



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-070

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:

Thrive Advocacy, LLC, attorneys for petitioner, by Raquel Gordon, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2021-22 school year was appropriate. The appeal must be sustained in part.

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) (20 U.S.C. §§ 1400-1482), 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 § 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 is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

According to the parent, the student "presented with delayed acquisition of early development milestones for cognitive functioning, language development, social and emotional skills, fine motor and gross motor skills," leading to the parent referring the student for early intervention and special education services (Parent Ex. K ¶5). In preschool, the student received integrated co-teaching (ICT) services along with speech-language therapy and occupational therapy (OT) (*id.* at ¶6).

Prior to 2021, there is very scant information regarding any annual special education planning by the district's CSE. A CSE convened on July 9, 2013 and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student for the 2013-14 school year (third grade) (*see* Parent Ex. C).¹ The CSE recommended ten "periods" of group special education teacher support services (SETSS) per week, as well as, three 30-minute sessions of group speech-language therapy per week, three 30-minute sessions of individual OT per week, and one 30-minute session of group counseling per week (*id.* at p. 7). The IESP also indicated that the student was parentally placed in a nonpublic school (*id.* at p. 9).

Even though it appears that the CSE did not convene for a number of years thereafter, according to the parent, the student nevertheless received services pursuant to the July 2013 IESP from the 2013-14 school year through the 2020-21 school year (tenth grade); however, the student did not receive related services during the 2019-20 and 2020-21 school years and did not receive SETSS at one point due to the COVID-19 pandemic (Parent Ex. K ¶¶8, 9).

The district school psychologist called the parent and had a telephone conversation with her on March 3, 2021 (Dist. Ex. 4 at pp. 6-7). During that conversation, the parent asked the district school psychologist to delete her old phone number and she indicated she preferred to be contacted by email and provided an email address to the school psychologist (*id.* at p. 7). According to the district's log, the parent gave the district permission to send documents via email and permission for the district to conduct a psychoeducational evaluation of the student (*id.*).

On March 3, 2021, the district school psychologist reached out to the parent via the email address that the parent had provided (*see* Dist. Ex. 5). The district indicated that additional data was needed for the student's next CSE review (*id.*). The district requested the student's transcripts and progress reports from the student's providers, as well as consent to evaluate the student (*id.*). Further, the district requested the parent's phone number, indicating the number on file was not working (*id.*).

An email dated March 9, 2021, indicated that the parent sent the district a high school transcript dated February 24, 2021 and a teacher progress report (Parent Ex. J; *see* Parent Exs. F;

¹ The IESP references reports for SETSS, speech-language therapy, OT, and counseling (Parent Ex. C at pp. 1-2). Accordingly, the IESP indicates that the student received SETSS, speech-language therapy, OT, and counseling during the prior school year—second grade; however, it is not clear from the hearing record the frequency of those services or what services the student was received between preschool and second grade.

G).² Also, on March 12, 2021, the parent provided consent to have the student evaluated (Parent Ex. E at p. 1).³

On June 22, 2021, the CSE convened to review the student's progress and develop an IESP for the 2021-22 school year (see Parent Ex. D).^{4, 5} The June 2021 IESP noted that the parent was contacted for a psychoeducational evaluation, but that the parent missed nine appointments after "[o]utreach was provided by various independent agencies" (id. at p. 1).⁶ According to the IESP, the student was not receiving speech-language therapy, OT, or counseling and indicated that there were no progress reports for related services (id.). The CSE recommended that beginning September 7, 2021, the student receive five periods of group SETSS per week (id. at p. 7). Additionally, the student was recommended to receive one 40-minute session of individual counseling per week and two 40-minute sessions of group speech-language therapy per week (id.). The IESP noted that the student was parentally placed in a nonpublic school (id. at p. 9).

On July 20, 2021, the parent entered into an agreement with Special Edge regarding the provision of SETSS to the student during the 2021-22 school year (see Parent Ex. L). The agreement did not specify the number of hours of SETSS that the student would receive during the 2021-22 school year; however, as to a rate for the services, the agreement indicated that Special Edge provided SETSS "at enhanced market rates" (id.).⁷ Further, the agreement indicated that Special Edge would bill the district directly, but that the responsibility for payment ultimately rested with the parent if the district did not fully fund the service (id.).

² The progress report and transcript were entered into the hearing record by both the district and the parent (see Parent Exs. F, G; Dist. Exs. 2, 3). For clarity, only the parent exhibits will be cited to for the duplicative exhibits in the hearing record.

³ The consent form indicates that the parent was provided with prior written notice "explain[ing] the proposed reevaluation and assessment(s) that will be conducted"; however, the hearing record does not include a copy of a prior written notice and it is not referenced in the district's events log (Parent Ex. E at p. 1; see Dist. Ex. 4).

⁴ The hearing record is not clear as to precisely who attended the June 2021 CSE meeting (Tr. p. 53; see also Parent Ex. D at p. 10). The attendance sheet for the June 2021 CSE meeting indicates that the district school psychologist participated as the district representative, along with a special education teacher, the parent, and the student's at-home SETSS provider and the SETSS provider for English Language Arts (ELA) (Parent Ex. D at pp. 9-10). The district school psychologist testified that the CSE attendees also included the student's classroom teacher and the private school special education coordinator (Tr. pp. 52-54). In addition, the district school psychologist testified that the CSE included three of the student's SETSS providers; however, the June 2021 IESP specifically notes that the student received support from three separate SETSS providers and only two providers participated in the meeting (compare Tr. pp. 52-53, with Parent Ex. D at p. 1).

⁵ The 2020-21 school year was the student's 10th grade school year (Parent Ex. D at p. 1). As such, the 2021-22 school year was the student's 11th grade school year (see generally Parent Ex. H).

⁶ The parent testified that she was never contacted to schedule an appointment for a psychoeducational evaluation of the student (Tr. p. 172; Parent Ex. K at ¶10).

⁷ An affidavit from an employee from Special Edge indicated that the student received 10 hours of 1:1 SETSS per week from the agency (Parent Ex. M at ¶3).

A. Due Process Complaint Notice

By due process complaint notice dated September 1, 2021, the parent asserted that the IESP created by the CSE was procedurally and substantively deficient (Parent Ex. A at p. 1).⁸ The parent argued that the CSE failed to properly evaluate the student, failed to consider evaluations, failed to consider the full continuum of services, failed to provide prior written notice, and that the district prevented the parent "from fully participating in the creation of the educational program" (id.).⁹

The parent argued that the district failed to evaluate the student in all areas of weakness and did not provide the parent with sufficient notice of the June 2021 meeting to obtain all of the student's progress reports, which resulted in a failure to collect sufficient information upon which to base the CSE's decision on and, combined with a failure to incorporate the information provided by the student's teachers and providers, "resulted in the creation of a substantively inappropriate program" (id. at pp. 2-3). The parent further asserted that the district's failure to consider all of data regarding the student led to a failure to properly classify the student as a student with a learning disability (id. at p. 3).¹⁰

The parent asserted that the June 2021 CSE "arbitrarily and inappropriately reduced/refused to consider the appropriate special educational services necessary" for the student (Parent Ex. A at p. 2). The parent contended that the CSE changed the student's recommendation without reason or justification which resulted in an IESP that was "inappropriate and insufficient" to meet the student's needs (id.). Further, the parent argued that the CSE was biased against her as the district "was not sympathetic or understanding to the individual concerns of the parent and [the student's] needs" (id. at p. 3). In addition, she asserted that the CSE refused to discuss the student's progress toward her previous IESP goals and failed to discuss annual goals for the upcoming school year (id.). In addition, the parent argued that the CSE arbitrarily recommended that the student receive SETSS in a group, rather than as an individual service as recommended by the student's teachers and providers (id.).

The parent requested a finding that the student was not offered a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at p. 4). As relief, the parent sought an order mandating the district to implement 10 periods of group SETSS per week, three 30-minute sessions of speech-language therapy per week, three 30-minute sessions of OT per week, and one 30-minute session of counseling services per week (id.), a program that was very similar to, if not identical with the student's 2013 IESP programming. Additionally, the parent requested an order

⁸ The parent filed another due process complaint notice on October 2, 2020 regarding the 2020-21 school year; however, the IHO denied the request to consolidate that proceeding with this proceeding (Sept. 6, 2021 IHO Interim Decision at p. 2).

⁹ In the due process complaint notice, the parent requested pendency services and asserted that the July 2013 IESP should be the basis for the student's pendency program as it was the last agreed upon special education program for the student (Parent Ex. A at pp. 2, 4). The parties agreed on pendency for the 2021-22 school year (Tr. p. 5; see also Parent Ex. B).

¹⁰ According to the IESP in the hearing record, the CSE found that the student was eligible for special education as a student with a speech or language impairment (Parent Ex. D at p. 1).

mandating that the district fund an independent neuropsychological evaluation of the student (id.). Sometime before the impartial hearing convened, the district agreed to fund the requested independent neuropsychological evaluation (Tr. p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 25, 2022, which concluded on March 24, 2022 following three days of proceedings (Tr. pp. 1-240).¹¹ In a decision dated May 2, 2022, the IHO found that the district met its burden to show that it offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 6-7).¹²

The IHO held that it was "reasonable to assume [the] student's needs change[d] over the course of 8 years" and that "what was appropriate [for the student] in 2013 must be carefully reassessed in 2022" (IHO Decision at p. 6). The IHO noted that although the parent presented a letter from the independent neuropsychologist who had recently evaluated the student, the parent did not present the full evaluation report (id.).¹³ Even though the letter recommended 10 hours of SETSS per week, the IHO determined "that a program that more comprehensively addresses the Student's current challenges may be appropriate" (id.). Moreover, the IHO noted that the letter cited to reports from the SETSS providers who did not testify at the impartial hearing, and did not mention the provider who had worked with the student for the past three years (id.).

The IHO held that after reviewing the testimony and other evidence hearing record, based on the information before the CSE, "taken together with [the] District's multiple attempts (9) to obtain Parent assistance in gathering new data," and in addition, taking the student's progress and changing needs since 2013, the district met its burden of offering a FAPE to the student (IHO Decision at pp. 6-7). Lastly, the IHO noted that "the equitable consideration of [the] Parent's lack of response to [the district's] attempts to schedule evaluation" (id. at p. 7). The IHO denied the parent's request for relief (id.).

IV. Appeal for State-Level Review

The parent appeals. As part of her appeal, the parent contends that the IHO should have found that the district failed to provide the student with a FAPE because the district "did not ensure that the agencies it contracted with actually scheduled" the psychoeducational evaluation needed to create the student's IESP for the 2021-22 school year. The parent argues that the district failed in its duty to reevaluate the student because it had previously failed to conduct a reevaluation of the student in 2016 and 2019 and instead conducted the reevaluation in 2021. Next, the parent argues on appeal that, the district had a standard operating procedures manual indicating that the

¹¹ The independent neuropsychological evaluation was not completed before the impartial hearing concluded; however, a letter from the evaluator was entered into the hearing record (see Parent I).

¹² The IHO decision is not paginated; for the purposes of this decision, the pages will be cited consecutively with the cover sheet as page one (see IHO Decision at pp. 1-13).

¹³ The IHO noted that impartial hearing dates were rescheduled to accommodate the independent neuropsychological report (IHO Decision at p. 6).

district was required to ensure that all contacts or attempted contacts by an outside agency were documented in the district's events log. The parent contends that although the district school psychologist testified that she saw nine separate attempts to reach out to the parent, only one attempt is listed in the district's events log. The parent asserts that the alleged attempts and evidence regarding those attempts fall short of what is minimally required by district policy.

The parent further argues that the evidence in the hearing record shows that the student still requires 10 periods of SETSS per week in order to maintain progress, as the two teacher progress reports and the letter from the neuropsychologist support the recommendation that the student receive 10 periods per week of SETSS. Moreover, the parent asserts that the district did not present any evidence to support its recommendation for five hours of SETSS per week. According to the parent, the district school psychologist acknowledged that she used the annual goals from the student's SETSS providers but did not accept the providers' recommendation that the student still required 10 periods of SETSS per week. The parent contends that the district failed to explain why five periods of SETSS per week was appropriate for the student and that the June 2021 CSE made the SETSS recommendation with incomplete data.

Next, the parent argues that the IHO improperly "assumed" that the student's needs had changed significantly over the past eight years. The parent contends that just because the student got older, does not mean that her needs had changed and asserts that the IHO's assumption was not supported by the evidence in the hearing record. According to the parent, nothing in the hearing record demonstrated a need to change the student's SETSS. The parent contends that the testimony of the SETSS provider supports the continuation of 10 periods of SETSS per week for the student. Additionally, the parent asserts that, based on all of the evidence, there was no substantive grounds for a reduction in SETSS and "[t]hus, the assumption that [the student's] needs over eight years changed [wa]s improper."

Lastly, the parent contends that the IHO violated her right to due process by engaging in prejudicial conduct during the impartial hearing. The parent argues that the IHO was biased against her and pointed to several instances during the hearing to support her position. Specifically, the parent pointed to a statement by the IHO that the 2013 IESP was "irrelevant," and what the parent asserts was pressure by the IHO to proceed more quickly through her direct examination and that the IHO prevented her from clarifying the record through redirect examination. The parent asserts that the IHO's behavior violated the rules governing impartial hearings.

As relief, the parent requests the "nullification" of the June 2021 IESP and that a new CSE meeting be scheduled to review the new independent neuropsychological evaluation. Additionally, the parent requests implementation of the July 2013 IESP and that funding of the student's SETSS be ordered at the enhanced rate for the 2021-22 school year.

In its answer, the district argues that the IHO correctly determined that five periods of SETSS were appropriate for the 2021-22 school year as the IESP recommendations were based on the student's individual needs. Notably, the district asserts that the district school psychologist testified that the student was now more mature, "a reader," and capable of passing all of her classes. The district asserts that the parent's arguments that 10 periods of SETSS are required is "not convincing" and notes that two of the exhibits the parent points to support her assertion were not

before the June 2021 CSE. According to the district, those reports should have no bearing on the analysis of the appropriateness of the IESP.¹⁴ The district contends that the evidence that the student was performing below grade level is contradicted by the student's transcript. Further, the district asserts that the IHO credited the parent's own witness, who testified that the student had improved tremendously, in finding that the student's needs had changed and that she no longer required ten periods of SETSS per week. Moreover, the district argues that the parent's lack of cooperation prevented the district from conducting a psychoeducational evaluation and, accordingly, the CSE had no choice but to hold a meeting and make a recommendation without the benefit of the evaluation. The district argues that the CSE used the information available and made an appropriate recommendation.

The district further contends that the IHO correctly held that equitable considerations do not favor the parent. The district asserts that the evidence in the hearing record demonstrated that it made nine attempts to schedule an evaluation of the student and the parent failed to respond. According to the district, any argument to the contrary is wrong "on both the facts and the law." The district further asserts that the IHO credited the testimony of the district school psychologist regarding the attempts made to schedule the evaluation and that the IHO's credibility finding should be granted due deference. Moreover, the district asserts that even if a new evaluation would have been beneficial, the absence of the evaluation does not amount to a denial of FAPE. According to the district, the CSE had sufficient data to make its recommendations and the parent was a full participant in the meeting. Additionally, the district argues that if it is determined that the district denied the student a FAPE, no relief is warranted due to equitable considerations.

With respect to claims of IHO bias, the district contends that the IHO was impartial during the hearing and that she did not "in any manner or respect, engage in prejudicial conduct against the Parent." According to the district, the parent's assertions of specific instances of bias "in no way bear out their claim" as the IHO was merely exercising her discretion in attempting to move the proceedings along. The district asserts that the IHO was very accommodating to the parent during the impartial hearing.

Lastly, the district argues that the parent's request for relief was improper. The district contends that an order directing implementation of the 2013 IESP is not proper as an annual review must be conducted each year to assess the student's present levels of performance. Further, the district asserts that the request for nullification of the 2021 IESP, a new CSE meeting, and funding for SETSS at the enhanced rate were all raised for the first time in the request for review and, therefore, are not properly before the SRO. The district requests that the IHO decision be sustained and the parent's request for relief be denied in full.

The parents submit a reply to the district's answer reasserting some of the points raised in the parent's request for review regarding district error. In addition, the parent responds to the district's assertion that the request for relief was improper. According to the parent, if a finding is made that the July 2013 IESP was appropriate for the student, as requested, a finding that the June

¹⁴ The district argues that the SETSS report that was before the CSE was created by a provider who did not testify at the impartial hearing. The district also alleges that the SETSS provider "harbored bias in favor of recommending" more SETSS as she would have benefitted financially.

2021 IESP was inappropriate is a natural result. In addition, the parent asserts that holding a new CSE meeting is in line with the district's duty to hold an annual review for the student.

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 student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing 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]).¹⁵ "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.*).¹⁶ Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving

¹⁵ 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]).

¹⁶ 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](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.*).

special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. The parent in her request for review requests funding for the student's SETSS at an enhanced rate as well as nullification of the 2021 IESP and a new CSE meeting (Req. for Rev. at p. 10). The district in response asserts that the parent failed to raise these issues during the impartial hearing or in her due process complaint notice and as such, the requests should not be addressed on appeal (Answer at p. 10).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

With respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

Turning to the parent's due process complaint notice, she requested a finding that the district denied the student a FAPE for the 2021-22 school year, an order directing the district to implement 10 periods per week of SETSS, three 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of OT, and one 30-minute session per week of counseling, as well as an order directing the district to pay for a neuropsychological evaluation (Parent Ex. A at p. 4). Initially, although the parent did not explicitly request "nullification" of the June 2021 IESP in the due process complaint notice, the parent raised a number of allegations challenging the procedural and substantive appropriateness of the June 2021 IESP (see Parent Ex.

A) and there appears to be little difference between her request for "nullification" and her request for a finding that the IESP was not appropriate. However, as noted by the district, the parent did not request a new CSE meeting or an enhanced rate for SETSS in her due process complaint notice (id.).

While the request for a reconvene of the CSE is a matter that should have been known at the time of the due process complaint notice, the request for an enhanced rate requires further examination.¹⁷ A review of the hearing record shows that at the time of the due process complaint notice, the parent should have known that she could be found liable for an enhanced rate for the SETSS she obtained for the student during the 2021-22 school year and should have identified that relief in her due process complaint notice against the district. The parent signed an agreement with Special Edge on July 20, 2021 (Parent Ex. L at p. 2). The agreement explicitly stated that Special Edge charged "enhanced market rates" (id.). The agreement also noted that the parent may seek funding from the district for the services; however, it also provided that "the parent is contracting for these services with Special Edge, and as such, responsibility ultimately rests with the parents for payment in the event that Special Edge does not receive full payment from the [district] for these services" (id.). As such, the parent was aware that she needed to ask for an "enhanced market rate" for the SETSS provided by Special Edge at the time she filed the due process complaint notice, yet she did not raise it as a requested form of relief. Additionally, there was no development of this request for relief in the record during the impartial hearing—the only mention of an enhanced rate during the impartial hearing was when the parent's advocate noted that the dispute between the parties regarding the prior school year was a claim for funding at an enhanced rate (Tr. pp. 39-40). The fact that there had been a dispute between same parties over the same type of relief in another due process proceeding further emphasizes the fact that the parent should have known about the relief and should have identified it in the due process complaint notice in this proceeding. It was insufficient to raise an enhanced rate as an issue by briefly mentioning the term during an impartial hearing that was already underway. For much the same reason, the parent cannot now raise the issue for the first time on appeal and the claim for funding SETSS at an enhanced rate must be dismissed as outside the scope of the hearing.

2. IHO Bias and Conduct of Hearing

Here, the parent claims that the IHO was biased against the parent and specifically cited to three circumstances/instances during the impartial hearing to support her claim. First, the parent contends that the IHO's statement that the 2013 IESP was "irrelevant" indicated bias (Req. for Rev. at p. 9). Second, the parent argues that the IHO stating "oh, my god" twice during the impartial hearing when the parent's advocate was questioning a witness was a display of bias (id.). Lastly, the parent asserts that the IHO pressured the parent's advocate to move quickly through questioning in a manner that she did not do during the presentation of the district's case (id.).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-

¹⁷ Although the parent did not request a reconvene of the CSE in her due process complaint notice, at this point in time the CSE should have reconvened for an annual review of the student's program (see 20 U.S.C. 1414[d][4][A] [a district has an obligation to review the IEP of a student with a disability periodically and at least annually]).

066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (*id.*). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]).

A review of the parent's allegations does not support a finding that the IHO was biased against the parent. Initially, it is noted that although the IHO stated that she did not believe the 2013 IESP was "really relevant" she did not exclude the exhibit from evidence (Tr. pp. 24-26). Additionally, when the IHO explained that she did not imagine something that happened in 2013 would still be appropriate in 2022, even the parent's advocate agreed with the IHO "[i]n terms of appropriateness" (Tr. pp. 25-26). Accordingly, this is not a display of bias, but a circumstance in which the IHO was discussing with the parties whether evidence was relevant to the case and that is distinctly within the discretion of the IHO (see 8 NYCRR 200.5[j][3][xii][c]-[e]). Next, the parent contends that the statement of "oh my god" was a demonstration of bias. The hearing record shows that the IHO did make that exclamation twice during the impartial hearing (Tr. pp. 163-64).

While the language used by the IHO in this instance is a poor model of the patience, dignity, and courteousness expected of an IHO, her frustration it is not a demonstration of bias on the part of the IHO. A review of the context of the statement within the hearing record, reveals that the IHO made those comments after advising the parent's advocate that her line of questioning was not necessary since the information was in the witness' testimony by affidavit or in the contract between the parent and Special Edge (Tr. pp. 162-63).¹⁸ The IHO had also previously acknowledged a time constraint that were present that day of the hearing and it appears as though hearing then took double the allotted time and ran over by 30 minutes to an hour (Tr. pp. 117, 123-124, 239). IHO should have used better language to explain her frustration with the parent advocate's line of questioning; however, considering the context it is not evidence of bias, especially considering that despite the IHO's justified belief that the line of questioning was repetitive, the IHO still allowed the witness to respond to the advocate's questions (Tr. pp. 162-65).

Finally, an IHO has broad discretion to maintain control of the hearing process and the IHO's attempts to keep the hearing moving toward a timely conclusion in this case does not lead me to a finding of bias. The hearing record does not show that the IHO prevented the parent from putting on a case to support her claims or that she denied the parent's due process rights. The parent's disagreement with the conclusions reached by the IHO does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Overall, contrary to the parent's allegations, a review of the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her requests for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, the evidence in the hearing record does not lead me to the conclusion that the IHO exhibited bias against the parent or prevented her from developing the hearing record.

B. June 2021 IESP

On appeal the parent asserts that the IHO should have determined that the district failed to offer the student a FAPE because the district failed to schedule a psychoeducational reevaluation of the student and did not have "sufficient records" at the June 2021 CSE meeting resulting in a "defective" IESP. The district counters that the 2021 IESP was appropriate based on the information before the CSE. In order to make a determination regarding the substantive

¹⁸ The cost of the services being asked about was included in the witnesses' direct testimony by affidavit that was prepared at the time of the impartial hearing in March 2022 (see Tr. p. 163-64; Parent Ex. ¶¶3-5); however, the same information was not specified in the agreement the parent entered into with Special Edge in July 2021 (see Parent Ex. L).

appropriateness of the June 2021 IESP, a full review and analysis of the 2021 IESP and the information that was before the CSE must be conducted.¹⁹

1. Evaluative Information

As discussed in detail below, the hearing record shows that with the reports available to the June 2021 CSE together with input from the parent, classroom teacher, private school special education coordinator, and the student's SETSS providers, the June 2021 CSE had sufficient evaluative information to develop the June 2021 IESP. Notably, however, the discrepancies between the present levels of performance in the June 2021 IESP as compared to the information contained in the February 2021 teacher progress report and the March 2021 high school transcript demonstrate that while the June 2021 CSE had sufficient information regarding the student's performance, it was not adequately reflected in the student's June 2021 IESP to allow for the development of an appropriate program.²⁰

The hearing record shows that a CSE convened on June 22, 2021, to review the student's special education program and develop an IESP for the 2021-22 school year (Parent Ex. D at p. 1). While the CSE lacked the results of any recent formal assessment of the student, it had available a February 2021 teacher progress report and the student's March 2021 high school transcript (Tr. pp. 51-52). The teacher progress report, which was prepared by the student's SETSS provider for math and developed collaboratively by all of the student's SETSS providers, included scores from TerraNova testing and information on the student's academic performance, described her learning style, social/emotional skills, physical development, and management needs, and included goals to address her reading, writing, and math skills (Parent Exs. G; K at p. 5). The district school psychologist, who also served as the district representative at the June 2021 CSE meeting, asserted that the progress report and transcripts were used in developing the student's June 2021 IESP (Tr. pp. 51-52). The hearing record shows that in addition to the district school psychologist, the June 2021 CSE included two of the student's three SETSS providers, the private school special education coordinator, the student's classroom teacher, and the parent who provided input to develop the June 2021 IEP (Tr. pp. 51-54, 81-82, 195-96, 198-99; Dist. Ex. D at p. 10).²¹

¹⁹ The evidence in the hearing record demonstrates that the district failed to convene a CSE for the student from July 2013 to June 2021. However, the district's past failures are not at issue in this case and the district school psychologist's actions to obtain up-to-date evaluative information regarding the student in order to create an appropriate program for the student were reasonable actions, as any past failures should not prevent the CSE from convening to review the student's needs and to make a recommendation for an upcoming school year (see J.R. v. New York City Dep't of Educ., 748 Fed App'x 382, 386 [2d Cir. Sept. 27, 2018] [in examining a district's offer of a FAPE, each school year is treated separately]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]).

²⁰ As the CSE had sufficient information to make an appropriate recommendation, the failure to obtain a psychoeducational evaluation is not determinative in this case and there is no need to delve into the details as to which party was at fault for the failure of that evaluation to be conducted as part of the FAPE analysis.

²¹ The district school psychologist testified that the names of the student's classroom teacher and the special education coordinator from the private school were omitted from the June 2021 IESP attendance page due to a restriction on how many names could be added into the computer program, but the hearing record confirmed that both participated in the June 2021 CSE meeting (Tr. pp. 52-53, 195-96).

To establish the student's academic needs the June 2021 CSE sought teacher and parent input and reviewed the student's high school transcript and the February 2021 teacher progress report (Tr. pp. 51-52; Parent Ex. D at pp. 1-3; see Parent Exs. F; G).²² According to the district school psychologist, the student's speech-language and counseling needs were determined through conversation with the student's parent and teachers, and recommendations were made based on the information reviewed at the June 2021 CSE meeting (Tr. pp. 54-55).

The June 2021 IESP, for math, reported that the student had passed Algebra, was instructed in "pre-geometry," and included a geometry grade of "88," which was noted to be from the student's tenth grade transcript (Parent Ex. D at pp. 1-2). A review of the student's February 2021 transcript showed that the student had, in fact received a failing grade in "Algebra I-CC Modified" during the 2019-20 school year and had a grade of "79" in "Modified Geometry" in January 2021—not "88" as reported in the June 2021 IESP (Parent Ex. F at p. 1).²³

Further, the February 2021 teacher progress report described that the student was learning "modified" 10th grade geometry in a one-to-one setting and struggled with understanding visual concepts and had difficulty understanding information when it was explained (Parent Ex. G at p. 2). The student could not perform addition and subtraction with double digit numbers or multiplication and division of numbers using the nine times table with ease, she had difficulty understanding abstract math concepts, needed repetition and prompting to grasp new information, and needed individual prompting to complete algebra problems (id. at pp. 1-2). The teacher progress report described that with guided practice, prompts to use the correct order of operations, math strategies to support solving problems, and repetition and review, the student could solve basic math problems using addition, subtraction, multiplication, and division, basic algebraic problems to find x, graph a line, and was gradually coming up with her own answers (id. at p. 2). According to the report, the student's math grade equivalent was sixth grade (id.). The report also included results from administration of the TerraNova achievement test, which showed that the student obtained a math score of 1 (id. at p. 1).²⁴

Regarding the student's performance in reading, the June 2021 IESP reported that the student was instructed in a modified English language arts (ELA) class, had made progress in reading comprehension, was reading at a sixth-grade level, and had improved with decoding and

²² The March 2021 high school transcript shows the student's grades for January 2021 but does not include final June grades for any classes (Parent Ex. F).

²³ It appears as though the student's grades in geometry and global history were switched from the student's transcript as the transcript shows the student as having received an 88 in modified global history and a 79 in modified geometry, while the June 2021 IESP reports the student as achieving a grade of 79 in global history and 88 in geometry (compare Parent Ex. D at p. 2, with Parent Ex. F).

²⁴ The teacher progress report described TerraNova as "a series of standardized achievement tests used in the United States designed to assess K-12 student achievement in reading, language arts, mathematics, science, social studies, vocabulary, spelling, and other areas." The report also indicated that "[a] passing score is the Scaled Score of 45"; however, the report did not identify whether the reported scores for the student were a scaled score, raw score, or a method of reporting a percentile rank, such as a stanine, and as there were no further reported scores from the testing or a discussion of the student's scores in the hearing record, the reported scores on this testing are of limited value.

paraphrasing skills (Parent Ex. D at pp. 1-2). The June 2021 IESP noted that the student had a grade of "86" in ELA (id. at p. 1).²⁵

The February 2021 teacher progress report documented that the student was receiving ELA instruction in a one-to-one setting and was reading at a fifth-grade level (Parent Ex. G at pp. 1-2). The student was reported to have "tremendous difficulty" decoding unfamiliar words, understanding and defining vocabulary, answering reading comprehension questions, identifying the main point of a story, and analyzing characters in a story (id. at p. 2). The student used supports and strategies such as graphic organizers to help her understand the main point of a story, lists of vocabulary words to help with comprehension, and high interest reading material at her instructional level to increase motivation while reading (id.). With guided practice, one-to-one instruction, the use of graphic organizers, lists of vocabulary words, and individualized and targeted instruction on word attack and comprehension strategies, the student had made some progress with reading comprehension and decoding skills but needed SETSS support to decode and comprehend grade level text (id.). The February 2021 teacher progress report included a reading score of 4 from the TerraNova achievement testing (id. at p. 1).

As to the student's performance in writing, the June 2021 IESP noted that the student could come up with an idea and write two to three paragraphs and benefitted from using a graphic organizer (Parent Ex. D at p. 2). In contrast, the February 2021 teacher progress report described that the student struggled to organize her thoughts and ideas when writing, was unable to independently generate an idea, and her spelling and grammar skills were "far below" grade level expectations (Parent Ex. G at pp. 1, 3). According to the report, the student had difficulty with fine motor skills and tired after writing one paragraph (id. at p. 2). The teacher progress report described the strategies the student's SETSS provider used to help the student with writing, including discussing ideas and structure before writing an essay, using graphic organizers to organize and develop main ideas, and using a "grammar rules cheat sheet" to help the student self-monitor and write with fewer grammar mistakes (id. at p. 3). The teacher progress report noted that because the student had difficulty generalizing and retaining ideas she did not remember or generalize the support strategies she was taught to her next writing task (id.). Using the supports and strategies mentioned, the student had made progress in her writing, but continued support was recommended for the student to make progress toward grade level (id.).

Addressing the student's management needs, the June 2021 IESP noted that the student needed SETSS to provide "direct and modified instruction" to address her individual goals in ELA and math, speech-language therapy to increase receptive and expressive language skills that would "translate to her reading and writing skills," counseling to address her anxiety, and the additional supports of differentiated instruction, the use of organizers, direct instruction of study skills, praise and encouragement, and assignments broken down (Parent Ex. D at p. 3).

As described above, the student's needs according to the evaluative information available to the June 2021 CSE were significantly different from those conveyed in the June 2021 IEP. Although the district did not have the benefit of evaluative information via a psychoeducational

²⁵ The February 2021 transcript reflected that the student's January 2021 grade in "Modified English" was an 86 (Parent Ex. F at p.1).

evaluation, the district had up-to-date information regarding the student's needs from the student's SETSS providers and the student's teacher; however, the district did not reasonably utilize the information before it. Rather, the June 2021 CSE appeared to have selectively chosen only the information from the student's progress reports that indicated the student was doing well. Accordingly, a review of all the information before the June 2021 CSE does not describe the same student as was described by the IESP.

2. Recommendation of SETSS

Turning next to the June 2021 CSE's recommendations, while the June 2021 IESP provided that the student receive five periods of SETSS per week, two 40-minute sessions of speech-language therapy per week, and one 40-minute session of counseling per week, the February 2021 teacher progress report conveyed that due to the student's "very significant delays" she should continue to receive ten hours per week of SETSS, as well as three 30-minute sessions of speech-language therapy per week, three 30-minute sessions of OT per week, and one 30-minute session of counseling per week (compare Parent Ex. D at p. 7, with Parent Ex. G at p. 3).

In describing how the June 2021 CSE determined that five hours of SETSS was appropriate to meet the student's needs, the district school psychologist testified that the CSE recommended reducing the student's SETSS because ten periods was "a really restrictive . . . considerable amount of services" (Tr. p. 55). She indicated that the CSE reviewed the student's goals, transition plan, and what she was "working on at [the] time" and determined that because the student was more mature, was a reader, and was passing her classes her goals would "be best addressed by SETSS and speech and language therapy," adding that the student's transcript showed that she had passed algebra and was taking geometry, which she described as an advanced math class, without SETSS and was passing the class (Tr. pp. 55- 56). The district school psychologist asserted that the student no longer required such "an increased and restrictive . . . amount of hours" and stated that in the past the student was learning to read but was now performing on grade level, and could pass her tests independently and only needed support to maintain her progress (Tr. pp. 134-35). She maintained that the June 2021 CSE saw that the student's "ELA [wa]s average; geometry [wa]s average; global history [wa]s average" and determined that the student "was on par, but . . . ha[d] executive functioning or other challenges" and needed SETSS to work on "learning strategies," adding that "with that, we will achieve grade level performance, because she's at the grade level and will want to maintain" (Tr. p. 134-35). However, as described above, the hearing record shows that the student was struggling academically.

The February 2021 teacher progress report showed that the student struggled in math and needed repetition and one-on-one prompting to grasp new information (Parent Ex. G at pp. 1-2). Further, despite the district school psychologist's assertion that the student passed algebra, the February 2021 transcript shows that the student had received a failing grade in the class entitled "Algebra I-CC Modified" during the 2019-20 school year and had a grade of "79" in "Modified Geometry" instructed by a SETSS provider in a one-to-one setting (Parent Exs. F at p. 1; G at p. 2).

The hearing record is inconsistent regarding the student's performance in modified Global History with her grade reported in January 2021 as being an 88; however, notably, the June 2021 IESP noted that the student's teacher reported that she could not meet the expectations in her small

modified Global History class, she was unable to pass the tests, and "[s]he was asked to leave the class" (Parent Exs. D at p. 2; F at p. 1).

The district school psychologist testified that in determining the recommendation for five hours of SETSS for "ELA, we looked [at] [ninth] grade and [tenth] grade"; however, the hearing record shows that while the student had a grade of 86 in modified English in January 2021 (tenth grade), she had a failing grade in English in January 2020 (ninth grade) and her June 2020 grade was an "incomplete" (Tr. p. 56; Parent Ex. F at p.1). The student had difficulty with reading and writing, in that she struggled with decoding, reading comprehension, and literary elements like theme, irony, and main idea (Tr. pp. 183-84; Parent Ex. G at pp. 1-2). Her written work was at "about the 6th grade level" and while she could choose a topic and develop a topic sentence on her own, she struggled with structuring and organizing her work independently (Tr. p. 184; Parent Ex. G at p. 3). The student used tools such as charts and graphic organizers but still had difficulty understanding the climax and resolution of a story and the student's SETSS provider placed her reading level at about a 6th grade level (Tr. pp. 189-90).

To further support the argument that five hours of SETSS was appropriate for the student the district school psychologist argued that while the student's classes were modified, "we don't accommodate the [private] school approach to it," adding that a "general education student . . . has to be in a general education classroom . . . with the support of the SETSS provider, which is in addition . . . to her instruction," and asserted that the five hours of SETSS recommended in the student's June 2021 IESP would be in addition to instruction provided in the general education classroom (Tr. pp. 135-36). She also testified that the practice at the student's private school was not to have students who receive SETSS in the regular classroom and noted that "modified" classes meant that the SETSS provider provided instruction rather than the general education teacher (Tr. pp. 136-37). The district school psychologist stated that students who received SETSS did not attend general education classes, but instead received instruction in a classroom with other students who were also recommended for SETSS (Tr. pp. 137-38).

Despite the fact that the student participated in modified classes with SETSS support, the district school psychologist asserted that she still had to "take the Regents test, independently, and she is on grade level . . . she's being promoted with a positive grade" (Tr. pp. 137-38). The district school psychologist appeared to base this claim on her knowledge of the general practices of the student's private school—asserting that almost all of the students at the private school completed the Regents exams for Algebra I and Algebra II in ninth grade, assuming this was the case for the student as she was in 10th grade—rather than on information provided on the performance of this student (Tr. pp. 141-42). Notably, the hearing record contains no evidence that the student had taken or passed any Regents exams, and further, the February 2021 transcript contained a blank box for Regents exam results and the June 2021 IESP noted that the parent indicated the student would not take the Regents exams (Parent Exs. D at p. 2; F).

The school psychologist's appraisal of the student's academic functioning was overly optimistic at best and was not sufficiently objective based on the data before the CSE. As discussed above, the evidence in the hearing record shows that the student's math, reading, and writing skills, even if improved, were still well below grade level despite one-to-one instruction from her SETSS providers. The district's argument that the student was getting average grades in her classes and passing Regents exams without support is contradicted by the evidence in the hearing record.

Based on the information described, the hearing record does not support the IHO's finding that the student's needs could have been met by a recommendation for five hours of SETSS per week. The student had significant needs that were not adequately described in the June 2021 IESP and which, if they had been described accurately, would have warranted a higher level of services than what the June 2021 CSE recommended. As such, the June 2021 IESP was not appropriate for the student and the hearing record supports finding that the district failed to offer the student a FAPE for the 2021-22 school year.²⁶

C. Relief/Equitable Considerations

Turning to the relief requested, the parent requests implementation of the July 2013 IESP for the 2021-22 school year (see Req. for Rev.).

Generally, having found that the district failed to offer the student a FAPE for the 2021-22 school year, the next issue would be whether the SETSS requested by the parent constituted appropriate unilaterally obtained private services such that the cost of the SETSS is reimbursable to the parent or, alternatively, should be directly paid by the district to the provider, and whether, as a matter of equitable considerations, the costs sought to be reimbursed or directly funded should be reduced (see Application of a Student with a Disability, Appeal No. 21-138).

However, in this instance, the parent has already received this exact relief through her agreement with the district as to the student's placement for the pendency of this proceeding (Parent Ex. B). In particular, the parent and district agreed that the student would receive 10 periods of group SETSS per week, three 30-minute sessions of group speech-language therapy per week, three 30-minute sessions of individual OT per week, and one 30-minute session of group counseling per week for a 10-month school year during the pendency of this proceeding (Parent Ex. B). As the parent's due process complaint notice was filed prior to the start of the 10-month 2021-22 school year and the school year has ended as of the date of this decision, the student already has a right to receive all of the services the parent is requesting as relief in this proceeding. Moreover by this time the CSE should have reconvened and considered new evaluative information including the full report from the independent neuropsychological evaluation that was conducted in January 2022, and that along with any other updated evaluative information and teacher progress reports, should be used for CSE planning going forward.

Accordingly, as the parent has already received all of the relief requested, the appropriateness of the SETSS and the IHO's finding regarding equitable considerations need be further addressed.²⁷

²⁶ As the district failed to offer the student a FAPE on substantive grounds, there is no need to address the parent's claim that the district committed procedural violations.

²⁷ The parent has not requested compensatory education for any related services not provided to the student.

VII. Conclusion

Having found that the district failed to offer a FAPE for the 2020-21 school year and that there is no relief to be granted, the analysis is at an end. The IHO's decision that the June 2021 IESP was appropriate for the student is reversed.

I have considered the parties remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the May 2, 2022, IHO decision is modified by reversing that portion which found that the June 2021 IESP recommended an appropriate program for the student for the 2021-22 school year.

Dated: **Albany, New York**
 August 19, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER