



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-020

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.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2018-19 school year were appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA), namely 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 §§ 3602-c; 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

related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions governing dual enrollment programming is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (Educ. Law § 4404[1]; see 20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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

For the 2017-18 school year, the student was attending a nonpublic preschool program (Tr. pp. 26-27; Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at p. 1). During this time, the student was receiving special education services including five hours per week of individual special education itinerant teacher (SEIT) services, two 30-minute sessions of counseling, and three 30-minute sessions of speech-language therapy at the nonpublic school (NPS) (Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at p.1).

A CSE convened on April 10, 2018 for the student's "turning five" meeting and to develop an IESP for the 2018-19 school year to be implemented at the student's NPS (Dist. Ex. 2 at pp. 1, 10, 12; see Tr. p. 30). Finding the student eligible for special education as a student with a speech or language impairment, the April 2018 CSE recommended the related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group (Dist. Ex. 2 at pp. 1, 10).¹ In addition, the CSE identified 28 management needs of the student including that she required modeling, repetition, checks for understanding, graphic organizers, preferential seating, praise, prompts, visual aids, manipulatives, and an "incentive system" (id. at p. 5). The April 2018 CSE recommended seven annual goals for the student to achieve during the ten-month school year in the areas of social/emotional and communication skills (id. at pp. 6-9; see Tr. p. 53).

By prior written notice dated April 16, 2018, the district summarized the recommendations set forth on the April 10, 2018 IESP and indicated the CSE relied on a February 5, 2018 classroom observation and a March 12, 2018 progress report in making its recommendation (Dist. Ex. 3 at p. 1). A Committee on Preschool Special Education (CPSE) convened on April 30, 2018 and recommended that, for the remainder of the 12-month 2017-18 school year, the student receive 2:1 direct SEIT services for five hours per week along with the related services of one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group (2:1) speech-language therapy, and two 30-minute sessions per week of individual counseling (Parent Ex. B at pp. 1, 12, 13).

A. Due Process Complaint Notice

By due process complaint notice dated September 7, 2018, the parent alleged that the student required SEIT services to address cognitive and social/emotional and behavioral delays (Parent Ex. A at pp. 2-3). The parent also contended that the student required 12-month school year services to prevent substantial regression during school breaks (id. at p. 3). The parent alleged that the April 10, 2018 IESP developed by the CSE for the 2018-19 school year was not appropriate for the student because it failed to provide for SEIT or 12-month school year services (id.). For relief, the parent requested direct continuation of the services set forth on the April 30, 2018 IESP developed by the CPSE (id. at p. 2).

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (34 CFR 300.8[c]; 8 NYCRR 200.1[zz][11]).

B. Impartial Hearing Officer Decision

An IHO was appointed to hear the matter on September 24, 2018 and a hearing on the issue of the student's pendency ("stay put") placement was held on September 27, 2018 (Tr. pp. 1-7; IHO Exs. I at p. 1; II at pp. 1, 3). By interim decision dated September 27, 2018, the IHO determined that the student's pendency placement consisted of direct, 2:1 special education teacher support services (SETSS) for five hours per week, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of group (2:1) speech-language therapy, and two 30-minute sessions of individual counseling, as set forth on the April 30, 2018 CPSE IEP (IHO Ex. II at pp. 5-6).

A prehearing conference was held on October 22, 2018 (Tr. pp. 8-14). The parties continued with the impartial hearing on November 20, 2018, which concluded on January 3, 2019 after two additional days of proceedings (Tr. pp. 15-126). In a decision dated February 1, 2019, the IHO found that the district offered the student a FAPE by providing personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction (IHO Decision at pp. 10, 14, 16). Specifically, the IHO found that the April 10, 2018 IESP offered an appropriate level of services to address the student's needs (*id.* at p. 14). In so finding, the IHO stated that the April 10, 2018 IESP correctly identified the student's areas of need and offered services to address each need (*id.*). The IHO also determined that no evidence was presented to the CSE to substantiate the parent's position that the student demonstrated a likelihood of substantial regression and, therefore, required 12-month services (*id.* at 11). With respect to the parent's contention that the student required SEIT services, the IHO noted that the SEIT report upon which the parent relied was not provided to the district until after the April 10, 2018 CSE meeting and, further, that there was "no direct evidence" to support the contention that the student's classroom teacher and assistants were unable to implement the IESP and support the student's special education needs (*id.* at pp. 14-16). Based on these determinations, the IHO found that the district offered the student appropriate services through the IESP (*id.* at p. 16).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO shifted the burden of proof to the parent to demonstrate that the student required SEIT and 12-month services. The parent also argues that the IESP could not be implemented without a SEIT in the classroom and that the IHO's findings to the contrary were against the weight of the evidence in the hearing record. The parent also asserts that the IHO erred by finding that the IESP offered the student an appropriate level of services and that the student was provided personalized instruction with sufficient support services to permit her to benefit educationally from that instruction. Next, the parent contends that the IHO erred by finding that there was no evidence to support the need for 12-month services. As relief, the parent requests a direct continuation of the student's preschool IESP, a finding that the district failed to offer the student a FAPE for the 2018-19 school year, nullification of the student's IESP developed by the CSE for the 2018-19 school year, and reversal of all of the IHO's individual findings, or, in the alternative, a remand of the matter for a new impartial hearing.

In an answer, the district responds with admissions and denials and argues that the IHO's decision should be upheld in its entirety. The district contends that the hearing record demonstrated that the student was provided a substantively and procedurally sound educational

program on an equitable basis as if she had been provided a FAPE. The district further argues that the April 10, 2018 IESP was designed to address the student's individual needs and to enable her to make academic progress. The district asserts that the IHO correctly found the discontinuation of SEIT services and 12-month services was appropriate. The district further argues that the parent's claim that the IHO improperly shifted the burden of proof to the parent is without merit and that substantial evidence in the hearing record supported the district's recommendation.

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]).

However, under State law, parents of a New York State resident student with a disability who is placed in a nonpublic school and who seeks to obtain educational "services" for his or her child may file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).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.).³ Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendations of the

² State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

³ State guidance explains 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," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance 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.).

CSE pursuant to the impartial hearing and State-level review provisions of Education Law § 4404 (id.).

VI. Discussion

A. Preliminary Matters - Burden of Proof

The parent claims that the IHO improperly shifted the burden of proof. Specifically, the parent asserts the IHO incorrectly determined that it was her burden to prove that the student needed SEIT and 12-month services. The parent asserts that it was the district's burden to prove that its recommendation was appropriate.

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]).⁴

An examination of the IHO decision reveals that the IHO weighed the evidence presented at the impartial hearing and resolved the disputed issues, while setting forth applicable legal standards (IHO Decision at pp. 3-16). 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.

The parent alleges that the IHO's determinations that the hearing record did not contain any evidence to support the parent's position represented the IHO's misapplication of the burden of proof. The IHO summarized all of the testimony and cited to most of the exhibits in the hearing record. Although the parent accurately quotes the IHO's opinion where he noted the lack of evidence to support the parent's contentions, this does not support a finding that the IHO shifted the burden to the parent. Rather, a fair reading of the IHO's decision is that the available evidence in the hearing record led the IHO to find that the IESP adequately addressed the student's needs and that there was no contrary evidence that would rebut that conclusion (i.e., evidence that the student required the specific services preferred by the parent); this did not represent a shift of the burden of persuasion to the parent to demonstrate the IESP's substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 ["[T]he Department bears the burden of establishing the validity of the IEP"]). However, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was 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

⁴ 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).

Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, concur with the IHO's determinations (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. April 10, 2018 IESP

In this case, although the sufficiency of the evaluative information available to the April 10, 2018 CSE and the description of the student's present levels of performance in the resultant IESP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—the appropriateness of the recommendations set forth in the April 10, 2018 IESP.

A December 2017 SEIT progress report indicated that, according to teacher report, observations, and the results of a checklist, the student's cognitive score placed her "below age-matched peers," although the special education teacher reported that the student had "made strides in her cognitive skills" (Dist. Ex. 6 at p. 1). The student reportedly was unable to "remain on task when distractions [we]re present" or "complete tasks without prompting" and needed "constant refocusing and redirection" (id.). The student exhibited "self-directed and impulsive behavior," wandered around the classroom if not redirected, did not "always follow classroom rules or routines," and had difficulty with "social and emotional context cues" (id.). The student was able to request objects, answer simple "WH" questions, use plurals, label a variety of common objects, and "follow visual two step directions with prompting" (id.). According to the report, the student appeared to be happy to go to school and enjoyed imaginative play and participating in art activities (id.). The report described the student's then-current annual goals and short-term objectives, which were designed to improve her: understanding of age appropriate social skills, play skills, and ability to engage with the counselor during sessions; social communication, expressive, and receptive language skills; speech intelligibility and articulation skills; word recall skills; and math skills (id. at pp. 2-4). Overall, the special education teacher reported that the student had made "significant progress" but had not yet met all her goals (id. at p. 4). The SEIT progress report included a recommendation that the student "continue to receive special education services" due to her: delays in "social-emotional and cognitive domains"; inability to remain focused and seated during circle time; difficulty following directions, rules, and routines; need for redirection; and failure to meet all her goals (id.).

Review of the January 2018 classroom observation report shows that information about the student's academic abilities was incorporated into the April 10, 2018 IESP (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 4 at p. 1). According to the observation report and the April 10, 2018 IESP academic present levels of performance, the student exhibited the ability to state her age when asked, was doing well learning Hebrew characters, identified basic body parts, demonstrated understanding of stories read in class and ability to predict what would happen next, and showed understanding of concepts including tallest/biggest/more/same/last, opposite concepts such as in/out, big/small, and up/down, and spatial concepts such as next to, far, under, on, and near (Dist. Exs. 2 at p. 1; 4 at p. 1). The observation report and the IESP indicated that the student identified and counted numbers to 20, counted objects from 1 to 20, recognized and identified basic and primary colors, matched pictures items and identified what was "same" or "different," followed one step directions, and was working on following two or more related and unrelated directions (Dist. Exs. 2 at p. 1; 4 at p. 1). Additionally, the observation report and the IESP indicated that the

student recognized and identified primary shapes such as square, triangle, and star (Dist. Exs. 2 at p. 1; 4 at p. 1).

Turning to the student's social/emotional skills and needs, a December 2017 counseling progress report stated that the student presented with social/emotional, social interaction, and behavioral deficits, which needed to be addressed in order for the student to participate in school and social settings in an age-appropriate manner (Dist. Ex. 7 at p. 1). Review of the April 2018 IESP shows that information from the counseling report was incorporated into the present levels of social development (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 7 at pp. 1-2). Specifically, both documents reflected that the student had made progress in her ability to play with peers given prompting, identify her feelings after a conflict, and, with help from a therapist, understand when she needed to improve her behavior (Dist. Exs. 2 at p. 3; 7 at p. 1). In addition, the student demonstrated strength in her ability to respond to and greet others and to share toys (Dist. Exs. 2 at p. 3; 7 at p. 1). The student continued to exhibit "significant" weakness in social interaction skills, including difficulty with independently initiating activities with peers, difficulty communicating needs to peers, and shutting down or acting aggressively when upset (Dist. Exs. 2 at p. 3; 7 at p. 1). The student also continued to exhibit difficulties with asking for assistance, persevering through disappointment, obeying authority, and transitioning from activities (Dist. Exs. 2 at p. 3; 7 at p. 1). In her report, the counselor recommended that the student receive special education services to address her need for "adaptation to academic routine and behavior modifications" (Dist. Ex. 7 at p. 2). She further noted that, because the student had demonstrated "significant regression" in her behavior—specifically, a decrease in her ability to transition from activities and decreased ability to use "her words"—during a period of time when she was not receiving services, the student required 12-month services to prevent regression of skills (id.).

Additionally, information from the January 2018 classroom observation report reflected in the April 2018 IESP about the student's social/emotional skills indicated that, when frustrated, the student benefitted from support to learn how to self-regulate emotions and build frustration tolerance (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 4 at p. 2).⁵ At times, the student responded impulsively and did not express her feelings in an appropriate manner but benefitted from prompts to use strategies to self-regulate her feelings (Dist. Exs. 2 at p. 3; 4 at p. 2). The observation report and the IESP indicated that the student benefitted from role-playing with adults about how to "deal with moments of frustration in the classroom," was willing to accept correction and limits set by adults, and, with prompting and visual reminders, demonstrated understanding of classroom rules and routines and followed the rules as directed (Dist. Exs. 2 at p. 3; 4 at p. 2).

Review of information in the hearing record regarding the student's attention skills shows that the April 2018 IESP reflected the speech-language therapist's February 2018 report that indicated that the student's attention "limitations" affected her ability to focus on and carry out a

⁵ The January 2018 classroom observation and teacher interview were conducted in the student's classroom at her preschool by the district school psychologist who served as the district representative at the April 10, 2018 CSE meeting (Dist. Exs. 2 at p. 14; 4 at p. 1). According to the observation report, initially, the student was sitting on the carpet listening to a story read by the teacher with a classroom teaching assistant seated behind her (Dist. Ex. 4 at p. 1). The school psychologist reported that the student attended to the activity, responded appropriately, and followed directions (id.). She was also able to refocus her attention independently, transition appropriately, and complete a coloring activity (id.). During the observation, the student did not have a SEIT with her (Tr. p. 29).

task to completion, in particular those activities that required "more thinking and listening skills" (Dist. Exs. 2 at p. 3; 8 at p. 1). The student demonstrated difficulty remaining on task for short intervals, continuing to work after encountering difficulty, and attending to and completing simple tasks (Dist. Exs. 2 at p. 2; 8 at p. 2).

Regarding the student's communication skills and needs, according to a February 2018 speech-language progress report, the student exhibited articulation, receptive language, and expressive language delays (Dist. Ex. 8 at p. 1). Information from the report reflected in the April 2018 IESP indicated that the student had shown progress in her speech intelligibility and in her ability to ask questions, understand various concepts, and sequence and describe pictures (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at p. 1). Student strengths noted in the report and IESP included speaking in class or other situations, pronouncing words, asking questions, and saying what she was thinking (Dist. Exs. 2 at p. 1; 8 at p. 1). The student exhibited difficulty producing certain target sounds and articulating multisyllabic words that contained the target sound (Dist. Exs. 2 at pp. 1-2; 8 at p. 2). Receptively, the IESP indicated that the student demonstrated difficulty following multistep directions involving specific elements/conditions, understanding material from lessons, and answering questions (Dist. Ex. 2 at p. 2). Expressively, the progress report and IESP indicated that the student showed difficulty naming some common objects in various categories and describing pictures, objects, functions, and events (Dist. Exs. 2 at pp. 1-2; 8 at p. 2). The student also had "difficulty answering questions using key words, details and descriptions and relating events and experiences" (Dist. Exs. 2 at p. 2; 8 at p. 2). The student struggled with segmenting words, describing things to others, making inferences, categorizing, and using a varied vocabulary when speaking (Dist. Exs. 2 at p. 2; 8 at p. 2). Finally, in her report, the speech-language therapist recommended that the student receive 12-month services to "prevent regression of skills" (Dist. Ex. 8 at p. 2).

In the area of motor and daily living skills, the April 2018 IESP reflected information from the SEIT report and the classroom observation report, indicating that the student's skills in these areas were age appropriate (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 4 at p. 2, and Dist. Ex. 6 at p. 2).

1. Adequacy of Related Services

I now turn to the parent's assertion on appeal that the IHO erred in finding that the April 2018 IESP provided the student with "personalized instruction with sufficient support services" to enable the student to benefit from instruction without a recommendation for SEIT services.

The school psychologist who conducted the January 2018 classroom observation and participated at the April 10, 2018 CSE meeting as the district representative testified that the decision to classify the student with a speech or language impairment was based on a "pattern" of her inability to communicate her needs, understand, and follow directions (Tr. pp. 32-33; see Dist. Exs. 2 at p. 14; 4 at p. 2). The April 10, 2018 CSE recommended the related services of speech-language therapy to address her language delays and counseling to address her frustration (Tr. pp. 30, 33, 64). The school psychologist further testified that the April 10, 2018 CSE recommended counseling and speech-language therapy because the student needed to improve her ability to "communicate when she was upset" rather than shutting down and becoming frustrated, to "think before acting," to communicate when feeling overwhelmed, follow multistep directions, answer

abstract "higher order" questions, and describe object functions using context cues (Tr. pp. 34-35). When asked what service was recommended to help meet the student's receptive language needs identified in the IESP, the school psychologist confirmed that the speech-language therapist could, in collaboration with the classroom teacher, help the student understand material presented during lessons, and that the teacher had some responsibility to differentiate instruction to ensure all students understand the material (Tr. pp. 38-39, 46-47).

The school psychologist testified that SEIT services were a "preschool support," which covered "a little bit of all different types of services," including counseling, speech-language, and academic support in both the classroom or small groups (Tr. p. 33).⁶ For students transitioning to kindergarten, the school psychologist testified that the model was more "academic" than the one for preschool students and that students recommended for special education teacher services demonstrate "significant academic delay" such as being unable to identify colors, count to five, or understand simple directions (Tr. pp. 33-34, 40, 66). She further stated that, at the time the April 10, 2018 IESP was developed, the student did not demonstrate any academic needs and was exhibiting "pre-kindergarten" skills including the ability to state her age, count up to 20, and learn letters (Tr. pp. 34, 39-40, 66).

On appeal, the parent does not challenge the sufficiency of the April 10, 2018 IESP annual goals, and review of the April 10, 2018 IESP reveals seven annual goals in the areas of social/emotional, communication, and articulation skills (Dist. Ex. 2 at pp. 6-9). The student's IESP included a counseling goal with corresponding objectives to address her need to follow rules and routines, identify various emotional states, and to give reasons for emotional states (*id.* at p. 6). To address the student's needs in the area of social communication, the IESP recommended a counseling goal and objectives for the student to initiate communication with peers, to spontaneously ask for help, and to take turns (*id.* at p. 7). In the area of self-regulation, the student's goal and objectives addressed her need to adapt to change and distraction without becoming aggressive, assess problems to determine alternative solutions, express frustrations verbally rather than physically, identify and verbalize accepted patterns of behavior in various situations, request clarification from the teacher to avoid conflict, and seek out help when under stress (*id.*). In the area of speech-language skills, the student's goal to improve her articulation would be met by increasing strength in her oral musculature, reducing developmental phonological process of liquid simplification, and reducing use of immature phonological processes (*id.* at pp. 7-8). The student's needs in the area of speech intelligibility were further addressed by objectives designed to improve her ability to discriminate target phonemes to eliminate liquid simplification and syllable reduction and to produce target phonemes in isolation, syllables, words, phrases, and sentences (*id.* at p. 8). In order to address the student's needs in the area of receptive language, the student's objectives included working on following one and two step verbal directives, which include prepositions and modifiers, indicating comprehension of quantitative concepts and opposites, sorting or pointing to

⁶ State regulation describes that SEIT services "shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]; "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>).

objects and images by categories, function shapes, colors, etc., and comprehending expanded sentences (*id.*). Finally, the student's expressive language skills were to be addressed by objectives targeting her ability to answer wh-/how questions, expand her length of utterances, name categories, label pictured objects, use various nouns, verbs, and modifiers, use possessives and plurals, and use subjective, objective, and possessive pronouns (*id.* at p. 9). The school psychologist testified that the student's IESP annual goals would be addressed primarily by the speech-language therapist and counselor providing the related services (Tr. pp. 42-43, 50-51). As stated previously, the April 10, 2018 IESP provided that the student would receive two sessions per week of individual and one session per week of group speech-language therapy, and one weekly session each of individual and group counseling (Dist. Ex. 2 at p. 10). The April 10, 2018 IESP does not contain any academic annual goals or objectives (*id.* at pp. 6-9).

To address the student's attention needs, the April 2018 IESP provided management strategies including repetition, checks for understanding, preferential seating, praise for work completion, direct instruction to the student regarding asking for help, and instructions repeated/rephrased, rewards for on-task behavior, use of a timer to self-monitor on-task behavior, physical breaks, and prompts to return to task (Dist. Ex. 2 at p. 5). According to the school psychologist, addressing the student's loss of focus in the classroom using cues, prompts, breaks, and positive reinforcement was something that the "classroom teacher c[ould] manage" rather than a SEIT (Tr. p. 46).⁷

Based on the foregoing, review of the evidence in the hearing record regarding the student's needs at the time of the April 2018 CSE meeting supports the IHO's finding that the April 2018 IESP recommendations for speech-language therapy and counseling, in conjunction with management strategies, many of which related to the student's social/emotional and communication needs, were appropriate. 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. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 [1982]).

⁷ The hearing record included testimony from a special education teacher who, since October 2018, had been providing the student with five hours per week of individual instruction in the student's classroom (Tr. pp. 76-77, 94). The special education teacher's testimony generally reflected that she was working on the student's counseling and speech-language goals in the classroom and, although she opined that the student's goals could not be met solely by services provided outside of the classroom, that opinion was not available to the April 10, 2018 CSE and, therefore, may not be relied upon to assess the CSE's recommendations (Tr. pp. 85-91, 94-95; 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]). Additionally, the special education teacher acknowledged that the student received counseling and speech-language therapy to address her needs and that, when the special education teacher was not in the classroom, the classroom teacher was able to help the student with her "issues," albeit "not as much" as when the special education teacher was present (Tr. pp. 89-90, 95).

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 v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]).⁸ 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).

2. Adequacy of 10-month Services

The parent next alleges that the IHO erred in finding the April 10, 2018 CSE's recommendation for a 10-month school year program appropriate in light of evidence that the student was at risk for substantial regression and, as a result, required 12-month services.

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]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a 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]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf>).⁹

Here, the student was eligible for special education through the CPSE during July and August 2018 as State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school" (Educ. Law § 4410[1][i]; see Educ. Law § 3202[1]; 8 NYCRR 200.1[mm][2]). Consistent with this, the April 30, 2018 CPSE recommended summer services for the student for July and August 2018 (Parent Ex. B at pp. 1, 12, 13). The parent has not challenged the appropriateness of the services recommended in the April 30, 2018 CPSE IEP (see generally Parent Ex. A). Further, according to the April 10, 2018 IEP, the CSE was due to conduct the student's annual review on or before April 11, 2019, prior to the summer months of the 2019-20 school year (Dist. Ex. 2 at p.

⁸ 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]).

⁹ District courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *15-*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).

1).¹⁰ Likewise, the district school psychologist testified that the student's need for services during the 2019 summer would be considered at a CSE meeting for the development of the 2019-20 IESP (Tr. pp. 53-54). Thus, putting aside a discussion of whether the evidence in the hearing record reflected the student's need for 12-month services, the April 10, 2018 CSE was not tasked with developing a program for the student that would encompass the summer months of either the 2018-19 or the 2019-20 school year and, as such, the parent's argument that the district failed to offer the student equitable services based on the CSE's failure to recommend 12-month services for the student is without merit.

VII. Conclusion

In this case, the evidence in the hearing record supports the IHO's determination that the April 2018 CSE designed an appropriate IESP for the student's 2018-19 school year.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 April 12, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER

¹⁰ In New York, the school year begins on July 1 (Educ. Law § 2[15]).