



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-054

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

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (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 §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404],"

which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 (8 NYCRR 200.5[j][3][v], [vii], [xii]; see 20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.510[b][2], [c], 300.515[a]). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.515[c]). 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[a]). 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 (8 NYCRR 279.12[a]; see 34 CFR 300.514[b][2]). 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 (8 NYCRR 200.5[k][2]; see 34 CFR 300.515[b], [c]).

III. Facts and Procedural History

The student in this case initially began receiving special education services through the Committee on Preschool Special Education (CPSE) as a preschool student with a disability during the 2017-18 school year (see Parent Exs. A at p. 2; C at p. 2; see generally Parent Ex. B).

On January 10, 2018, a CPSE convened and, finding that the student remained eligible for special education services as a preschool student with a disability, recommended that she receive 10 hours per week of special education itinerant teacher (SEIT) services as well as the following related services: two 30-minute sessions per week of individual occupational therapy (OT) and two 30-minute sessions per week of individual physical therapy (PT) (see Parent Ex. B at pp. 1, 11). According to the January 2018 IEP, the student would receive SEIT services "as support in the classroom," specifically, the "[e]arly childhood setting chosen by [the] parent" (id.).

On May 7, 2018, a CSE convened in anticipation of the student's transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the 2018-19 school year (kindergarten) (see Dist. Ex. 4 at pp. 1, 9). At that time, the CSE reviewed a reevaluation of the student, which had been conducted in April 2018, to determine whether the student was eligible to receive special education services as a kindergarten student in September 2018 (id. at pp. 1-2). Finding the student eligible as a student with an other health impairment, the May 2018 CSE recommended that the student receive integrated co-teaching (ICT) services in a general education setting for instruction in English language arts (ELA), mathematics, social studies, and science, together with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a small group, and two 30-minute sessions per week of individual OT (id. at pp. 1, 6-7). In addition, the May 2018 CSE recommended supplementary aids and services, program modifications, and accommodations consisting of "[o]n task prompting" throughout the school day as needed within the classroom (id. at p. 7). The May 2018 CSE also created annual goals to address the student's areas of need and recommended strategies to address the student's management needs (id. at pp. 3-6).

A. Due Process Complaint Notice

By due process complaint notice dated July 30, 2018 (July 2018 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1-2). The parent asserted that the recommendation for ICT services could not provide the student with the "level of support that [was] comparable to her individualized CPSE program," which included the 1:1 support of a SEIT who provided the student with "support and modification[s] to increase her level of attention, engagement, and [to] improve her fine motor skills" (id. at pp. 2, 4). Similarly, the parent alleged that the May 2018 IEP failed to include sufficient adult support throughout the student's school day, and the ICT services recommended in the IEP "left [the student] with at least 16 periods without any special education services including lunch" (id. at pp. 4-5). Next, the parent contended that the district failed to evaluate the student prior to changing the student's "program," consistent with Section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (id. at p. 5). The parent also contended that the annual goals in the May 2018 IEP were "grossly inappropriate," noting that while the "IEP clearly describe[d] all of [the student's] needs," the annual goals failed to address "all of those needs" and were "arbitrary" (id.). As an example, the parent noted that the May 2018 IEP included "academic goals for a student that demonstrate[d] average functioning across academic areas," but did not include annual goals reflecting her "individualized needs" or that were "capable of implementation and measurement" (id.).

Next, the parent alleged that the management needs listed in the May 2018 IEP could not be implemented "appropriately" in a "classroom with 25-30 students" (Parent Ex. A at p. 5). The parent indicated that, because the student required "on task prompting, visual prompts, repetition and clarification of verbal directions presented among other supports," the student would be "lost multiple times throughout the day as she wait[ed] for 1 of only 2 teachers to address her needs" (id.). The parent further indicated that the management needs did not appropriately address "all" of the student's needs (id. at p. 6).

As further support for the district's alleged failure to offer the student a FAPE, the parent asserted that the May 2018 CSE failed to "properly consider all the programs available" within the district and pursuant to the continuum of services per State regulation (Parent Ex. A at p. 6). More specifically, the parent alleged that the CSE failed to consider "various alternative placements along a continuum ranging from the least restrictive to the most restrictive," especially given the input from the student's teacher and parent (id.). The parent also noted that, although the May 2018 IEP indicated that the CSE considered "multiple options," the IEP did not provide "persuasive evidence as to why the team rejected these options absent sufficient evaluative material" (id.). Additionally, the parent alleged that the May 2018 CSE did not "provide justification for why a more restrictive program was not considered" or why the student's then-current program was not appropriate (id.). As a result, the parent asserted that this procedural violation impeded her right to participate in the decision-making process (id.).

As a final issue, the parent alleged that her visit to the assigned public school site "confirmed" her concerns with the "program recommendations" (Parent Ex. A at p. 6). Based upon the visit, the parent asserted that the classroom with "25-30 students" was "grossly inappropriate" because it was "loud and busy" and would "exacerbate [the student's] issues and contribute to social anxiety which would further impede her social and communication progress" (id.). In addition, the parent noted that the other students in the classroom observed had a "broad range of disabilities including those with behavioral issues" that would "exacerbate [the student's] challenge with attention" (id.). The parent also noted that the student would be "completely overwhelmed in such a large school setting," the student would not be "able to learn in a classroom as large" as the ICT kindergarten classroom, and the student could "never attend to basic tasks in a classroom with as many as thirty students" (id.). In light of these issues, the parent indicated that she was "not comfortable agreeing to this change" to the student's program (id.).

As relief for the alleged violations and failure to offer the student a FAPE for the 2018-19 school year, the parent requested that the district continue to fund the program set forth in the student's January 2018 CPSE IEP, including 10 hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (see Parent Ex. A at pp. 1-2, 7).¹

¹ In addition to seeking these services as the final relief requested, the parent requested that the district maintain those same services as the student's pendency (stay-put) placement (see Parent Ex. A at pp. 1-4, 7).

B. Events Post-Dating Due Process Complaint Notice

The parties entered into a resolution agreement executed on August 14 and August 15, 2018 (Dist. Ex. 1 at pp. 1, 3). According to the resolution agreement, the parties agreed that the district would conduct a psychoeducational evaluation of the student no later than August 24, 2018 and convene a CSE meeting no later than September 5, 2018 to discuss the following: the results of the psychoeducational evaluation "along with all other previous or current performance data," to "[d]evelop an [IESP] if the parent present[ed] a completed Parent Notice of Intent/Parentally Placed [form] indicating the parents' intent to pay [for the student's] education at her current school as noted in the Impartial Hearing Request," and to develop an "[IEP] if a completed Parent Notice of Intent/Parentally Placed [form] [was] not presented at the meeting" (id. at p. 1). In addition, the parties agreed to: "reconsider current programs, including but not limited to Special Education Teacher Support Services (SETSS), more restrictive programs, and/or a combination of programs that may be appropriate for [the student]"; "reconsider current related service recommendations and consider other related services that may be appropriate for [the student]"; "consider whether or not paraprofessional support [was] appropriate for [the student]"; "develop an IEP that include[d] evidence-based support to improve [the student's] functioning and school adjustment"; and if the CSE developed an IESP, the district agreed to "pay for the mandated related services to be provided at [the student's] school" (id. at p. 2).²

On August 26, 2018, the district conducted a psychoeducational evaluation of the student (August 2018 psychoeducational evaluation) to assess her "current cognitive, academic and social/behavioral functioning" (Dist. Ex. 3 at p. 1).³ The evaluation consisted of a student interview and the administration of the Wechsler Individual Achievement Test—Third Edition (WIAT-III) and the Wechsler Preschool and Primary Scale of Intelligence—Fourth Edition (WPPSI-IV) to the student (see Dist. Ex. 3 at p. 1).⁴

On August 30, 2018, the parties proceeded to an impartial hearing and presented their respective positions as to the student's pendency (stay-put) placement and services (see Tr. pp. 1-6; Parent Exs. A-B). In an interim decision dated September 4, 2018, the IHO found that, consistent with the parties' agreement at the August 2018 impartial hearing date, the following constituted the student's pendency placement and services: 10 hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (compare Interim IHO Decision at p. 1, with Tr. pp. 4-5).

² Both of the boxes identifying whether the resolution agreement constituted either a full settlement or a partial settlement of the claims in parent's due process complaint notice (noted as "August 13, 2018") were checked (Dist. Ex. 1 at p. 3).

³ The evaluation was conducted at the student's home and, according to the evaluation report, "conditions were conducive to testing with very few environmental distractions" (Dist. Ex. 3 at p. 1).

⁴ As noted in the psychoeducational evaluation report, although the student had been evaluated in November 2017 and then again in April 2018, a "significant discrepancy was revealed between the results of the November 2017 and the April 2018 tests scores, with regard to [the student's] cognitive functioning, in addition to her achievement functioning" (Dist. Ex. 3 at p. 1; see Parent Ex. B at pp. 3-4; Dist. Ex. 4 at pp. 1-2).

On the same date—September 4, 2018—a CSE convened to review the results of the August 2018 psychoeducational evaluation and developed an IESP for the student for the 2018-19 school year (see Dist. Ex. 2 at p. 1). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the September 2018 CSE recommended the following: one 30-minute session per week of individual counseling services (in the general education classroom setting), one 30-minute session per week of counseling services in a small group (in a separate location), one 30-minute session per week of individual OT (in the general education classroom setting), and one 30-minute session per week of individual OT (in a separate location) (*id.* at pp. 5-6). In addition, the September 2018 CSE created annual goals to address the student's social/emotional needs, her needs related to classroom and school skills, and her needs in the area of OT (*id.* at pp. 4-5). The September 2018 IESP included the following strategies to address the student's management needs: prepare the student for transitions; monitor the student for signs of frustration; make expectations and requirements clear to the student; be consistent and adhere to a system of rewards and consequences; repeat and clarify verbal directions presented; break down verbally complex tasks; provide the student with on-task prompting, visual prompts, and on-topic reminders; and model the initiation of social interactions with peers for the student (*id.* at p. 3).

C. Amended Due Process Complaint Notice

Shortly thereafter, the parent prepared an amended due process complaint notice dated September 27, 2018 (September 2018 due process complaint notice), and realleged that the district failed to offer the student a FAPE for the 2018-19 school year (compare Parent Ex. C at pp. 1-2, with Parent Ex. A at pp. 1-2).⁵ Overall, the parent asserted in the September 2018 due process complaint notice that the district failed to provide her an opportunity for "meaningful participation in the development of an educational program" for the student (Parent Ex. C at pp. 1-2). With respect to the disputed issues, the parent alleged that the district failed to provide the student with "appropriate equitable services," the "recommended program" was not appropriate, and the "IEP [was] developed improperly" (*id.* at p. 2).

As to the recommended program, the parent asserted that the student required a "significant amount of individualized support," which the IESP failed to offer (Parent Ex. C at p. 3). The parent noted that at the CSE meeting she objected to "this type of program" due to her concerns about the student's need for "significant one-to-one special education support" and further noted that the "recommendation" was not consistent with the "information" provided to the CSE by the parent and the "professionals" who knew and had worked with the student (*id.*). According to the due process complaint notice, the professionals working with the student "opined" that the student required "significant one-to-one attention" and the September 2018 CSE ignored this information and, instead, recommended a program that could not provide the student with the "level of support and individualization that would enable [the student] to benefit from her education" (*id.*). The parent maintained that the CSE "unilaterally modified" the student's educational program notwithstanding the "abundance of evidence demonstrating [the student's] need for one-on-one special education support services" (*id.*). The parent contended

⁵ The parent also repeated a request for the same pendency placement and services as set forth in the July 2018 due process complaint notice (compare Parent Ex. C at pp. 1-2, with Parent Ex. A at pp. 1-4).

that the CSE denied the student "necessary one-on-one special education support services" and eliminated the services without any rationale and without consideration of the student's individual needs (id.). According to the parent, the CSE also unilaterally decided to reduce the student's "receipt of necessary one-to-one special education support" despite the parent's and the SEIT's "vehement objections," who both "argued" that the student required "at least ten hours of one-to-one special education support to be able to access education" (id.). The parent alleged that, without such services, the student would regress and that the CSE "continued its predetermined recommendation" to offer the student "only four hours per week of group-based special education supplemental support" (id.).

Next, the parent alleged that the CSE reviewed information establishing the student's need for the services of "one-on-one special education teacher to adapt the content, methodology, and delivery of instruction to support [the student's] ability to successfully participate and progress in the general curriculum during regular instruction; not support to supplement the general education curriculum" (Parent Ex. C at p. 3 [emphasis in original]). The parent also alleged that, while the CSE had "notice of [the student's] need for direct, close instruction in academic, emotional, and social domains," the CSE failed to consider recommending the "support of a one-on-one special education teacher to work closely with [the student] on academic, emotional, and social skills" (id.). Accordingly, the parent asserted that the CSE deprived the student of "educational opportunities" and deprived the parent of the opportunity to "meaningfully participate in the decision-making process" (id.).

In the September 2018 due process complaint notice, the parent indicated that the CSE also failed to offer any "explanation of why one-on-one SEIT services would not be required" for the student to receive educational benefit, especially where, as here, the student had a "documented inability to pay attention and attend to tasks without a set structure and one-on-one individualized adult guidance" (Parent Ex. C at p. 3). The parent further indicated that the student had made progress in a "one-on-one support setting" (id.). Given this information, the parent asserted that the CSE's "failure to consider support . . . known to be necessary" for the student established that the CSE failed to "properly discharge its duties in the development" of the student's "IEP" (id. at pp. 3-4).

With respect to the recommended program, the parent also contended that the CSE did not possess any information to "establish the appropriateness of only providing [the student] with related services" (Parent Ex. C at p. 3). More specifically, the parent alleged that the recommendations for counseling and OT in the "IEP" would not have met the student's need for "one-on-one support" (id. at p. 4). The parent also alleged that the CSE failed to consider the "question" of the student's need for "one-on-one services at all" (id.). As final points, the parent asserted that the IESP failed to offer an appropriate program, the recommendations for related services were insufficient to meet the student's "complex" needs, the student could not participate in "academics without special education support," and the recommendations were not based upon the student's individual needs (id.).

Turning to the annual goals, the parent alleged that the annual goals were "grossly inappropriate" and that while the "IEP clearly describe[d] all of [the student's] needs" the annual goals failed to address "all of those needs" and were "arbitrary" (Parent Ex. C at p. 4). As an example, the parent noted that the "IEP" included "academic goals for a student that

demonstrate[d] average functioning across academic areas," but did not include annual goals reflecting her "individualized needs" or that were "capable of implementation and measurement" (id. at pp. 4-5).

The parent also challenged the management needs (see Parent Ex. C at p. 5). Here, the parent alleged that the management needs were "improper" and did not "appropriately address all of [the student's] needs" (id.). The parent also alleged that the CSE could not make an appropriate program recommendation for the student because the CSE failed to identify the student's "specific management needs" (id.).

Finally, the parent alleged that the CSE failed to provide "proper justification for why a more restrictive program was not considered" for the student (Parent Ex. C at p. 5). More specifically, the parent asserted that the "IEP" failed to reflect that the parent's "preferred placement" was duly considered (id.).

As a remedy, the parent requested that the district continue to fund the program and services set forth in the student's January 2018 CPSE IEP for the entirety of the 2018-19 school year, including 10 hours per week of SEIT services, two 30-minute sessions per week of OT, and two 30-minute sessions per week of PT (see Parent Ex. C at p. 5).

D. Impartial Hearing Officer Decision

On December 11, 2018, the parties returned to the impartial hearing in this matter, which concluded thereafter on April 8, 2019 after four total days of proceedings (see Tr. pp. 1, 10, 16, 23-73). In a decision dated May 13, 2019, the IHO found that the district offered the student appropriate services on an equitable basis for the 2018-19 school year and denied the parent's request for the district to fund 10 hours per week of SEIT services for the student (see IHO Decision at pp. 4-8).

In reaching the conclusion that the district offered the student appropriate services on an equitable basis, the IHO pointed out that the parent did not "present any witnesses to contest the appropriateness of the IESP" (IHO Decision at pp. 4-6). More specifically, the IHO noted that, although the parent's due process complaint notice indicated that she disagreed with the IESP, the parent did not appear as a witness to testify about the inappropriateness of the IESP and, similarly, no testimony had been elicited "from any witness" regarding the inappropriateness of the IESP (id. at p. 6). Moreover, the IHO indicated that the parent's "hearing request" was not "evidence" (id.).

Next, the IHO turned to the testimonial evidence provided by the student's then-current SEIT provider who testified on behalf of the parent's case (see IHO Decision at pp. 6-7). According to the IHO, the SEIT testified that the student needed "help in writing—which was the area of the occupational therapist"—and "support . . . in her unwillingness to engage in certain behavior in the classroom" (id. at p. 6). However, the IHO noted that the SEIT was not a "license[d] behavior therapist" and the parent was not seeking reimbursement for the costs of an applied behavior analysis (ABA) therapist (id.).

Based upon the SEIT's testimony, the IHO noted that the SEIT was "in the classroom in the morning when the class was engaged in the religious portion of the school day," but the

district did "not pay SEITs for supporting religious training" (IHO Decision at p. 6). The IHO then noted that the hearing record did not include any evidence of the SEIT's schedule regarding the "specific days" the SEIT worked with the student during the 2018-19 school year, other than an affidavit executed in October 2018 by the agency that employed the SEIT, which reflected "400 hours at a cost of \$175 an hour for \$70,000" (*id.*). The IHO indicated that, based upon the affidavit, it appeared that the parent wanted the district to "take it upon faith" that the SEIT actually worked the 400 hours with the student, even though the SEIT testified that she "usually" worked with the student for 2.5 hours per "week" and, at times, the SEIT worked with the student on Friday mornings if she or the student had missed a session (*id.* at pp. 6-7).⁶

Next, the IHO found that the hearing record did not include any "assessments by the agency" with respect to the student and "no expert witness testimony that this student required 10 hours of SEIT" (IHO Decision at p. 7). The IHO also found that the hearing record lacked testimony regarding "the determination" that the student required 10 hours of SEIT services (*id.*). According to the IHO, the SEIT's testimony describing how she assisted the student in "singing Hebrew in a circle, [and] putting her items in her backpack [was] not the description of the work of a SEIT" (*id.*). The IHO further noted that the SEIT was neither an occupational therapist, an ABA therapist, nor "any other behavior therapist and should not be engaging in behavior therapy" (*id.*). In addition, the IHO found that the hearing record did not include any evidence to support the SEIT's statements that the "teachers needed her assistance" (*id.*). The IHO also concluded that the parent failed to "present any credible documentation that [the SEIT] presented 400 hours of SEIT as per a document dated October of 2018, the second month the school year was in existence" (*id.*).

In reviewing the August 2018 psychoeducational evaluation report, the IHO noted that the evaluator "mentioned the student's immaturity, but did not recommend [10] hours of SEIT" (IHO Decision at p. 7). Moreover, the IHO noted that the September 2018 IESP included a recommendation for the student to receive "60 minutes a week of counseling on that issue" (*id.*).

In summary, the IHO found that the IESP was appropriate and denied the parent's request for "any hours of SEIT payment," noting further that the agency's fee of "\$175 an hour [was] totally without merit" (IHO Decision at p. 7). The IHO continued and alternatively concluded that, even if the IESP was not appropriate, the IHO would nonetheless have found that the student did not require 10 hours per week of SEIT services, as the hearing record lacked any evidence that the student needed this level of SEIT services (*id.*). Moreover, the IHO noted that even if he had determined "any services" were appropriate for the student, the IHO "would not have found \$175 per hour appropriate" (*id.*). The IHO thereafter opined that, while "dubious" to him, the "entire methodology—if believed" was not "appropriate for determining an hourly rate" for the SEIT (*id.*). Instead, the IHO indicated that if "any number of hours [were] appropriate," he would have found "an hourly rate of \$85 an hour appropriate" (*id.* at pp. 7-8). In addition, the IHO noted that the hearing record did not include any "reliable evidence" of the SEIT's purported schedule for working with the student, or that the SEIT "was going to provide 400 hours" of services as set forth in the "surely, self-interested" information within the agency's affidavit (*id.*

⁶ Contrary to the IHO's finding, the SEIT testified that she worked with the student for 10 hours per week, usually for 2.5 hours per day on Monday through Thursday (*see* Tr. pp. 35-36).

at p. 8). As a final point, the IHO noted that there was "still separation of church and state in this country" and the SEIT had testified that she provided "whatever she provided [to the student] during the religious portion of the school day" (*id.*).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent argues that the IHO improperly shifted the burden of proof from the district to the parent with respect to establishing whether the September 2018 IESP was appropriate and provided the student with equitable services pursuant to Education Law § 3602-c. Relatedly, the parent asserts that the IHO erred in finding that the IESP was appropriate to meet the student's needs. In support of this assertion, the parent contends that the CSE failed to base its recommendations on appropriate assessment materials, in that the CSE failed to assess the student's areas of weakness, including but not limited to her social/emotional and behavioral functioning. The parent specifically contends that the CSE failed to administer any standardized assessments, such as the Temperament and Atypical Behaviors Scale (TABS) or a functional behavioral assessment (FBA). The parent argues that, instead, the CSE relied upon "informal measures to guide their clinical opinions" of the student's social/emotional functioning. As a result, the parent alleges that the CSE's recommendations were "inaccurate and insufficient." In addition, the parent argues that the student's eligibility category of other health impairment was erroneous, which also resulted in the CSE inaccurately determining the student's special education services.

Next, the parent argues that the IHO failed to rule on whether the September 2018 IESP included sufficient services to support the management needs recommended in the IESP. Here, the parent asserts that the IESP, while acknowledging that the student required classroom supports throughout the school day, failed to include "any provider or service to meet those admitted needs." The parent also asserts that the counseling services recommended in the IESP, which included one 30-minute session per week in the student's classroom, could not meet the student's needs for on-task prompting throughout the school day.

Similarly, the parent argues that the IHO failed to rule on whether the annual goals were sufficient to meet the student's needs. More specifically, the parent contends that the annual goals in the September 2018 IESP lacked the "basic framework for acceptable IEP goals" because the annual goals did not include "short-term objectives, indicators of time and levels of support, attainment and accuracy to enable [the student] to achieve progress." The parent also contends that, in contrast to the annual goals in the January 2018 CPSE IEP that formed the basis for the "10 hour recommendation," the annual goals in the September 2018 IESP "compress[ed] numerous social/emotional and behavioral objectives into singular annual goals" and "plainly erred in outlining [the student's] comprehensive needs." As a result, the parent argues that the CSE "failed to recognize that 10 weekly hours of support that would be necessary in addressing them."

Next the parent argues that the IHO erred in finding that she did not establish that the requested 10 hours per week of SEIT services were appropriate to meet the student's needs. In addition, the parent asserts that the IHO's decision included "insinuations that unfairly" undermined the SEIT's testimony and deprecatory language describing the SEIT's "behavioral

interventions" used with the student. The parent also alleged that the IHO improperly dismissed the SEIT's testimony on the grounds of finding that the SEIT was an interested witness.

In addition to the foregoing, the parent argues that the IHO failed to address "all of the issues raised" in the due process complaint notice. The parent also argues that the IHO failed to hold the district to its burden of proof with regard to whether it met the student's individualized special education needs, whether the district failed to implement an appropriate placement to meet the student's management needs, and whether the district failed to consider the full continuum of services for a more restrictive program.

Finally, the parent contends that the IHO erred in concluding that the SEIT supported the student's religious training and that the IHO improperly considered and determined the "market rate" for the SEIT services.

As relief, the parent seeks an order directing the district to fund 10 hours per week of SEIT services, including "compensatory hours," for the 2018-19 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.⁷

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]).⁸ "Boards of education of all school districts of the

⁷ The district also asserts in its answer that the parent failed to number the paragraphs in the request for review, as required by the practice regulations. Part 279 of the Practice Regulations was amended, effective January 1, 2017, and while the former regulations mandated that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][former 3]), that requirement was not carried through into the regulations as amended (see 8 NYCRR Part 279). The regulations as amended neither require nor preclude the use of numbered paragraphs; however, the regulations do now require that each issue raised on appeal be separately numbered (8 NYCRR 279.8[c][2]). The request for review sets forth numbered issues in accordance with the practice regulations.

⁸ State law provides that "services" includes "education for students with disabilities," which means "special

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.*).⁹

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 Impartial Hearing and Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. In the request for review, the parent challenges the appropriateness of the September 2018 IESP based upon the sufficiency and/or accuracy of the evaluative information—or "assessment materials"—the CSE relied upon to make its recommendations (Req. for Rev. at pp. 3-4 [supporting "Issue #2"]). Within the same section of the request for review, the parent similarly argues that the CSE improperly identified the student as eligible for special education as a student with an other health impairment, which further contributed to the CSE's failure to make appropriate program recommendations for the student (*id.* at p. 4). In its answer, the district asserts that the parent's failure to raise the issues of the student's eligibility category and the current request for compensatory educational services as issues in the due process complaint notice precludes the parent from raising such allegations on

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]).

⁹ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

appeal for the first time.¹⁰ In addition, the district contends that the parent's claims with respect to the CSE's alleged failure to rely upon sufficient and/or accurate evaluative information is without merit.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its 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[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 300.508[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]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, I find that the parent's due process complaint notice—as amended—cannot reasonably be read to include challenges to the appropriateness of the September 2018 IESP based upon either the sufficiency and/or accuracy of the evaluative information—or "assessment materials"—the CSE relied upon to make its recommendations or the CSE's decision to find the student eligible as a student with an other health impairment as issues to be resolved at the impartial hearing (see generally Parent Ex. C). Moreover, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parent did not seek to further amend the September 2018 due process complaint notice or seek permission from the IHO to further amend the due process complaint notice prior to the impartial hearing to include allegations

¹⁰ To the extent that the parent requests an unspecified amount of "compensatory hours" for SEIT services "at market rate," it is entirely unclear what relief the parent specifically seeks or why the parent has requested such relief because the request for review offers no explanation or elaboration on this point (see generally Req. for Rev.). In its answer, the district argues that the parent is not entitled to such relief, in part, because the parent failed to request the same in the September 2018 due process complaint notice and raises the requested relief for the first time on appeal (see Answer ¶ 3). The district also argues, in part, that the parent is not entitled to such relief because the district fully provided the student with, and fully funded, 10 hours per week of SEIT services at the rate of \$175.00 per hour pursuant to the IHO's interim order on pendency and the parent does not now allege that the student failed to receive any of these pendency services or that the pendency services have not been paid for by the district (id.; see generally Req. for Rev.).

challenging the sufficiency or the accuracy of the evaluative information relied upon by the September 2018 CSE in the development of the IESP or challenging the student's eligibility category of other health impairment as issues to be resolved at the impartial hearing (see generally Tr. pp. 1-73; Parent Exs. A-E; Dist. Exs. 1-5).¹¹

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues and otherwise failed to raise these issues in the September 2018 due process complaint notice as amended, the issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]). Consequently, the allegations pertaining to the sufficiency and/or accuracy of the evaluative information—or "assessment materials"—the CSE relied upon to make its recommendations and the CSE's decision to find the student eligible as a student with an other health impairment raised by the parent now, for the first time on appeal, are outside the scope of my review, and therefore, these allegations will not be considered (see B.M., 569 Fed. App'x at 58-59; N.K., 961 F. Supp. 2d at 584-86; C.H., 2013 WL 1285387, at *9; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).

Next, the parent asserts in the request for review that the IHO erred in failing to address all of the issues raised in the September 2018 due process complaint notice. In particular, the parent contends that the IHO failed to determine: whether the IESP included services to support the student's management needs; whether the annual goals in the IESP were appropriate to meet the student's needs; whether the district failed to meet the student's special education needs; and whether the district failed to consider the continuum of services for a more restrictive placement for the student (see Req. for Rev. at pp. 4-6, 9 [identifying "Issue #3," "Issue #4," and "Issue #6"]; compare Parent Ex. C at pp. 2-5, with IHO Decision at pp. 4-7). Overall, the district

¹¹ Nor could it be deemed that the district opened the door to such issues during the hearing since the district did not present any testimonial evidence or cross-examine the parent's witnesses (see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]).

generally denies all of the allegations in the request for review but argues alternatively that the parent's contentions on these issues have no merit.

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see also Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have made determinations regarding the remaining issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed, even briefly (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

However, at this juncture, I am loathe to remand for further proceedings, where both the IHO and the undersigned ultimately agree that the September 2018 IESP offered the student appropriate services on an equitable basis, and where, as here, the unaddressed issues are relatively narrow such that the hearing record has been adequately developed for review of these issues. Adding even more weight in favor of not remanding the case for further proceedings before the IHO is the fact that, to date, the 2018-19 school year at issue has expired, the student has received all of the SEIT services the parent has requested as relief through the IHO's interim order on pendency, and the SEIT services have been fully funded at the rate of \$175.00 per hour, which the parent has also requested as relief (compare Req. for Rev., with Answer). Thus, remanding for further proceedings will only serve to further engage the parties in litigating issues that, for all intents and purposes, appear to have become moot.¹² Therefore, the merits of the parent's appeal are addressed herein.

¹² A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). Here, as the district has not raised mootness, application of the doctrine will not be further discussed.

2. Burden of Proof

As noted briefly above, the parent argues that the IHO improperly shifted the burden of proof from the district to the parent with respect to establishing whether the September 2018 IESP was appropriate and provided the student with equitable services pursuant to Education Law § 3602-c. In support of this contention, the parent points to specific language in the IHO's decision indicating that neither of the parent's witnesses testified about the inappropriateness of the IESP and the parent failed to present any witnesses to testify about the inappropriateness of the IESP. The parent contends that she bore no burden of proof at the impartial hearing and the district failed to sustain its own burden of proof. The district, in response, asserts that the IHO properly concluded that the September 2018 IESP was appropriate and properly placed the burden of proof on the district in making this determination.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).¹³

At first glance, an examination of the IHO decision—and in particular, the language used by the IHO—unmistakably supports the parent's contention that the IHO improperly shifted the burden of proof from the district to the parent (see IHO Decision at p. 6). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is 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]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). This is so despite the fact that the district did not present any testimonial evidence during the impartial hearing, the district did not appear at the second impartial hearing date, and the district representative did not engage in any cross-examination of either of the parent's two witnesses (see Tr. pp. 10, 30-57). Instead, the district representative offered an opening statement, which is not considered as evidence, and thereafter elected to rest its case-in-chief on the five documents submitted on the district's behalf (see Tr. pp. 28-30; Dist. Exs. 1-5). While this bare presentation of its case is not encouraged and, in many instances, may result in a finding that the district failed

¹³ The Court in Schaffer left open the question of whether States have the authority to shift the burden of proof through legislation (546 U.S. at 61-62).

to meet its burden of proof, under the specific circumstances of this case and given the nature of the claims pursued by the parent on appeal, the district's evidence is sufficient to establish the appropriateness of the September 2018 IESP, as set forth below.¹⁴

Notwithstanding the poor language used by the IHO when drafting her decision, which could easily be read as a misallocation of the burden of proof (see IHO Decision at pp. 6-7), an alternative reading of the IHO's decision overall reveals that the IHO recited the appropriate burden of proof (IHO Decision at p. 5) and that available evidence in the hearing record led the IHO to find that the IESP adequately addressed the student's needs and that there was no contrary evidence that would rebut that conclusion (i.e., evidence that the student required the specific services preferred by the parent); this did not necessarily represent a shift of the burden of persuasion to the parent to demonstrate the IESP's substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). In any event, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, concur with the IHO's ultimate determinations (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. September 2018 IESP

1. Present Levels of Performance

In this instance, although the sufficiency and accuracy of the student's present levels of performance and individual needs described in the September 2018 IESP are not at issue, a review thereof facilitates the discussion of the issues to be resolved—namely, whether the annual goals in the September 2018 IESP were appropriate and whether the educational program recommended in the September 2018 IESP, absent 10 hours per week of individual SEIT services, was reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

Initially, the September 2018 IESP reported the results of the August 2018 psychoeducational evaluation of the student, which reflected the student's overall performance on the WPPSI-IV as within the average range (full scale standard score [SS] 100, 50th percentile) (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at pp. 1, 4). Similarly, the IESP reflected the following WPPSI-IV composite scores: verbal comprehension, SS 114 (82nd percentile, high average range); visual spatial, SS 94 (34th percentile, average range); fluid reasoning, SS 117 (87th percentile, high average range); working memory, SS 74 (4th percentile, borderline range);

¹⁴ Ideally, if a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). While such documentation is not present in full in the present case, as noted herein, given that the student's needs are undisputed, the evidence is sufficient to examine the appropriateness of the annual goals and recommended program and services in the September 2018 IESP.

and processing speed, SS 100 (50th percentile, average range) (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 4). The September 2018 IESP also included narrative information gleaned from the August 2018 psychoeducational evaluation report: for example, the IESP indicated that the student exhibited strengths in verbal and fluid reasoning skills and "below normal limits" scores on measures of working memory, which the evaluator opined—based on the student's behavior—was "more likely" due to her "insufficient cooperation" during the administration of working memory subtests (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at pp. 4-5). In addition, the September 2018 IESP reflected information obtained from an April 2018 interview with the student's then-current SEIT provider, which indicated that the student demonstrated the ability to attend for at least five minutes and repeat back three numbers and four-word sentences (see Dist. Ex. 2 at p. 2).¹⁵ According to the IESP, the student remained on task with minimal prompting and positive reinforcement (using stickers) to complete tasks during an unspecified evaluation (id. at p. 3).

Academic achievement testing results from the August 2018 administration of the WIAT-III included in the September 2018 IESP reflected the following subtest standard scores: early reading skills, SS 108 (70th percentile, average range); alphabet writing fluency, SS 101 (53rd percentile, average range); spelling, SS 103 (58th percentile, average range); math problem solving, SS 116 (86th percentile, high average); and numerical operations, SS 94 (34th percentile, average range) (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 4). The evaluation report and the IESP included the evaluator's finding that the student's "[a]chievement test scores indicate[d] that [the student was] making sufficient progress in her acquisition of reading, math and written language skills" (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 5). Based upon the April 2018 interview with the student's then-current SEIT, the September 2018 IESP indicated that the student "met several of her Pre-kindergarten goals," she identified primary colors and shapes, she recognized her name, and she "usually" recognized most letters and numbers 1 through 10 (Dist. Ex. 2 at p. 2). The present levels of performance also reflected that the student identified directions, quantities, object functions, and similarities and differences; matched one-to-one; sequenced events; and told a story using details and sequencing of events that made sense based upon information provided by the student's then-current SEIT (id.). At times, the student reportedly exhibited some difficulty counting with 1:1 correspondence to 20 (id.).

Turning to the description of the student's social development in the present levels of performance and individual needs section of the September 2018 IESP, an April 2018 interview with the student's then-current SEIT revealed that the student continued to require reminders and prompts to attend to the activities presented, and to not shut down when she did not want to engage in a task or when asked to transition from a preferred to a less preferred activity (see Dist. Ex. 2 at p. 2). The IESP indicated that the student did not cope well with, and occasionally had difficulty with, adapting to changes in her routine (id.). During times when the student refused

¹⁵ According to the evidence in the hearing record, the SEIT who testified at the impartial hearing and who provided services to the student during the 2018-19 school year began providing services to the student in May 2018, and thus, was not the same SEIT provider who participated in the April 2018 interview or who provided SEIT services to the student in preschool for the majority of the 2017-18 school year (see Tr. p. 35; see also Parent Ex. E; Dist. Ex. 5).

to engage in challenging tasks, she required an adult to provide her with "a lot of attention and encouragement" to comply with the request (id. at pp. 2-3). The student's then-current SEIT's and classroom teacher's reports, as reflected in the September 2018 IESP, noted that the student had positive interactions with adults, usually complied with adult requests and interacted positively with school staff when engaged in preferred activities, and asked staff for things she required, but "rarely interact[ed] with staff for a purely social reason" (id. at p. 2). According to the student's then-current SEIT, as of April 2018, the student was showing improved play skills, although she played more in a parallel fashion than collaboratively and needed prompting to engage in pretend play scenarios (id.). The student's then-current classroom teacher's report reflected in the September 2018 IESP indicated that the student attempted to interact with a few female peers during the school day and joined activities initiated by other students (id.). Although the IESP reflected reports that the student's sharing and turn-taking skills had improved, the September 2018 IESP continued to note that she still became upset when a peer had a toy she desired or she believed she would not get to take her turn (id.). The classroom teacher reported that the student had difficulty initiating play scenarios, appeared at times to prefer to play on her own, and more often engaged in parallel play with peers (id.).¹⁶ According to the August 2018 psychoeducational evaluation report and as noted in the IESP, the student "appear[ed] to be an emotionally immature child who ha[d] difficulty tolerating frustration, delaying gratification and responding to limit setting which may impede her daily functioning and her ability to get along with others" (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at p. 3).

Regarding the student's physical development and activities of daily living (ADL) skills, the September 2018 IESP indicated that the student was generally healthy and her hearing and vision skills were within normal limits (see Dist. Ex. 2 at p. 3). As reported in the IESP, an administration of the Peabody Developmental Motor Scales to the student reflected the following testing results: grasping skills, 1st percentile; visual motor integration skills, 16th percentile; and fine motor quotient, 2nd percentile (id.). The IESP reflected that, according to an April 2018 OT progress report, the student continued to need to work on improving her fine motor skills, bilateral coordination, visual motor and visual perceptual skills, and upper body strength (id.). The student's then-current SEIT reported, and the IESP reflected, that the student did not always hold writing implements with an appropriate grasp, use scissors correctly, or copy a simple design, although she wrote some letters and her name (id. at p. 2; see Dist. Ex. 3 at p. 3). With regard to the student's ADL skills, the September 2018 IESP indicated that the student was "completely toilet trained" and ate and dressed independently (Dist. Ex. 2 at p. 2). Occasionally, the student needed to repeat herself to people unfamiliar with her pronunciation (id.).

2. Annual Goals

Before addressing the parties' dispute regarding the annual goals in the September 2018 IESP, it does not go unnoticed that, although the parent took advantage of the opportunity to amend her original July 2018 due process complaint notice, the amended September 2018 due process complaint notice continued to reflect issues related to the May 2018 IEP as opposed to the most recently created September 2018 IESP. This is particularly apparent with respect to the

¹⁶ However, the September 2018 IESP also reported that, during a classroom observation, the student "was observed to interact positively with her peers and to engage in positive play behaviors" (Dist. Ex. 2 at p. 3).

allegations pertaining to the annual goals. For example, in the July 2018 due process complaint notice the parent alleged that the "IEP clearly describe[d] all of [the student's] needs" but the annual goals "failed to address all of those needs"; the annual goals "recommended [were] arbitrary"; the "IEP recommend[ed] academic goals for a student that demonstrate[d] average functioning across academic areas" (Parent Ex. A at p. 5). The parent further alleged in the July 2018 due process complaint notice that the "absence of goals in the IEP that reflect[ed] the student's individualized needs, and which [were] capable of implementation and measurement, undermine[d] the validity of the IEP" (*id.*). The parent's September 2018 due process complaint notice included the same allegations, verbatim, about the annual goals (compare Parent Ex. C at pp. 3-4, with Parent Ex. A at p. 5), notwithstanding the fact that the September 2018 IESP included new and different annual goals when compared to the annual goals in the May 2018 IEP (other than the two annual goals created to address the student's OT needs) and, in particular, the September 2018 IESP did not include the "academic goals" that had been included in the May 2018 IEP (compare Dist. Ex. 2 at pp. 4-5, with Dist. Ex. 4 at pp. 4-6).

Nevertheless, at this juncture and out of an abundance of caution, the allegations in the September 2018 due process complaint notice will be generously interpreted as pertaining to the annual goals in the September 2018 IESP even though the allegations appear to be directed at the annual goals in the May 2018 IEP.

Turning now to the parties' dispute, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. § 1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).¹⁷ As discussed more fully below, the annual goals in the September 2018 IESP met the applicable

¹⁷ State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (*id.*). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (*id.*).

standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

Upon review, the September 2018 IESP includes five annual goals targeting the student's identified needs in the areas of social/emotional skills, classroom and social skills, and fine motor skills (see Dist. Ex. 2 at pp. 4-5). A careful review of the annual goals reveals that, contrary to the parent's assertions on appeal, each annual goal included an evaluative criteria (i.e., 4 out of 5 trials, 80 percent accuracy, 4 out of 5 times over 3 consecutive trials), an evaluation schedule (i.e., 1 time per quarter, 1 time per month), and a procedure to evaluate the goals (i.e., teacher or provider observations, verbal explanation, provider recorded observations) (id.). Additionally, the IESP indicated that the student was not designated to participate in the alternative assessment, and therefore, short-term objectives were not required in this instance (id. at p. 7).

On appeal, the parent also challenges the way in which the September 2018 IESP social/emotional annual goals were written or worded, asserting that too many "objectives" were included in each annual goal. Even assuming for the sake of argument that this assertion is true, a review of the social/emotional annual goals and classroom/school skills goal shows that, overall, they addressed the student's needs reflected in the present levels of performance, which are undisputed (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 2 at pp. 4-5). For example, the IESP annual goals were designed to improve the student's ability to maintain appropriate behavior when frustrated, demonstrate improved self-control, receive feedback, and respond to limit setting appropriately, as well as the student's ability to demonstrate appropriate play skills by engaging in cooperative play, waiting her turn, and resolving conflicts in an appropriate manner (see Dist. Ex. 2 at p. 4). Another annual goal addressed the student's need to work steadily with attention focused on the task, finish a given task on time, attempt tasks considered to be challenging, and ask for help when needed (id.). Here, even if each of the annual goals, as written, targeted multiple skills or areas of need, the annual goals meet the requisite regulatory criteria for measurability and address the student's needs. Moreover, a review of the annual goals shows that they are sufficient to guide an educator in providing instruction to the student, and any deficiencies do not rise to the level of denial of a FAPE.

Next, to the extent that the parent argues on appeal that the annual goals—as written—in the September 2018 IESP contributed to the CSE's failure to recommend an appropriate program for the student and relate directly to the CSE's failure to recognize that the student would require 10 hours per week of SEIT services to support, or implement, the student's annual goals, such argument will be addressed below.

3. Recommended Services

The parent asserts that the IHO's finding that the September 2018 IESP was appropriate "ignored the obvious absence of recommended services"—i.e., 10 hours per week of SEIT services—to support the student's management needs and annual goals, and therefore, the IESP recommendations for only related services was not supportive enough to meet the student's social/emotional and behavioral needs. As evidence of the September 2018 IESP's inappropriateness, the parent argues that while both the May 2018 IEP and the September 2018

IESP recognized the student's need for on-task prompting throughout the school day as needed in the classroom, the May 2018 IEP's recommendation of ICT services presumably allowed the special education teacher to provide the on-task prompting in the classroom. In addition, the parent argues that the September 2018 IESP—which "added additional management needs" to the student's program and removed the special education teacher support or ICT services—failed to include support for the management needs and/or the on-task prompting in the classroom throughout the school day.¹⁸

Initially, it is undisputed that that the student demonstrates social/emotional and behavior needs and, moreover, that the parent does not challenge the accuracy or sufficiency of how those needs are identified and described in the present levels of performance (see generally Parent Ex. A; Req. for Rev.). In fact, the parent wholly acknowledged that both the May 2018 IEP and the September 2018 IESP clearly identified the student's needs (see Parent Exs. A at p. 5; C at p. 4). Thus, the crux of the dispute focuses on how the student's needs were to be addressed by the special education recommendations in the September 2018 IESP: to wit, related services of counseling and OT versus the parent's preferred service consisting of 10 hours per week of SEIT services.

As described in the September 2018 IESP, the student exhibited "difficulty tolerating frustration and cooperating"; the IESP also noted that the student, "at times," exhibited "oppositional and defiant behavior" (Dist. Ex. 2 at p. 1; see also Dist. Ex. 2 at p. 2 [noting difficulties with transitioning from a preferred to a less preferred activity, when transitioning with an unfamiliar adult, and when she was unwilling to engage in a task; also noting the student's tendency to "shut down" when asked to transition from a preferred to a less preferred activity or when asked to transition with an unfamiliar adult]). According to the IESP, due to the student's "short attention span, fine motor delays, social skills deficits, and self-directed behavior," she may demonstrate a slower than expected rate of progress in "acquiring skills and information" when compared to similarly aged students (Dist. Ex. 2 at p. 2). As a result of the foregoing, the September 2018 IESP noted that the student required the following: "frequent prompting to remain on task, direction repeated and clarified, models for appropriate fine motor skills, praise and encouragement when she engage[d] in appropriate transitions, and [to] break down complex fine motor tasks into easier segments" (id.). The IESP documented the parent's concerns about the student's social/emotional functioning and her fine motor skills, and that the parent "inquired about continuing SEIT support for behavior and social emotional development" (id.).

In response to the parent's request for SEIT services to address the student's social/emotional needs, the September 2018 IESP documented that the "[t]eam" members of the CSE explained to the parent that SEIT services were "not a school age service" and further, that

¹⁸ With regard to the parent's arguments that compare the September 2018 IESP to the May 2018 IEP, as the September 2018 IESP came about as a result of the parent's due process complaint notice challenging the May 2018 IEP and resultant resolution agreement between the parties (see Parent Ex. A; Dist. Ex. 1), it was intended to remedy deficiencies in the May 2018 IEP, and, therefore, it is the adequacy of the September 2018 IESP that is the subject of this proceeding and the content of the May 2018 IEP is of limited relevance to that assessment (R.E., 694 F.3d at 187-88).

the student "did not require such a service" (Dist. Ex. 2 at p. 2). The IESP also documented that the CSE did, however, "recommend counseling as a related service once a week in the classroom and once a week in a group with goals aimed to address [the student's] social emotional functioning" (id.). The IESP also reflects that the parent requested counseling as a related service recommendation to help the student "improve her behavior, including her compliancy" (id.).

Similarly, the September 2018 IESP described the student socially as being "emotionally immature," which resulted in the student exhibiting "difficulty tolerating frustration, delaying gratification and responding to limit setting" (Dist. Ex. 2 at p. 2). The IESP further noted that these difficulties may "impede [the student's] daily functioning and her ability to get along with others" (id.). In the same regard, however, the student responded at times to "positive reinforcement" and had a "few peers she gravitate[d] toward"; additionally, the IESP reflected that the student "usually interact[ed] positively with school staff" when engaged in preferred activities (id.). According to the IESP, the student also responded to and complied with "adult requests" (id.). To the extent that the student, at times, "shut down and refuse[d] to engage in fine motor tasks that tend[ed] to be more challenging for her," the September 2018 IESP noted that the student "usually require[d] a staff person to provide a lot of attention and encouragement for her to comply with the request" (id. at p. 3). As parent concerns, the IESP reflected the parent's desire for the student to initiate more peer interactions and her concerns about the student's behavior during transitions and that the parent felt the student required "support with transitions" (id.).

To address the aforementioned needs, the September 2018 CSE recommended, in part, the following strategies to address the student's management needs: prepare the student for transitions, monitor her for signs of frustration, make expectations and requirements clear to the student, be consistent and adhere to system of rewards and consequences with the student, repeat and clarify verbal directions, break down verbally complex tasks, provide on-task prompting, visual prompts, and on topic reminders, and model initiation of social interactions with peers for the student (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 2 at p. 3).¹⁹

¹⁹ State regulation and guidance documents define management needs as the "means the nature and degree" to which "environmental modifications," "human resources" and "material resources" "are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [providing examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note taking), and material resources (i.e., instructional materials in alternative formats)]. Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model IEP form," Office of Special Educ. Mem. [Revised Mar. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm>). A student's management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]; see also "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

In addition, the CSE recommended the following related services to directly target the student's social/emotional, behavioral, and fine motor or graphomotor skills: one 30-minute session per week of individual counseling in the general education classroom, one 30-minute session per week of counseling in a group in a separate location (counseling room), one 30-minute session per week of individual OT in the general education classroom, and one 30-minute session per week of individual OT in a separate location (OT room) (Dist. Ex. 2 at pp. 5-6). Additionally, the IESP included the following supplementary aides and services, program modifications, and accommodations: "[o]n task prompting" to be provided throughout the school day as needed in the classroom (*id.* at p. 6).

In addition to the management needs and related services, the September 2018 CSE created annual goals that directly addressed the student's social/emotional and behavioral functioning, as well as the student's fine motor and graphomotor skills (*see* Dist. Ex. 2 at pp. 4-5). For example, the September 2018 CSE developed annual goals to improve the student's ability to hold a writing implement with a mature grasp, draw designs and letters, and improve scissor skills (*id.* at pp. 2-3, 5). The September 2018 CSE also developed annual goals targeting the student's social/emotional functioning, to wit: her ability to "identify and manage her feelings (i.e., frustration)," to maintain "appropriate behavior even when frustrated," and to demonstrate "improved self[-]control and receive feedback appropriately and respond to limit setting" (*id.* at p. 4). The September 2018 IESP included an annual goal to address the student's "play skills, peer relations and cooperative learning," as well as an annual goal addressing the student's ability to "display productive school behavior on a daily basis," her ability to sustain attention to tasks, and attempting tasks that the student may consider to be challenging (*id.*).

In reviewing the entire hearing record, the evidence demonstrates that the present levels of performance describing the student's social/emotional and behavior needs, as well as her fine motor and graphomotor needs, in the September 2018 IESP closely and carefully align with the recommendations made for management needs and annual goals (*compare* Dist. Ex. 2 at pp. 1-3, *with* Dist. Ex. 3). In addition, while the student may have required additional adult support (i.e., SEIT services) in the past within her preschool setting, at the time of the September 2018 CSE meeting the information available to the CSE indicated that the student participated in an evaluation with "some encouragement" from adults, remained on task with "minimal prompting and positive reinforcement using stickers," and complied with less preferred tasks with prompting (Dist. Ex. 2 at pp. 2-3).²⁰ Moreover, a review of the management needs

²⁰ To the extent the parent points to the testimony of the SEIT that delivered services to the student after May 2018, as well as the February 2019 progress report she prepared, as evidence that the student required SEIT services during the 2018-19 school year (*see* Req. for Rev. at pp. 6-7; Tr. p. 35; Parent Ex. D), there is no indication in the hearing record that her opinion about the student's need for SEIT services was available to the September 2018 CSE and, therefore, may not be relied upon to retrospectively assess the CSE's recommendations (*see* C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

recommended in the September 2018 IESP reflects that many relate to providing the student with prompting, supporting her peer interactions, and encouraging appropriate behavior. Additionally, the IESP specifically noted that the student's difficulty transitioning and refusal behaviors were at times related to requests to participate in fine motor activities, which she found challenging, but which the September 2018 CSE addressed via the social/emotional and graphomotor annual goals and through both related services recommendations for counseling and OT services (id. at pp. 2-3, 5).

While the parent contends that the student required additional adult support to implement the management needs and annual goals in the IESP, the parent does not point to any legal authority or any evidence in the hearing record to support this contention. With regard to the parent's assertion that the CSE should have recommended SEIT services in particular, to be clear, State law defines SEIT (or "SEIS") 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; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Thus, to the extent that the parent believes the student should have continued to receive SEIT services in the 2018-19 school year, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for preschool students to a school-aged student. However, going forward it may be helpful to the parent if she remains interested in continuing 1:1 instruction by a teacher or 1:1 support by a paraprofessional that she speaks to district staff in those terms rather than relying on the term "SEIT." Additionally, as reflected in the September 2018 IESP, it was not inaccurate for the CSE—when the parent requested SEIT services to address the student's social/emotional needs—to explain to the parent that "SEIT [was] not a school age service" and to thereafter address the student's needs in this area through alternative special education services (see Dist. Ex. 2 at p. 2).²¹

For the reasons set forth above, the student's needs did not warrant additional adult support in the classroom for the student. However, in this instance, examination of the options

²¹ Moreover, the State guidance, which sets forth indicators for CPSEs to consider when recommending the frequency of SEIT services, indicates that a CPSE recommendation of 7 to 10 hours per week of SEIT services—here, the frequency and duration sought by the parent—would be warranted if the student exhibited "serious delays in multiple domain areas, which require intensive intervention by a special education teacher"; the student's "behavior management program requires extensive coordination, direct implementation, and facilitation by a special education teacher"; and "caregivers require extensive consultation and training by a special education itinerant teacher in order to support the [student's] achievement of goals and objectives" ("Special Education Itinerant Services for Preschool Children with Disabilities," Attachment 1). As set forth herein, the student's needs do not rise to this level.

available on the continuum—which may have offered the level of support preferred by the parent—lends further support for a determination that the CSE's recommendation for related services, along with annual goals and identified supports for the student's management needs, offered the student an appropriate education on an equitable basis. For example, direct consultant teacher services, resource room services, or ICT services, all contemplate delivery of either direct or supplemental instruction to the student by a certified special education teacher (see 8 NYCRR 200.1[m][1]; [rr]; 200.6[d], [f], [g]; see also "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/documents/continuum-schoolage-revNov13.pdf>). However, there is no dispute that the student exhibited average functioning across academic areas and no indication that she required direct or supplemental academic instruction.

As for paraprofessional support, a State guidance document, dated June 2016, related to a CSE's consideration for one-to-one aide services for either a preschool student or a school-age student contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/documents/new-regs-for-one-to-one-aides.pdf>; see 8 NYCRR 200.4[d][3][vii]). As set forth above, the student's needs did not rise to this level.

Simply stated, a review of the student's needs as identified in the present levels of performance in the September 2018 IESP, which accurately reflect the testing results in the August 2018 psychoeducational evaluation report, do not support a finding that the student exhibited needs at a level of intensity requiring a recommendation for instruction or support from a special education teacher (via a SEIT or otherwise) or one-to-one aide services based upon State regulation and guidance documents. Rather, a review of the evidence in the hearing record shows that the September 2018 CSE identified the student's needs in the areas of social/emotional, behavioral, and graphomotor functioning, developed annual goals targeting these specific areas of need, and recommended related services—albeit not the 10 hours per week of SEIT services preferred by the parent—to address those needs, resulting in an IESP that was reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student appropriate services on an equitable basis for the 2018-19 school year, the

necessary inquiry is at an end and there is no need to reach the issue of the appropriateness of the SEIT services provided to the student during the 2018-19 school year (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, at 370 [1985]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
July 24, 2019

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**