



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-029

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

### **Appearances:**

Gulkowitz Berger, LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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 denied her request to have the respondent (the district) provide home-based special education itinerant teacher (SEIT) services to her son in his nonpublic school (NPS) for the 2017-18 and 2018-19 school years. The appeal must be sustained.

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

When a student who resides in New York is eligible for special education services and attends a nonpublic school located within the State, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) upon the written request of the parent under what is commonly referred to as the State's 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**

The hearing record in this proceeding is not extensive, as the student's kindergarten (2017-18) and first grade (2018-19) school years are the subject of this appeal. The student began attending a preschool program within an NPS as early as January 2016, and continued at the NPS's

school-aged program through the 2018-19 school year, his chronological first grade year (Parent Exs. A at p. 2; B at p. 1; Dist. Exs. 1A at p. 1; 2A at pp. 1, 9; 1; 3 at p. 5; 4 at p. 2; 5 at p. 1).<sup>1, 2</sup>

A January 2016 home language survey completed by the parent indicated that "most of the time" the student used English with family and friends (Dist. Ex. 1). In February 2016, at the parent's request, a psychological evaluation was conducted in the student's classroom to assess the student's expressive language and sensory development (Dist. Ex. 2 at p. 1). Delays in the student's expressive language prompted a speech-language evaluation and an occupational therapy (OT) evaluation was also recommended to assess his sensory and fine motor development (id. at p. 5).

A committee on preschool special education (CPSE) convened in December 2016 to develop an IEP for the student (Parent Ex. B). Finding the student eligible for special education and related services as a preschool student with a disability, the December 2016 CPSE recommended two hours daily of special education itinerant teacher (SEIT) services in a group of two, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id. at pp. 1, 21).<sup>3</sup> The December 2016 IEP indicated that the student was attending the NPS (id. at p. 1).

The school psychologist testified that at the time the student "aged out of preschool" ... an IEP was developed for the student which provided for integrated co-teaching (ICT) services, OT, and speech-language therapy (Tr. pp. 44-45; see Tr. pp. 8-9, 11-12). At some point after the development of that IEP, the parent requested an IESP as the student was going to remain in the NPS setting (Tr. p. 44; Dist. Ex. 4 at p. 2).

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<sup>1</sup> The student is parentally placed at the NPS, and the parent is not seeking tuition at public expense for the placement.

<sup>2</sup> The district's exhibits admitted into evidence during the December 2018 hearing date included a functional behavioral assessment (FBA) and an IESP, both dated June 1, 2018, which were labeled as district exhibits 1 and 2, respectively (Tr. pp. 37-38). These were the only two exhibits specifically referenced as being admitted into evidence during the hearing; however, a total of eight district exhibits appear to have been accepted into evidence (see Tr. pp. 37-38, 141-46). The district initially provided four district exhibits with the hearing record and later, in its answer, the district included the remaining exhibits as additional evidence. The Office of State Review requested clarification of the hearing record from the parties, reminding the district that it is obligated to "submit a signed certification with the record" certifying "that the record submitted is a true and complete copy of the hearing record before the impartial hearing officer" (8 NYCRR 279.9[a]). In response, the district sent an amended certification of the hearing record and an updated exhibit list, identifying eight district exhibits, of which, the original district exhibits 1 and 2 were not included. To avoid confusion, the new eight district exhibits identified in the district's updated exhibit list will be referenced as listed, and the original two district exhibits, the June 1, 2018 FBA and June 1, 2018 IESP, will be referred to as district exhibits 1A and 2A, respectively (see Dist. Exs. 1A; 2A; 1-8). Additionally, district exhibit 3, the November 2017 IESP, is marked as having six pages; however, the exhibit is seven pages because page five was not marked (Dist. Ex. 3). For clarity, page citations for district exhibit 3 refer to each page of the exhibit sequentially from page one through page seven instead of the page number marked on the exhibit.

<sup>3</sup> The continuum of services for preschool students with disabilities includes special education itinerant services, which are services provided by a certified special education teacher of an approved program on an itinerant basis (8 NYCRR200.16[i][3][ii]; see Educ. Law 4410[1][k]).

On November 9, 2017, a CSE convened to develop an IESP for the student for the 2017-18 school year (Dist. Ex. 3). Finding the student eligible for related services as a student with a speech or language impairment, the CSE recommended that the student receive two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (Dist. Exs. 3 at p. 4; 4 at p. 1).<sup>4</sup> The IESP noted that the student was in kindergarten and was parentally placed in an NPS (Dist. Ex. 3 at pp. 1, 5).

In May 2018 the district conducted a classroom observation and a hearing assessment of the student (Dist. Exs. 5; 6). In June 2018 the district conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) (Tr. p. 50; Dist. Exs. 1A; 2A at p. 2).

Also, in June 2018 a CSE convened to conduct the student's annual review and develop his IESP for the 2018-19 school year (Dist. Ex. 2A). Finding the student remained eligible for services as a student with a speech or language impairment, the CSE recommended the student for two 30-minute sessions per week of OT in a group, two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of counseling in a group, and the support of a full-time 1:1 behavior management paraprofessional (*id.* at pp. 1, 7).

During the hearing, the IHO and the advocates for the parties discussed a separate due process proceeding that was filed in February 2018 and withdrawn in July 2018; according to the advocates, the subject of that proceeding was either the IEP developed between the December 2016 IEP and the November 2017 IESP or the November 2017 IESP (*see* Tr. pp. 6-12). In a June 15, 2018 prior written notice, the district responded to a parental request for compensatory speech-language therapy, OT, and SEIT services (Dist. Ex. 8 at p. 1). According to the prior written notice, the district granted the request for compensatory speech-language therapy and OT but denied the request for SEIT services indicating that the student received SEIT services through pendency in a separate proceeding beginning in February 2018 (*id.*). It is not clear from the hearing record what the subject matter of the other proceeding was or whether the other proceeding is still pending.

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

In a due process complaint notice dated September 15, 2018, the parent requested an impartial hearing (Parent Ex. A at p. 2). The parent asserted that the November 2017 CSE removed the recommendation for 20 hours per week of instruction by a SEIT, which the parent asserted had been included in the student's December 2016 IEP, without providing any appropriate alternatives that would address the student's learning and auditory deficits (*id.*).<sup>5</sup> The parent also alleged that although a paraprofessional was authorized, "the assistance with behavioral modification was not

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<sup>4</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute in this appeal (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

<sup>5</sup> There are multiple examples in the hearing record where the parties or IHO used the terms IEP and IESP interchangeably; the correct document title will be referenced regardless of how it was referred to by the parties or the IHO.

provided for" (*id.*). The parent requested a pendency hearing and ultimately, the reinstatement of the services provided for in the student's December 2016 IEP (*id.*).

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

A pendency hearing was conducted on October 23, 2018 (Tr. pp. 1-18). In an interim decision dated October 31, 2018, the IHO determined that the student's pendency placement was based on the December 2016 IEP and ordered the district to provide the student with "Special Education Itinerant Teacher Services: 20x30x2" (Interim IHO Decision).<sup>6</sup>

A two-day impartial hearing on the merits convened on December 17, 2018 and concluded on January 22, 2019 (Tr. pp. 19-148). In a decision dated March 4, 2019, the IHO denied the parent's request for home-based SEIT services (IHO Decision at p. 7). In doing so, the IHO found that the evidence supported the conclusion that the student was "of average intelligence, and his school issue and probably at home was one of inappropriate behavior" (*id.*). The IHO also found that to address the student's behavior at school, the district conducted an FBA and provided for a 1:1 paraprofessional throughout the school day (*id.*).

The IHO also distinguished between SEIT services and the provision of special education teacher support services (SETSS) (IHO Decision at p. 6). The IHO found that while the parent requested SEIT services in the due process complaint notice, the student was six years old as of the start of the 2018-19 school year and SEIT services were for preschool students (*id.*). The IHO then assessed the parent's claim as a claim for SETSS, which the IHO determined were to aid a student "who is having difficulty in learning, in the English language school subjects" (*id.* at p. 7). The IHO further found that the student's preschool SEIT worked with the student on decreasing his inappropriate behaviors outside of the school environment (*id.*). The IHO also found that the hearing record did not demonstrate that the student received any instruction in the English language or any academic subject in English at the NPS (*id.* at pp. 6, 7).

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

The parent appeals, asserting that the IHO erred in denying her request for SEIT services for the student. Initially, the parent asserts that the IHO erred in relying on the district's recommendation for a 1:1 paraprofessional, as this would not serve to help change the student's behaviors, whereas a SEIT's services are designed to effect a change in behavior. The parent also asserts that the IHO erred by considering whether SETSS would be appropriate for the student, rather than a SEIT, when the parent never requested the former, only the latter. The parent also asserts that the IHO erred in relying on testimony that the student is taught Jewish history, and that SETSS cannot be used for this subject, noting that history is a common core subject and SETSS can be used to teach it. The parent also asserts that the IHO disregarded her testimony that the student receives instruction in the English language, as well as math. The parent requests that the

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<sup>6</sup> In making the request for pendency, the parent's advocate clarified that the December 2016 IEP recommended 10 hours per week of SEIT services and in response the IHO indicated he would write down whatever was on the IEP (Tr. pp. 12-13). There appeared to have been some confusion as the summary page of the IEP indicated a recommendation for "20x30:2 Direct" SEIT services (Parent Ex. B at p. 1), while the recommended special education programs and services section of the IEP indicated 10 hours per week (two hours per day) of SEIT services (*id.* at p. 21).

district be ordered to "fund the provider the Parent located for the full mandate of 10 hours per week of SEIT services to the Student for the 2018-19 school year at the rate that provider charges."

The district answers, generally denying the parent's assertions. The district asserts that the IHO's decision should be upheld on appeal.

## **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]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to 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]). "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>7</sup> Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review provisions of Education Law § 4404 (id.).

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<sup>7</sup> 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.).

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. November 2017 IESP**

In this case, although the sufficiency of the evaluative information available to the November 2017 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 November 2017 IESP.

Initially, the November 2017 IESP references scores from a February 2016 psychological evaluation report assessing the student's cognitive functioning and progress reports in the areas of OT and speech-language (Dist. Ex. 3 at pp. 1-2; 4 at p. 1).

The February 2016 psychological evaluation report stated that while the student presented as an expressive and verbal child, he also presented with articulation delays which rendered his speech very unclear and not easily understood by his mother, teachers, and peers (Dist. Ex. 2 at p. 1). According to his teacher and parent, the student lacked danger awareness and climbed on furniture, jumped off chairs, jumped on top of other students in an effort to play with them, and had tried to leave the classroom setting (id.). The February 2016 report further stated that the student presented with delays in his sensory development and that while he appeared to be retaining the information taught in class, the student constantly sought sensory stimulation and was unable to attend to tasks or to circle time and was always given a "job" (e.g., setting the table, serving lunch) by his teacher during structured learning sessions to keep him stimulated (id.). Reportedly the student could follow simple directives, albeit not consistently, and when given multi-step instructions the student tended to lose focus and only attended to the beginning part of the sentence (id.).

The evaluator, who conducted the February 2016 evaluation, observed that during testing the student remained cooperative and engaging, was eager to please and maintained eye contact (Dist. Ex. 2 at p. 1). Additionally, the evaluator found the student impulsive and quick to complete tasks and noted that the student remained distracted, shifted in his seat, stood up and walked around, went to look at what his classmates were doing, stood on his chair "clapping haphazardly," jumped off his chair, and ran around the room until redirected and thus prompting was required throughout for the successful completion of the testing material (id.). The evaluator stated that the student's articulation was unclear and noted distortions (e.g., "Broom=zzoom," "Guitar-tar," "Car=cah," "Bear=beah") stating that many of the student's responses were understood only within the context of the evaluation material (id. at pp. 1-2).

The parent served as the informant in an administration of the Vineland Adaptive Behavior Scales (Dist. Ex. 2 at p. 3). With respect to communication, the February 2016 report stated that the student presented with an appropriate knowledge of vocabulary, could express his wants and needs, and communicated with his family, teachers and peers yet his tendency to offer sound substitutions was increasing in frequency and interfered with the clarity of his communications (id. at p. 4). Regarding daily living skills and in addition to his limited danger awareness discussed

earlier, the student reportedly was able to clean-up his toys, wash his hands and face and brush his teeth with assistance; recognized the function of a clock; ate different textured foods; and could help with his dressing and undressing (id.). Within the socialization domain, the February 2016 report stated that while the student could engage in imaginative play and attend to his independent play sessions, enjoyed playing with cars and building blocks, and could listen to a story read by his parent, his interpersonal relationships were adversely affected by his sensory delays as he lacked the ability to engage in cooperative play sessions both at home and in school and lacked the attention skills necessary for cooperative and purposeful play sessions (id.). The student was described as an "'excitable child' who [wa]s impulsive in his actions" (id.). In addition, he was unable to communicate clearly with his peers, express his needs and wants within a cooperative play session, ask appropriately for a toy, or join others in reciprocal play (id.). The student's gross motor skills were scored as adequate, while fine motor delays were indicated as he colored with a light stroke, could not replicate simple designs including a straight line or make simple cuts with scissors, had difficulty completing projects with beads and pegs, and could not build a tower with five blocks (id.). In addition, the February 2016 report stated that sensory delays were demonstrated in the student's lack of spatial and danger awareness, his impulsivity, and his distractible nature (id.).

Formal testing administered to assess cognitive functioning revealed the student to be functioning in the average range in the areas of verbal comprehension and working memory and found the student functioning in the low average range on tasks measuring his visual motor perception and motor planning (Dist. Ex. 2 at p.p. 2. 3)<sup>8</sup>. The student's full-scale IQ, as measured by the Wechsler Preschool and Primary Scales of Intelligence - Fourth Edition, was in the average range (id. at p. 2).

In sum the evaluator stated that despite the student's "average scoring achieved on formal testing," he was not successfully functioning in the classroom and significant sensory delays impaired his ability to attend to tasks, focus on teacher directives, complete simple tasks, and interact with his peers (Dist. Ex. 2 at p. 5).

A review of the November 2017 IESP reveals the present levels of performance reflect the above evaluative findings (compare Dist. Ex. 2 at pp. 1-5, with Dist. Ex. 3 at pp. 1-2).

The November 2017 IESP indicated the CSE also had available speech-language therapy and OT progress reports, and while these reports were not included in the hearing record summaries of these progress reports were included in November 2017 IESP's present levels of performance (Dist. Ex. 3 at pp. 1-2). Regarding the student's speech-language progress, the November 2017 IESP indicated that delays were noted in the student's expressive/receptive language skills and that limited progress deterred the student from answering age-appropriate comprehension questions and that his then-current delays hindered his ability to identify "story problem/solution" (id. at p. 1). The IESP indicated that the student's attention limited his ability to follow instructions; complete schoolwork, chores, or other duties; organize tasks and activities; or listen to a short story without disruption (id.). In addition, the IESP noted that significant weaknesses in auditory listening skills affected the student's ability to follow and comprehend

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<sup>8</sup> The evaluator noted that the student had difficulty in grasping the blocks and that his impulsivity and poor attending skill were factors in his below average scoring (Dist. Ex. 2 at p. 3).

stories read aloud and his weakness in comprehension skills affected his ability to sequence events using pictures (id.). As per the clinician's observations, the student demonstrated deficits with following spoken directions, understanding new ideas, understanding facial expressions, answering questions asked by others, and answering as quickly as others, and the student used a variety of vocabulary words when talking that were not at age-appropriate levels (id.). In addition, the clinician noted concerns with respect to the student's articulation, specifically his ability to produce the sounds /r/, /th/, and /s/ (id.). The clinician further noted that the student's then-current articulation delays hindered his ability to pronounce words (id.).

The OT progress report summary included in the November 2017 IESP identified the student's areas of need which aligned with the stated concerns of the parent and teacher (Dist. Ex. 3 at p. 2). The identified areas of need included ADLs, fine motor skills, motor planning, pre-writing/handwriting, sensory processing, visual motor/perception, attention span, and gross motor and fine motor coordination (id.).

The November 2017 IESP also included parent input indicating that during the then-current school year the student was able to retain information and that his focusing had improved (Dist. Ex. 3 at p. 1). However, the parent also reported that the student continued to have a lot of energy in the classroom and did not consistently follow directions (id.).

The November 2017 conference checklist, which included hand written notes from the CSE meeting, included additional parent comments that the student had improved from the previous year, liked imaginative play, focused better on letters, was very verbal/expressive, scored high on IQ, had appropriate gross motor skills, and in general that there was no complaint from teachers in terms of his behavior (Dist. Ex. 4 at p. 2). The November 2017 checklist noted parent concerns regarding language (lisp, pronunciation), following directions, fine motor skills (cutting, pencil grip, tracing), and sensory issues and the parent's desire to see improvement in behavior, attention, and motor planning (id.). In summary, the November 2017 checklist indicated that the parent agreed with the recommendations and that there were no academic concerns (id.).

To address the student's needs the November 2017 CSE recommended the student receive two 30-minute sessions per week of individual speech-language therapy, as well as two 30-minute sessions per week of individual OT, and developed four annual goals related to increasing expressive language skills by answering age appropriate "wh" and "yes/no" questions; improving the ability to respond to increasingly complex auditory verbal information by following two-step directives; increasing media manipulation skills by using writing tools with a mature grip; and improving sensory processing skills by completing an obstacle course or table top activity (Dist. Ex. 3 at p. 4).

The parent argues that the previous mandate of SEIT services—provided for in the student's December 2016 IEP—was designed to effect change in the student's behavioral and emotional struggles and "would address and actually remedy" the student's issues. To the extent that the parent's argument could be construed to mean that the November 2017 IESP failed to address the student's behavioral needs in the classroom, the hearing record supports such an argument.

As detailed above, the evaluative information available to the November 2017 CSE described a student who was not successfully functioning in the classroom; who had limited danger awareness; and whose attentional deficits, impulsivity, and sensory delays adversely affected his

interpersonal relationships, his ability to attend to tasks and teacher directives, and his ability to complete simple tasks (Dist. Exs. 2 at pp. 1-5; 3 at pp. 1-2). While the November 2017 IESP included speech-language and OT services along with four annual goals addressing some of the student's language and sensory processing needs, the November 2017 IESP failed to provide any services, program accommodations or supports, or annual goals to address the student's significant behavioral and sensory deficits which by all reports adversely impacted his ability to benefit from instruction. Based on the above, I find that the November 2017 IESP did not appropriately address the student's behavioral deficits.

### **B. June 2018 IESP**

A CSE convened in June 2018 and developed a program for the student's 2018-19 school year (Dist. Ex. 2A). The June 2018 CSE recommended two 30-minute sessions per week of OT in a group, two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of counseling in a group, and a full-time 1:1 behavior management paraprofessional (*id.* at pp. 1, 7). The June 2018 IESP indicated that counseling was initiated since the student needed to learn safety awareness skills and body awareness skills and that the student required the assistance and supervision of a 1:1 behavior management paraprofessional to assist in the classroom and school environment (*id.* at p. 2).

Although the parent's due process complaint notice did not specifically challenge the June 2018 IESP, referring only to the November 2017 IESP, the due process complaint notice included an allegation that "[a]lthough a para was authorize[d], the assistance with behavioral modification was not provided for" (Parent Ex. A at p. 2). The IHO appears to have relied on the recommendation for a paraprofessional and the development of an FBA as support for the district's position that it developed a program to address the student's behaviors at school (*see* IHO Decision at p. 7). On appeal, the parent asserts that the IHO erred in finding the support of a paraprofessional to address the student's behaviors appropriate, contending "a paraprofessional would merely serve as a 'band-aid,' shielding the student's disruptions from his classmates" (Req. for Rev. ¶ 5). The parent continues to assert that SEIT services would "remedy" the student's behaviors (*id.*).

In addition to the information available from the November 2017 CSE meeting, the June 2018 CSE had a June 2018 FBA (completed the same day as the meeting), a May 2018 classroom observation, and teacher reports (*see* Dist. Exs. 1A; 2A at pp. 1-2).

In June 2018 the district conducted an FBA and used parent and staff interviews, information from the "IEP" present levels of performance, classroom observation and an OT progress report to identify and support the functional hypothesis (Dist. Ex. 1A at pp. 1-8).

The student's targeted problem behaviors were identified as poor safety awareness/body awareness, impulse control, and sensory processing skills (Dist. Ex. 1A at p. 1).<sup>9</sup> The June 2018 FBA identified skill/performance deficits and physical/health/medical issues as influencing factors that increased the likelihood of the targeted problem behaviors and noted that the student was an energetic and highly impulsive youngster who had a difficult time with self-regulating his

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<sup>9</sup> The FBA indicated that the student exhibited the following unsafe/impulsive behaviors: picking up and walking with a chair, leaving the classroom, climbing the windowsill, fidgeting in his seat, falling out of his chair, running, sliding down from the table to a chair, falling and bumping into other boys and furniture (Dist. Ex. 1A at p. 1).

emotions, presented with sensory processing difficulties, and was easily affected by any extraneous stimuli and required prompting from an adult to refocus (id. at pp. 3, 4).

The June 2018 FBA identified that the function of the targeted behaviors was to gain peer attention and sensory input and to avoid difficult or non-preferred tasks and that difficult tasks, non-preferred activities, and the need for sensory input and sensory overload were the antecedents or triggers (Dist. Ex. 1A at pp. 3, 4). Baseline data indicated that the student's behaviors occurred every five minutes with a duration of three to five minutes and interfered with the student's learning and that of the entire class (id. at p. 5).

The June 2018 FBA's functional hypothesis stated that when the student was overly excited by extraneous stimuli, expected to complete a difficult task, or asked to engage in a non-preferred activity the student became disruptive and demonstrated unsafe and impulsive behavior within unstructured and structured activities throughout the school day at an approximate rate/duration of every five minutes seeking sensory input and attention from peers and avoiding non-preferred activities and difficult tasks (Dist. Ex. 1A at pp. 6-7).

Behavioral supports previously provided included structure, consistent and firm limit setting, movement breaks, positive feedback, and prompting and redirection to facilitate age appropriate social and classroom behaviors (Dist. Ex. 1A at pp. 4, 7). To further support the student, the June 2018 FBA indicated that counseling was being initiated and a behavior management paraprofessional was being recommended to address the student's targeted behaviors (id. at p. 7).

The June 2018 FBA identified student interests and possible reinforcers as his imagination and creativity and his interest in building with blocks, magna tiles and Legos and noted that the student responded well to positive feedback but did not find negative attention or threats reinforcing or motivating (Dist. Ex. 1A at pp. 7-8).

In discussing replacement behaviors, the June 2018 FBA stated that with prompting, modeling, and supervision the student would increase his ability to regulate his behaviors by following teacher/adult directions and remaining in class, as well as adhering to class rules and routines (Dist. Ex. 1A at p. 8). Recommendations for teaching alternative skills or behaviors that would replace the targeted behaviors included modeling, prompting and redirection, positive reinforcement, and movement breaks (id. at p. 8).

Within the June 2018 IESP the student's current teacher reported that the student had a difficult time focusing in class; however, she also reported that he knew most of the Hebrew letters, had good phonemic awareness skills, and was able to identify the beginning letter sounds in words (Dist. Ex. 2A at p. 1). The student's teacher also reported that academically the student had the potential and motivation to learn but that his negative behaviors were impeding his learning (id. at p. 2). The teacher noted that the student was inattentive, impulsive and disruptive and could not concentrate on an activity for a needed period of time and could not follow directions or classroom rules (id.). Specifically, the teacher noted that the student would leave his seat without permission, often climbed on tables, jumped and ran around bumping into other children and furniture, and required constant supervision as his behavior may present a danger to himself or others (id.).

The June 2018 IESP included notes from a May 10, 2018 classroom observation that echoed the classroom teacher's report detailed above (Dist. Ex. 2A at p. 1). The notes indicated that the student was an "energetic" student who enjoyed learning but who had difficulty with self-regulation (id.). The observation notes described the student as impulsive, "extremely" loud, animated, silly, and in constant motion (id.). According to the notes, the student was "easily effected by any extraneous stimuli, and required prompting from an adult to refocus" (id.).

In addition to the teacher report and classroom observation, the June 2018 IESP also included the results of the February 2016 psychoeducational evaluation and the narrative from the speech progress report found in the prior November 2017 IESP (compare Dist. Ex. 2A at p. 1 with Dist. Ex. 3 at p. 1). The IESP noted that based on clinical observation the student demonstrated deficits in his ability to follow spoken directions, understand new ideas and facial expressions, respond to questions, and use age-appropriate vocabulary (Dist. Ex. 2A at p. 1). The IESP reported that at the time it was developed the student was not receiving speech-language therapy, but that the service was being recommended (id. at p. 2).

According to the June 2018 IESP, the student was a "very quick learner" and had good comprehension skills (Dist. Ex. 2A at p. 1). The June 2018 IESP stated that in order to assist the student in the classroom he would benefit from a behavior management paraprofessional to help him stay focused, remain in task, and follow the classroom routine (id. at p. 2). The IESP further stated that the student would benefit from preferential seating, use of drill and repetition, and a multisensory approach to learning to address his overall academic performance (id.).

With respect to the student's social emotional/development, the IESP again noted the student's lack of safety awareness and further indicated that he lacked body awareness and hurt others without intent (Dist. Ex. 2a at p. 2). The IESP described the student as sweet, charming, fun, and kind, and noted that everyone loved playing with him and the boys in the class liked to follow his behaviors (id.). According to the IESP, counseling was being initiated to assist the student with learning safety awareness and body awareness skills (id.). The IESP indicated that an FBA and BIP were developed for the student and that he needed positive feedback, redirection, prompting, structure, movement breaks, and consistent and firm limit setting (id.).

Turning to the student's motor development, the June 2018 IESP reflected the results of a May 2018 OT report which indicated that the student needed to develop age-appropriate skills related to tracing shapes and using appropriate pencil grasp and shifting paper with his non-dominant hand (scissor skills) (Dist. Ex. 2a at p. 2). The IESP indicated that the student had difficulty keeping his hands to himself, reducing excessive fidgeting and sitting for longer periods of time, and completing puzzles (id.). However, the IESP also indicated that the student's gross motor skills were age appropriate and that he demonstrated a strength in motor planning (id.). The IESP noted that the student had made minimal progress (in OT) "due to [the] recent start date" (id.). Both the parent and classroom teacher expressed concern about the student's sensory processing and the IESP stated that the student would benefit from the continuation of OT (id. at p. 3).

In summary, the IESP stated that the student presented with inattentive/impulsive behaviors, sensory processing difficulties, and poor safety and body awareness (Dist. Ex. 2a at p. 3). In addition, the student exhibited delays in conversational and pragmatic language skills (id.). According to the IESP, the student's deficits presented an obstacle to his ability to function

appropriately within the classroom setting; however, the IESP also indicated that with the support recommended in the IESP the student is able to access the general education curriculum (id.).

The school psychologist testified that because the student was having difficulty following the class structure, the June 2018 CSE recommended a 1:1 full-time paraprofessional to help eliminate the dangerous behaviors engaged in by the student (e.g., leaving the classroom, climbing on furniture) (Tr. p. 49). In addition, the June 2018 CSE recommended group counseling to help the student "see through those social-emotional concerns" (Tr. p. 49). The school psychologist stated that the district put together an FBA and a BIP for the student with the participants at the CSE meeting (Tr. p. 50). Lastly, the school psychologist stated that the June 2018 CSE recommended OT "for the sensory issues that he has" and speech-language therapy (Tr. pp. 49-50).

When questioned as to why the district did not recommend SEIT services, the school psychologist replied that a SEIT was a preschool service and further explained that the main concern for the student was his behavior, impulsivity, and distractibility and that it was his behaviors (e.g., safety awareness, ability to focus and attend to task) that were impacting his functioning in the classroom (Tr. pp. 45-46). In referencing the June 2018 CSE meeting the school psychologist stated that based on teacher input; the CSE decided that it was the student's behaviors, and not his academics, that were at issue (Tr. p. 46). The school psychologist stated that according to the teacher the student knew his Hebrew letters and sounds and that he had the ability to learn; however, the teacher also noted that the student was impulsive, could not sit still, and constantly engaged in behaviors that were unsafe and that were impacting his ability to focus and learn (id.). The school psychologist stated that the June 2018 CSE provided services to address those concerns (Tr. p. 45).

While the hearing record includes a copy of the FBA developed on June 1, 2018, the same day as the June 2018 CSE meeting, the hearing record does not include a copy of the BIP referenced in the June 2018 IESP (Dist. Ex. 2A at p. 2; see Dist. Ex. 1A). The student's June 2018 IESP indicated that a BIP had been developed for the student (Dist. Ex. 2A at p. 2) and the development of a BIP is referenced in the hearing transcript (Tr. pp. 25, 50), however, a copy of the BIP is not contained in the hearing record. Nevertheless, the student's IESP included goals that addressed the targeted problem behaviors identified in the June 2018 FBA, including a goal related to the student's ability to control impulsivity and develop self-control, complete required tasks without resistance or disruption, and respond appropriately to teacher instructions and interventions (Dist. Ex. 2A at p. 4). Additional goals targeted the student's ability to demonstrate improved social interaction with peers by waiting his turn and being cognizant of others' personal space; following classroom routines, transitioning in a timely manner, increasing attention to non-preferred tasks and lessons, completing assignments, remaining in his seat and in the classroom, and improved compliance with teacher instructions; and adjusting to classroom changes and following the schedule, accepting consequences of his actions, participating and showing respect, and following multi-step directions (id. at pp. 4-5). The IESP indicated that the student would complete these goals with the assistance of a 1:1 behavior management paraprofessional (id. at p. 4).

Another concern, other than the absence of the BIP from the hearing record, is that the June 2018 IESP indicated that an FBA and BIP were developed because of the student's need for the assistance of a 1:1 behavior management paraprofessional to assist him in the classroom/school

environment (Dist. Ex. 2A at p. 2). In January 2012, the Office of Special Education issued a field advisory letter entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," which provides that "One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan." ([see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf](http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf)).

Overall, the June 2018 CSE took steps to address the student's behavior in the classroom. The district conducted an FBA and developed a BIP, the CSE recommended counseling and the support of a 1:1 behavior management paraprofessional, and the June 2018 IESP included goals directed at the behaviors outlined in the FBA. However, as the student's BIP was not included in the hearing record, and the June 2018 IESP does not identify the primary staff member responsible for implementing the BIP, the hearing record does not include sufficient information to support finding that the recommendations included in the June 2018 IESP were sufficient to address the student's behavioral needs.

### **C. Relief**

Having determined that the November 2017 and June 2018 IESPs did not sufficiently address the student's behavioral needs in the classroom, the next step is determining what an appropriate form of relief might be. As relief, the parent specifically requests ten hours per week of SEIT services for the 2018-19 school year.

As an initial matter, the student is not eligible for SEIT services, which are defined by State law as services available only to preschool students with disabilities (Educ. Law § 4410[1][k]). State law defines SEIT services (the specific service requested by the parent) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; [see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory \[Oct. 2015\], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf](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](http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf)). In addition, SEIT services are "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] [emphasis added]). Thus, to the extent that the parent believes the student should continue to receive SEIT services in the 2018-19 school year, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for pre-school students to a school-aged student.

Nevertheless, the parent has already been awarded a substantial portion of the requested relief as the interim pendency decision awarded the student pendency services based off of the December 2016 IEP, which included ten hours per week of SEIT services (Interim IHO Decision; see Parent Ex. B at p. 21). The student's right to pendency automatically attached as of the filing of the due process complaint notice on September 15, 2018 ([see Parent Ex. A](#); [see also 20 U.S.C. § 1415\[j\]](#); Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Child's

Status During Proceedings, 71 Fed. Reg. 46710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). Accordingly, the student was entitled to receive ten hours per week of SEIT services from September 15, 2018 through the pendency of this proceeding. However, during the hearing the parent testified that the student was not receiving his recommended amount of SEIT services because they were trying to figure out the scheduling and further testified that the SEIT came to the house three times a week for about 30 to 40 minutes (Tr. pp. 81, 84).<sup>10</sup>

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at \*25, \*26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

While the hearing record indicates that the student did not receive all of the SEIT services to which he was entitled during the pendency of the proceeding, the hearing record is not fully developed as to what services the student received during the 2018-19 school year. The parent reported that during the 2018-19 school year—at the time of the hearing—the student was in a general education class and was receiving speech-language services and OT (Tr. pp. 77-78). The parent also testified that the student had a paraprofessional at school (Tr. p. 76). As the June 2018 IESP is the only document in the hearing record containing a recommendation for a 1:1 paraprofessional, and it did not include a recommendation for SEIT services, it appears the student was receiving a combination of services pursuant to the disputed June 2018 IESP and pursuant to pendency (see Dist. Ex. 2A at p. 7). Because of this combination of services, the student received both more support (in the form of the 1:1 paraprofessional) and less support (in not receiving all of the mandated hours of SEIT services) than he was entitled to under pendency. However, as the hearing record does not include information indicating that the provision of a 1:1 paraprofessional to the student made up for the diminished number of hours of SEIT services, the student should receive the SEIT services he missed during the pendency of the proceeding as a compensatory remedy (see E. Lyme, 790 F.3d at 456).

As the parent is already entitled to the relief she requested as part of pendency in this proceeding, no further relief will be considered for the portion of the 2018-19 school year that has

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<sup>10</sup> It is not uncommon for SEIT services to be provided to preschool children with a disability in the home because, as a purely practical matter, preschool students have not yet reached the age at which students are entitled to attend the public schools of a district (see Educ. Law § 3202[1]) and, therefore, are offered by the public agency wherever they can be most practically delivered to the child. It is also not uncommon for SEIT services to be provided on a 1:1 basis in the home as a purely practical matter because most parents would not be comfortable with the idea of allowing public agencies to enter their homes and set up group instructional programs involving other disabled children. However, the December 2016 IEP recommended that SEIT services be provided in the classroom (Parent Ex. B at p. 21), and the interim IHO decision on pendency is silent as to the location of the service (see Interim IHO Decision). Accordingly, it is unclear why the SEIT services were being provided in the student's home pursuant to pendency.

already passed during the pendency of this proceeding. However, as the November 2017 IESP did not include services to address the student's behavioral needs and the hearing record did not include sufficient information regarding the services recommended in the June 2018 IESP to establish that they were appropriate to meet the student's behavioral needs in the classroom, the student should also receive additional support in the classroom for the remainder of the 2018-19 school year. In addition, although the parent's request for 10 hours per week of SEIT services may be more services than the student requires considering the supports available in the June 2018 IEP, the provision of a special education teacher is a reasonable support to ensure that the student's BIP is implemented appropriately and for coordination and supervision of the student's paraprofessional.

With respect to the evidence in the hearing record regarding the SEIT services the student received, the student's special education teacher testified that she had been the student's SEIT since January 2018 and with the student in his home (Tr. p. 105). She identified the student's "challenges" as difficulty focusing and following directions, that he had a lot of impulsive behavior, he was "challenged in the social-emotional realm," and he had difficulty with play skills, some verbal and expressive challenges, fine motor difficulty, and some visual spatial challenges where the student was not aware of dangerous situations (Tr. pp. 105-06). The special education teacher further testified that the student's behaviors affected his academic progress (Tr. pp. 116-17). The special education teacher testified that she used various techniques with the student and that they helped the student (Tr. p. 108). Initially, the special education teacher testified that the parents indicated to her that the student showed improvement in focusing and academic work, then clarified that she received feedback from the parents indicating "improvements in some play skills with siblings" (Tr. pp. 109-10). As of the date of the hearing, the special education teacher had not spoken to anyone at the school about the student and although she read progress reports from the speech-language and OT providers, she did not communicate with them (Tr. p. 118-19). The lack of communication between the student's SEIT and the staff at the student's NPS and related service providers is particularly troubling (see 8 NYCRR 200.16[f][2] ["If the IEP includes special education itinerant services and one or more related services, the special education itinerant service provider shall be responsible for the coordination of such services"]).

Based on the above, an appropriate remedy going forward is to continue the student's receipt of support provided by a special education teacher, but to require that the support be provided in the student's classroom to address the student's in school behaviors. Accordingly, the student will be awarded 10 hours per week of consultant teacher services and such services shall be provided in the classroom unless otherwise agreed to by the parties.<sup>11</sup> In addition, at least two hours per week of the consultant teacher services shall be an indirect service, meaning "consultation provided by a certified special education teacher . . . to regular education teachers to assist them in

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<sup>11</sup> Consultant teacher services is the service on the continuum of services which most closely approximates the relief requested by the parent (see 8 NYCRR 200.1[m][1]; 200.6[d]; Application of the Bd. Of Educ., Appeal No. 14-109). Consultant teacher services are "for the purpose of providing direct and/or indirect services to students with disabilities who attend regular education classes . . . and/or to such students' regular education teachers" (8 NYCRR 200.6[d]). They are also "provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers" (8 NYCRR 200.1[m]). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6) and is not adequately defined in the hearing record in this matter (see Tr. pp. 46-48, 86-88).

adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability" (8 NYCRR 200.1[m][2]; see 200.16[i][3][ii]).

## **VII. Conclusion**

Based on the above, I find that the hearing record does not support finding that either the November 2017 IESP or the June 2018 IESP provided sufficient supports and accommodations to address the student's behavioral needs within the classroom and award services consistent with the above to make up for the lack of services.

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated March 4, 2019, is modified by reversing those portions which denied the parent's request for relief; and

**IT IS FURTHER ORDERED** that the student is awarded compensatory services pursuant to pendency in the amount of 10 hours per week of instruction by a special education teacher for the pendency of this proceeding consistent with the body of this decision; the award must account for any and all services already obtained and provided to the student during the 2018-19 school year, and the award must include the time period (based on a 10-month school year) from the filing of the due process complaint notice through the conclusion of the administrative and/or any further judicial proceedings consistent with the applicable statutory or regulatory provisions governing pendency.

**IT IS FURTHER ORDERED** that unless the parties otherwise agree, the district shall provide the student with 10 hours per week of consultant teacher services consistent with the body of this decision for the remainder of the 2018-19 school year with such services to be delivered to the student in the school environment.

**Dated:**           **Albany, New York**  
                          **May 17, 2019**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**