the required services. For relief, the parent requests that the student's IESP provide for either 15 hours of SETSS per week with 10 hours provided in school and five hours provided at home or, in the alternative, eight hours of SETSS per week in school, and that the district fund the student's SETSS for the 2015-16 school year at an enhanced rate. Finally, the parent requests that the IHO's interim order on pendency remain in effect during the pendency of this appeal and any appeal from the decision of an SRO.<sup>3</sup>

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety. The district argues that the IHO did not impermissibly shift the burden of proof, and that the district established that both the March 2015 and November 2015 IESPs offered the student an appropriate program. The district further contends that the parent did not raise in her due process complaint notice the issue of whether the district ensured that an IESP was in place at the beginning of the school year. In any event, the district argues that the March 2015 IESP was in place at the beginning of the school year, that neither IESP was implemented, and the student received services pursuant to pendency during the 2015-16 school year. The district also affirmatively asserts that because the student was parentally placed in a nonpublic school, FAPE is not at issue, and an appropriate IESP was developed for the student for the 2015-16 school year. Further, the district contends that the parent's assertions regarding the recommendation for related services in a group are without merit and the CSE's recommendations were supported by the evaluative information available to it. With respect to the parent's request for funding of the student's SETSS at an enhanced rate, the district argues that the student received services pursuant

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<sup>3</sup> To the extent the parent continues to allege that the CSEs were not properly composed, the parent does not allege on appeal that the absence of a regular education teacher from the CSE meetings impeded her ability to participate in the meeting or deprived the student 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]). In addition, although not excusing the district's procedural noncompliance, the hearing record indicates that the parent is a certified regular education and special education teacher (Tr. p. 183).

to pendency and that the parent did not avail herself of available providers who would accept the district rate.<sup>4</sup>

## V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

In New York, students with disabilities who attend nonpublic schools are entitled pursuant to Education Law § 3602-c—commonly referred to as the dual-enrollment statute—to receive special education services upon parent request for such services from the school district where the nonpublic school is located (the district of location) (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located

within the school district" (*id.*).<sup>5</sup> Additionally, section 3602-c provides that a parent may seek

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<sup>4</sup> As noted by the district, the parent did not appeal from the IHO's determination that the student did not require services on a 12-month basis, and that determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6, \*10 [S.D.N.Y. Mar. 21, 2013]).

<sup>5</sup> The Court of Appeals has explained that the purpose of section 3602-c is to offer students with disabilities who have been placed in nonpublic schools "access to all of the special programs provided for public school students," and that the program developed for a student pursuant to the dual-enrollment statute must be "appropriate" to meet the student's individual needs (*Bd. of Educ. v. Wieder*, 72 N.Y.2d 174, 184-87 [1988]). The State Education Department has issued guidance explaining that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," at Attachment 1 p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance

review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (*id.*). Except for in circumstances not applicable here, the burden of proof in an impartial hearing is on the school district (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Burden of Proof**

The parent argues that the IHO's finding that she did not establish that five periods of SETSS per week would be inadequate to meet the student's needs amounted to an impermissible shifting of the burden of proof to the parent. Upon review, the evidence in the hearing record does not support the parent's assertions.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).<sup>6</sup> Here, the hearing record does not indicate that the IHO misapplied the burden of proof (see IHO Decision at pp. 4-14). The IHO, instead, weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (*id.*). Although the parent disagrees with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to correctly apply the burden of proof in his analysis.<sup>7</sup>

Although the IHO used less than optimal language in finding that "the parent did not establish any basis for the claim that 5 periods of SETSS would be inadequate," an examination of

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document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*). In addition, "[a] nonpublic student may not be denied services that a public school student would receive based solely upon his or her status as a nonpublic student" (*id.*).

<sup>6</sup> The Court in Schaffer left open the question of whether States have the authority to shift the burden of proof through legislation (546 U.S. at 61-62).

<sup>7</sup> Even assuming for the sake of argument that the IHO misallocated the burden of proof to the parent, the harm would be only nominal insofar as the hearing record indicates that this was not one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]).

the IHO's decision reveals that the IHO properly noted that the district bore the burden of proof, outlined the district's case in support of the program offered to the student, and found that the district offered the student an appropriate program (IHO Decision at pp. 4-6, 10-13). To the extent that the IHO stated that the parent had not established a basis for her claim, it was in the context of the IHO crediting the testimony of the district witness over the parent's witnesses (id. at pp. 12-13). In addition, for the reasons discussed below, after an independent review of the hearing record I find that the evidence supports the IHO's ultimate determination. Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-218). Thus, the parent's assertions must be dismissed.

## **2. Timing of November 2015 IESP**

The district contends that the parent did not raise her argument regarding the development of the November 2015 IESP in her due process complaint notice. The district argues that because the parent did not claim that the district deprived the student of educational benefits as a result of this purported delay, and did not seek any relief related to the delay, these factual statements did not properly raise the issue. Initially, while the district is correct that the parent did not specifically argue that the district failed to have an IESP in place at the beginning of the 2015-16 school year, the district acknowledges that her due process complaint notice asserted that the originally scheduled CSE reconvene was cancelled so that the district could conduct additional evaluations and that the CSE had not yet reconvened when school started in September 2015.

The IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]). In this case, the March 2015 IESP was developed for implementation for the beginning of the 2015-16 school year (Dist. Ex. 9). While the parent asserts that the district was required to reconvene the CSE in response to her July 2015 request, as discussed below the information contained in the privately-obtained developmental pediatric evaluation was consistent with the information available to the March 2015 CSE, and the district is correct that the parent did not assert any harm to the student as a result of any delay and seeks no relief related thereto. Accordingly, the hearing record reflects that a program was in place at the beginning of the school year.

### **B. November 2015 IESP**

#### **1. Adequacy of SETSS<sup>8</sup>**

In her petition, the parent alleges that not only did the district fail to prove the appropriateness of its recommendation to decrease the amount of SETSS services provided to the

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<sup>8</sup> SETSS is not defined in State or federal laws or regulations, is not referenced in any currently published federal or State policy documentation, and is not identified on the State continuum of special education services (see Application of a Student with a Disability, Appeal No. 16-056). Furthermore, the hearing record does not contain an adequate definition of these services; however, it appears the parties considered them to be a school-age analog



student, but that evidence was presented at the impartial hearing, in the form of witness testimony, illustrating the need for an increase in the number of SETSS hours. After reviewing the evidence in the hearing record and for the reasons detailed below, I find that the IHO's determinations were consistent with the evidence presented and that the program recommended by the November 2015 CSE—including five periods per week of SETSS—was appropriate to meet the student's needs. In this case, although the sufficiency of the evaluative information available to the November 2015 CSE and the description of the student's present levels of performance in the accompanying IESP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—the appropriateness of the program recommendations set forth in the November 2015 IESP.<sup>9</sup>

In developing the November 2015 IESP, the CSE reviewed the student's March 2015 IESP, the February 2015 classroom observation, a January 2015 service provider progress report, the September 2015 psychoeducational evaluation report, and the September 2015 speech-language evaluation report (Tr. p. 63; see Dist. Exs. 5; 6; 9; 13; 16). The present levels of performance included in the November 2015 IESP reflected the results of the formal assessments and revealed that the student's cognitive abilities were within the superior range (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 5 at p. 2). The November 2015 IESP also noted that the student possessed a relative weakness in fluid reasoning and that results of the student's performance on various tasks within the assessments suggested concerns in the areas of sustained working memory, planning and organization (Dist. Ex. 2 at p. 1). Regarding the student's academic performance, formal assessments found the student to be in the very superior range in math computation; in the superior range in math reasoning; in the average range in the areas of letter-word identification, spelling, and writing; and within the low range in passage comprehension (id.). The IESP reflected assessment results which found the student presented with average language skills with weakness in expressive vocabulary (id. at p. 2). The November 2015 IESP present levels of performance included teacher reports that the student did not participate in small group activities with her peers, worked more slowly than her peers, and had a hard time following directions and interacting with her peers (id.). The November 2015 IESP noted that the student benefitted from instruction that incorporated multiple modalities and that the student was expected to make progress and acquire skills within one year with mandated supports (id.).

With respect to social development, the November 2015 IESP included results from the September 2015 psychoeducational evaluation, in which the evaluator reported that during the evaluation the student established and maintained eye contact, was in fair spirits, displayed a neutral mood and appropriate affect, and that her thoughts were relevant and goal oriented (Dist. Ex. 2 at p. 2). Rating scales completed by the parent found the student to be within the clinically

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to the special education itinerant services available to preschool students with a disability (Tr. pp. 69-70, 105-06, 148, 196; Parent Ex. C at p. 4; see 8 NYCRR 200.16[i][3][ii]). The parties and IHO are reminded that when discussing a service that is unique to a district, the hearing record should contain information regarding the purpose of the service, how the service must be described on a student's IEP, any delivery requirements for the service, and any other information necessary for a full, meaningful review by administrative reviewers or the courts.

<sup>9</sup> The December 23, 2015 prior written notice indicated that the parent informed the November 2015 CSE that the student was parentally placed in a nonpublic school at the parent's expense, and that the parent was seeking equitable services from the district; therefore, an IESP was developed (Dist. Ex. 4 at p. 1; see Dist. Ex. 2 at p. 12).

significant range for anxiety, atypicality, and withdrawal; and to be within the at-risk range in the areas of depression, social skills, hyperactivity, social disorders, resiliency, and negative emotionality (id.). Teacher reports considered by the November 2015 CSE stated that the student did not like to listen to authority figures and at times struggled to follow through with a direction, needed constant reminders to ask teachers for help or to repeat instructions, had difficulty working in an organized way and finishing activities, struggled to transition smoothly, and was resistant to correction (id.). In addition, the teacher reports noted that the student did not always participate in the lessons or work well in groups, had difficulty initiating and maintaining conversations with her peers, and engaged in parallel play (id.). The November 2015 IESP also included parent input that she would like to see the student socialize more appropriately, comfortably, and confidently (id. at p. 3).

Regarding physical development, the November 2015 IESP included notations that the student had received a diagnosis of autism, was allergic to mustard and tree nuts, and "suffered from asthma" (Dist. Ex. 2 at p. 3). The November 2015 IESP present levels of performance further explained that the student presented with delays in sensory processing which impacted her ability to self-regulate, self-soothe, and modulate sensory input in the classroom and community (id.). Further, the November 2015 IESP noted that the student presented with delays in dynamic balance and gross motor skills (id.). The parent reported that the student exhibited excess motor behavioral/self-stimulatory behaviors such as fidgeting and picking (id.).

To address the student's needs and provide support in the general education classroom, the November 2015 CSE recommended five periods per week of SETSS to address the student's annual goals involving reading comprehension, written expression, identifying key math terms, task completion and following directions; two 30-minute sessions per week of counseling in a group to address annual social/emotional goals involving emotional responses, appropriate responses to staff directives, and initiating verbal exchanges with peers; and one 60-minute session per month of parent counseling and training (Dist. Ex. 2 at pp. 4-7, 10). The November 2015 IESP continued to recommend OT services to address annual goals involving sensory processing and transitioning, visual/perceptual motor coordination and attention, and shoulder/postural stability (compare Dist. Ex. 2 at pp. 5-6, 10, with Dist. Ex. 19 at p. 1). The November 2015 IESP also provided two 30-minute sessions of speech-language therapy in a group to address annual speech-language goals involving expressive and receptive language skills, and one 60-minute session per month of parent counseling and training (Dist. Ex. 2 at pp. 6, 10).

In addition, to further provide support for the student's needs in executive functioning, planning and organization, work pace, following directions and instructions and her ability to transition, the November 2015 IESP provided a number of accommodations such as modeling of concepts and extra guided practice, repetition of concepts, brief/clear/concise directions and instructions, use of graphic organizers/story grammars/sentence starters, processing time, use of manipulatives and picture supports, positive praise and encouragement, consistent and specific redirection and refocusing, and check-ins for task completion (Dist. Ex. 2 at p. 3).

Review of the hearing record reveals that much of the information available to the November 2015 CSE showed the student made progress during the 2014-15 school year with the services provided in the October 2014 CPSE IEP. The October 2014 IEP included eight hours of

SEIT services per week to address annual goals focusing on the student's needs in the areas of social/emotional skills, receptive language, interactive play skills, focusing skills, enhanced conversational skills, academic functioning, activities of daily living skills, and self-advocacy skills (Dist. Exs. 16 at p. 1; 19 at pp. 1, 11-21). In addition, the October 2014 IEP included two 45-minute sessions per week of individual OT to address OT annual goals involving postural control, sensory processing, and fine and gross motor skills (Dist. Exs. 16 at p. 1; 19 at pp. 1, 5-10, 13). The student continued to receive those services pursuant to pendency during 2015-16 school year (Interim IHO Decision at p. 2; Tr. pp. 148-49).

The January 2015 service provider progress report indicated that although the student continued to exhibit delays, she made progress in the areas of transitioning from one activity to another and using words to ask for help, and reportedly "matured greatly" regarding social interactions with peers (Dist. Ex. 16 at pp. 1, 2, 8). The January 2015 classroom observation indicated that at times the student could be stubborn and tantrum, but that these behaviors appeared to have lessened in frequency and severity (Dist. Ex. 13 at p. 1). The September 2015 psychoeducational evaluation report stated that school personnel indicated that during the 2014-15 school year the student was a "terror" and "would react in an out of control manner when something triggered her" (Dist. Ex. 5 at p. 1). However, the November 2015 CSE meeting minutes noted that there had been no issues with hyperactivity or tantrums during the beginning of the 2015-15 school year and that "physical behaviors" had not been seen in school (Dist. Ex. 8 at pp. 6-7). Also, included within the November 2015 CSE meeting minutes was parent input that the student's school behaviors had improved (*id.* at p. 7). The school psychologist testified that after reviewing the student's scores in the September 2015 psychoeducational evaluation report and the student's classroom functioning, she did not believe the student's areas of deficit rose to the level of necessitating an increase in SETSS from that recommended by the March 2015 CSE (Tr. p. 106). She further testified that the November 2015 CSE reviewed all the data presented at the time of the meeting to determine the SETSS recommendation and that she believed that the November 2015 IESP—with five periods per week of SETSS—would allow the student to make appropriate progress (Tr. pp. 69, 81-82; Dist. Ex. 2 at p. 10).

The school psychologist testified that in fact, the November 2015 CSE considered a reduction in SETSS because the CSE recommended adding two periods of speech-language therapy services (Tr. pp. 125; Dist. Ex. 8 at p. 8). The school psychologist explained that while the speech services were not necessarily a substitute for the SETSS, she felt that it was important for the student to be in the classroom (Tr. pp. 106, 125).

Thus, the hearing record shows that at the time the November 2015 IESP was developed, the student had demonstrated progress under a similar program the year before, such that the recommendation for five periods per week of SETSS together with related services was appropriate to meet the student's needs (compare Dist. Ex. 2 at p. 10, with Dist. Ex. 19 at p. 1; see Dist. Exs. 5 at p. 1; 8 at pp. 6-7; 13 at p. 1; 16 at pp. 1, 2, 8).

Turning to the parent's contention that the five hours of SETSS recommended by the November 2015 CSE was inadequate and that the student's IESP should have provided for ten hours of SETSS in school and five hours of SETSS at home, the evidence in support of the parent's request for increasing the number of SETSS hours was presented by the director of the private

special education agency (director) that provided the student's services during the 2015-16 school year (Tr. pp. 143, 161-62). By way of background, the director stated that since September 2015, his agency had been providing the student with eight hours of special education services pursuant to the student's October 2014 IEP and subsequent pendency order (Tr. pp. 148-49, 172; see Interim IHO Decision at p. 2; Dist. Ex. 19 at p. 1). The director explained that the SETSS hours were provided in a combination of push-in and pull-out services, and that some of the time was used to introduce new skills one-on-one and some was used to generalize within the classroom (Tr. p. 172).

With respect to the amount of SETSS the student was receiving, the director stated that eight hours was "just about, you know, making it" and that "we are seeing progress," although in terms of generalization of skills, ten hours "would make a difference" (Tr. p. 155). When asked if the student had made progress during the school year with eight hours of SETSS, the director replied "yes, absolutely" and explained that the providers had seen fewer outbursts and could see an increase in the effort the student was "putting in" (Tr. p. 157). The director testified that he saw it as his responsibility to "really empower our therapists and give them all of the necessary tools to be able to deliver maximum results" (Tr. p. 143). In addition, the November 2015 CSE meeting minutes stated that regarding the SETSS mandate, the parent felt the student's program should be reviewed to "maximize her potential" (Dist. Ex. 8 at p. 7).

Furthermore, the director did not participate in the November 2015 CSE meeting, and much of his testimony refers to the portion of the 2015-16 school year that post-dated the November 2015 CSE meeting and therefore was not information available to the November 2015 CSE (Dist. Ex. 2 at p. 13; see Tr. pp. 153-58). In addition, the director testified that he had not had the opportunity to meet or observe the student, did not have contact with the SETSS teacher assigned to the student, and that his understanding of the student's progress was from contact with the provider's supervisor and the parent, and from reviewing sessions notes, quarterly reports and communication logs (Tr. pp. 162-63). Further, the director stated that he was not sure whether the session notes prepared by the providers were provided to the November 2015 CSE (Tr. pp. 160-61). Also, although the hearing record reflects that the SETSS provider was present at the November 2015 CSE meeting and that a July 2015 SEIT report was presented at the November 2015 CSE meeting, the hearing record does not indicate that a recommendation for additional SETSS hours was made at the CSE meeting (Tr. p. 149; Dist. Exs. 2 at p. 13; 8 at p. 2; see Dist. Ex. 8 at pp. 1-8).

With respect to the home-based SETSS requested by the parent, the private special education director testified that the addition of five hours of SETSS in the home would be "very beneficial" to the student and would "make a tremendous difference" in terms of generalization of skills (Tr. pp. 155-56). However, with respect to the relative importance of home-based SETSS, the director stated that at the time of the hearing the student was receiving all eight hours of SETSS in school and explained that he could not "afford" to provide any of those hours in the home because his providers had to prioritize and they felt the main concern of the student was in school (Tr. p. 166).

Furthermore, while the privately-obtained May 2015 developmental pediatric evaluation report included a recommendation for "[g]uidance on home-based ABA programs" to coordinate

closely with school SEIT services, the information in the hearing record does not show that the November 2015 CSE was presented with any information indicating that the student required home-based services (Parent Ex. E at p. 6; see Dist. Exs. 2 at pp. 1-3; 8 at pp. 1-8). In addition, although the parent believed the student required home-based SETSS, the hearing record indicates that the primary reason given for the addition of these services was to enable the student to generalize skills (see Tr. pp. 155-56). Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases such as here, where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X, 2008 WL 4890440, at \*17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at \*7 [S.D.N.Y. Apr. 21, 2008]).<sup>10</sup>

Further, while not directly applicable because, as argued by the district, the student is receiving services pursuant to Education Law § 3602-c rather than the IDEA, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Bd. of Educ. v. Rowley, 458 U.S. 176, 189 [1982]). The IDEA 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).<sup>11</sup> While I can sympathize with the parent, who understandably desires an ideal program for her daughter, it does not follow that the district has failed to meet the more modest standard required of it by the IDEA and Education Law § 3602-c, because 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).

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<sup>10</sup> No authority is cited by the parents, and independent research has uncovered none, for the proposition that generalization is required by Education Law § 3602-c (see "Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," at Attachment 1 pp. 11-12 [noting that "a school district of location is not required to provide greater services to a nonpublic student than a public school student would receive under the Rowley standard"]).

<sup>11</sup> As noted above, the Court of Appeals has similarly held that an IESP developed pursuant to section 3602-c must be appropriate to meet a student's needs (Wieder, 72 N.Y.2d at 184, 186-87).

## 2. Related Services

The parent next alleges that the November 2015 IESP recommendation for group speech-language therapy and counseling services resulted in an IESP which was not appropriate to meet the student's needs. Upon review, the evidence in the hearing record does not support this claim.

The September 2015 psychoeducational evaluation report described the student as "behind socially" and needing to "learn to socialize with peers and make friends" (Dist. Ex. 5 at p. 1). The November 2015 IESP present levels of performance included classroom reports that the student participated "very rarely" in math and did not contribute in small-group activities with her peers, which affected her progression to grade-level standards in math (Dist. Ex. 2 at p. 2). In addition, the November 2015 IESP detailed the student's reported weaknesses with expressive vocabulary and her difficulty in following directions and interacting with peers (id.). With respect to social development, the November 2015 IESP stated that the student had difficulty initiating and maintaining conversations with her peers, engaged in parallel play, played and worked alongside her peers instead of interacting with them, and did not work well in groups (id.).

The November 2015 IESP reflected the parent's concern that the student should receive assistance when navigating social interactions with peers, and that she would like to see the student socialize more appropriately, comfortably, and confidently (Dist. Ex. 2 at pp. 2, 3). The school psychologist stated that the November 2015 IESP addressed the parent's concern regarding socialization through group counseling and group speech-language therapy (Tr. pp. 126-27). The school psychologist explained that when developing programs for students, the CSE targeted areas of deficit to remediate, and that "it would just make sense" to provide the student's related services in a group setting to practice prosocial skills and to develop skills in working well within a group (Tr. p. 89).

Based on the information contained in a November 2015 teacher report<sup>12</sup> regarding the student's social skills, the school psychologist stated that the November 2015 CSE recommended the student to continue to receive counseling in a group so the student could practice prosocial skills with her peers (Tr. pp. 71-73; see Dist. Exs. 2 at p. 2; 7 at p. 2). Further, within the September 2015 speech-language evaluation report, the evaluator concluded that based on the student's weaknesses in expressive vocabulary and her difficulty in following directions and interacting with peers, the student would benefit from group speech-language services to improve her overall pragmatic skills with her peers (Dist. Ex. 6 at p. 2). The school psychologist further stated that she did not feel it would be educationally beneficial for the student to have individual speech-language therapy with an adult, when the student was having difficulty with pragmatic skills and "you practice them with your peers" (Tr. p. 114).<sup>13</sup>

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<sup>12</sup> Although this exhibit is undated, the exhibit disclosure list indicated that this exhibit was dated November 23, 2015, which appears to be a facsimile transmission date (Dist. Ex. 7).

<sup>13</sup> Although the director opined that social thinking and literacy skills, and social/emotional learning should be done in a one-on-one setting; he also stated that he felt that "ultimately in combination with one-on-one, group sessions would eventually be a good idea for the generalization of skills" (Tr. pp. 153-55). As noted above, the director did not attend the November 2015 CSE meeting, nor does the hearing record show that he otherwise

Therefore, a review of the hearing record reveals that the November 2015 IESP's recommendation of counseling and speech-language therapy in a group setting was appropriate.

### **C. Pendency**

Finally, the parent requests that the IHO's interim order on pendency continue in effect during "the pendency of the within appeal and any appeals of the decision of the SRO." The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]).

Pendency is available for the duration of a proceeding. Accordingly, as there is no dispute regarding the student's pendency placement, no additional relief with respect to pendency can be given. As a matter of law, the student's pendency entitlement arose as of the date of the parent's due process complaint notice and, if the parent appeals from this decision, the student will continue to be entitled to receive stay-put services during the pendency of any judicial proceeding (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455-56 [2d Cir. 2015]).

### **VII. Conclusion**

In this case, the evidence in the hearing record supports the IHO's determination that the November 2015 CSE designed an appropriate IESP for the student's 2015-16 school year.

I have considered the parties' remaining contentions and find them without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 10, 2016**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**

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presented this opinion to the CSE prior to or at the time of the meeting (see Dist. Exs. 2 at p. 13; 8).