



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-067

**Application of the BOARD OF EDUCATION OF THE PLEASANTVILLE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability**

### **Appearances:**

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Garrett L. Silveira, Esq.

Trevor Eisenman, PC, attorney for respondents, by Trevor Eisenman, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that the student was eligible for special education and related services for the 2018-19 school year and ordered the district to fund a functional behavior assessment (FBA) of the student as an independent educational evaluation (IEE). The parents cross-appeal from that portion of the IHO's decision which denied their request for a neuropsychological evaluation of the student as an IEE. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[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 (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### III. Facts and Procedural History

In this case, the student—at ages three and four—attended preschool for "six hours per day and [five] days per week" (Dist. Ex. 5 at p. 21).<sup>1</sup> As reported by her parents, the student had a "difficult time participating in a typical classroom setting" and was enrolled in an "integrated setting" through the Committee on Preschool Special Education (CPSE) (*id.*). As a preschool student with a disability, the student also received physical therapy (PT) and occupational therapy (OT) (*id.*).

The evidence in the hearing record indicates that prior to entering kindergarten in September 2014 during the 2014-15 school year, the student had been "declassified following her transition" from receiving CPSE (preschool) services to receiving CSE (school-age) services (Dist. Ex. 5 at p. 21). However, the student continued to receive "building-level" PT and "counseling consultation services" in kindergarten (*id.*). The student reportedly did "well" in kindergarten "because the expectations were limited" (*id.*).

In April 2016 during first grade in the 2015-16 school year, the parents referred the student to the CSE "due to concerns regarding her attention, emotion regulation, and her ability to communicate her thoughts" (Dist. Ex. 5 at pp. 21-22). At that time, the district evaluated the student and determined she was not "eligible for CSE services," but then referred her to the "504 Committee to create a plan for her ongoing academic and social/emotional needs" (*id.* at p. 22; see Parent Ex. A at p. 1).

In June 2016, a 504 committee conducted an initial determination meeting, and found that the student had a "physical or mental impairment that substantially limit[ed] a major life activity" and thus, qualified for a "504 Plan" (Parent Ex. A at pp. 1-2).<sup>2</sup> More specifically, the 504

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<sup>1</sup> Although the district separately and numerically identified each exhibit entered into the hearing record as evidence, the district consecutively paginated all of the exhibits; for example, the first page of district exhibit "5"—a March 2018 psychological evaluation report (a 26-page document)—is Bates-stamped as page "00020," as opposed to page "1" and the last page of district exhibit "5" is identified as page "00045" as opposed to page 26" (see generally Dist. Ex. 5). For clarity, citations to specific pages within the district exhibits will reflect the shortened Bates-stamped number (i.e., "20" and not "00020") assigned to those pages.

<sup>2</sup> "Under section 504 of the Rehabilitation Act, a public school district that receives federal funds must provide reasonable accommodations to a student with a disability to ensure that the student is not 'excluded from the participation in,' 'denied the benefits of,' or 'subjected to discrimination' in public education 'solely by reason of her or his disability'" (Hoover City Bd. of Educ. v. Leventry, 2019 WL 4415565, at \* 2 [S.D. Ala. Sept. 16, 2019], citing 29 U.S.C. § 794[a]). "A disabled student under the Rehabilitation Act has 'physical or mental impairments [which] substantially limit his ability to learn and participate in a classroom environment'" (Hoover, 2019 WL 4415565, at \* 2 [emphasis in original removed]; see J.S.R. v. Dale Cty. Bd. of Educ., 2015 WL 5692804, at \*4 [M.D. Ala. Sept. 28, 2015], citing 34 CFR 104.35[a]). "'All children with disabilities under the IDEA, as well as some children who are ineligible for special education under the IDEA, are [ ] protected by [section] 504 of the Rehabilitation Act'" (Hoover, 2019 WL 4415565, at \* 2, citing J.S.R., 2015 WL 5692804, at \*3). "'An IEP created under the IDEA satisfies [section] 504's requirements'" (Hoover, 2019 WL 4415565, at \* 2; see J.S.R., 2015 WL 5692804, at \*4, citing K.D. v. Starr, 55 F. Supp. 3d 782, 785 n.3 [D. Md. 2014]). "'But an education plan created for a student under the Rehabilitation Act may not meet the IDEA's FAPE requirements'" (Hoover, 2019 WL 4415565, at \* 2; see J.S.R., 2015 WL 5692804, at \*4).

committee identified the student's "physical or mental impairment" as having a diagnosis of autism spectrum disorder (ASD) (*id.* at p. 2).<sup>3</sup> In addition, the 504 committee identified the "major life activity affected by this physical or mental impairment" as the student's "impulsivity," noting that it could "impede her ability to focus" (*id.*). According to the 504 accommodation plan, the student's "impairment substantially limit[ed] a major life activity" by "interfer[ing] with her ability to stay on and complete tasks without accommodations" (*id.*). To address these needs, the 504 committee recommended the following as program accommodations, modifications, and supports: two 30-minute sessions per week of speech-language therapy (group), one 30-minute session per week of psychological counseling services (group), and one 15-minute session per week of psychological counseling services ("direct/indirect consult") (*id.* at p. 3). In addition, the 504 committee recommended the following as supplementary aids, services, program modifications, and accommodations: the services of an aide, a behavior intervention plan (BIP), preferential seating, repetition of directions, checking for understanding, special seating arrangements, and movement breaks (*id.*).

The evidence in the hearing record indicates that the student "continued to receive support under her Section 504 Plan in second [2016-17 school year] and third grades [2017-18 school year], with a shared aide," two 30-minute sessions per week of speech-language therapy, one 30-minute session per week of counseling services (small group), and one 15-minute session per week of counseling services "for direct/indirect consultation" (Dist. Ex. 5 at p. 22; see generally Tr. pp. 14, 18, 241; Parent Exs. A-B [comprising the student's section 504 accommodation plans for the 2016-17 and 2017-18 school years];<sup>4,5</sup> K [reflecting "Response to Intervention [RtI] Services Progress Report" (RtI "Level Tier 2") for speech-language therapy services provided during the 2016-17 school year]; L [reflecting "[RtI] Services Progress Report" (RtI "Level Tier 2) for speech-language therapy services provided during the 2017-18 school year]; M [reflecting "[RtI]

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<sup>3</sup> According to the section 504 accommodation plan, the student received a diagnosis of ASD during the previous "summer" (Parent Ex. A at p. 1). The 504 plan also indicated that the student's OT services would be discontinued at the conclusion of the 2015-16 school year "because [she] ha[d] made so much progress th[at] year" (*id.*). At that time, that student exhibited "attentional difficulties," but "[t]esting showed [that the student had] strong cognitive functioning and no signs of a learning disability" (*id.*). The 504 plan also noted that the student "currently attend[ed] an outside language group to work on pragmatics" and received a "sensory diet" (*id.*).

<sup>4</sup> For the 2017-18 school year, the program recommendations in the student's 504 accommodation plan remained essentially unchanged from those in the 504 plan for the 2016-17 school year (compare Parent Ex. A at pp. 2-3, with Parent Ex. B at pp. 3-4). However, for the 2017-18 school year the 504 committee added "gum chewing" to the list of the supplementary aids, services, program modifications, and accommodations that the student would receive during the 2017-18 school year, and modified the student's plan to include various testing accommodations (breaks, extended time, clarification of direction, directions repeated or clarified, refocusing, reminders to check work before submitting it, and a flexible setting) (compare Parent Ex. A at pp. 2-3, with Parent Ex. B at pp. 3-4).

<sup>5</sup> As reported in the student's 504 plan for the 2017-18 school year, the district school psychologist had "a lot of concerns about [the student's] inattention" (Parent Ex. B at p. 1). The 504 plan noted that the parents "continue[d] to trial different medications" with the student (*id.*). The parents also expressed concerns about the student's ability to "develop appropriate social interactions" (*id.*). In that regard, the parents requested that the committee consider assigning the student to a classroom next year where "a group of students [were] not pulled daily" (*id.*). The committee agreed to "do the best we can," but noted that there were "no guarantees" (*id.*).

Services Progress Report" (RtI "Level Tier 2) for counseling services provided during the 2017-18 school year]). In addition, the evidence reflects that the student had a BIP as part of her section 504 plans for both the 2016-17 and 2017-18 school years (see Parent Exs. A at p. 3; B at p. 3; see also Dist. Ex. 5 at p. 20).

During third grade (2017-18 school year), the parents—in an email dated February 9, 2018—"formally" referred the student to the CSE for an eligibility determination under the IDEA (Parent Ex. AA at pp. 73-74). According to the email, the parents had "grown increasingly concerned that the [student's] current plan [was] not appropriately meeting her needs" (id. at p. 74). As part of the referral and evaluation process, the parents specifically requested that the district conduct an FBA and create a BIP to "assist with educational planning" (id.).

Thereafter, as a part of this process, the district conducted a March 2018 psychological evaluation (see generally Dist. Ex. 5),<sup>6</sup> a March 2018 classroom observation (see generally Dist. Ex. 9), an April 2018 education evaluation (see generally Dist. Ex. 6), an April 2018 speech-language evaluation (see generally Dist. Ex. 7), an April 2018 OT evaluation (see generally Dist. Ex. 8), and a May 2018 FBA (see generally Dist. Exs. 11; 20; Parent Exs. CC; EE; FF-GG), and a May 2018 BIP (see generally Dist. Ex. 12).

According to the evidence in the hearing record, the March 2018 psychological evaluation consisted of the administration of the following assessments to the student (or where appropriate, the parents and/or teachers): the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V), the Behavior Assessment System for Children—Third Edition (BASC-3) (parent and teacher rating scales), the Gilliam Autism Rating Scale—Third Edition (GARS-3) (parent and teacher rating scales), and selected tests from A Developmental Neuropsychological Assessment Test—Second Edition (NEPSY-II) (see Dist. Ex. 5 at pp. 20, 29, 32, 36; see also Tr. pp. 102-03, 126).<sup>7</sup> In addition, the psychological evaluation included completing a social and developmental history, a file review, and behavioral observations (see Dist. Ex. 5 at pp. 20-23). The evidence in the hearing record reveals that although a psychology student intern administered the March 2018 psychological evaluation to the student, the district school psychologist selected the assessments

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<sup>6</sup> As noted in the March 2018 psychological evaluation report, the parents indicated that the student took "several medications daily to manage a variety of medical concerns," including, among other things, "juvenile idiopathic arthritis for the past 3 to 5 years" and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 5 at p. 21).

<sup>7</sup> Although the March 2018 psychological evaluation report reflects that the district administered the "Second Edition" of the Behavior Assessment System for Children (BASC), the district school psychologist testified that the "Third Edition"—or "BASC-3"—was administered to the student (compare Dist. Ex. 5 at pp. 20, 32, with Tr. pp. 126, 318).

to be administered to the student and she supervised the psychology student intern's testing of the student (*id.* at pp. 20, 42; *see* Tr. pp. 99-103, 306-08).<sup>8,9</sup>

On May 8, 2018, a CSE convened for an initial eligibility meeting and reviewed the evaluative information collected for the student (*see* Dist. Ex. 18 at pp. 136-41; *see generally* Dist. Exs. 5-12; 18). Prior to reviewing and discussing the evaluative information, the parents expressed their "major concern" as the student's difficulty "focusing" (Dist. Ex. 18 at p. 136). The parents indicated that the student saw a "private therapist" and had a "number of different issues," but hoped that "improving the focusing w[ould] help with the other issues" (*id.*). In addition, the parents noted that while the student's focusing was the "biggest problem in terms of medication," the medication had helped and the student, currently, "seem[ed] stable" (*id.*). The parents also noted that the student, who they described as "very intelligent," could not "access the words necessary and sometimes . . . [made] no sense" and that "[t]hings were very scripted"—which had also been observed at school (*id.*). The parents also raised concerns about the "social component," noting that the student had "finally developed friends," but it, at times, appeared "awkward" (*id.*). According to the parents, they believed this reflected a "communication problem and verbal language problems," and wanted to know what else to do for the student, who they also described as "maturing at a slower rate" (*id.*).

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<sup>8</sup> At the impartial hearing, the district school psychologist testified that "every year" since she began working at the district, the district participated as an American Psychological Association (APA) "accredited internship program" (Tr. pp. 99-100). Through this program, the district was a "training facility for interns" in graduate degree programs (Tr. p. 100). When supervising an intern conducting an evaluation, the district school psychologist met with the intern "regarding the test battery scoring interpretation, [and] report writing"—meaning, in this instance, that the school psychologist met with the intern about "administration, about scoring" and she "double scored the protocols and then the interpretation and report writing" (Tr. p. 101). The district school psychologist explained that she met weekly with interns for "individual supervision," as well as "biweekly district-wide supervisions" (Tr. pp. 101-02). The psychology student intern who administered the March 2018 psychological evaluation to the student also provided counseling services to the student during the 2017-18 school year, namely, the "direct consult portion of [the student's] 504 [plan] which . . . serve[d] as either an individual counseling session or a push into the classroom" sessions (Tr. pp. 309-10). In addition, the psychology student intern "co-led the group" counseling session the student received with the district school psychologist (Tr. p. 310). At the time of the March 2018 psychological evaluation, the psychology student intern was completing "her third year of graduate school" and "had taken all the appropriate course work prior to that point" (Tr. p. 313). The psychology student intern had been working in the district since September 2017 (*id.*).

<sup>9</sup> The evidence in the hearing record reveals that, in an email dated March 27, 2018, the psychology student intern introduced herself to the parents and advised them that she would be "doing some of the testing" for the student's "upcoming CSE evaluation" (Parent Ex. AA at p. 122). In response, the parents, among other things, asked when the student would be "observed in class by an outside psychologist and if [they] c[ould] cho[ose] that doctor" (*id.*). Later that same day, the district school psychologist responded to the parents' inquiry in an email, noting that the CSE evaluation process did not include an "observation by an outside psychologist" (*id.* at pp. 121-22). She also explained that the psychology student intern would assist her in collecting "observational data needed for the FBA" (*id.*). The next day on March 28, 2018, the parents sent an email to the district school psychologist, indicating that they were a "bit concerned with an intern conducting such a critical portion of [the student's] assessment in terms of data collection for the FBA" (*id.* at p. 121). In addition, the parents asked for clarification about "how many observations the intern" would do versus the school psychologist—and then requested that the school psychologist" (as a licensed professional) be the one to create and write up the FBA/BIP" (*id.*). Finally, the parents indicated that they were "not aware of the fact that an intern would be participating in the assessment or [they] would have voiced [their] concerns sooner" (*id.*).

According to the May 2018 CSE meeting minutes, the parents' observations of the student were "consistent with what [was] seen in school" (Dist. Ex. 18 at p. 136). The student's then-current third grade classroom teacher (a general education teacher) added that they, too, observed the student's use of scripting at school and that she had a "difficult time with theory of mind" and could "struggle with understanding another's perspective" (id.). He further noted, however, that the student was "so bright" and could "compensate" (id.). The teacher observed the "social and emotional components [as] more difficult than [the] attention" (id.).

At that point in the CSE meeting, the district school psychologist reviewed and discussed the FBA of the student (see Dist. Ex. 18 at p. 136). Overall, the school psychologist characterized the student's "emotional meltdowns" as the most significant behavior affecting the student and that her attention issues were "not impacting her as much" (id.). The school psychologist indicated that the "emotional meltdowns" were found to be the "biggest problems" because they often led to "decreased positive social interaction[s]" (id.). She further indicated, however, that the student's "coping" had improved, which would "help with the negative social interactions" and "help build her social skills" (id.). According to the third grade teacher, the student's "meltdowns happen[ed] during lunch/recess, specials, and more open ended activities" (id.). The parents noted that they were "not worried about the academics"—and the teacher added that while the student's "meltdowns . . . [were] disruptive," this behavior did not impact her "ability to learn, as they [were] happening during less structured time" (id.).

Next, the CSE reviewed and discussed the remaining evaluations—OT, psychological, speech-language, and educational—as well as the student's progress on her speech-language goals (see Dist. Ex. 18 at p. 137-38). With respect to the psychological evaluation, it was reported that the student's "overall Full Scale IQ was found to be in the High Average Range" with continued strengths in the "verbal reasoning and comprehension areas" (id. at p. 137). While the parents expressed "surprise[]" at this finding, the CSE characterized it as an "enormous intellectual strength" that the student could use to "mediate social situations" (id.). In addition, the CSE noted, however, that the student's testing results in "fluid reasoning"—i.e., "her ability to apply her knowledge to solve novel problems"—was "much higher" in her previous testing in first grade, but further noted that the student's "engagement for the task appeared to be weaker" (id.). Generally, the CSE reported that the student's performance fell within the average to high average ranges on various subtests, while noting that the student continued to demonstrate difficulty "understand[ing] if someone ha[d] a different belief or opinion" (id.). The CSE also reviewed the GARS-3, indicating that the student "struggle[d] in the emotional responses and cognitive style," which were "areas of concern" (id.).

During the CSE's evaluative information discussions, the parents indicated that their "overall concern [was] that there [was] one more year" for the student to attend the district elementary school before entering middle school (Dist. Ex. 18 at p. 137). The parents saw "what other kids [were] doing and what they [were] capable of doing," and expressed concern about the "aide" and their "understanding" about what she did on a "day to day basis" with the student (id.). The parents also expressed concern about the student's friendships, noting that she did have "playdates more than years past" and would "have sleepovers," but they felt that these friendships did not have a "lot of depth" (id.).

After reviewing and discussing all of the evaluative information, the May 2018 CSE found that the student was not eligible for special education and related services under the IDEA (see Dist Ex. 18 at p. 138). Based upon the "updated testing," however, the CSE recommended making "updates to [the student's] 504 Accommodation Plan" (id.).

In an email to the district school psychologist dated May 21, 2018, the parents requested a neuropsychological IEE of the student at district expense (see Dist. Ex. 14 at pp. 113-14). The parents indicated that they disagreed with the "evaluation results" because the "test did not encompass all of [the student's] disabilities" and failed to provide them with a "full picture of her challenges at school" (id.). In an email to the parents dated May 24, 2018, the school psychologist invited the parents to attend a reconvene of the CSE scheduled for May 31, 2018 to discuss their "concerns" with the district's director of special education (director), who would also be present at the meeting (id. at pp. 112-13).

At the May 31, 2018 CSE meeting, the attendees reviewed and discussed the parents' IEE request (see Dist. Ex. 18 at p. 135). At that time, the parents indicated that while they knew the district did "great evaluations and appreciate[d] what ha[d] been done and how thorough the evaluations [were]," a conversation with the student's then-current private psychologist had revealed, as the "biggest concern," that the district's evaluations did not look at the student "as a whole" (id.). In addition, while the parents knew the student was "so smart," they expressed their desire for the student to "be qualified for special education" under an IEP, due, in part, to the student's "many other issues, including behavioral, oral expressive, and emotional disturbance issues" and what they perceived as her inability to "build the appropriate relationships with her teacher and other students" (id.). The parents also commented at the meeting about the need for the student to have "goals" rather than having the "aide helping her get through the year" (id.). As further noted in the meeting minutes, the parents indicated that they needed "someone with a PhD to tell [them] what the student needs" and the "aide and the behavioral plan [were] not cutting it" (id.). The parents believed that the student's issues were "being band-aided and not fixed" and that "some of the student's issues c[ould] be fixed"—moreover, the parents felt that "certainly the executive functioning issues c[ould] be worked on and someone c[ould] help her with this" (id.). As noted in the meeting minutes, the parents did not "want to get to a point when [the student was] old[er], that she fail[ed] and her academic achievement level[ed] off"—more importantly, the parents wanted to "do as much as possible now before that happen[ed]" (id.). The parents continued to express concerns about the aide and how the aide assisted the student (compare Dist. Ex. 18 at p. 135, with Dist. Ex. 13 at p. 136). The parents also indicated that the "difference between the IEP and the 504 [were] the goals set" and they wanted "another person [to] let them know what goals should be addressed" (id.).

The district director, who had not attended the initial eligibility meeting, "noted that the evaluation was thorough and provided all [of the] necessary information" and that the "issues the parents discussed [were] being targeted" (Dist. Ex. 18 at pp. 135-36). The director then noted that the student did not "meet [the] criteria for special education services as she d[id] not require specialized instruction or the support of a special program at this time" (id.). In addition, the director noted that it was "not a wait to fail model" and that the student's "needs [were] being targeted through a 504 [plan]" (id.). The district school psychologist joined the conversation, explaining that the "504 accommodation plan allow[ed] the student all [of the] services and accommodations an IEP would, with the exception of specialized instruction, which [was]



something the team agreed she d[id] not need at this time" (id.). The school psychologist also noted that the "team c[ould] develop goals together for her related services" and that recommendations for an "assistive technology evaluation, family training, and increased counseling services c[ould] be made through the 504 plan as well as any changes to program modifications and testing accommodations" (id.).

At that time, the parents noted that the "overall concern [was] that a neuropsychological exam w[ould] give them information they d[id]n't have" (Dist. Ex. 18 at p. 135). The director responded by informing the parents that the neuropsychological evaluation would be "similar to what the district ha[d] done" (id.). The director also explained that the district would grant an evaluation "if it [was] felt that we [were] not willing to defend the evaluation," and the district had the "information we need[ed] to plan appropriately" (id.). The parents believed, however, that more could be done for the student—"other therapies and programs" they did not know about—and they had "spent a lot of money over the years with private services and fe[lt] it [was] time the district did something" (id.). The parents also noted that they did not feel "that an aide next year" would help (id.).

Next, the student's then-current third grade classroom teacher explained the aide's "crucial" role in assisting the student with "transitions, self-control, and [that] home to school in the morning" was the most difficult transition (Dist. Ex. 18 at p. 135). The teacher further noted that, during "academic functioning," the student did not need the aide but the aide could provide the student with reinforcement of the "skills taught in sessions" (id.). He also reported that they were "working on helping [the student] stop for one second to use her strategies" and that the student was "trying [to] generalize and implement the strategies" (id.).

The parents continued to insist that they did not know what services to "ask for," and the student's "expressive language, rigidity, and executive issues" were "another component" not being addressed (Dist. Ex. 18 at p. 135). To this end, the parents repeated their desire for a "person with a PhD" to "come in and take a look" at the student (id.). At that point in the meeting, the district sought and received the parents' consent to reach out to the student's "private therapist" to discuss the parents' specific concerns (id. at pp. 135-36). The parents also indicated they would contact "their professionals" and contact the district with respect to their request for an IEE (id. at p. 136).<sup>10</sup>

In a June 4, 2018 letter sent to the district as an attachment to an email dated June 6, 2018, the student's then-current private psychologists briefly summarized selected portions of the student's "recent school-based assessments" and made the following recommendations: a "comprehensive neuropsychological assessment" of the student by a psychologist who was "not familiar" to the student that included "more extensive testing in the realm of executive functioning, social-emotional development, and pragmatics" as well as the Autism Diagnostic Observation

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<sup>10</sup> In an email to the parents dated June 5, 2018, the district school psychologist who attended both of the CSE meetings held in May 2018 indicated that the student's private therapist was "unable to speak" to her prior to the student's upcoming section 504 accommodation plan meeting (Dist. Ex. 14 at pp. 111-12). As an alternative, the district school psychologist asked for the parents' consent to speak with the founder of the clinic (clinical psychologist), and instead, the parents forwarded her a copy of a letter prepared by two therapists (id.; see generally Dist. Ex. 13). At the impartial hearing, the clinical psychologist—who had not provided any counseling services to the student—testified on the parents' behalf (see Tr. pp. 897-976, 1131-1229; see also Tr. pp. 906-11).

Schedule—Second Edition (ADOS-2) to "definitely clarify diagnosis"; a "formal" FBA and BIP of the student by an "evaluator unfamiliar" to the student; "[t]argeted executive functioning skills training, delivered daily within the context of [the student's] classroom, social and academic experiences, to assist her in increasing cognitive flexibility, accepting assistance, enhancing frustration tolerance, increasing sustained focus, and increasing impulse control via measurable goals"; a continuation of speech-language "support to address applied pragmatic deficits via measurable goals"; and a continuation of counseling "support to address concerns within the areas of aggression, depression, and learning problems (the social-emotional impact of such learning problems) identified via teacher reports . . . , and to work toward building age-appropriate social skills, all via measurable goals" (Dist. Ex. 13 at pp. 109-110; see Dist. Exs. 14 at pp. 111-12; 26 at pp. 194-95).

On June 7, 2018, the district conducted an annual review meeting for the student's 504 accommodation plan for the 2018-19 school year (see Parent Ex. C at p. 1). After reviewing the student's progress, the committee found that the student remained qualified for a 504 accommodation plan (id. at pp. 1-2). At that time, the parents expressed concerns with their ability to communicate with the "student's team . . . beyond the quarterly progress reports"; to address this concern, the 504 committee recommended the implementation of a communication book as part of the recommended supplementary aids, services, program modifications, and accommodations (id. at pp. 1, 4). The parents also inquired about restarting a "sensory diet in the morning . . . to assist the student with her transition into [the] school day," but the occupational therapist attending the meeting did not believe a "sensory concern" existed (id. at p. 1). The classroom teacher attending the meeting also noted that the "timer and checklist" implemented during the school year "helped her transition in a timely manner each morning" (id.). The parents also characterized the student's "social cognition and executive functioning" as "their primary concerns" and expressed their desire to communicate with the "aide" working with the student (id. at p. 2). The committee explained that the communication book could be completed, in part, by the aide to "include notes on any social interactions and social [c]ues—coping strategies used throughout the day (when things go wrong and how she handled the situation)" (id.). As a final point, the district assistant principal attending the meeting indicated that the student's "updated diagnosis for the student of [an ADHD] as well as Social Pragmatic Communication Disorder" would be included in the 504 accommodation plan (id. at pp. 2-3).<sup>11,12</sup>

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<sup>11</sup> At the meeting, the occupational therapist in attendance recommended an assistive technology evaluation of the student (see Parent Ex. C at p. 1). The same occupational therapist testified at the impartial hearing that the assistive technology evaluation occurred in fall 2018 (see Tr. pp. 669-70).

<sup>12</sup> According to the Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition (DSM-5), the diagnostic criteria for a social pragmatic communication disorder includes the following:

(A) "Persistent difficulties in the social use of verbal and nonverbal communication as manifested by all of the following:

1. Deficits in using communication for social purposes (i.e., greetings, sharing information), in a manner that is appropriate for the social context.
2. Impairment of the ability to change communication to match context or the needs of the listener (i.e., speaking differently inside a classroom versus on a playground).
3. Difficulties following rules for conversation and storytelling (i.e., taking turns in conversation).

For the 2018-19 school year, the 504 committee recommended that the student receive the following related services: two 30-minute sessions per six-day-cycle of speech-language therapy (group), one 30-minute session per six-day-cycle of psychological counseling services (group), one 45-minute session per six-day-cycle of individual psychological counseling services, and one 45-minute session per month of individual parent training and counseling services (see Parent Ex. C at p. 3).

Shortly thereafter in an email dated June 11, 2018, the district school psychologist followed up with the parents regarding whether they decided to pursue the IEE previously requested (see Dist. Ex. 27 at p. 198). In an email dated June 20, 2018, the parents—having discussed the "proposed 504 plan" and conferring with their "private practitioners"—advised the district of their intention to pursue the requested IEEs (neuropsychological and FBA) (id.). In response, the director notified the parents in an email dated July 6, 2018, that after consideration of their request, the district was of the "opinion that the current evaluations conducted by the [d]istrict [were] sufficient to identify the [student's] needs in all areas of suspected disability" (Dist. Ex. 28 at p. 200; see Dist. Ex. 27 at p. 198). In addition, the director indicated that the district did not "find any basis that the further testing [they] requested would provide any meaningful additional information regarding the education" of the student (Dist. Ex. 28 at p. 200).

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

By due process complaint notice dated July 12, 2018, the district initiated an impartial hearing related to the parents' request for a neurological IEE and an FBA IEE of the student (see Dist. Ex. 1 at p. 1; see also Dist. Ex. 2 [parents' response to the due process complaint notice, dated July 23, 2018]).

In a due process complaint notice dated July 30, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see Dist. Ex. 3 at pp. 5, 12-15; see also Dist. Ex. 4 [district's response to parents' due process complaint notice, dated August 8, 2018]). The parents reiterated their request for IEEs (neuropsychological and FBA) based upon their disagreement with the district's "FBA (and the BIP created therefrom)" (see Dist. Ex. 3 at p. 12). With respect to the requested FBA IEE, the parents asserted that their disagreement arose for "various reasons," such as the following: "the accuracy and interpretation of the observation data gathered by the direct observation"; the FBA failed to "identify the roles of the evaluator (otherwise known to [the student])"; the FBA failed to "document the assistance" provided to the student in "modifying or impacting [the student's] behaviors during the observation"; the evaluator "misinterpreted and [failed] to provide the classroom data"; and the "conclusions in the FBA [were] contrary to other reports including but

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4. Difficulties understanding what is not explicitly stated (i.e., making inferences) and nonliteral or ambiguous meanings of language (i.e., humor, metaphors).

(B) Deficits result in functional limitations in effective communication, social participation, social relationships, academic achievement, or occupational performance, individually or in combination.

(C) The onset of the symptoms is in the early developmental period (but deficits may not become fully manifest until social communication demands exceed limited capacities).

(D) The symptoms are not attributable to another medical or neurological condition or to low abilities in the domains of word structure and grammar, and are not better explained by autism spectrum disorder, intellectual disability (intellectual developmental disorder), global developmental delay, or another mental disorder.

not limited to, the reports of [the student's] classroom teacher" (id. at pp. 12-13). The parents also noted that the district failed to have sufficient evaluative information concerning the student's behaviors, noting, for example, the district's failure to determine a "diagnosis [that was] critical to developing a BIP to modify [the student's] behaviors" (id. at p. 13).

Next, the parents alleged that they requested a neuropsychological IEE because the district's psychological evaluation of the student "failed to comply with the IDEA and State Education Law for various reasons," including that the district was "required to assess [the student] in all areas relating to her disabilities" (Dist. Ex. 3 at p. 13). In addition, the parents—relying upon guidance from the Office of Special Education Programs (OSEP)—asserted that the district was required to provide a neuropsychological IEE of the student because it had not conducted its own neuropsychological evaluation (id.). The parents then contended that they disagreed with the district's "Psychiatric Evaluation" for various reasons, including: the results related to the student's attention were "contradicted by various reports"; the evaluation failed to assess the student in "all areas relating to her disability, such as visual attention which other evaluators identified as problematic"; and the evaluation was "inconclusive" regarding the student's "potential ASD diagnosis" (id.). According to the parents, whether the student "suffer[ed] from ASD [was] critical to informing" the district, themselves, and "other CSE members of [the student's] needs and appropriate interventions" (id.). As a final point, the parents alleged that the "evaluator was not appropriately qualified to evaluate [the student] in these areas" (id.).

Next, the parents asserted that the district failed to evaluate the student in all areas of need and failed to "follow up on other areas of need identified by its evaluators, including, but not limited to, assistive technology" (Dist. Ex. 3 at p. 13). Relatedly, the parents alleged that the district's failure to fully evaluate the student in all areas of her disability and the failure to "adhere to the regulatory mandate regarding IEEs ha[d] interfered" with the parents' ability to participate in the CSE process and denied the student a FAPE "on an ongoing basis" (id.).

Thereafter, the parents alleged that the district failed to find the student eligible for special education services (see Dist. Ex. 3 at pp. 14-15). In support of this allegation, the parents indicated that the district had been providing the student with "services that amount[ed] to special education services"—as defined by "specially designed instruction"—including, but not limited to, speech-language therapy and counseling services (id. at p. 14). The parents also noted that the student's social/emotional and attention issues "increasingly impact[ed] her education" (id.). Moreover, contrary to the district's documentation, the student's behaviors did "impact her in the classroom setting" notwithstanding the implementation of a BIP and the "efforts of her teachers and aide" (id.). The parents also alleged that the district's failure to provide the parents with an IEE deprived them of "observations and opinions of private, disinterested observers" (id. at pp. 14-15).

With respect to the alleged failure to offer the student a FAPE for the 2016-17 and 2017-18 school years, the parents asserted that the district failed to develop an "appropriate and effective BIP," and failed to offer the student assistive technology or training in that area, appropriate speech-language therapy, and appropriate social skills training (Dist. Ex. 3 at p. 15).

As relief for these alleged violations, the parents requested an order directing the district to provide the requested IEEs; findings that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years; a finding that the student was eligible for special education

services as either a student with multiple disabilities, a student with autism, or a student with an other health-impairment; order the CSE to reconvene to develop an IEP; and provide any further relief, including compensatory educational services, deemed just and proper by the IHO (see Dist. Ex. 3 at p. 16).<sup>13</sup>

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

On December 4, 2018, the parties met for an impartial hearing, which concluded on March 27, 2019 after a total of six days of proceedings (see Tr. pp. 1-1373). In a decision dated June 20, 2019, the IHO concluded that, based upon the evidence in the hearing record, the district's assessments of the student provided the CSE with "sufficient information in all areas related to the suspected disability to enable it to determine the educational needs of the student" (IHO Decision at pp. 14-15, 20, citing 8 NYCRR 200.4[b][6]). Contrary to the focus of the parents' expressed concerns about the student—namely, in the "areas of executive functioning, social[/]emotional development and pragmatics as well as the suggestion on earlier testing of the likelihood of an ASD diagnosis"—the IHO found that, in addition to the WISC-V to assess the student's cognitive functioning, the district appropriately assessed the student's executive functioning skills, including the areas of "attention, inhibition and impulse control," through the administration of the "NEPSY-[II]" (IHO Decision at p. 15). Similarly, the IHO found that the "BASC-3" and the "GARS[-3]" were appropriate tools used by the district to assess the student's behavior and social/emotional development (id.). With respect to assessing the student's pragmatic language skills, the IHO concluded that the district appropriately administered the "GARS[-3]" and the "Theory of Mind" as a part of the psychological evaluation and also conducted a speech-language evaluation of the student (id.). According to the IHO, the hearing record contained credible testimony from several district witnesses to support a finding that the district's evaluations of the student, together with "teacher reports and data available from the FBA and BIP," provided the CSE with "sufficient information to make educational recommendations" (id. at pp. 15-16).

Next, the IHO addressed the parents' concerns about the district's psychological evaluation of the student as expressed by one of the witnesses—the clinical psychologist who co-authored the June 4, 2018 letter sent to the district—testifying on their behalf at the impartial hearing (see IHO Decision at p. 16). Here, the IHO found that, although the clinical psychologist testified at the impartial hearing that "longer and separate continuous performance tests for auditory and visual information of eight to twelve minutes duration were preferable" to the "one subtest for auditory attention and response of three minutes duration" administered by the district as part of the "NEPSY-[II]" to assess the student's executive functioning skills, the IHO found this objection to the district's psychological evaluation to be "relatively minor" (id.). With respect to the administration of the "GARS[-3]" and the "absence of the ADOS[-2] to identify ASD," the IHO found this objection "moot"—noting that the parents' own witness, the clinical psychologist, testified that the student could not be diagnosed as having an ASD because she did not "have the prerequisite measure of repetitive behaviors" (id.).

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<sup>13</sup> In an order dated August 20, 2018, the IHO consolidated the district's and the parents' due process complaint notices (see generally Interim IHO Decision).

Having disposed of the parents' concerns with the district's psychological evaluation of the student, the IHO found that the parents were not entitled to a neuropsychological IEE (IHO Decision at p. 16).

With respect to the parents' request for an FBA IEE, the IHO found that the "relevant record [was] muddled and disturbing" (IHO Decision at p. 16). Initially, the IHO noted that the student's behavior was a "critical area of concern and an impediment to full participation during the school day" (*id.*). More specifically, the IHO pointed to the student's "lack of self-regulation" as the basis for the student's "impulsive verbal remarks, fidgeting with other people's property and emotional meltdown[s] and removal from the activity" (*id.*). While the IHO found that the teacher reports and data reported about these behaviors reflected that the behaviors were "less likely to occur during academic lessons," the IHO also found that the evidence in the hearing record was not clear as to "how frequently [the behaviors] happen[ed]" (*id.*). In contrast, the IHO found that the "teacher's contemporary emails and reports" reflected "evidence of greater interference with the classroom routine than [the teacher's] testimony that tended to minimize the frequency and duration of these episodes" (*id.* at pp. 16-17). In addition, the IHO noted the "confusion between data collected for the FBA and data memorialized as a result of the original and altered BIP" (*id.* at p. 17). According to the IHO, she also found "inconsistencies as to definitions of targeted behaviors and as to motivating factors" (*id.*). As a result, the IHO concluded that she could not "judge" the effectiveness of the "assessment of the antecedents of behaviors and other relevant factors and how consistently the behavior plan was being implemented" (*id.*).

Given the above, the IHO was persuaded by the parents' witness—here, a BCBA—who, at the impartial hearing "enumerate[ed] items that should [have] be[en] measured [but] that were omitted from the FBA," together with evidence demonstrating that the student's "behaviors at school were not significantly improving during the 2017-2018 school year" as the basis to conclude that the parents were entitled to an FBA IEE at district expense (IHO Decision at p. 17).

Finally, the IHO addressed whether the district's failure to find the student eligible for special education "in May 2018" resulted in a failure to offer the student a FAPE (*see* IHO Decision at pp. 17-18). On this point, the IHO initially noted she was "not impressed by the parents' categorical argument that if both an IEP and a 504 Plan [were] appropriate, the [d]istrict must provide services under the IDEA"; nor was the IHO persuaded that a student must be eligible under the IDEA "by default" if the student received "services that [were] typically provided by an IEP" (*id.*). Instead, the IHO indicated that a "factual determination [was] appropriate in each case" (*id.* at p. 18).

Turning to the factual analysis, the IHO indicated that the district—in support of its position that the student was not eligible for special education under the IDEA—"urge[d] a narrow definition of specifically designed instruction" under State regulation: "namely adaptation to the content, methodology or delivery solely of academic instruction" (IHO Decision at p. 18, citing 8 NYCRR 200.1[vv][emphasis in original]). The IHO noted, however, that "from preschool onward, education [was] deemed to include the acquisition of other skills such as socialization with report cards that grade as to 'works and plays well with others'" (IHO Decision at p. 18). According to the IHO, the student's behavior—notably, her "documented disputes with her peers and meltdowns during unstructured time"—"clearly interfere[d] with the educational goal of socialization and require[d] strategies and interventions" (*id.*). In addition, the IHO found that the student's teacher

testified about "instances when in the classroom he ha[d] added techniques especially effective with this student, such as jokes, clapper signs and yoga" (*id.*).

The IHO also noted that, notwithstanding these efforts, the evidence in the hearing record "portray[ed] many instances where the student's day ha[d] been interrupted by her interfering behaviors," and which resulted, at times, in the student's removal "for not an insignificant period of time from the classroom or a school activity such as library or recess" (IHO Decision at pp. 18-19). In light of this evidence, the IHO concluded that the district was "required by law to appropriately address" the student's "emotional issues"—which she described as of "long duration" and which "continue[d] to occur outside of school even with weekly individual counseling sessions"—within the school setting (*id.* at p. 19).

In summary, the IHO found that while the student's 504 plan had been "generous with services" and the parents had not challenged the sufficiency of those services, an IEP would "add[] the enrichment of formal goals with periodic formal assessment, mandatory evaluations and enhanced legal protections" (IHO Decision at p. 19). Finding "multiple areas of concern and the limited improvement as to the significant deficits in executive functioning and social/emotional skills," the IHO concluded that the district should have found the student eligible for special education under the IDEA for the 2018-19 school year (*id.*). The IHO left the CSE with the responsibility of selecting an appropriate eligibility category, that is, for example, other health-impairment or multiply disabled, and further noted that, given the "passage of a year, the student may already have been classified at a later CSE meeting" (*id.*). As a final point, the IHO noted that if the student had already been found eligible, "this decision w[ould] have no effect as there [was] no request for any compensatory services" (*id.*).

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

The district appeals, arguing that the IHO erred in finding that the district failed to offer the student a FAPE for the 2018-19 school year, and relatedly, that the district improperly concluded that the student was not eligible for special education and related services under the IDEA for the 2018-19 school year. The district also argues that the IHO erred in finding that its FBA of the student was not appropriate and that the parents were entitled to an FBA IEE at district expense.

In an answer, the parents respond to the district's allegations in the request for review and generally argue to uphold the IHO's decision finding that the district failed to find the student eligible for special education under the IDEA, the district failed to offer the student a FAPE, and the parents were entitled to an FBA IEE at district expense. The parents also assert that the district's request for review was not properly verified and fails to comply with the practice regulations.<sup>14</sup> The parents also argue that the district raises additional grounds for reversal of the

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<sup>14</sup> Contrary to the parents' assertion, the district's request for review—as verified by the district's attorney—complies with practice regulations. State regulation requires that when an appeal is taken by the "trustees, the board of trustees, or the board of education of a school district, [the request for review] shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such trustees or board authorizing the commencement of such appeal on behalf of such trustees or board" (8 NYCRR 279.7[b]).

IHO's decision in the memorandum of law that were not raised in the request for review. As a cross-appeal the parents contend that the IHO erred in denying their request for a neuropsychological IEE of the student and seek a finding that they were entitled to a neuropsychological IEE at district expense.<sup>15</sup>

In an answer to the cross-appeal, the district responds to the parents' allegations and argues to uphold the IHO's decision denying the parents' request for a neuropsychological IEE of the student. The district also argues that the parents' allegation that the district school psychologist was not qualified to conduct the psychological evaluation of the student, as a basis upon which to conclude that they were entitled to a neuropsychological IEE, was not raised in the due process complaint notice, and thus, is beyond both an IHO's and an SRO's jurisdiction.<sup>16</sup>

The parents respond to the district's answer to the cross-appeal, arguing that the due process complaint notice included an allegation concerning the district school psychologist's qualifications as a basis to disagree with the district's psychological evaluation of the student. Generally, the parents continue to press arguments supporting their request for a neuropsychological IEE of the student.

## **V. Discussion**

In their challenges to the IHO's decision, as noted above, the parties dispute is twofold in that the parents' referral of the student to the CSE resulted in an initial evaluation by the district with which the parents disagreed and sought IEEs at public expense. The parties then contest whether the evaluation of the student, which according to the parents was flawed, should have resulted in a determination by the CSE that the student was eligible for special education services as a student with a disability. As the district initiated due process first in accordance with its responsibility to respond to IEE requests at public expense, I will first address the challenges to the IHO's decision regarding the evaluation of the student by the district and the parents ensuing IEE requests. I will then turn to the district's challenge to the IHO's determination that the student should be found eligible for special education under the IDEA.

### **A. Legal Framework—District and Independent Evaluations**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

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<sup>15</sup> Other than requesting that the undersigned SRO overturn the IHO's decision denying their request for a neuropsychological IEE, the parents seek no relief in the cross-appeal except for awarding them a neuropsychological IEE of the student at district expense (see generally Answer & Cr. App.).

<sup>16</sup> The district attaches additional documentary evidence to its answer to the cross-appeal for consideration on appeal (see generally Answer to Cr. App. & Reply Ex. A). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).



designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]). In New York, the CSE develops IEPs for eligible students (Educ. Law § 4402[1][b][1]). However, before determining that a student is eligible to receive a FAPE under the IDEA, the school district is responsible to "conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability" (20 U.S.C. § 1414[a][1][a]; 34 CFR 300.301[a]).

## 1. CSE Evaluations

Pursuant to federal and State procedures for determining a student's eligibility and educational needs, a "[CSE] and other qualified individuals must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c][i]). To accomplish this task, a district is required, in part, to conduct an initial evaluation of the student referred to the CSE (see 20 U.S.C. § 1414[a][1][B]-[C]; 34 CFR 300.301, 300.306; 8 NYCRR 200.4[a]-[b]).

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under federal regulation, an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

- (i) a physical examination . . . ;
- (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;
- (iii) a social history;
- (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and
- (v) other appropriate assessments or evaluations, including an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b][1]).<sup>17</sup> A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).<sup>18</sup>

Federal and State evaluation procedures require that any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii] 8 NYCRR 200.4[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

## 2. Independent Educational Evaluations

The IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an

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<sup>17</sup> Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history and FBA are not defined in federal law or regulation.

<sup>18</sup> Although it may be done without a CSE meeting, as part of a reevaluation (or an initial evaluation if appropriate) a CSE must

- (1) Review existing evaluation data on the child, including—
  - (i) Evaluations and information provided by the parents of the child;
  - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
  - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—
  - (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
    - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
  - (ii) The present levels of academic achievement and related developmental needs of the child;
  - (iii)(A) Whether the child needs special education and related services; or
    - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
  - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(34 CFR 300.305[a]).

evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]). Parents who express a disagreement with an evaluation conducted by the district also have the right to seek an IEE conducted at public expense in some circumstances (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; see also Lauren W. v. DeFlaminis, 480 F.3d 259, 275 [3d Cir. 2007] [explaining that parents do not have the right to an IEE at public expense where parents actually agreed with the school's evaluation]; Edie F. v. River Falls Sch. Dist., 243 F.3d 329, 335 [7th Cir. 2001] [explaining that parents do not have the right to an IEE at public expense where their disagreement was with the result of the child's IEP not with a particular diagnosis or methodology of evaluation]; M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 2012 WL 834350, at \*11–12 [S.D.N.Y. Mar. 5, 2012]; M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at \*6 [N.D.N.Y. Mar. 8, 2013]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234–35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense that was sought for additional information]). "If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation [m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child" (34 CFR 300.502[c]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 2019 WL 3021232, at \*3 [3d Cir. July 10, 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).<sup>19</sup> An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]), however recent caselaw clarifies that parents may not demand a comprehensive IEE at public expense while at the same time refusing to consent to the school district's offer to conduct the same assessments (D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 178 [D. Conn. 2019], citing N.D.S. v. Acad. for Sci. & Agric. Charter Sch., 2018 WL 6201725, at \*5–\*7 [D. Minn. 2018] [explaining that where parents request an IEE to challenge an obsolete evaluation, they are entitled to a due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they

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<sup>19</sup> The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year reevaluation period in some cases (see D.S., 357 F. Supp. 3d at 179).

must allow the school district to conduct a current reevaluation and then request an IEE if they disagree]).

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). In accordance with this burden, the district bears the burden of showing that its evaluation of the student was appropriate in order to prevail in its challenge to the parents' requests for IEEs at public expense.

### **3. Neuropsychological IEE**

In denying the parents' request for a neuropsychological IEE, the IHO found that the district's psychological evaluation—and specifically, the administration of the WISC-V, the NEPSY-II, the BASC-3, and the GARS-3—adequately assessed the student in the "areas of executive functioning, social[/]emotional development and pragmatics as well as the suggestion on earlier testing of the likelihood of an ASD diagnosis" (IHO Decision at p. 15). In addition, the IHO found that the district adequately assessed the student's pragmatic language skills through the administration of the GARS-3 and the "Theory of Mind" as a part of the psychological evaluation and further noted that the district also conducted a speech-language evaluation of the student (id.).

Because the IHO's determination relied heavily upon the district's psychological evaluation of the student in reaching the decision to deny the parents' requested neuropsychological IEE, consideration of the parents' cross-appeal will begin with an overview of the district's psychological evaluation as a context for further analysis.

#### **a. The District's Psychological Evaluation**

Consistent with State regulation governing a school district's obligations when conducting an initial evaluation, the district completed a March 2018 psychological evaluation of the student (compare Dist. Ex. 5 at p. 20, with 8 NYCRR 200.4[b][1][ii]). According to State regulation, a psychological evaluation generally includes the use of "a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics" (8 NYCRR 200.1[bb]). In this instance, the March 2018 psychological evaluation consisted of the following: the WISC-V, the BASC-3, the GARS-3, NEPSY-II selected tests, a social and developmental history, a file review, and behavioral observations (see Dist. Ex. 5 at pp. 20, 22-23, 29, 32, 36; see also Tr. pp. 102-03, 126).<sup>20</sup>

According to the evaluation report, a WISC-V "is administered to gain greater insight into an individual's cognitive development as well as to better understand intellectual strengths and weaknesses" (Dist. Ex. 5 at p. 23). The evaluation report explained that "7 core subtests" of the WISC-V assessed "various aspects of cognitive functioning," and "supplemental subtests" could

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<sup>20</sup> The social and developmental history included information related to the student's medical and developmental history, her social/emotional development, and her educational and evaluation history (see Dist. Ex. 5 at pp. 20-22).

be administered that yielded "composite scores in 5 indices:" verbal comprehension, processing speed, fluid reasoning, working memory, and visual spatial reasoning (*id.* at pp. 23-24). When combined, "these subtests provide[d] a measure of overall cognitive functioning known as the Full Scale Intelligence Quotient (FSIQ)" (*id.* at p. 23). Based upon the student's performance, the evaluators found the student's "overall cognitive functioning" (i.e., FSIQ) to be within the high average range when compared to her peers (*id.* at pp. 23-24). In addition, the student's performance with respect to verbal reasoning abilities (i.e., verbal comprehension subtest) were assessed to be within the very high range, while her performance on the visual spatial reasoning subtest and the working memory subtest both fell within the high average range, while the student's performance on the fluid reasoning subtest and the processing speed subtest both fell within the average range (*id.* at p. 24). The evaluators noted that "these scores [were] slightly inconsistent with the previous assessment performed in 2016 in some areas," which "may suggest" an uneven development of the student's cognitive abilities, but it was also noted the student's "medications ha[d] changed since the previous testing" and those changes "may [have] impact[ed] the expression of her cognitive functioning" (*id.*).

In addition to the WISC-V, the March 2018 psychological evaluation report indicated that selected tests from the NEPSY-II (developmental neuropsychological assessment) were administered "to gain a better understanding of the student's executive functioning and attentional skills" (Dist. Ex. 5 at p. 29). According to the March 2018 psychological evaluation report, "[e]xecutive functioning refer[red] to the examinee's ability to plan, monitor, and regulate his/her behavior and mental efforts and include[d] such functions as working memory, attention, inhibition, flexibility of thinking, organization, planning, self-monitoring, and initiation, among others" (*id.*). Based upon the student's performance on the "Auditory Attention" subtest, the evaluators found the student's "ability to maintain consistent attention for a short time to monotonous auditory stimuli" fell within the "expected limits for her age" (*id.* at pp. 29-30). Similarly, the student's performance on the "Response Set" subtest—"that is, a "task asking her to inhibit her natural response in favor of an alternate response"—fell within the very high range (*id.*). In light of this information, the evaluators opined that, in the classroom, the student "may become inattentive or disengaged when the material [was] perceived as easy or monotonous" and that the student "may better be able to follow the rules and perform to her potential" when she felt "challenged" (*id.* at p. 30).

Next, the March 2018 psychological evaluation report noted that "[a]dditional subtests of the NEPSY-[II] were administered to assess the student's social perception and ability to comprehend others' perspectives, intentions, and beliefs (i.e., theory of mind)" (Dist. Ex. 5 at p. 30). As noted in the evaluation report, the "Theory of Mind" subtest was a "psychological construct describing an individual's ability to attribute mental states to oneself, and to others" and "refer[red] to the understanding that others have beliefs, desires, intentions, and perspectives that [were] different from one's own" (*id.* at p. 31). Based upon the student's performance on these subtests, the evaluators found the student's "awareness of others' perceptions as separate from her own" fell within the average range and therefore her "'theory of mind' [was] appropriately developed" (*id.*). More specifically, the evaluators found the student's ability to "recognize situation-specific expressions [was] in the age-appropriate range" (*id.*). However, the evaluators further noted that the student had "received interventions in this area, which may [have] improve[d] her ability to respond to these questions in a rehearsed or scripted manner" and noted, moreover, that the student's "superior verbal reasoning and comprehension aided her ability in this area" (*id.*).

Next, the March 2018 psychological evaluation report included the findings of an administration of the BASC-3, as assessed through the completion of ratings scales (i.e., externalizing problems, internalizing problems, school problems, behavioral symptoms index, and adaptive skills) by the student's mother and the student's teacher (see Dist. Ex. 5 at pp. 32-36). According to the evaluation report, the BASC-3 is a "comprehensive measure of behavioral functioning which compare[d] frequency and type of behaviors the student exhibit[ed] with peers his/her same age" (id. at p. 32). In addition, it was noted that the BASC-3 also "measure[d] both positive (adaptive) and negative (clinical) aspects of behavior and personality and provide[d] clinical, adaptive and composite scores" (id.).

With respect to the student's externalizing problems composite score—which assessed the primary behaviors of hyperactivity, aggression, and conduct problems—the evaluators found that the parents indicated the student's behavior was in the "[a]verage range overall," while the teacher "expressed more concern" about the student's "overall level of self-control in the classroom setting, rating her functioning in the [a]t-[r]isk range" (Dist. Ex. 5 at p. 32).<sup>21</sup> Both the teacher and the parents indicated the student "engage[d] in many disruptive, impulsive, and uncontrolled behaviors at school and at home, rating her hyperactivity in the [c]linically [s]ignificant range" (id.). In addition, while the teacher reported that the student "engage[d] in verbally and physically aggressive behaviors at a higher rate than her same-age peers, rating her aggression in the [a]t-[r]isk range," the parents "did not observe similar aggressive behaviors at home" (id. at pp. 32-33). Both the parents and the teacher reported that the student did "not demonstrate rule-breaking behavior any more than other children her age" (id. at p. 33).

With respect to the student's internalizing problems composite score—which assessed the primary behaviors of anxiety, depression, and somatization—the evaluators initially noted that, overall, the teacher "expressed more concerns" in this area than the parents (Dist. Ex. 5 at p. 33). For example, the teacher reported that at school, the student demonstrated "[a]t-[r]isk levels of anxiety" and at times, displayed "behaviors stemming from worry, nervousness, and/or fear at a higher rate than her same age-peers (sic)" (id.). More specifically, the teacher reported that the student was "almost always easily stressed, sometimes ha[d] panic attacks, worrie[d], and appear[ed] tense" (id.). The parents did not "report these concerns at home" (id.). Additionally, the teacher reported "depression-related behaviors in the [c]linically [s]ignificant range" noting that the student "crie[d] easily, appear[ed] sad and irritable, and c[ould] be negative and pessimistic" (id.). The parents did "not report similar concerns" (id.). Finally, both the parents and the teacher indicated that the student "complain[ed] of health-related problems to about the same degree as others her age" (id.).

Regarding the school problems scales—which assessed the primary behaviors of learning problems and attention problems—the teacher (acting as the sole reporter of learning problems) indicated that, overall, the student's "functioning in school" and "level of school-related problems [were] similar to others her age" (Dist. Ex. 5 at pp. 33-34). The evaluators noted, however, that "caution should be exercised when interpreting this score, as the two scores comprising this index

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<sup>21</sup> The psychological evaluation report indicated that scores in the "low or average range [were] not significant and d[id] not warrant concern" but "[a]t-risk scores should raise some concern and behaviors in these areas should be monitored" (Dist. Ex. 5 at p. 32). It was also noted that scores within the "clinically significant range indicate[d] that problems in the specified area [were] significant and may require intervention" (id.).

[were] widely discrepant" (id. at p. 34). With respect to "learning problems," the teacher indicated that although the student did "not have unusual difficulty comprehending or completing schoolwork," the student had "difficulty maintaining the necessary levels of attention at school," which the evaluators opined "may impact [the student's] academic functioning and performance in other school-related areas" (id.). Specifically, the teacher reported that the student was "almost always easily distracted and ha[d] trouble concentrating" (id.). The parents, who reported on "attention problems," indicated that the student had "significant difficulty maintaining necessary levels of attention" and she had a "short attention span and trouble concentrating" (id.).

In the behavioral symptoms index—which included the primary behaviors assessed as atypicality and withdrawal—the parents and the teacher both rated the student's behaviors in the "[c]linically [s]ignificant range . . . due to elevations with regard to anxiety, depression, and atypicality" (Dist. Ex. 5 at p. 34). The evaluators noted that in terms of the student's "ability to display logical thought patterns and an awareness of her surroundings, both [the student's] parents and teachers reported scores indicating significant concern" (id. at pp. 34-35). The parents indicated the student "engage[d] in behaviors that may appear disconnected from her surroundings, specifically staring blankly, saying things that ma[d]e[] no sense, and babbling to herself," and her teacher rated the student in the "[c]linically [s]ignificant range on the [a]typicality scale, specifically indicating that she d[id] strange things, act[ed] confused and sa[id] things that ma[d]e no sense" (id. at p. 35). On the "[w]ithdrawal scale, which assesse[d] [the student's] ability to develop and maintain friendships without avoiding typical social situations," the parents reported "[a]t-[r]isk levels of concern" and noted that the student "often ha[d] trouble making new friends, sometimes isolate[d] herself from others, and sometimes prefer[red] to play alone" (id.). The evaluators indicated, however, that the teacher reported "no more concerns than others her age" and "in the school environment, [the student] never isolate[d] herself from others or prefer[red] to play alone" (id.). The teacher did indicate that the student "often ha[d] trouble making new friends" (id.).

With respect to the adaptive skills composite—assessing the primary behaviors of adaptability, social skills, leadership, functional communication, study skills, and activities of daily living (ADL) skills—the teacher rated the student as "within the normal limits for all but one scale": adaptability (Dist. Ex. 5 at pp. 35-36). For this skill, the teacher rated the student as falling within the "'at risk range'" because she had "difficulty adapting to changing situations and t[ook] longer to recover from difficult situations than most others her age" (id. at p. 36). In contrast, the parents rated the student's "overall adaptive skills in the 'clinically significant' range," due to concerns about the student's "adaptability and social skills" and "more significant concerns with [the student's] ability to carry out [ADL skills]" and "demonstrate functional communication" (id.). With specific regard to adaptability, the parents—rating the student in the "'at risk' range"—noted that she "rarely adjust[ed] well to changes in routine, rarely handle[d] winning and losing well" (id.). As to social skills, the parents also rated the student as within the "'at risk' range," and noted that while she "usually d[id] not offer to help other children," the student did "usually congratulate[] others when good things happen[ed] to them, and often trie[d] to make others feel welcome" (id.). In rating the student's ADL skills, the parents found her to be within the "'clinically significant' range," because the student "rarely ma[d]e[] healthy food choices, rarely clean[ed] up after herself, and often ha[d] trouble fastening buttons on her clothing" (id.). According to the parents, the student also demonstrated "unusually poor expressive and receptive communication skills, and she may have difficulty seeking out and finding information on her own" (id.). For

example, the parents indicated that the student "rarely track[ed] down necessary information," she failed to "take[] down messages," and she was "generally unclear when presenting ideas" (*id.*). Based upon the foregoing, the evaluators concluded that the student's adaptive skills were "primarily within the [a]verage range in the school setting, but she appear[ed] to struggle more in the home setting" (*id.*).

As an additional behavior rating scale, the March 2018 psychological evaluation report next reflected the results of the administration of the GARS-3 to the student (*see* Dist. Ex. 5 at pp. 36-38). According to the evaluation report, the GARS-3 was "a 58-item norm-referenced screening instrument used for the assessment of individuals ages 3-22 who have behavioral problems that may be indicative of [an ASD]" (*id.* at p. 36). Additionally, the evaluation report indicated that the GARS-3 "gather[ed] information about specific characteristics typically noted in children with ASD in six areas:" restrictive or repetitive behaviors, social interaction, social communication, emotional responses, cognitive style, and maladaptive speech (*id.*). With respect to scoring, it was noted that an "Autism Index" score "greater than 101, the probability of ASD [was] very likely" (*id.*). In this instance, the evaluators opined that, given the student's autism index scores as assessed by both her teacher (97) and her parents (87), the "probability of ASD [was] very likely, with a severity level of 2, indicating that she may require substantial support" (*id.* at p. 38). Notwithstanding the overall autism index scores, the evaluators also noted in the psychological evaluation report that neither the parents nor the teacher "reported scores on [the restrictive or repetitive behaviors] subscale that [were] representative of an individual with Autism" (*id.* at p. 37).<sup>22</sup> Within the summary of the testing results, the evaluators opined that the student "exhibited many characteristics of ASD, most notably related to her poor communication, emotional responses, and cognitive styles" and that her teacher "rated concerns with speech and social interactions" (*id.* at p. 41).

#### **b. Disagreements with the District's Assessments**

Turning, now, to the cross-appeal of the IHO's decision, the parents contend that, in denying the request for a neuropsychological IEE, the IHO erred in finding that the CSE had "sufficient information to make educational recommendations" because the district failed to "sufficiently test and/or follow up in areas where they knew [the student] had deficits" (Answer & Cr. App. at p. 8). As a result, the parents argue that the "evaluations considered by the CSE were inadequate," and thus, they were entitled to a neuropsychological IEE at district expense (*id.* at pp.

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<sup>22</sup> Restrictive or repetitive behaviors "measure[d] stereotyped behaviors, fixated interests, routines and rituals" (Dist. Ex. 5 at p. 18).



8-10).<sup>23</sup> The district denies these allegations, noting that the psychological evaluation of the student properly assessed all of the student's needs, including the areas of executive functioning, pragmatics, and for an ASD (Answer to Cr. App. at p. 2).

As discussed more fully below, the evidence in the hearing record supports the IHO's conclusions that the district's evaluation of the student provided a detailed description of the student's needs in the areas of concern expressed by the parents, and therefore, further assessments were not needed in order to conduct appropriate educational planning for the student and the parents were not entitled to an independent neuropsychological evaluation of the student at public expense. The evidence shows that the CSE (1) used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student; (2) did not rely on any single measure or assessment as the sole criterion for determining ... an appropriate educational program, and (3) used technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (see 20 U.S.C. § 1414[b][2][A]–[C]; A.H. by & through K.P. v. Colonial Sch. Dist., 2018 WL 3306897, at \*2 [D. Del. July 5, 2018], aff'd, 2019 WL 3021232 [3d Cir. July 10, 2019]).

### **i. Executive Functioning**

Here, the parents assert that the student performed "better than expected in attention and Theory of Mind, two areas where [the student] [was] acknowledged to have significant deficits" (Answer & Cr. App. at p. 8). The parents argue that because the district "acknowledged that their testing did not reflect [the student's] deficit in these areas," their request for "more thorough and more appropriate testing in these areas should be granted" (Parent Mem. of Law at pp. 27-18). In addition, the parents assert that the district's testing did not "assess cognitive flexibility and inadequately evaluated executive functioning," which the parents describe as two more areas of recognized weaknesses for the student (Answer & Cr. App. at p. 8).

The district's psychological evaluation described executive functioning as the "examinee's ability to plan, monitor, and regulate his/her behavior and mental efforts" and noted that it "include[d] such functions as working memory, attention, inhibition, flexibility of thinking, organization, planning, self-monitoring, and initiation, among others" (Dist. Ex. 5 at p. 29). At the impartial hearing, the parents' clinical psychologist testified that executive functioning included

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<sup>23</sup> To the extent that the parents also argue in their cross-appeal that they were entitled to a neuropsychological evaluation because the WIAT-III—administered to the student over the course of five sessions as part of an education evaluation (separate and apart from the psychological evaluation of the student) (see generally Dist. Ex. 6)—was "not conducted in an ordinary format," this issue was not raised in the due process complaint notice as a basis upon which to conclude that the district's evaluations of the student were not appropriate or as a basis upon which to conclude that they were entitled to a neuropsychological evaluation (compare Answer & Cr. App. at pp. 8-9, with Dist. Ex. 3 at pp. 12-13; Parent Mem. of Law at pp. 27-28; see also Tr. pp. 40-41 [identifying parents' disagreement with the district's evaluations in the opening statement for the IHO and specifically stating that "testing in the areas of executive functioning, social-emotional development and pragmatics was required"]; Dist. Ex. 2 at pp. 2-3 [describing the parents' disagreement with the district evaluation and specifically indicating that the parents were seeking "more extensive testing in the areas of educational need including executive functioning, social emotional development, and pragmatics"]). Consequently, this issue is outside my jurisdiction and will not be otherwise addressed.

"things like inattention, impulsivity, challenges with self-control and emotional regulation and difficulties with shifting, which include[ed] making transitions" (Tr. p. 927).

As part of the district's psychological evaluation of the student, the school psychologist selected the auditory attention and response set subtest from the NEPSY-II to assess the student in the areas of executive functioning and attention (see Dist. Ex. 5 at p. 29). Administration of the subtest yielded scores in the average to high average range with the exception of the student's commission and inhibitory error rates on the "auditory attention combined" portion of the subtest, which fell in the extremely low range (id. at p. 30).

In contrast to the student's average and high average scores on the NEPSY-II subtests, the student's teacher reported that the student "struggle[d] with inattention, impulsivity and self-control," was "easily distracted by her peers and with the materials in her desk," and "require[d] prompting to remain on task" (Dist. Ex. 10 at pp. 68, 70). However, the teacher also reported that, notwithstanding these difficulties, the student was "able to focus during independent assignments and require[d] minimal redirection" (id. at p. 70). Completion of the BASC-3 by the parents and the student's teacher as part of the district's psychological evaluation indicated that the student engaged in "many disruptive, impulsive, and uncontrolled behaviors at school and at home," and both rated the student's "hyperactivity" as being in the "[c]linically [s]ignificant range" (Dist. Ex. 5 at p. 32).<sup>24</sup> With respect to the school problems scale, the student's teacher reported that the student had "difficulty maintaining necessary levels of attention at school," that she was "almost always easily distracted and ha[d] trouble concentrating" (id. at p. 34). Within the same rating scales, the parents also reported that the student had "significant difficulty maintaining necessary levels of attention," as well as a "short attention span and trouble concentrating" (id. at p. 34). In summarizing the results of the psychological evaluation, the evaluators included a lengthy discussion in the evaluation report about the student's executive functioning, specifically with regard to her attention and inhibition (id. at pp. 39-40). The evaluators concluded that the student's "behaviors point[ed] to the likelihood that [the student] ha[d] a self-directed learning style, in that she attend[ed] to and engage[d] with material that [was] new and exciting, such as novel or self-generated information, but struggle[d] when rote, verbally presented information need[ed] to be recalled" (id. at p. 40).

At the impartial hearing, the district school psychologist testified that the district assessed the student's executive functioning "in a few different ways, some through the psychological evaluation and some through the [FBA]" (Tr. pp. 107-08).<sup>25</sup> She indicated that she had qualitative

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<sup>24</sup> The evaluators reported that "[the student's] mother demonstrated a Consistency Index score in the "[c]aution range, suggesting inconsistent responses to similar items" (Dist. Ex. 5 at p. 32 [emphasis in original]). As a result, the evaluators noted that "these inconsistent responses may impact the validity of the scores" and that "caution should be exercised when interpreting the BASC parent rating form" (Dist. Ex. 5 at p. 32).

<sup>25</sup> For example, as part of the FBA, the district used the Behavior Observation of Students in School (BOSS), which was described as a "structured observation system that examine[d] engaged time in the classroom as well as off-task behaviors" (Dist. Ex. 11 at p. 102). The student was observed on three separate occasions—during math/snack/ELA, ELA/social studies, and ELA computer lab (id. at pp. 102-03). Based on the data collected, the school psychologist reported that the student's "engagement was comparable to that of her peers" and that the student was "likely better able to attend when actively involved than when asked to passively listen" (id. at p. 103).

information regarding the student's attention from cognitive testing and also "directly" assessed the student's attention using the NEPSY-II (Tr. p. 108). More specifically, the school psychologist reported that the student's performance on the NEPSY-II showed that she performed in the average range for the attention component of the task and that her self-monitoring and inhibition of impulses were weak in one area (Tr. p. 108). The school psychologist testified that the student did better on the attention testing than she had anticipated, noting that the student was "hyperfocused on it" (Tr. p. 329). However, she stated that she thought that the "other attentional data" she had was more valid than "that particular assessment" in terms of the student's ability to attend or sustain her attention (Tr. p. 329; see Dist. Ex. 5 at pp. 33-34).

The school psychologist opined that in terms of the student's attention, the NEPSY-II subtest was an accurate measure of what the student was able to do, but not what she did on a daily basis (Tr. p. 110). The school psychologist suggested that the FBA provided more information about the student's attending because it included direct observations of the student's attention within the classroom (Tr. p. 110). In addition, the school psychologist testified that she had teacher ratings of the student's attention (Tr. p. 110). With respect to the student's inhibition and impulse control, the school psychologist reported that she had assessment data from the BIP and FBA (Tr. pp 110-11).

The school psychologist acknowledged that information gleaned as part of the FBA indicated that "functionally in the classroom [the student's] attention was not a significant concern during [the] observation periods" but that "teacher report" data, collected through the process of monitoring the student's attention, showed there were still concerns (Tr. pp. 123-24). She confirmed that she had contradictory data in terms of the teacher seeing that attention was still "somewhat of a concern" for the student, while her direct observations showed that it was "less of a primary concern" (Tr. p. 124). The school psychologist testified that despite the contradictory data she did not feel that further assessment was necessary to determine which was accurate (Tr. p. 124). Conflicting information may be acquired through an evaluation of a student, but it does not automatically render the evaluation inappropriate or entitle a parent to an IEE at public expense (see, e.g., Jack B. v. Council Rock Sch. Dist., 2008 WL 4489793, at \*7 [E.D. Pa. Oct. 3, 2008] [noting the presence of contradictory data in a district's evaluation but denying an IEE at public expense]). As the school psychologist explained in this case, "I do [not] want to say one is accurate and one is not. These are taken at a single point in time, and so at that moment this is very accurate as to how [the student] was attending at that moment" (Tr. p. 124). She further explained that there was "a lot of validity to a teacher kind of seeing [the student] across the course of a day several settings and saying sometimes [the student] is inattentive in that area" (Tr. p. 124). She opined that both the FBA observation and teacher data collection were valid assessments and showed that at different points the student was more active or less actively engaged (Tr. pp. 124-25).

The clinical psychologist stated that results of the BASC-3, as well as teacher reports, included in the March 2018 psychological evaluation indicated that the student had "some issues" with attention, however she noted that she did not feel that the testing was comprehensive since there was just one direct measure to assess the student's sustained attention and it only "tapped to" her auditory skills (Tr. pp. 942-43, 1214; see Dist. Ex. 5 at pp. 33-34). The clinical psychologist stated that within the March 2018 psychological evaluation executive functioning was "screened for" on the BASC-3 questionnaire, which assessed attention and hyperactivity, but there was no direct assessment of executive functioning outside of the auditory attention and response set test

from the NEPSY-II (Tr. 954). The clinical psychologist explained that the administered NEPSY-II subtests included a "brief screener" (a three-minute task) for sustained auditory attention and another three-minute task with more complicated task demands and stated that the student performed well (Tr. pp. 941-42).

The clinical psychologist further explained that from a neuropsychological perspective she felt the student should have been administered a Continuous Performance Test (CPT), one for auditory information and one for visual information (Tr. p. 943). She noted that they were both between eight and twelve minutes long, longer than the NEPSY-II task (Tr. p. 943). The clinical psychologist testified that the CPT allowed for comparison of auditory versus visual focusing and allowed for more concise measurement of a student's "true" attention span that could inform academic and behavioral planning (Tr. pp. 943-44). In addition, the clinical psychologist opined that the student should have been tested differently in the area of sustained attention and cited the Conners' Auditory Test of Attention (CATA) and the CPT as the "gold standard" measures for assessing this area (Tr. p. 1213). She indicated this was necessary because while qualitative observations of a child's attention were "part of the piece of the puzzle," these quantitative measures isolate a child's attention for low preference tasks which was the most crucial area to evaluate when determining the potential impact of executive functioning deficits on educational planning and placement (Tr. pp. 1213-14). While she explained her view that quantitative measures were preferable in her opinion, it does not alter the fact that the district conducted qualitative assessment in this area and she did not identify a deficiency in the district's administration of the assessment of the student, even if she might have handled it differently.

With regard to the student's working memory, the school psychologist stated that, based on her cognitive testing, the student's working memory was strong (Tr. pp. 109, 111; see Dist. Ex. 5 at pp. 27-28). However, she indicated that this was inconsistent with the district's observation of the student in the classroom in that the student tended to forget directions, routines and procedures, which could be linked to working memory (Tr. p. 112). She noted, however, that it was not that the student did not have the capacity to remember directions or routines, rather if she was not attending to what she was doing or directions to begin with, she did not follow through with directives (Tr. p. 112). According to the school psychologist, the student's over engagement with the task (auditory attention subtest of the NEPSY-II) and failure to remember the directions were close to what the district observed in the classroom (Tr. p. 113).

Turning to other executive functions, the school psychologist reported that she assessed the student's impulse control (impulsive vocalizations and actions), cognitive flexibility (inflexible and rigid behavior), and emotional regulation (emotional elevation, difficulty coping) by assessing the student's target behaviors as part of the FBA (Tr. pp. 117-18). She further reported that she assessed the student's adaptive behavior noting that adaptive behaviors "are kind of the opposite of the target behaviors" and included student behaviors the district was looking to increase, such as following directions and task engagement (Tr. p. 120). The clinical psychologist asserted that the student's cognitive flexibility (which she defined as the ability to look at a situation from a perspective other than your own) was not assessed as part of the district's psychological evaluation (Tr. p. 953). However, the school psychologist pointed out that cognitive flexibility, which included inflexible and rigid behavior, was assessed as part of the FBA (Tr. p. 118; see Dist. Ex. 11 at pp. 89, 93-100).

The director of special education testified that the NEPSY-II and the FBA assessed the student's executive functioning and she noted that the district had data from both formal standardized testing as well as data from the professionals providing services who worked with the student on a regular basis (Tr. p. 825). While the clinical psychologist's testimony attempted to find gaps in the assessment of student's executive functioning, the parents' evidence did not rebut the district's evidence that the evaluation of the student adequately covered this area of suspected disability.

## **ii. Pragmatic Language Skills**

Next, the parents argue that the district's speech-language evaluation failed to assess the student's "conversational language," which they describe as an area of weakness specifically being targeted through the student's 504 accommodations plan (Answer & Cr. App. at p. 8).

A review of the district's speech-language evaluation shows that it included assessments of the student's receptive and expressive language skills, ability to implement problem solving and language-based critical thinking skills, and expressive and receptive vocabulary (Dist. Ex. 7 at pp. 55-59). The evaluation did not include an assessment of the student's conversational language skills (see Tr. pp. 728-29). However, a review of the district's psychological evaluation shows that the evaluators assessed the student's functional communication, which included expressive and receptive communication skills and the ability to seek out information independently, using the BASC-3 (Dist. Ex. 5 at p. 35). Although the student's teacher rated the student's functional communications skills as being within normal limits, the student's mother rated the student's skills as being within the clinically significant range and expressed concern regarding the student's ability to "demonstrate functional communication" (Dist. Ex. 5 at pp. 35-36). Notably, the student's mother reported that the student demonstrated "unusually poor expressive and receptive communications skills" and was "generally unclear when presenting ideas" (Dist. Ex. 5 at p. 36). On the social interaction subscale of the GARS-3, the student's teacher reported that the student did not always follow others' cues to look at people and did not try to make friends with other people, aside from her two existing friends (Dist. Ex. 5 at p. 37). On the social communications subscale, both the student's parents and teacher indicated that the student had difficulty understanding when someone was teasing and what caused people to dislike her, failed to predict probable consequences in social events, and did not seem to understand that people had thoughts, feelings, and knowledge that were different from her own (Dist. Ex. 5 at p. 37). The district's psychological evaluation also included an assessment of the student's social perception and ability to comprehend others' perspectives, intentions, and beliefs (Dist. Ex. 5 at p. 30). Administration of the theory of mind subtest by the district evaluators yielded scores in the average range (Dist. Ex. 5 at p. 31). The evaluators noted that the student received intervention in this area, which may have improved her ability to respond to test questions in a rehearsed or scripted manner (Dist. Ex. 5 at p. 31). They further noted that the student's superior verbal reasoning and comprehension aided her in this area (Dist. Ex. 5 at p. 31).

In addition to the psychological evaluation, the confidential teacher report, completed by the student's classroom teacher, indicated that the student was well-liked by her peers, but struggled to maintain friendships and often relied on scripting to initiate interactions (Dist. Ex. 10 at p. 68).

The district speech therapist described pragmatic language skills as "higher level language skills such as inferencing, problem solving," and conversation skills (Tr. p. 681).<sup>26</sup> She testified that there were four tests administered as part of the district's speech-language evaluation (Tr. p. 686). The first Test was the Clinical Evaluation of Language Fundamentals (CELF) which was a "broad" test of expressive and receptive language skills; the second test was the Test of Problem Solving (TOPS) that assessed higher level language skills including inferencing, predicting and problem solving; and the remaining two tests the Receptive One Word Picture Vocabulary Test and the Expressive One Work Picture Vocabulary Test assessed the student's receptive and expressive vocabulary skills (Tr. pp. 686-689; Dist. Ex. 7 at p. 54).

The speech therapist testified that she understood pragmatic language as the way that language skills are used and included a student's ability to carry on conversations, understand figurative language, parts of speech, and higher-level skills related to inferencing and problem solving (Tr. p. 689). She reported that the student's pragmatic language skills were assessed through the administration of the TOPS where her ability to inference, problem solve and predict were formally assessed (Tr. pp. 690, 728). In addition, she reported that the GARS-3, administered as part of the district's psychological evaluation, included a subscale that formally looked at the student's pragmatic language skills (Tr. p. 690).

The clinical psychologist opined that the student's social perception was not sufficiently explored within the district's evaluations and noted that the theory of mind subtest from the NEPSY-II used by the district was "very basic" and that some students could compensate for underlying challenges and perspective taking with their high IQ and reasoning skills (Tr. p. 956). As noted above, the school psychologist acknowledged this observation in her report and testified that given the student's identified weakness in perspective taking she was a little surprised that the student did as well as she did; she noted the student's strength in verbal reasoning and that the subtest "does load with verbal reasoning" and so she found that the student was able to "reason through the evaluations" (Tr. pp. 115, 318, 1171-72; see Dist. Ex. 5 at p. 31). The school psychologist testified that within the social perception domain, the theory of mind subtest was selected because the evaluators had "observationally seen and by teacher report" the student struggled with taking the perspective of another person (Tr. pp. 114-16, 316). The evaluators also noted that when the student was unable to tap into her reasoning strengths, she had greater difficulty in recognizing the perceptions and facial expressions of others (theory of mind) (Dist. Ex. 5 at pp. 40, 41). The parent's clinical psychologist indicated that the psychological evaluation did not provide a standardized score for the theory of mind subtest, rather a "reference range" and "more appropriate tasks of this sort of socialization do exist and would be appropriate to administer" (Tr. p 957).

The clinical psychologist noted that there was nothing in the March 2018 psychological evaluation that directly spoke to quantitative or qualitative assessment of the student's visual attention (Tr. pp. 944, 1224). She stated that the reason that it was appropriate to proceed with "an assessment of quantitative evaluation of sustained visual attention" was because this was a student

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<sup>26</sup> The district speech therapist who testified was not the same speech therapist who evaluated the student in March and April 2018 (Tr. p. 685). Although the speech therapist who testified was the student's "treating clinician" from September 2017 to January 2018 and from September 2018 through the time of her testimony, she was on leave at the time the evaluation was conducted (Tr. pp. 680, 685).

with historic and documented challenges with executive functioning and noted that it was of importance to evaluate the student's attention in both the auditory and the visual realms, particularly based on her profile (Tr. pp. 1225-26). Again the clinical psychologist stated, from a neuropsychological perspective, since the evaluator felt it was important to isolate and evaluate the student's auditory skills, which were found to be secure, there was even more of a reason to "continue down the hypothesis and rule out" a problem with isolated, sustained visual attention (Tr. pp. 1226-27). In addition, the clinical psychologist noted that there was a difference between visual attention and sustained visual attention (Tr. p. 1224).

The district's director of special education testified that the district did not agree with the parents' expressed concern that the district evaluations did not look at the student as a whole (Tr. p. 823). She opined that there was a perception that different components of school district evaluations were conducted by different professionals and when an evaluation was done by a private evaluator, there was one clinician assessing a student in all different areas (Tr. p. 823). She explained this made it look like the district was doing piecemeal evaluations and not looking at the student holistically (Tr. p. 823). The director testified that the district evaluations looked at the student as a whole person (Tr. p. 824). The director testified that the district felt it had sufficiently evaluated the student in all areas (Tr. p. 825).

With respect to the parents request for a neuropsychological evaluation at the May 31, 2018 CSE meeting, the director testified that she indicated that it would be similar to what the district had already done (Tr. p. 826). She opined that a neuropsychological evaluation would not differ from the district's psychological evaluation because in addition to a social history, cognitive testing and social/emotional assessment, the district used the NEPSY-[II] to test the student's executive functioning (Tr. p. 828). The director reported that she explained to the parents at the CSE meeting that a neuropsychological evaluation would be similar to what the district had done (Tr. p. 829). The director of special education testified that a standard psychological evaluation was often just a cognitive assessment and did not include neuropsychological testing and typically a test of executive functioning was the extra element in a neuropsychological evaluation (Tr. pp. 869-70).

She recalled that the parents felt that there was something "more" that could be done for the student although they could not articulate what "more" was (Tr. p. 829). In response, the district offered to reach out and speak with the parents' private clinicians (Tr. p. 829). The director reported that the district made attempts to connect with the outside professionals but that they indicated they were too busy to speak and that the district would be receiving a letter (Tr. pp. 831-32). She reported that the district received the letter (Tr. p. 832; Dist. Ex. 13). The director of special education testified that she did not agree with the assertion that the student's visual attention wasn't assessed as it was and was included in the psychological evaluation where there is a note that the student's visual attention was not found to be concerning (Tr. p. 835). She reported that for auditory attention the district had the standardized test and additional data (Tr. p. 835). In response to the clinical psychologist's recommendations, the director testified that she had not heard of a requirement that an examiner should be unfamiliar with a student they evaluate (Tr. p. 836). She suggested that there were advantages to an evaluator being familiar with a student because standardized testing is conducted during a limited number of structured settings and the evaluator may or may not always pick up on an area of deficit that a student presents in their day-to-day functioning (Tr. p. 836). She opined that an examiner who knows a student brings a lot more knowledge about the student, especially their day-to-day functioning (Tr. p. 837).

In response to the clinical psychologist's recommendation for more extensive testing of the student's social/emotional development, the director stated that she felt the district had sufficiently evaluated the student in that area through formal standardized testing and data obtained through the student's service providers (Tr. p. 837). The director disagreed with the clinical psychologist's recommendation that an FBA should be conducted by someone unfamiliar with the student and her assertion that because the examiner who conducted the FBA was familiar with the student the findings might not be an accurate reflection of the student's naturalistic functioning (Tr. pp. 843-44). She opined that an unfamiliar evaluator was not necessary because at the end of an FBA the examiner speaks with the teacher and asks if what they observed was typical behavior for the student (Tr. p. 843). She noted that if it was not the student's typical behavior the teacher usually approached the examiner right away to advise them of this and that did not happen in this case (Tr. pp. 843-44).

However, on cross examination the clinical psychologist also acknowledged that the district conducted evaluations that assessed or "looked at" the student's visual attention and discrimination, language processing, fine motor skills, executive functioning, social-emotional development, and theory of mind (Tr. pp. 1167-69, 1171). The clinical psychologist acknowledged that while most neuropsychological evaluations were conducted by one person, the regulations for assessing a student for purposes of special education eligibility required that assessments be conducted by a multi-disciplinary team (Tr. 1170-71; see 8 NYCRR 200.4[b][6][vi]).

The hearing record supports the district's argument that its evaluation yielded adequate information regarding the student's pragmatic language and functional communication skills including the student's difficulty making and sustaining friendships, reliance on scripting to initiate interaction and lack of understanding that people have thoughts, feelings, and knowledge that is different than her own (Dist. Ex. 5 at pp. 21, 31, 35-38; 10 at p. 68). That the clinical psychologist would have opted for even more assessment of the student was not a basis for finding the district's evaluation inappropriate.

### **iii. Potential Diagnosis of ASD**

As a final basis for arguing that they were entitled to a neuropsychological IEE of the student at public expense, the parents contend that the district failed to determine whether the student has a diagnosis of an ASD (see Answer & Cr. App. at pp. 9-10). In support of this argument, the parents point to the recommendation for a neuropsychological evaluation made by the clinical psychologist in the June 4, 2018 letter—and in particular, an administration of the ADOS-2—of the student in order to "obtain a clearer diagnostic picture of [the student] given her deficits in varied areas" (id. at p. 9). According to the parents, the district's evaluation "raised serious but questionable concerns" regarding a potential diagnosis of ASD, and an administration of the ADOS-2 would clarify those concerns (id.).

Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight



on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]. "Indeed, [t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education" Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 (7th Cir.1997).

In contrast to the parents' assertions, however, the evidence in the hearing record reveals that the district had already recognized and acknowledged that the student had been diagnosed as having an ASD as early as June 2016, when developing the student's 504 accommodation plan for the 2016-17 school year (see Parent Ex. A at p. 1). Notably, the student's 504 plan documented that the student had a "diagnosis of [ASD]" and that same information was reported in the student's subsequent 504 plans for both the 2017-18 and the 2018-19 school years (compare Parent Ex. A at p. 1, with Parent Ex. B at p. 1, and Parent Ex. C at p. 1). In addition, when the district conducted the March 2018 psychological evaluation of the student, the evaluators specifically noted within the body of the report that the student had been diagnosed as having an ASD (Dist. Ex. 5 at p. 20).

In addition, as part of the March 2018 psychological evaluation, the district administered the GARS-3 to the student, which as noted above, resulted in "Autism Index" scores indicating the "probability of ASD [was] very likely, with a severity level of 2, [further] indicating [the student] may require substantial support" (Dist. Ex. 5 at pp. 36-39). In summarizing the testing results in the March 2018 psychological evaluation report, the evaluators determined that the student's social communication, emotional responses, and cognitive styles indicated that she exhibited a high likelihood of ASD, consistent with her then-current diagnosis of ASD (id. at p. 41).

In light of this evidence, it appears that the district's administration of the GARS-3 confirmed the student's then-current diagnosis of ASD (id. at pp. 20, 36-39, 41; see Parent Exs. A at p. 1; B at p. 1; C at p. 1), and it was not until the clinical psychologist's review of "recent school-based assessments" that the student's then-current diagnosis of ASD was called into question (see Dist. Ex. 13 at p. 108).<sup>27</sup> To wit, in the June 2018 letter co-authored by the clinical psychologist, it was noted that "one area within the [GARS-3], that was consistently reported to be secure across respondents was Restrictive/Repetitive Behaviors, the presence of which [were] required to in order to meet criteria for an [ASD] based upon current diagnostic guidelines" (id. at p. 109). To "definitely clarify diagnosis," the clinical psychologist recommended a "comprehensive neuropsychological assessment" that included the "gold standard ADOS-2" because the student's

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<sup>27</sup> The June 2018 letter also represents the first time in the hearing record that reported the student as having a diagnosis of "Social Pragmatic Communication Disorder" (Dist. Ex. 13 at p. 108; see Parent Ex. C at p. 2 [updating the student's 504 accommodation plan to include Social Pragmatic Language Disorder diagnosis]; see generally Tr. pp. 1-1373; Parent Exs. A-C; K-Z; AA-II; Dist. Exs. 1-15; 18-29).

"recent testing [was] inconclusive and her current therapeutic diagnostic profile [was] inconsistent with [the] presence of ASD" (*id.*). According to the evidence in the hearing record, the additional views of the clinical psychologist were not made known to the district until the parents forwarded a copy of the June 2018 letter to the district school psychologist via email on June 6, 2018—after both May 2018 CSE meetings had been held to review and discuss the student's evaluative information and the parents' IEE request (see generally Dist. Exs. 13-14).

Consistent with the information set forth in the June 2018 letter, the clinical psychologist testified at the impartial hearing that the presence of restrictive or repetitive behaviors was a diagnostic requirement for an autism diagnosis and since these were not reported on the GARS-3 conducted as part of the March 2018 psychological evaluation, this indicated to her that additional testing was needed (Tr. pp. 948, 1178-79; see Dist. Exs. 5 at pp. 36-37; 13 at pp. 108-09). The clinical psychologist explained that fully confirming a diagnosis of an ASD would inform the interventions that were most appropriate for the student (see Tr. pp. 947-49).

The clinical psychologist further explained that the ADOS-2, was considered to be the gold standard not only to make a diagnosis but to determine whether someone has level one, level two, or level three ASD, and it was necessary in this situation to determine what the student's foundational challenges were so that she could receive appropriate remediation and support (see Tr. pp. 950-51). In addition, the clinical psychologist explained the difference between the GARS-3 and the ADOS-2, noting that the GARS-3 was a screening instrument used to identify students who might require further testing, while the ADOS-2 was a clinical tool that was used to definitively make a diagnosis (see Tr. p. 951). The clinical psychologist also noted that the GARS-3 was a questionnaire filled out by a parent or teacher while the ADOS-2 was a "direct 1:1 assessment measure . . . administered by a qualified professional" (Tr. pp. 951-52). The clinical psychologist testified that this distinction impacted the reliability of the tests because whenever a parent or teacher was asked to provide their observations "it's through that individual's frame of reference" and "would ha[ve] less objectivity" when compared to the ADOS-2, which was administered by a qualified professional (Tr. p. 952).

During cross-examination of the clinical psychologist, she testified that it was "important in [the student's] particular circumstances" to follow up the GARS-3 with a "more quantitative assessment such as the ADOS-2" because, "even though there was the absence of reported repetitive and stereotype behaviors, it [was] still possible the ADOS[-2] would reflect an elevation or cutoff score that would be consistent with a social pragmatic communication disorder and clarification of her specific needs in that realm [was] considered important to provide her with appropriate educational supports" (Tr. pp. 1212-13 [emphasis added]).<sup>28</sup>

At the impartial hearing, the district school psychologist testified that she knew that the student had a diagnosis of autism and, with that knowledge, she understood that "certain behaviors might be associated with that" (Tr. pp. 327-28). However, the school psychologist also testified that she was more concerned about how the student was "presenting," and explained that regardless of whether a student either did or did not have a diagnosis, she was "working with the behaviors"

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<sup>28</sup> According to the DSM-5, an individual must manifest "[r]estricted, repetitive patterns of behavior, interests, or activities" as one of the diagnostic criteria for ASD; however, this same diagnostic criteria is not required for social pragmatic communication disorder.

the student was presenting (Tr. p. 328. Moreover, the school psychologist further testified that she did not "need a diagnosis" and stated, "whether you call it autism, whether you call it social communication pragmatic disorder, whether you call it ADHD, whether you call it emotional, [or] mood disability," district staff "work[e]d off of the behaviors that we assess" (Tr. pp. 326-27).

The director also testified at the impartial hearing with respect to whether an administration of the ADOS-2 was required in order to clarify a potential diagnosis of ASD. The director indicated that if "everyone" agreed that the student did not demonstrate "restrictive and repetitive behaviors"—which was required in order to be diagnosed as having an ASD—it was not clear to her "how the ADOS[-2]" would provide "any additional information with regard to [the student's] qualification for autism" (Tr. pp. 838-39). The director disagreed with the clinical psychologist's opinion that the district needed "to definitively clarify [the] diagnosis," because, as a school district, it was more concerned about "how" the student presented in terms of the behaviors and how those behaviors "impact[ed]" a student's learning, and therefore, a school district was "not as concerned with diagnoses" (Tr. pp. 839-40). That the clinical psychologist may have used additional or different testing to obtain a definitive DSM-5 diagnosis for clinical purposes does not render the district's evaluation in accordance with IDEA for educational purposes inappropriate or call into question the director's determination that there was sufficient information to address the student's educational needs.

### **c. Qualifications of the District School Psychologist**

Turning next to the parents' challenges to the qualifications of the school district evaluator, the IDEA requires that each school district "shall ensure that-- . . . assessments and other evaluation materials used to assess a child under this section . . . are administered by trained and knowledgeable personnel (20 U.S.C. § 1414[a][3][A][iv]). In the cross-appeal, the parents initially argue that in denying the request for a neuropsychological IEE, the IHO failed to address whether the district's school psychologist who conducted the psychological evaluation of the student was "sufficiently credentialed" to conduct the evaluation of the student (Ans. & Cr. App. at p. 7). The district contends that the parents did not raise the school psychologist's qualifications in the due process complaint notice as a basis upon which to discredit the district's March 2018 psychological evaluation of the student and seek an IEE at district expense. Consequently, the district asserts that the parents cannot now raise this as an issue for the first time on appeal.

A review of the parents' due process complaint notice does not immediately provide an answer to this disputed issue. Here, in support of their continued request for IEEs, the parents first recited the reasons for their disagreement with the FBA conducted and turned, next, to the request for a neuropsychological IEE (see Dist. Ex. 3 at pp. 12-13). On this point, the parents cited the district psychological evaluation's failure to comply with relevant portions of the IDEA and State law—notably, the failure to assess the student in "all areas relating to her disabilities," as well as the fact that the district did not conduct its own neuropsychological evaluation of the student—as bases to support their request for a neuropsychological IEE (id. at p. 13). However, it is when the parents then describe the reasons for their disagreement with the district's evaluation that the parents' due process complaint notice becomes somewhat confusing. This is because the parents' due process complaint notice indicates that they disagreed with the district's "Psychiatric Evaluation" of the student—an evaluation that the district did not conduct as part of the initial evaluation process—and then include as a final statement within this same section of the due

process complaint notice that the "evaluator was not appropriately qualified to evaluate [the student] in these areas" (compare Dist. Ex. 3 at p. 13, with Dist. Exs. 5-9; 11-12).

Therefore, on one hand, the district's assertion that the parents did not raise the qualifications of the district school psychologist as a basis to invalidate the March 2018 psychological evaluation and receive an award of a neuropsychological IEE is technically correct, since the challenge to the qualifications of some unidentified evaluator in the due process complaint notice appears to refer to the individual who conducted a psychiatric evaluation of the student, which did not occur. On the other hand, the parents' assertion that they did, in fact, challenge the evaluator's qualifications in the due process complaint notice is also technically correct, because it is true that the due process complaint notice included language that challenged the qualifications of an evaluator. Given the fact that the hearing record is devoid of any evidence that the student was either administered a psychiatric evaluation or otherwise required a psychiatric evaluation, the parents' due process complaint notice can be reasonably read to include a challenge to the district school psychologist's qualifications and the issue will be addressed out of an abundance of caution.

Turning, then, to the merits of this issue, the parents—as support for this contention—point to the district IEE policy, which they assert requires that "independent and school district evaluators conducting Psychological Evaluations hold either a Ph.D. or a Psy.D. in Psychology" (Answer & Cr. App. at pp. 7-8 [emphasis in original], citing to Parent Ex. BB [noting that "Independent evaluators must hold the same credentials as school district evaluators"])). The parents argue that, by extension of this IEE policy, the district school psychologist—who only held a master's degree and not a "Ph.D. or Psy.D." in psychology—was not qualified to conduct the psychological evaluation, and the IHO should have granted the request for a neuropsychological IEE on this basis (Ans. & Cr. App. at p. 8).

While the parents' logic in reaching this conclusion may, at first glance, appear reasonable, it ignores State regulation, which unambiguously defines an "[i]ndividual psychological evaluation" as "a process by which a New York State-certified school psychologist or licensed psychologist uses, to the extent deemed necessary for purposes of educational planning, a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics" (8 NYCRR 200.1[bb]). The parents' argument is a technical one that focuses on the semantics of the district's explanatory policy, but the reason behind the policy, while it might be more artfully drawn, is sufficiently clear. It is designed to ensure the individual performing a psychological IEE assessment does so consistent with the professional licensure requirements of New York State law. Any independent evaluator conducting a psychological assessment in New York State would be required to have a doctoral degree in psychology (Educ. Law § 7603[2]). There is also a limited exception under state law for a certified school psychologist to perform psychological assessments in the course of their employment relationship with a school district (Educ. Law § 7606[1]). A certified school psychologist is permitted to temporarily practice while holding a provisional certificate and, continue to practice upon completing a permanent certificate that is based in part on having a master's degree (8 NYCRR 80-2.3[e]). There is no provision in New York law for an "independent" certified school psychologist to conduct psychological testing outside the scope of their employment with a school district or similar public agency employment, thus the district policy just has the effect of ensuing that IEEs are conducted in accordance with

the minimum credentialing requirements in state law. Here, the evidence in the hearing record reflects that the district school psychologist was a New York State-certified school psychologist with a master's degree who was trained and knowledgeable of the assessments she conducted and therefore, was qualified to conduct the psychological evaluation of the student (see Tr. pp. 43, 45, 46; Dist. Ex. 5 at pp. 20, 42).<sup>29</sup> There was no defect in the district's evaluation attributable to the school psychologist's State certification or other credentials and thus no reason to award an IEE on this basis.

#### **4. FBA IEE**

As noted above, a district must—as part of its initial evaluation of a student under State regulations—conduct an FBA "for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4 [b][1][v]). In this case, it is undisputed that the district conducted an FBA as one of the assessments to guide the CSE's eligibility determination (see generally Dist. Ex. 11).

On appeal, the district contends that, in reaching the conclusion that the FBA of the student was inadequately assessed, the IHO confused the FBA with the implementation of the student's BIP during the 2017-18 school year, which was wholly irrelevant and unrelated to the appropriateness of the FBA. The district further contends that the evidence in the hearing record weighs in favor of finding that the FBA was appropriate and the parents were not entitled to an FBA IEE at district expense. The parents generally deny these allegations and seek to uphold the IHO's findings. Upon review, the evidence in the hearing record does not support the IHO's conclusion that the district's FBA was deficient. As a result, the IHO's finding, as well as the order awarding the parents with an FBA IEE at district expense must be reversed.

In contrast to the more adaptable requirements that are needed for psychological assessments of a variety of students under a broad range of circumstances, State regulations provide much greater specificity regarding the manner in which an FBA is to be conducted for those particular students who have behaviors that impede their learning or that of their peers. In this case, it is troubling that neither the IHO, nor the parties, relied upon State regulations to guide this analysis at any juncture throughout the administrative process—including, now, on appeal (see generally IHO Decision; Parent Ex. II; Parent Mem. of Law; Dist. Ex. 29; Dist. Mem. of Law). While this, alone, does not warrant overturning the IHO's findings, reliance upon the appropriate

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<sup>29</sup> At the impartial hearing, the director, during cross-examination, was referred to parent exhibit BB, which comprised the district's IEE policy in effect at the time the parents requested the neuropsychological IEE and the FBA IEE (see Tr. pp. 859-60; see generally Parent Ex. BB). In particular, the parents' attorney pointed to a statement in the IEE policy indicating that "independent evaluators have to have the same credentials as school evaluators" (Tr. p. 860). After the director confirmed that this statement appeared in the IEE policy, the parents' attorney then asked the director to confirm whether the district school psychologist who conducted the psychological evaluation was not a "Ph.D."—and the director confirmed this fact (Tr. pp. 860-61). The parents' attorney pressed on, asking whether the district determined that that "certification" was "required to perform that test" (Tr. p. 861). While the director confirmed the attorney's statement, she also clarified the point by explaining that that level of certification—a doctorate—was required in New York to maintain an outside, private practice and a school psychologist with a master's degree could not, therefore, engage in an outside, private practice but instead, could only perform work within a school setting (see Tr. pp. 861-62; see also Educ. Law §§ 7600, 7605).

legal standard would have clarified the "relevant record"—which the IHO described as "muddled and disturbing"—in order to render a finding (IHO Decision at p. 16). Finally, even though the parents' disagreements with the district's FBA—and as addressed during the impartial hearing—generally cannot be construed to allege any specific regulatory deficiencies as a basis to find the FBA was not appropriate, these contentions will be addressed herein out of an abundance of caution.

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).<sup>30</sup> Upon review, the evidence in the hearing record reveals that, consistent with State regulations, the district based the FBA on multiple sources of data. For example, as reflected in the FBA document itself, the data sources included: the collection of "ABC Data" through direct observation (see generally Dist. Ex. 11 at pp. 87-91), the collection of "ABC Data" through classroom data (see generally Parent Ex. GG), structured behavioral observations (direct observation), a teacher interview (administration of the Motivational Assessment Scale-2 [MAS-2]) (see Tr. pp. 474-76; Dist. Ex. 11 at p. 99; see generally Parent Ex. FF), a parent interview (administration of the Functional Assessment Interview Tool [FAIT]) (see generally Dist. Ex. 11 at pp. 83-84), and third marking period progress monitoring data (Dist. Ex. 11 at p. 83).<sup>31</sup> At the impartial hearing, the district school psychologist testified that she conducted the FBA of the student and collected the "primary data for the FBA" (see Tr. pp. 43, 116-17, 190). The school psychologist further testified that she

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<sup>30</sup> Moreover, although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

<sup>31</sup> At the impartial hearing, the district school psychologist explained that "ABC charts" referred to "antecedent behavior consequence" charts (Tr. p. 117).

made "direct observations" of the student for the FBA from March 26, 2018 through April 19, 2018, and the "ABC data" collected from the teacher's observations of the student for the "ABC charts"—also used in conducting the FBA—occurred from March 12, 2018 through April 25, 2018 (Tr. pp. 117, 193; see Dist. Ex. 11 at p. 91; Parent Ex. GG at pp. 1-29 [comprising "ABC Chart—data collection" in the classroom from March 12, 2018 through April 25, 2018 and used as "Supplemental Data" for FBA]).<sup>32</sup>

In addition, a review of the FBA reveals that, consistent with State regulation, it identified contextual factors that contributed to the student's target behaviors, such as the student's "diagnosis of [ASD]," the administration of "several medications daily to manage a variety of medical concerns" including juvenile arthritis and an ADHD, "not being aware of the task demands due to inattention," "difficulty in transitioning," and "social disappointment" (compare Dist. Ex. 11 at pp. 83, 93, with 8 NYCRR 200.1[r]).

Furthermore, the FBA also included baseline information setting forth the frequency, duration, and intensity of the student's target behaviors across activities, settings, people, and times of the day, as required by State regulation (compare Dist. Ex. 11 at p. 95, with 8 NYCRR 200.1[r]).

Turning to the parents' concerns, at the impartial hearing, the parents' witness—a "doctoral level" BCBA and State "licensed behavior analyst" (parents' BCBA)—testified about alleged deficiencies in the district's FBA of the student (see Tr. pp. 980-1055). Her first criticism pertained to the "supplemental data" referenced in the FBA document, which she understood to comprise data collected by "whoever wrote this document up in the classroom" (Tr. p. 988). Based upon information reported to her by the parents, the BCBA believed that the "aide" gathered that information (id.). When asked whether it was "important at all to figure out who was gathering the data, to develop an FBA," the BCBA confirmed that was important because it was "necessary that there be calibration across the data collection in order to ensure that it's accurate information that's being recorded as well as that everyone is on the same page about exactly what we are looking at in terms of the problem behaviors" (Tr. pp. 988-89). Therefore, the BCBA concluded that "it would have been necessary for the aide to have had some degree of training prior to recording that data" used in conducting the FBA (Tr. p. 989). According to the BCBA, she "did not see any information relative to how the training was provided" to the aide within the FBA document itself (Tr. p. 989).

As a rebuttal witness, the district presented another school psychologist employed by the district, who was a State-certified school psychologist (doctoral level) and who was a State "licensed behavior analyst" (district's BCBA) (Tr. pp. 1264-67). With regard to the criticism leveled about the absence of information in the district's FBA identifying "who collected the ABC data," the district's BCBA testified that the absence of that information within the FBA did not invalidate the FBA (Tr. pp. 1272-73).

Next, a review of the FBA reveals that, consistent with State regulation, the district identified and operationally defined five "[t]arget [b]ehaviors" (i.e., "behaviors to reduce"):

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<sup>32</sup> According to the district school psychologist, the student's aide primarily recorded the information in the "ABC Chart—data collection" document, or if she was absent, the student's teacher would do so (Parent Ex. GG at pp. 1-29; see Tr. pp. 193-94, 345).

impulsive vocalizations or actions, non-compliance, inflexible or rigid behavior, negative verbalizations toward peers, and emotional elevation or difficulty coping (Dist. Ex. 11 at pp. 84-85). In addition, the district identified and operationally defined four "[a]daptive [b]ehavior[s]" in the FBA: follows directions, pro-social interaction, used a coping skill, and task engagement (id. at pp. 85-86).

At the impartial hearing, the parents' BCBA explained that in an FBA, it was "necessary that the behaviors of interest are operationally defined" (Tr. p. 991). After reviewing the district's FBA, the parents' BCBA testified that although the FBA did include a heading with "operational definitions" with "five behaviors that were targeted for decrease," the behaviors were "all defined in terms of . . . what they include and what they don't include in some cases" (id.). She explained that it was important to define the behaviors so that "one is very aware of what exactly we are looking at" and also that "everyone ha[d] to be consistently identifying what those occurrences [were] in terms of the occurrence of the behaviors" (Tr. pp. 991-92). The parents' BCBA was then referred to the student's "behavior chart," and upon questioning, testified that to her knowledge, the "target behaviors" were not defined anywhere on the "behavior chart" (Tr. pp. 991-92; see generally Dist. Ex 20).

At the impartial hearing, the district's BCBA was asked about the alleged failure to include target behavior definitions in the student's "behavior chart" as a concern raised by the parents' BCBA (Tr. p. 1274; see generally Dist. Ex. 20). The district's BCBA did not hold a similar concern, noting that the student's "behavior charts [were] something running parallel to the FBA" beginning in October (Tr. p. 1274; see Dist. Ex. 20 at p. 143). She also testified that, based upon her own understanding, the student's "behavior chart" was a "reinforcement chart"—meaning that it was a way for the district, on a daily basis, to "check in with [the student] and [to] mak[e] sure she [was] working toward her skillful behaviors" (Tr. pp. 1274-75; see, e.g., Dist. Ex. 20 at pp. 143-45). The district BCBA testified that the district used the "behavior chart" as a way to build the student's "self-monitoring" skills—but "this wouldn't have been part of the supplemental data" used with respect to the FBA (Tr. p. 1275 [emphasis added]; see Dist. Ex. 11 at p. 91 [referencing supplemental data used in FBA as the ABC classroom data]; see generally Parent Ex. GG [comprising ABC classroom data collected]; Dist. Ex. 20 [comprising the student's "behavior chart"]). She further explained, therefore, that the "chart definitions, all of that would be a piece of either the direct observation data or the classroom ABC data" (Tr. p. 1275).

With respect to the student's "behavior chart," the district's BCBA explained at the impartial hearing that its purpose was "part of her classroom incentive plan individualized to her to—help her understand" (Tr. p. 1276; see generally Dist. Ex. 20). Reviewing the "behavior chart," the district's BCBA testified that it appeared as though the student was "working on raising her hand before speaking, using coping strategies to avoid meltdown behavior and focusing" (Tr. p. 1276; see Dist. Ex. 20 at p. 143).

Turning to the very specific concern raised that the "behavior chart" did not "identify the target behaviors" or define the target behaviors, the district's BCBA testified that it was not a concern for her (Tr. p. 1277). The district's BCBA explained that while she did not "want to underplay [that] target definitions have to be for the purpose of data collection for the behavior plan, which [was] the classroom ABC data and the direction observation data," a student's "behavior chart"—especially for an elementary student—is designed for the student and so "we



want it to feel happy and exciting for the student, so it's in student friendly language" and, in this particular instance, had "ice cream cones on it" (*id.*; see generally Dist. Ex. 20). She further explained that it was important for the student's "behavior chart" to include "student friendly language" because "[w]e want to build self-monitoring in and we want it to be something that a student likes to do" (Tr. p. 1277). Consequently, the district often individualized students' "incentive plan[s] so they c[ould] be looking at pictures of things they like so the language isn't overwhelming" or "look like a list of rules" (Tr. pp. 1277-78).

However, to the extent that the parents' BCBA appeared to criticize the target behavior definitions in the district's FBA, a review of the FBA demonstrates that, consistent with State regulation, it included detailed operational definitions of the target behaviors in concrete terms (compare Dist. Ex. 11 at pp. 84-85, with 8 NYCRR 200.1[r], and 8 NYCRR 200.22[a][3]). For example, the FBA defines impulsive vocalizations or actions as "[a]cting in a way that [was] not consistent with expected behavior in the classroom," including behaviors such as "getting up from seat during whole class instruction to access a break or materials without first asking permission, calling out without first raising her hand and gaining permission to ask a question, [and] walking away from a group project to speak to non-group members" (Dist. Ex. 11 at pp. 84-85). In addition, the target behavior definition included a description of behaviors that were not to be considered as falling within the definition of that specific target behavior, such as when the student was "asking for assistance after accessing staff attention and permission to speak or leaving seat/instructional area after obtaining teacher permission," as well as when the student was "walking away from group members in a group activity after vocalizing the reason for walking away" (Dist. Ex. 11 at pp. 84-85). Upon review, the remaining four target behavior definitions in the district's FBA were similarly fashioned with concrete language consistent with State regulations (*id.*).

Next, the parents' BCBA was asked at the impartial hearing whether it would be "relevant" to note within the FBA whether "there was no data either collected or retained" for a certain period of time during the data collection or observation period from March 12, 2018 through April 25, 2018 (Tr. pp. 992-93; see Dist. Ex. 11 at p. 91). The parents' BCBA testified that while there "may have been a vacation period" during that timeframe, "regression [may occur] during periods of no practice and not being in school without that level of consistency in the school setting" and this was often the case for children, especially those diagnosed on the spectrum" (Tr. p. 993). She further testified, however, that regardless of the reason for no data being collected or retained on certain days, it should be noted in the FBA whether data missing for particular days were due to vacation time or if the recorder of that information was absent (i.e., the aide) (see Tr. pp. 994-95).

On this point, the district's BCBA initially confirmed that "Easter break was in that period of time so that would" account for some days where data was not collected (Tr. pp. 1278-79; see generally Parent Ex. GG). The district's BCBA also acknowledged that, generally, "all information [was] useful" and "any time we miss an event, there [was] something we could understand" (Tr. pp. 1279-80). The district's BCBA also testified that, when conducting an FBA, "multiple sources of information" are used (Tr. pp. 1280-82). In this case, there was "a lot of supplemental data and a lot of data in the direct observation," so although data not collected could have been "useful," the absence of that information did not "invalidate" the FBA or "discount all the information" that was otherwise available (Tr. pp. 1281-82).

As the next criticism leveled at the district's FBA, the parents' BCBA observed that—as noted in the FBA—the student, at times, "required the support of psychology staff," which indicated that the student was removed from the classroom and taken to the school psychologist's office (Tr. p. 998; see Dist. Ex. 11 at p. 92).<sup>33</sup> According to the parents' BCBA, even though this information was included in the FBA, it remained "unclear and in what instances" or "under what circumstances" the student was removed from the classroom for support (Tr. p. 998). Based upon her review of that "situation," the parents' BCBA testified that it had occurred "about six times" during the "ABC data" collection but that that "relevant information" was not noted within the FBA (Tr. pp. 999-1000). Similarly, the parents' BCBA believed that the FBA did not document the "frequency of those problem behaviors occurring during social opportunities, [and] the frequency of [the student's] inability to tolerate being incorrect or being corrected by [a] peer" (Tr. pp. 1030-41; see Parent Ex. GG at pp. 4, 6, 8-9, 14-16, 22, 26).

The district's BCBA responded to these criticisms as well (see Tr. pp. 1282-84; Dist. Ex. 11 at p. 92). She testified that, contrary to the opinion of the parents' BCBA, the FBA did "speak to" the number of times the student "needed to be removed" from the classroom or activity and referred to the previous page of the FBA for that information (Tr. pp. 1282-84; Dist. Ex. 11 at p. 91). Noting the "third to last sentence," the district's BCBA pointed out that "in one instance of target five behaviors, so emotional elevation, when that occurred . . . required moderate to intensive assistance" and that the student required "additional support" for "occasions of intensive assistance" (Tr. pp. 1284-85; Dist. Ex. 11 at p. 91). She explained that that information was "available as part of the supplemental data," and she was able to "go through and see the location and the duration for when [the student] was removed from a classroom" (Tr. p. 1285). The district's BCBA also explained that the absence of a pattern regarding when the student's behaviors occurred meant that her behaviors did not appear to interfere with the student "missing a substantial amount of specific content area"—which would have been important to record as data if it had occurred (Tr. p. 1286). In addition, the district's BCBA testified that, contrary to the concern expressed by the parents' BCBA, the FBA did not lack information regarding how much "instruction and what periods of instruction [the student] missed due to emotional elevation" (Tr. p. 1292). Here, she pointed to the FBA and the distinction the school psychologist made between her own direct observation of the student as "emotionally elevated during only one observational period" with the information provided in the "[s]upplemental [d]ata," which tended to reflect instances when the student was "emotionally elevated" throughout the school day and in different settings (Tr. pp. 1292-93; Dist. Ex. 11 at p. 91). Finally, the district's BCBA disagreed with the parents' BCBA's opinion that the FBA failed to document particular behaviors reflected in the supplemental data (Tr. pp. 1307-09; see generally Parent Ex. GG). In disagreeing with this opinion, the district's BCBA pointed, again, to the portion of the FBA that captured the information gleaned from the supplemental data, which noted that the student, at times, had to be removed from the setting to receive support from the psychology staff or in order to receive more intensive interventions (see Tr. pp. 1307-10; Dist. Ex. 11 at p. 91).

Next, the parents' BCBA—based upon her review of the FBA—concluded that the classroom teacher incorrectly estimated the frequency of the student's behavior of "non-

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<sup>33</sup> The full statement in the FBA is as follows: "At times [the student] requires the support of psychology staff; however, typically her aide is able to redirect the behavior" (Dist. Ex. 11 at p. 92).

compliance" when compared to the frequency reported about that same behavior and as observed by the district's BCBA during the data collection for the FBA (see Tr. pp. 999-1003; Dist. Ex. 11 at pp. 88, 95).

Here, the district's BCBA testified that, after her review of the "specific noncompliance data," she found that this behavior had been "removed as a behavioral target" during the implementation of the student's BIP (Tr. pp. 1286-88). However, when collecting data for the FBA with "target definitions," the observer—in this case, the district school psychologist—had no discretion to decide what constituted noncompliance because it had been identified by the target definition (Tr. pp. 1288-89; Dist. Ex. 11 at p. 88). After noting particular examples of the student's behaviors that the school psychologist was required to include in the data collection as the student's "noncompliance," she further explained that it made "sense that the teacher d[idn't] view those as noncompliance," such as the student not following a direction given because she did not hear the directions (which had not been ruled out of the target definition for noncompliance) and when the student was observed doodling on a white board (Tr. pp. 1288-91).

As the next area of concern, the parents' BCBA was directed to the FBA to explain what was meant by "the functions of the behavior" (Tr. p. 1009; Dist. Ex. 11 at p. 99).<sup>34</sup> The parents' BCBA testified that the "functions of the behavior are the reasons why—the perceived reasons" for a student's particular behavior (Tr. p. 1009). She further noted that when conducting an FBA, "we are hypothesizing what the function of the problem[] behaviors are" based upon the "teacher's opinion as to why [the student] was emitting the problem behavior" (id.). As an example, the parents' BCBA testified that, with respect to the behavior of "impulsive vocalizations," the primary function—as noted in the FBA—was "sensory," which, according to her meant that it was "automatically reinforcing" and "something that [the student] d[id] because of some internal event or some internal need" (Tr. p. 1010; Dist. Ex. 11 at p. 99). The parents' BCBA further testified that the "function of the problem behaviors" are investigated in order to "develop a plan specific to that problem behavior" with the "intention that we develop proactive and reactive strategies to target the decrease of that problem behavior" (Tr. p. 1010). Essentially, "[w]e have to know why it's occurring in order to figure out how we are going to treat it" (id.). The parents' BCBA was then directed to review the student's BIP and opined that, if "impulsive vocalizations and actions" were "truly being maintained by a sensory component," the BIP needed to include "some type of self-monitoring intervention" to address it—and in this instance, she did not see any such intervention in the student's BIP (Tr. pp. 1010-15; see generally Dist. Ex. 12).

In response to this concern—albeit more closely aligned to the appropriateness, or the implementation, of the student's BIP as opposed to the FBA or the functional hypotheses set forth in the FBA—the district's BCBA agreed with the idea that the BIP "should include a component

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<sup>34</sup> Consistent with State regulations, the district formulated hypotheses in the FBA regarding the general conditions under which the student's target behaviors usually occurred (compare Dist. Ex. 11 at pp. 99-100, with 8 NYCRR 200.1[r]). For example, the FBA noted that the student's target behavior identified as impulsive vocalizations or actions "appear[ed] to serve a number of functions, with the most influential functions likely being sensory and access to peer or adult attention" (Dist. Ex. 11 at p. 99 [emphasis in original]). In addition, the FBA indicated probable consequences that served to maintain the behaviors, including peer and adult attention and removal from the activity (id. at p. 97).

where [the student] would self-monitor her behavior" (Tr. p. 1298). To this end, the district's BCBA testified that "multiple places" in the BIP targeted the student's need to self-monitor (Tr. p. 1299). For example, the district's BCBA pointed to one positive strategy and intervention in the BIP requiring that the student "will be proactively prepped for situations that may cause disappointment or may not go as expected as much as possible by reviewing strategies and appropriate language and behavior" (Tr. p. 1299; Dist. Ex. 12 at p. 106). She explained that "[e]very time" this strategy or intervention was implemented, it helped the student learn and built in that "self-monitoring" by letting the student know that she was going to have an opportunity to "use her coping strategies" (Tr. pp. 1299-1301).<sup>35</sup>

At the impartial hearing and upon questioning by the IHO, the parents' BCBA also took issue with the "escape attention" functional hypothesis noted in the FBA (Tr. p. 1020; Dist. Ex. 11 at p. 99). The parents' BCBA testified that "escape attention"—referenced in the "Teacher Ratings from MAS-[2]" portion of the FBA—meant that the student was attempting to "avoid attention of someone else" (Tr. p. 1020). In this regard, the BCBA did not find the teacher's rating scale in the FBA to "be very accurate," noting that it did not "make sense . . . that escape attention would be the [student's] motivation" for a particular behavior (Tr. pp. 1020-22).

With respect to the functional hypothesis identified as "escape attention," the district's BCBA explained that it was not used as a term to describe escaping the attention of her peers—as misconstrued by the parents' BCBA—but rather, to "escape/avoid unexpected or changing peer situations" (Tr. pp. 1301-03). The district's BCBA explained that in this instance, the student had "struggled with extra recess when a peer left to join a different game"; in that situation, the student engaged in the target behavior identified as "negative verbalizations towards peers" because the student "was uncomfortable" and she wanted to escape or avoid "having to deal with that feeling" (Tr. p. 1303).

The IDEA does not specify specific standards with regard to how an FBA must be conducted; however, as noted above, the State has. The evidence described above shows that district's FBA was conducted in accordance with State procedural requirements. While parents' BCBA identified how she might have conducted the FBA in a different manner, she failed to raise any serious concern showing that the district's FBA was conducted in an inappropriate manner or in a way that led to a gap in vital necessary information regarding the student's behavior.

In summary, the evidence shows that the district's evaluation of the student relied on a battery of multiple assessments and strategies to gather relevant functional, developmental, and academic information about the student. The district did not rely on a single measure or assessment as the sole criterion in evaluating the student and instead used a variety of technically sound instruments in the evaluation of the student. There is no basis in the hearing record upon which to conclude that the evaluation was conducted by a school psychologist who lacked appropriate training or knowledge to administer the assessments. Additional information was not required in

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<sup>35</sup> I agree with the district's contention that, when examining whether the student was appropriately assessed, the IHO, and the parents' BCBA for that matter, improperly placed emphasis on the effectiveness of the interventions student's BIP rather than keeping the focus on the adequacy of the actual assessment in question, the FBA upon which a BIP called for by the student's IEP should later based. The focus for the IEE dispute in this proceeding is the district's evaluation of the student, not the success of a particular intervention, or lack thereof.

order to comprehensively and individually evaluate the student for purposes of developing an IEP for the student, and the district was not required to show that it had exhaustively performed every assessment that the parents' experts could point to in order to prevail. Accordingly, because I find the district's evaluation was appropriate, the parents are not entitled to a neuropsychological IEE or an FBA IEE at public expense (see A.H., 2018 WL 3306897, at \*2 [D. Del. July 5, 2018]). While I appreciate that the parents and private evaluators believe further information would be valuable, the federal regulation provides for this particular contingency—the parents still have the right to an IEE, but not at public expense (34 CFR 300.502[b][3]).

## **B. Legal Framework—Special Education Eligibility Determinations**

Having determined that the parents are not eligible to receive IEEs of the student at public expense, I will turn next to the district's challenge to the IHO's determination that the student is eligible for special education. Upon the completion of the administration of assessments and other evaluations, a "team of qualified professionals and the parent of the child"—in New York, a CSE (or CPSE)—meets to discuss and review the information gathered about the student in order to determine whether the student is eligible for special education and related services under the IDEA (see 8 NYCRR 200.4[c][1]). The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A][ii]; Educ. Law § 4401[1], [2][k]). In order to qualify for special education and related services, a student must not only have a specific physical, mental or emotional condition, but in most of the disability categories enumerated under the IDEA, such condition must also adversely affect or impact upon a student's educational performance to the extent that he or she requires special education and related services (see 34 CFR 300.8[a], [c]; see also 8 NYCRR 200.1[zz]; see, e.g., Application of a Student Suspected of Having a Disability, Appeal No. 17-003; Application of the Bd. of Educ., Appeal No. 15-116; Application of the Dep't of Educ., Appeal No. 11-152; Application of the Bd. of Educ., Appeal No. 09-087).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]; M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at \*10–11 [S.D.N.Y. Sept. 14, 2016]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., M.N., 2016 WL 4939559, at \*10; Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. of Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B. v. Dep't of Educ., 322 Fed. App'x 20, 21-22 [2d Cir. Apr. 7, 2009] [finding insufficient evidence that the student has suffered an adverse impact on educational performance because the student

continuously performed well and tested above grade level on the district's psychoeducational evaluation and a psychological evaluation]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems—which manifested chiefly as truancy, defiance and refusal to learn—were the product of depression or any similar emotional condition"]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and holding that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009] [finding that the SRO's conclusion that there was insufficient evidence of an adverse effect on the student's educational performance was "directly contradicted by [the student's] failing grades, repeated expulsions, suspensions, need for tutors and need for summer school"]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007] [holding that there was insufficient evidence that the student's educational performance was adversely impacted because the student did not fail any of his classes and his grade-point average (GPA) declined only nine points], aff'd, 300 Fed. App'x 11 [2d Cir. Nov. 12, 2008]; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d 394, 399).

In summary, therefore, when making an eligibility determination, a CSE must generally consider two elements: first, whether the student meets the criteria for one of the 13 disability categories as defined by State regulation which categories often include the subfactor of whether the student's disability has an adverse effect upon her educational performance; and second, whether the student requires special education (see 8 NYCRR 200.1[zz][1]-[13]).

### **1. Scope of Review**

Before addressing the merits, a determination must be made regarding the permissible scope of the district's arguments on appeal. Upon review, the evidence in the hearing record reveals that, notwithstanding this two element analysis, the only element disputed by the parties with respect to the student's eligibility under the IDEA—and thus, the only element presented to the IHO for consideration on this issue—was the second element described above: whether the student required special education. For example, the district asserted this as the sole rationale for its determination that the student was not eligible for special education under the IDEA for the first time at the CSE meeting reconvened on May 31, 2018 to discuss the parents' request for an IEE (compare Dist. Ex. 18 at p. 135, with Dist. Ex. 18 at pp. 136-38). In their due process complaint notice, the parents disagreed with the district's rationale for not finding the student eligible, and asserted that the district had already been providing the student with special education services consisting of speech-language therapy and counseling services (see Dist. Ex. 3 at pp. 14-15).

At the impartial hearing, the district's opening statement outlined the district's position with regard to issues to be determined by the IHO (see Tr. pp. 19-37). With respect to the student's eligibility under the IDEA, the district did not mention or raise the question of whether the student met one of the 13 eligibility categories or whether the student's disability adversely affected her educational performance (id.). Instead, the district pointed out to the IHO that the only question raised by the parents was whether the student needed "special education" and that according to the parents, the student's 504 plan was in fact already providing her with special education (Tr. pp. 20-

23). Disagreeing with the parents' position, the district then led the IHO through the definitions set forth in the State Education law and regulations for "student with a disability," "special education," and "specially designed instruction" (Tr. pp. 24-29).

Similarly, the parents' opening statement did not include any references to the first element set forth above (see Tr. pp. 37-42). Instead, the parents focused on the basis for awarding the requested IEEs at district expense, and briefly mentioned that, contrary to the district's assertions, the student was receiving special education because the district did adjust the "delivery and content" of material to provide the student with "individualized instruction" and "specially designed instruction" to meet her needs (see Tr. pp. 40-42).

In addition, in its closing brief to the IHO the district continued to argue that the "CSE properly determined that [the student], although having a disability ([the student] was already designated under Section 504 as having a mental and/or physical impairment that substantially impacted a major life function . . . ) did not, presently, require specially designed instruction and, therefore, did not require special education services or programs" (Dist. Ex. 29 at pp. 16-17). It could be inferred from this statement—together with the absence of any evidence, arguments, or legal standards presented by the district with respect to the first element—that the district conceded that the student met the element for eligibility and therefore, the IHO did not need to address them (id.).

On appeal, the district's arguments in the request for review focus solely on the premise that the student did not meet the criteria for eligibility as a student with a disability because she did not "need special education," as defined by State and federal statutes and regulations (Req. for Rev. ¶¶25-35). However, upon closer examination, it appears that the district now attempts to raise the first element as a basis upon which to conclude that the student was not eligible for special education under the IDEA in its memorandum of law submitted in support of its request for review.<sup>36</sup> For example, the district argues in the memorandum of law that the student did not meet a subfactor of the criteria for eligibility as a student with a disability because the "reliable and uncontroverted evidence established that [the s]tudent did not evidence any adverse [e]ffect upon [the s]tudent's academics"—and therefore, the student could not meet the criteria for any of the 13 eligibility categories pursuant to State regulation (Dist. Mem. of Law at pp. 8-11).

Where, as here, neither party sought agreement to expand the scope of the impartial hearing to include these issues and otherwise failed to raise these issues in either of the due process complaint notices, 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],

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<sup>36</sup> In the memorandum of law, the district also argues that the issues before the IHO for resolution at the impartial hearing were limited to those issues raised by the parents in the due process complaint notice (see Dist. Mem. of Law at p. 6). The district contends that it did not agree to expand the scope of the impartial hearing beyond those issues raised in the due process complaint notice and, throughout the impartial hearing, the district made "repeated objections" to the attempts made by the parents' attorney to expand the scope (id.). Notwithstanding these contentions, the district does not identify what, if any, issues the IHO resolved that were beyond her jurisdiction or may have been otherwise raised and decided sua sponte by the IHO (id.). Similarly, the district did not point to any objections it raised at the impartial hearing in support of these contentions (id.).

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, any allegations pertaining to whether the student met the criteria for one of the 13 disability categories and whether the student's disability adversely affected her educational performance raised by the district 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]).

Furthermore, to the extent that the district now elaborates or expands upon arguments in support of the issues in the request for review within the memorandum of law, or argues additional grounds—i.e., that the student did not meet the criteria for eligibility because the hearing record was devoid of evidence of the subfactor that the student's disability adversely affected her educational performance—as a basis, now for the first time on appeal, upon which to conclude that the student was not eligible for special education under the IDEA solely within the memorandum of law, the district and the district's attorney are reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at \*9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]). This is especially true where, as here, neither party presented



the first element as an issue or as part of any legal arguments or standards for the IHO's consideration (see generally Parent Ex. II; Dist. Ex. 29).

Therefore, with regard to the district's contention in the request for review—as the only issue presented pertaining to the student's eligibility—that the student also did not require special education and related services as a result of her condition, the district's argument, discussed more fully below, is unpersuasive. Here, the evidence in the hearing record demonstrates that the student was already receiving related services, which pursuant to both the State Education law and its implementing regulations, constitutes special education (see Parent Exs. A-C; see also Educ. Law §4401[1], [2][k]; 8 NYCRR 200.1[qq]).

## 2. Needs Special Education

As noted above, in addition to meeting the first element for a specific disability category, a student must also meet the second element that, by reason of such disability, the student "need[s] special education and related services" in order to be deemed eligible for special education (34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz]). State regulation defines "special education" as "specially designed individualized or group instruction or special services or programs" (8 NYCRR 200.1[ww]; see 20 U.S.C. § 1401[29]; Educ. Law § 4401[2]; 34 CFR 300.39[a][1]). "Specially-designed instruction," in turn, means "adapting, as appropriate, to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

In New York, the Education Law describes special education as including "special services or programs," which, in turn, includes, among other things, "[s]pecial classes, transitional support services, resource rooms, direct and indirect consultant teacher services, transition services . . . , assistive technology devices as defined under federal law, travel training, home instruction, and special [education] itinerant teachers [services]" (Educ. Law § 4401[1], [2][a]). Moreover, in New York the definition of "special services or programs"—and therefore "special education"—also encompasses related services, such as "counseling services," OT, "physical therapy," "psychological services," "parent counseling and training services," and "speech-language pathology" services, as well as "other appropriate developmental, corrective or other support services" (Educ. Law § 4401[2][k] [emphasis added]; 8 NYCRR 200.1[qq] [emphasis added]).

While the issue of whether a student requires special education is not always clear, because some services described by special education teachers and providers appear at times to be similar to services that are provided to regular education students (see, e.g., L.J. v. Pittsburg Unified Sch. Dist., 835 F.3d 1168, 1175-78 [9th Cir. 2016] [finding that a student's receipt of 1:1 assistance, mental health services, behavioral interventions, and accommodations to the general educational environment constituted specially designed instruction despite the school district's assertion that they were general education services]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding that, although a district developed an academic and behavior contract to assist the student and identified him at risk, the student demonstrated academic progress and social success and, therefore, did not need special education]; M.P. v. Aransas Pass Ind. Sch. Dist., 2016 WL 632032, at \*5 [S.D. Tex. Feb. 17, 2016] [finding that district employees managed [the student's] behaviors using interventions available to all students, and therefore, the student did not need

services under the IDEA]; Ashli C. v State of Hawaii, 2007 WL 247761 at \*10-\*11 [D. Haw. Jan. 23, 2007] [distinguishing the differentiated instruction the student received in a general education setting, which was available to all students, from accommodations or specially designed instruction]), such is not the case here.<sup>37,38</sup>

What the district's arguments throughout the impartial hearing and now on appeal ignore is that the broad definition of special education within New York's Education Law includes related services such as "speech-language pathology," "psychological services," "counseling services," and "parent counseling and training" (Educ. Law § 4401[2][k] [emphasis added]; see Parent Ex. C at p. 3).<sup>39</sup> With this in mind, the determination, in this instance, of whether the student required special education is more easily answered than in some cases: namely, because the student—through her 504 accommodation plans for the 2016-17, 2017-18, and 2018-19 school year—received the related services of speech-language therapy and psychological counseling services (see Parent Exs. A at p. 3; B at p. 3; C at p. 3). And while some of the district's evidence may reflect these related services as "building level services" or "RtI support," the district presented no evidence or arguments that the related services recommended for, and received by, the student during these school years was something other than related services as included within the

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<sup>37</sup> For example, State law and regulation in New York also specifically contemplate the provision of academic intervention services (AIS), response to intervention (RTI) support, or "additional general education support services" to students in the general education setting (see Educ. Law §4401-a[3]; 8 NYCRR 100.1[g]; 100.2[ee], [ii]; 200.4[a][9]). As another example, State regulation defines speech or language improvement services as "eligible to students with speech impairments, such as dysfluency, impaired articulation, language disorders, or voice disorders, of a severity that does not adversely affect the student's educational performance, but does present a barrier to communication" (8 NYCRR 100.1[p]). Such services are to be provided "to any student determined to be in need of such by the building administrator" (8 NYCRR 100.2[t][1]). Additionally, "[a] student whose speech impairment adversely affects the student's educational performance shall be referred to the [CSE] for further evaluation and review of the need for special services and programs" (8 NYCRR 100.2[t][2]).

<sup>38</sup> Further, there may be overlap between "protections and requirements of the IDEA and those of Section 504 and the ADA" that the IDEA and its implementing regulations do not address (see Parental Revocation of Consent for Special Education Services, 73 Fed. Reg. 73,013 [Dec. 1, 2008]). The provision of accommodations under section 504 rather than special education under the auspices of the IDEA has caused conflict in terms of differentiating eligibility under the two statutes (compare Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 [9th Cir. 2007] [affirming denial of IDEA eligibility for child receiving accommodations under section 504], with Mr. L., 480 F.3d 1 [finding that a student afforded services under section 504 should have been found eligible for special education under IDEA]).

<sup>39</sup> This would not mean that every student who needs a particular related service would automatically qualify as a student eligible for special education since, first, the student would have to fall within one of the 13 disability categories.

definition of special education under State law (see generally Tr. pp. 1-1373; Parent Exs. A-C; K-Z; AA-II; Dist. Exs. 1-15; 18-29).<sup>40</sup>

In conclusion, under the circumstances of this case, given the array of supports and services that, according to the section 504 plans developed by the district, the student required, the weight of the evidence supports a finding that, at the time of the May 2018 CSE meeting, the student should have been found eligible for special education programs and services as a student with a disability under the IDEA (see 20 U.S.C. § 1401 [3][A]; Educ. Law § 4401[1], [2][k]; 34 CFR 300.8 [a][1], [c][9]; 8 NYCRR 200.1[zz]; see also Muller, 145 F.3d at 105 [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]). With that said, nothing in this decision should be interpreted as finding that the section 504 plans offered insufficient support to address the student's needs (which, as noted above, is an issue outside the scope of my review) or that it would be inappropriate for a CSE to recommend the same or similar supports and services on an IEP for the student.<sup>41</sup>

## VI. Conclusion

In view of the forgoing discussion, the IHO's determinations that the district's evaluation of the student was inappropriate and that the parents were entitled to an IEE at public expense must be reversed. Insofar as the district's arguments that the student did not require special education

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<sup>40</sup> Certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., academic intervention services or "building level services"); however, according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). On the other hand, services that clearly fall into the realm of special education services are required to be listed on an IEP, at least according to United States Department of Education guidance, which states that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]). This observation relates to considerations after a determination of eligibility but is generally relevant to the question of whether certain supports or services may be deemed special education in a particular instance.

<sup>41</sup> To be clear, although the IHO noted in the decision that the parents did not challenge the appropriateness of the student's services recommended in her section 504 accommodation plans (see IHO Decision at p. 19) and the parents do not otherwise challenge the IHO's conclusion on this issue within the cross-appeal (see generally Answer & Cr. App.), an SRO lacks jurisdiction to consider parents' challenges to an IHO's failure or refusal to rule on section 504, section 1983, or ADA claims or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the parents had challenged the IHO's finding with regard to the services recommended in the 504 accommodations plans, an SRO has no jurisdiction to review any such claims regarding section 504.

are premised upon a misreading of the application of the definition of special education (but not a factual misunderstanding of the student's needs as revealed by the district's evaluation of the student), the district's challenges to the IHO's determination that the student was eligible for special education services are without merit.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated June 30, 2019, is hereby modified by reversing the IHO's finding that the parents were entitled to an FBA IEE at district expense; and,

**IT IS FURTHER ORDERED** that, consistent with the IHO's decision, dated June 30, 2019, the district is directed to convene a CSE meeting, if it has not already done so, to find the student eligible for special education and related services pursuant to the IDEA and to develop an IEP for the student.

**Dated:** Albany, New York  
September 30, 2019

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**