The University of the State of New York

The State Education Department
State Review Officer
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No. 15-055

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

Appearances:
The Law Offices of Martin Marks, attorneys for petitioners, Martin Marks, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the 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) recommended for the student for the 2014-15 school year were appropriate. The appeal must dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

During the 2013-14 school year, the student attended a general education preschool program and received special education and related services as a preschool student with a disability pursuant to an IEP developed by the Committee on Preschool Special Education (CPSE) (see Tr. pp. 163-64, 209-10; see generally Dist. Exs. 1-5; Parent Ex. B). Specifically, the student received five hours per week of special education itinerant teacher (SEIT) services delivered at the preschool program, along with the related services of three 30-minute sessions per week of

individual occupational therapy (OT) and two 30-minute sessions per week of individual speech-language therapy (see Dist. Exs. 1; 2 at pp. 1-2; 4 at p. 1; 5 at p. 1; Parent Ex. B at pp. 1, 11).[1]

On March 11, 2014, the CSE convened to conduct the student's "[t]urning [f]ive" conference and to develop an individualized educational services program (IESP) for the 2014-15 school year (see Dist. Ex. 18 at pp. 1, 5-7; see also Tr. pp. 43-44, 74-77; Dist. Ex. 2 at p. 1).[2] Finding the student eligible for special education as a student with a speech or language impairment, the March 2014 CSE recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group and as a direct service, along with the following related services: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual counseling services, and one 30-minute session per week of counseling services in a group (Dist. Ex. 18 at pp. 5-6).[3] In addition, the March 2014 CSE developed annual goals and recommended strategies to address the student's management needs (id. at pp. 2-5).

In a "Parentally Placed Final Notice of Recommendation" (FNR) dated March 11, 2014, the district summarized the SETSS and related services recommended in the March 2014 IESP (see Dist. Ex. 16). On March 11, 2014, the parents signed the FNR (id.). In addition, the parents indicated on the FNR that they agreed with the "recommended services," but that they would place the student in a "private school at [their] expense" and requested that the district provide "equitable services" for the student "as listed" on the FNR and on the IESP (id.).

During the third or fourth week of August 2014, the district mailed the parents an "Authorization for Independent Special Education Teacher Support Services for Parentally-Placed Student[s]" (Tr. pp. 96-99; see Dist. Ex. 20). The authorization indicated that the student could receive SETSS from an "eligible independent provider at no cost" to the parents, referenced an enclosure of a "list of eligible providers," and included an internet website link to access the list of eligible SETSS providers (Dist. Ex. 20). The authorization also provided the parents with the name, address, and telephone number of a contact person if the parents "need[ed] assistance locating a provider" (id.). According to the authorization, the student could receive a "maximum" of three hours "per day" of SETSS or a "maximum" of five hours "per week" of SETSS; however, the services could not start before September 1, 2014 and the total amount of SETSS the student could receive for the 2014-15 school year (through June 30, 2015) could not exceed "180 hours"

[1] The Education Law defines special education itinerant services (commonly referred to as "SEIT" services) 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; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

[2] The district school psychologist who attended the March 2014 CSE meeting described a "[t]urning [f]ive" student as one who would "turn five within that school year" and would transition from a CPSE to CSE—explaining further that the student would transition from "preschool to school age" (Tr. pp. 43-44).

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

(id.). Finally, the authorization indicated that the "maximum group size" of the SETSS could not exceed "5" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 14, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Parent Ex. A at pp. 1-2). Specifically, the parents alleged that the March 2014 CSE was not properly composed due to the absence of the student's SEIT and the student's regular education teachers (id. at p. 2). Next, the parents asserted that they disagreed with the March 2014 CSE's decision to reduce the student's "special education support" from five 60-minute sessions of "1:1" services to five 40-minute "periods" of services both "individually and in a group" (id.). The parents also argued that the reduction in the student's recommended services, as well as the recommendation for both individual and group sessions, were not reasonably calculated to provide "appropriate special education support," especially given the student's "significant" distractibility, attention, and receptive and expressive language delays (id.). The parents asserted that "the student would benefit from additional hours of SETSS to address her learning needs" (id.). The parents also alleged that the "IEP" lacked "sufficient" annual goals in the areas of reading, writing, and receptive language (id.). Next, the parents alleged that after the March 2014 CSE meeting, they attempted to locate a "SETSS provider experienced in working with students" with attention, focus, behavioral, and social/emotional needs at the "SETSS rate of approximately $41.00 per hour" (id.). As relief, the parents requested that an IHO order that the student receive 10 hours of SETSS per week at the enhanced rate of $100.00 per hour, along with related services (id.).

B. Impartial Hearing Officer Decision

On September 29, 2014, the parties proceeded to an impartial hearing, which concluded on February 25, 2015 after four days of proceedings (see Tr. pp. 1-219).[4] In a decision dated April 14, 2015, the IHO concluded that the district offered the student a FAPE for the 2014-15 school year and denied the parents' request for relief (see IHO Decision at pp. 7-10).

Initially, the IHO noted that, although the parties disputed the legal standard applicable for determining the "adequacy of the IESP," she declined to directly address this issue and explained that, "even had the district been required to establish it provided a 'FAPE', . . . it ha[d] done so" (IHO Decision at p. 7). The IHO also declined to address whether the parents raised particular issues in the due process complaint notice or whether "various claims" had been "waived" (id.). Next, the IHO found the testimony of the district school psychologist "credible" but declined to "credit" the parents' testimony insofar as it was not consistent with "what occurred" at the March 2014 CSE meeting (id.). The IHO also "did not credit" the parents' claim that they did not know the difference "between IEP and IESP" because the IHO found that the parents received such information at the March 2014 CSE meeting (id.).

[4] In an interim order on pendency, dated October 1, 2014, the IHO found that the student's pendency (stay-put) placement consisted of the following: five hours of individual SEIT services, two 30-minute sessions of individual speech-language therapy services, and three 30-minute sessions of individual OT services (see IHO Ex. III at pp. 1, 3).

Based upon the evidence in the hearing record, the IHO noted that the March 2014 CSE considered and relied upon "substantial information including up to date testing" in the development of the IESP, which the IHO found was "reasonably calculated to enable the student to make meaningful educational gains" (IHO Decision at p. 7). The IHO also noted that the classroom observation of the student "described a number of situations relevant to the student's deficits" (id. at pp. 7-8). In addition, the IHO found that the IESP noted the student's "deficits" as described by the SEIT (id. at p. 8). Next, the IHO noted that the hearing record lacked "documentary evidence" indicating that the student required "additional SETSS hours" or "any increase in her then current mandate" to make "meaningful gains" (id.). Moreover, the IHO found it "noteworthy" that the student's SEIT "acknowledged the substantial progress" the student made as a result of the services provided pursuant to pendency (id.). The IHO further noted that, while the student "might benefit from additional services," this fact did not establish an entitlement to additional services (id.).

Having determined that the student did not require "additional SETSS hours" to make meaningful gains, the IHO then rejected, as speculative, the parents' contention that the SETSS recommended in the March 2014 IESP constituted a "significant decrease in services" (IHO Decision at p. 8). Here, the IHO determined that, although the SEIT's testimony at the impartial hearing indicated that the student's nonpublic program did not have "'periods,'" "this issue" was not raised at the March 2014 CSE meeting, it was not "supported by any documentary evidence," and it was not a "basis to conclude" that the March 2014 CSE's "recommendation" was not appropriate (id.). Moreover, the IHO noted that the SEIT "flexibly delivered" services to the student at the nonpublic preschool program (id.). Finally, the IHO noted that the March 2014 CSE recommended counseling services and an additional speech-language therapy session to "address the needs the SEIT described," and provided the student with an additional 90 minutes of services per week, which limited the "impact, if any, from the differently worded mandate" (id.).

Turning to the issue of whether the March 2014 CSE was properly composed, the IHO found that, contrary to the parents' assertion, the student's SEIT was not a "mandated participant" (IHO Decision at p. 8). In addition, the IHO found that the March 2014 CSE considered a "comprehensive report" prepared by the student's SEIT, the CSE "had spoken with" the SEIT, and the CSE received input from the student's regular education teacher who "communicated" with the SEIT and worked "concurrently" with the SEIT in the student's preschool classroom (id.). The IHO also found that the SEIT's testimony recounting the regular education teacher's ability to participate at the March 2014 CSE meeting was "not reliable" (id. at pp. 8-9). Rather, the IHO "credit[ed]" the district school psychologist's testimony, which described the March 2014 CSE meeting as a "'long meeting'" with "substantial teacher participation" (id. at p. 9).

With respect to the annual goals in the March 2014 IESP, the IHO found that the parents "abandoned" such claims because the parents did not address them in their "closing memorandum" (IHO decision at p. 9). Nonetheless, the IHO found that the hearing record lacked evidence regarding the "deficiencies" and concluded that the annual goals in the March 2014 IESP "adequately cover[ed] all necessary areas" (id.).

Finally, the IHO denied the parents' request for an enhanced payment rate of $100.00 per hour to obtain a SETSS provider (see IHO Decision at p. 9). The IHO found that, although the parents contacted three providers who were not "available" and the parents showed the SETSS

authorization letter to the staff at the nonpublic school, the parents made no attempts to locate a SETSS provider after the student began receiving pendency services (id.). In addition, the IHO found that the parents did not contact the "[district] staff listed" on the SETSS authorization form or "any other [district] staff" to locate a SETSS provider (id.). Consequently, the IHO determined that the parents' efforts to locate and secure a SETSS provider were "insufficient to demonstrate that an enhanced rate [was] required at this time" to obtain the services (id.). In addition, the IHO noted that she gave "no weight" to "any absence of assistance" from the district in locating a SETSS provider after the parents filed the due process complaint notice "where the student was receiving services pursuant to pendency" (id.).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school year. More specifically, the parents allege that the IHO erred in finding that the March 2014 CSE considered and relied upon sufficient and adequate evaluative information and prepared an IESP that was reasonably calculated to confer educational benefit on the student. The parents also allege that the IHO erred in finding the classroom observation of the student was appropriate and sufficient because it was performed during the student's "'free play'" period instead of in the student's "learning environment." Next, the parents assert that the IHO erred in finding that the student's SEIT was not a "mandated participant" at the March 2014 CSE meeting. The parents also assert that the IHO erred in finding that the student did not require 10 hours per week of SETSS in order to make "meaningful educational progress." The parents allege that the IHO erred in finding that the parents were not entitled to an order directing the district to fund SETSS at an enhanced payment rate. In addition, the parents argue that the IHO improperly placed the burden of proof on the parents and that the district failed to demonstrate that the IESP was "procedurally and substantively appropriate" or that it "actually offered" the student services pursuant to the IESP. Next, the parents argue that the IHO improperly placed the "burden of obtaining a service provider" on the parents, the IHO improperly "limited the level of compensation" paid to the SETSS provider, and the IHO improperly concluded that the parents' efforts to locate a SETSS provider were insufficient to demonstrate the necessity of an enhanced payment rate. The parents further argue that the IHO "misunderstood" and "misapplied" Education Law § 3602-c, the IHO applied "conflicting standards" to the parties' respective actions in locating a SETSS provider, and the IHO lacked impartiality by applying "different standards" to the district and the parents. Finally, the parents assert that the IHO made erroneous credibility findings regarding the accuracy of the parents' testimony.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety.

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, no such students are 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 individualized educational services plan [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.). 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 procedures pursuant to Education Law § 4404 (id.).

VI. Discussion

A. Preliminary Matters

The parents assert that the IHO erred in placing the burden of proof on the parents to demonstrate that the district failed to offer the student a FAPE. The district rejects the parents' contentions. Upon review, the evidence in the hearing record does not support the parents' assertions.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).[5] Here, there is no evidence that the IHO misapplied the parties' respective burdens of proof (see IHO Decision at pp. 4-9). The IHO, instead, weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (id.). Although the parents disagree with the

[5] The Schaffer Court left open the question of whether the States may have authority to shift the burden of proof through legislation (Schaffer, 546 U.S. 49, 61-62).

conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to correctly apply the burden of proof in her analysis.[6]

Relatedly, to the extent that the parents assert that the IHO exhibited a lack of impartiality by allegedly holding the parents to a different and much higher standard than the one applied to the district and by finding the testimony of the district school psychologist credible but the testimony of the parent and the SEIT not credible, this argument amounts to the parents' disagreement with the conclusions reached by the IHO or with the weight afforded to testimonial evidence presented at the impartial hearing.[7] Such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013). Overall, an independent review of the hearing record demonstrates that the parents had the opportunity to present their case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-219). Thus, the parents' assertions must be dismissed.

B. March 2014 CSE Composition

The parents allege that the IHO erred in finding that the March 2014 CSE was properly composed because the student's SEIT was not a required member of the CSE. First, the parents argue that the student's SEIT—as a "special education teacher of the student"—was a required member of the CSE. Next, the parents argue that, as a result of the SEIT's absence, the March 2014 CSE based its recommendations on "inadequate data" that was not remedied by the March 2014 CSE's consideration of the SEIT's written report. The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parents' assertions.

At the time of the March 2014 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student or, where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see also 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . ,

[6] Even assuming for the sake of argument that the IHO misallocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]).

[7] Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this case, a review of the non-testimonial evidence and the entire hearing record—when read as a whole—does not compel conclusions contrary to those made by the IHO. Based on the foregoing, the IHO's credibility findings will not be disturbed.

certified or licensed to teach students with disabilities"]).[8] Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Upon review, the evidence in the hearing record reveals that the following individuals attended the March 2014 CSE meeting: a district school psychologist (who also served as the direct representative), a district regular education teacher, a district special education teacher, the parents, and the student's regular education teacher from the general education preschool program (see Dist. Ex. 19; see also Tr. pp. 43-45, 82-83, 185, 187). It is undisputed that the SEIT did not attend the March 2014 CSE meeting (see Dist. Ex. 19; see also Tr. pp. 45, 148).

The evidence in the hearing record shows that the student's regular education teacher spoke to the March 2014 CSE about the student's "education" and what the student could and could not do in class (Tr. pp. 185-86; see Tr. pp. 149-51). After that discussion, the regular education teacher then asked the CSE if she could "find" the student's SEIT—who was working at the preschool program—so that the SEIT could further articulate "concerns" about the student because the regular education teacher did not think that the CSE really "heard" the concerns she expressed at the CSE meeting (Tr. pp. 149-51). The parents similarly testified that, after the regular education teacher spoke to the March 2014 CSE, they asked the CSE if the SEIT could further "explain" the student's behavior, social/emotional, and academic needs from the SEIT's own perspective and to advocate for more special education support services (Tr. pp. 185-87). According to the parents, the March 2014 CSE responded to this request by indicating that the CSE had "more meetings" and did not "really have time to do that" (Tr. pp. 185-86). However, the parents also testified that, after continuing to explain to the March 2014 CSE that the student needed more services, the March 2014 CSE recommended additional speech-language therapy and OT services and added counseling as a related service to the IESP (see Tr. pp. 186-89). Moreover, the district school psychologist testified that, even though the student's testing results did not "warrant it," the March 2014 CSE nonetheless recommended SETSS "five times a week" in direct response to the concerns expressed at the meeting by both the parents and the student's regular education teacher (see Tr. p. 51).

In addition to the participation of the parents and the student's regular education teacher—who were directly acquainted with the student's particular needs—the March 2014 CSE considered

[8] The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). This language in the Official Analysis of Comments does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040). Given that the parents indicated to the March 2014 CSE that they intended to continue the student's enrollment in a nonpublic school of their choice and opted not to enroll the student in a district public school (see Tr. pp. 76, 210), it is altogether unclear what relevance, if any, this aspirational guidance has under these circumstances; that is, where the document developed—the IESP—was not intended for implementation at a public school placement.

and relied upon a January 2014 student progress report prepared by the student's SEIT in the development of the IESP and, therefore the nonattendance of the SEIT was of little consequence in this instance (compare Dist. Ex. 18 at pp. 1-2, with Dist. Ex. 4 at pp. 1-2; see Tr. pp. 45-46, 51, 54-55, 185-91; see also A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; K.C. v New York City Dep't of Educ., 2015 WL 1808602, at *8 [SDNY Apr. 9, 2015] [finding no deprivation of a FAPE based on the absence of a special education teacher of the student where the CSE had before it written input from the private school]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student's] educational and therapeutic needs"]).[9]

Based on the foregoing, even assuming for the sake of argument that the SEIT's absence from the March 2014 CSE meeting constituted a procedural error, the evidence in the hearing record does not suggest that the absence of the student's SEIT impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, thereby resulting in a denial of a FAPE.

C. March 2014 IESP—SETSS

The parents assert that the district failed to establish that "'five periods' per week of SETSS" was sufficient to enable the student to make meaningful progress. In addition, the parents argue that the March 2014 IESP failed to set forth with specificity the duration of the recommended SETSS, noting that reference to "'periods'" in the IESP was "hopelessly vague," and failed to indicate the size of the "group" within which the student would receive SETSS. The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parents' contentions; thus, there is no reason to disturb the IHO's findings that the student did not require additional SETSS hours and that the March 2014 IESP was reasonably calculated to enable the student to receive educational benefits.

In this instance, although the student's needs are not directly in dispute, a discussion thereof facilitates a determination regarding whether five periods per week of SETSS was reasonably

[9] A review of the January 2014 SEIT progress report reveals that the SEIT did not recommend a specific duration or frequency of services that the student should receive during the 2014-15 school year; rather, the SEIT recommended that the student "continue to receive SEIT therapy so that SEIT delays can be further targeted" and so the student could "function properly in a classroom environment" (Dist. Ex. 4 at p. 3). In this case, even if the SEIT participated at the March 2014 CSE meeting and advocated for more special education services or for a specific frequency and duration of special education services for the student, the March 2014 CSE would not be obligated to adopt such recommendations.

calculated to enable the student receive educational benefits for the 2014-15 school year.[10] Upon review, the evidence in the hearing record demonstrates that the March 2014 CSE considered and relied upon the following evaluative information to develop the March 2014 IESP: a January 2014 SEIT progress report, a January 2014 speech-language therapy progress report, a February 2014 preschool teacher progress report, a February 2014 classroom observation, results from a February 2014 administration of the Kaufman Survey of Early Academic Language Skills (K-SEAL), and input provided by the parents and the student's regular education teacher (see Tr. pp. 45-46, 50-51, 54-55, 64-70, 80-84, 186-91; compare Dist. Ex. 18 at pp. 1-2, 3, 5, with Dist. Ex. 1, and Dist. Ex. 3 at pp. 1-4, and Dist. Ex. 4 at p. 2).

As noted in the March 2014 IESP, an administration of the K-SEAL to the student in February 2014 revealed that the student performed within the average range in the following areas: vocabulary; numbers, letters, and words; early academic and language skills; expressive and receptive language skills; and articulation (reported as "[n]ormal") (Dist. Ex. 18 at p. 1). In addition, the March 2014 IESP reflected that, based upon "teacher" report, overall, the student made progress but continued to exhibit difficulty with "learning without direct individual instruction" (see id.). The March 2014 IESP also indicated that the student needed to be "taught one on one" to comprehend lessons (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 3 at pp. 1, 3). In addition, according to the March 2014 IESP, the student knew colors, shapes, and numbers at an age-appropriate level but demonstrated difficulty with "one-to-one correspondence and with similarities" and differences (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 3 at p. 1, 5). The March 2014 IESP also reflected that the student had difficulty communicating with peers during play and required assistance in learning how to interact with her peers (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 3 at pp. 2, 5). In addition, the March 2014 IESP identified the student's needs in relation to the following areas: individual support, attention span, classroom behavior, social interactions, classroom transitions, working within a routine, receptive and expressive language skills, fine motor skills, and sensory processing (see Dist. Ex. 18 at pp. 1-2).[11]

[10] Other than generally asserting that the IHO erred in finding that the March 2014 CSE considered and relied upon sufficient and adequate evaluative information, the parents' claim in this regard lacks specificity and citation to the record (see 8 NYCRR 279.4[a]; 279.8[b]), with one exception. The parents do assert that the March 2014 CSE inappropriately relied upon a classroom observation conducted during "'free play'" as opposed to during the student's "learning environment" (compare Pet. ¶¶ 8, 30, with Parent Ex. A at pp. 1-2). In any event, because the parents did not raise the adequacy of the evaluative information or, specifically, of the classroom observation in their due process complaint notice, this allegation is outside the permissible scope of review and will not be considered (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]). Moreover, the district did not open the door to the claim relating to the classroom observation by soliciting testimony from a witness "in support of an affirmative, substantive argument" (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. Jun. 18, 2014]; see M.H., 685 F.3d at 250-51); rather, it was exclusively the parents' advocate who elicited testimonial evidence relating to this allegation (see Tr. pp. 74, 146-47).

[11] The January 2014 SEIT progress report noted the student's progress with social/emotional, attentional, and transitioning skills, but indicated that she still benefited from verbal prompts, encouragement, and redirection in these areas (see Dist. Ex. 4 at p. 1).

With regard to language needs, the March 2014 IESP indicated that the student demonstrated delays in both expressive and receptive language, but produced utterances of an age-appropriate length to request, protest, comment, and ask and answer questions (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 1). The March 2014 IESP reflected that the student improved in: the area of narrative skills; her ability to retell a story; and her ability to use plurals, verb tenses, possessives, and articles in spontaneous speech (id.). The March 2014 IESP indicated that the student maintained age-appropriate attention to task, but she exhibited difficulty in word finding and using non-specific language (id.).

To address the student's needs identified in the March 2014 IESP, the March 2014 CSE recommended five periods of SETSS per week in a group as a direct service—together with related services, annual goals, and strategies to address the student's management needs (see Dist. Ex. 18 at pp. 2-6). At the impartial hearing, the district school psychologist described SETSS as an "academic intervention" (Tr. pp. 47-48).[12] In contrast, the district school psychologist described SEIT services as services provided to a preschool student to "address all developmental concerns that the [student] may have—cognitive, language, academic, occupational, fine motor, gross motor, [and] social emotional" (Tr. p. 48).[13]

Turning first to May 2014 IESP's description of the duration of the SETSS sessions and the size of the group in which the SETSS would be delivered, State regulations provide that an IEP shall describe recommended programs and services, by setting forth, "as appropriate," the maximum number of students who can receive instruction together in a special class or resource room (or, in this case, SETSS) and the "anticipated frequency, duration and location . . . for each of the recommended programs and services" for the student (8 NYCRR 200.1[i], 200.4[d][2][v][b][2], [7]). The district school psychologist explained that "SETSS [was] never" recommended on an IESP as a particular amount of "minutes for each session"; instead, she explained that SETSS recommendations related to the length of a period at a school (Tr. pp. 47-48; see Tr. p. 55). Additionally, the district school psychologist explained that the recommendation for "direct and group" SETSS meant that the student could receive SETSS in group with a "maximum of eight [students]," and that the SETSS could be provided to the student "individually" within the group if the student had "very specific needs" (Tr. p. 80).

The district cites no legal support for the district school psychologist's testimony that IESPs should omit details such as durations or group sizes. In this instance, however, these omissions do not support a finding that the IESP as a whole was not appropriate. As to the duration, even if the student received less than five "hours" per week of SETSS, the March 2014 CSE recommended an additional 30-minute session of speech-language therapy and added two 30-minute sessions of counseling to address the student's social/emotional and behavior needs (compare Dist. Ex. 18 at

[12] State regulations do not define SETSS within the continuum of services (see generally 8 NYCRR 200.6). Generally, however, SETSS typically refers to services consistent with the regulatory version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also 8 NYCRR 200.6[f]).

[13] The district school psychologist also testified that a SEIT was "not provided by a CSE" (Tr. pp. 46-47).

pp. 5-6, with Dist. Ex. 14 at pp. 1, 12). This results in a total of 90 additional minutes of services per week as compared to the student's 2013-14 school year, which, as the IHO noted, would reduce any potential impact from a change in the duration of special education services (compare Dist. Ex. 18 at pp. 5-6, with Dist. Ex. 14 at pp. 1, 12). Moreover, as to the size of the group, notwithstanding some language in the present levels of performance section of the March 2014 IESP indicating that the student benefited from instruction on an individual basis within the classroom, given the student's average academic skills, her need to improve social/emotional and behavioral skills, and testimony from the district school psychologist regarding the inherent opportunities for individual instruction within a small group, the recommendation for SETSS in a small group was appropriate in this instance (see Tr. p. 80; Dist. Ex. 18 at pp. 1-2) and there was nothing before the March 2014 CSE which would indicate that the student could not receive educational benefit in a small group of up to eight students as a consequence of the number of students in such group. Based on the foregoing, the hearing record does not support a finding that the district committed a procedural violation as a consequence of the May 2014 IESP's description of the duration or group size of the SETSS.

Turning to the frequency of the recommended SETSS, in reaching the decision to recommend five periods per week, the district school psychologist testified that the March 2014 CSE "had a long meeting with the [student's regular education] teacher," who "was very concerned" that the student required "additional support" as a result of the "very different demands" when transitioning from a preschool setting to a school-age setting (Tr. p. 51). The district school psychologist further testified that, during this discussion, she explained the results of the standardized assessments administered to the student—as well as the results of the classroom observation—to the student's regular education teacher and that the results did not "warrant" additional support (id.). However, given the concerns expressed by both the parents and the student's regular education teacher, the March 2014 CSE decided to recommend "SETSS for five times a week so that [the student] [w]ould have the additional supports when she [was] transitioning into [a] school age [setting], although [the student] really, according to the results and [the classroom] observations did not warrant it" (id.).[14]

At the impartial hearing, the parents testified that they requested more "SEIT" services, but the March 2014 CSE explained that "right now" the SETSS recommendation would remain at "five times" and the CSE recommended "more" counseling to "deal with the [student's] behavi[or]" (Tr. pp. 190-91).[15] In response to the March 2014 CSE's decision, the parents expressed their disagreement, explaining that "at that age," the student could not talk "about problems" or "understand"—and therefore, the parents believed the student "need[ed] someone on board to work with her and understand her needs" and "[c]ounseling c[ould not] help behaving" (id.). Subsequently, however, the parents did indicate their agreement with the recommended services

[14] In addition, the district school psychologist testified that she explained to the parents at the March 2014 CSE meeting that the frequency of the recommended SETSS could be "increased" if, upon receiving SETSS, the student "was not catching on" and the SETSS provider completed a progress report that recommended an "increase of services," which would then be considered by a CSE (Tr. p. 52).

[15] To address the parents' concerns expressed about the student's "social and emotional behaviors, . . . difficulty with limit setting, . . . low frustration tolerance, and difficulty following directions," the district school psychologist testified that after a "long conversation with [the parents]" the March 2014 CSE recommended counseling services (Tr. pp. 54-55, 60).

on the FNR and did not raise any issues in the due process complaint notice with respect to the related services recommendations in the March 2014 IESP (see Dist. Ex. 16; Parent Ex. A at pp. 1-2).

Notwithstanding the parents' concerns voiced about the student at the March 2014 CSE meeting and their belief that the student required 10 hours per week of SETSS, the evidence in the hearing record demonstrates that the student made progress in the areas of need identified by her teachers and therapists in the preschool program with five hours per week of SEIT services (see generally Dist. Exs. 1; 3-4). And although the March 2014 CSE recommended five periods per week of SETSS without proscribing the group size or the length of a period in the IESP, as discussed above, the evidence in the hearing record demonstrates that the CSE fully explained the SETSS recommendation to the parents at the CSE meeting (see Tr. pp. 47-18, 51-52, 55; Dist. Ex. 18 at p. 5). To the extent that the SEIT testified at the impartial hearing that the student required 10 hours per week of SETSS because the student had "tremendous potential" and additional SETSS would provide the student with more support to meet the increased demands placed upon her (see Tr. pp. 160-62), the IHO properly concluded that this rationale, alone, did not establish that the student's entitlement to that level of SETSS (see IHO Decision at p. 8). School districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Moreover, in addition to SETSS and related services, the March 2014 IESP included annual goals targeting the student's identified needs in the areas of attention, fine motor skills, expressive language skills, English language arts, mathematics, and social/emotional skills that included evaluative criteria, evaluation procedures, and a schedule for measuring progress (see Dist. Ex. 18 at pp. 2-5). In addition, the March 2014 IESP included strategies to address the student's management needs, such as preferential seating; presenting material in small increments; using a multimodal approach to instruction; and using positive reinforcement, praise, and encouragement (compare Dist. Ex. 18 at p. 2, with Dist. Ex. 3 at p. 3, and Dist. Ex. 4 at p. 1).

Based upon the foregoing, the evidence in the hearing record supports the IHO's conclusion that the March 2014 CSE's decision to recommend five periods per week of SETSS was reasonably calculated to enable the student to receive educational benefits on an equitable basis.

As a final matter, based on the above determinations regarding the appropriateness of the SETSS recommendation, even if the evidence in the hearing record supported a conclusion that the district improperly shifted the responsibility to procure the recommended services to the parents, the parents would not be entitled to any relief in this instance. That is, assuming that the evidence in the hearing record supported the parents' assertions, the proper remedy under such circumstances would be to order the district to implement the student's SETSS mandate or, perhaps, order relief in the form of compensatory educational services.[16] However, the 2014-15 school year has ended and the district was required to fund five hours of SEIT services per week for the entirety of the 2014-15 school year, as a result of its obligation to provide the student with pendency services for the duration of these proceedings (see IHO Ex. III at p. 2). The student's SEIT from the 2013-14 school year provided the five hours of SEIT services to the student pursuant

[16] The parents did not request compensatory educational services in the due process complaint notice but, instead, raised this form of relief for the first time in the petition (see Parent Ex. A at p. 2).

to pendency during the 2014-15 school year at an enhanced payment rate of $100.00 per hour (see Tr. pp. 134-35, 153). Thus, no additional award of compensatory educational services is necessary in order to achieve the aim of such relief (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014]). The student has received special education services of a duration and intensity equal to or greater than those which were, as determined above, appropriately recommended in the March 2014 IESP at the enhanced payment rate sought by the parents. In light of the foregoing, I need not address the parents' remaining contentions and the necessary inquiry is at an end.

VII. Conclusion

In this case, the evidence in the hearing record supports the IHO's determination that the March 2014 CSE designed an appropriate IESP for the student's 2014-15 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 22, 2015

SARAH L. HARRINGTON
STATE REVIEW OFFICER