



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 19-104

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

### **Appearances:**

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Theresa Crotty, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from those portions of the decision of an impartial hearing officer (IHO) which denied her request for reimbursement of privately obtained services and compensatory education services to remedy respondent's (the district's) failure to implement its individualized education services program (IESP) for the 2017-18 school year and failure to offer equitable services to her son for the 2017-18 and 2018-19 school years. The district cross-appeals from that portion of the IHO's decision which awarded the student prospective placement in a State-approved nonpublic school at public expense. The appeal must be sustained. The cross-appeal must be sustained.

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

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an IESP under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but

is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[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

The student attended a nonpublic preschool (NPS) beginning in 2014 as a three-year old preschooler (see District Ex. 14 at p. 2).<sup>1</sup> In November 2015, the parent referred the student for an evaluation at a child study center related to her concern over the student's behavior, which included tantrums followed by difficulty calming down, spitting, hitting, throwing objects, taking off clothing, toileting accidents, body restlessness, and running away from teachers beginning around February or March 2015 (*id.*). Based on the cumulative information gathered by the evaluator, including an observation and behavior rating scales completed by the student's mother and teacher, it was determined that the student met the criteria for a diagnosis of Disruptive Behavior Disorder, Other Specified, and recommendations were made for the student to receive behavioral therapy with a parent component, school-based behavioral intervention strategies, and a daily school-home report card (*id.*). The parent attended parent training and subsequently reported some improvement in the student's behavior at home (*id.*). The student, however, continued to demonstrate "intermittent issues with compliance and impulsivity in class and in his afterschool program" and during a July 2016 summer camp the student exhibited significant impulsivity, low frustration tolerance, and poor body/self-control (*id.*). According to behavioral rating scales completed by staff of the summer camp, the student exhibited elevated levels of attention problems, hyperactivity, and emotional reactivity (*id.*). Based on the additional information and the student's ongoing behavior challenges, the student received a diagnosis of an attention deficit/hyperactivity disorder (ADHD), combined type and recommendations were made for continuation of behavioral therapy with a parent component, a medication consultation, academic accommodations, and continued school-based strategies, behavioral interventions, and daily school-home report card (*id.*).

The student continued to attend the NPS for kindergarten during the 2016-17 school year and received instruction in a general education classroom composed of six students and one teacher (Dist. Ex. 14 at p. 2). A private neuropsychological evaluation was conducted in March 2017 to investigate the parent's concerns regarding the student's behavior in school and its impact on his academic progress (*id.* at p. 1). According to the report, the parent wanted to better understand the student's strengths and challenges in order to inform his future educational planning (*id.*). In a report dated April 8, 2017, the private neuropsychologist indicated that the student's kindergarten teacher had expressed concerns regarding the student's behavior in contrast to his strong academic skills (*id.* at pp. 2-3). The April 8, 2017 neuropsychologist's report indicated that on standardized testing of cognitive and academic ability the student had mostly performed within the high average and average ranges, with a couple of scores in the superior range (*id.* at pp. 6, 7, 12-13). According to the report, formal testing as well as parent and teacher behavior rating scales were obtained to gain insight into the student's executive functioning and social/emotional functioning (*id.* at pp. 10-11). The report also included recommendations to address the student's needs in deficit areas as well as program recommendations for the student (*id.* at pp. 15-16). One of the recommendations suggested that the parents "engage with behavioral specialists that can provide in home parent training and behavioral interventions" and provided the contact information for "IBI Associates,

---

<sup>1</sup> The Commissioner of Education has not approved the NPS the student attended as a school or preschool with which school districts may contract to instruct students with disabilities or preschool students with disabilities (see 8 NYCRR 200.1[d], [p], [u], [nn]; 200.7; 200.16[e], [f][3]).

Incidental Behavioral Intervention" (IBI) (id. at p. 15). The evaluator also recommended that the student undergo additional evaluations and that the parents request a CSE meeting (id.).

Following the referral by the evaluator who conducted the March 2017 neuropsychological evaluation, the parent obtained an evaluation from IBI to assess the student's behavior and attention and to determine, among other things, whether the student's current school environment, a full day, mainstream kindergarten class, was an appropriate placement and whether any other related services were warranted (Dist. Ex. 11 at pp. 1-2). The resultant May 30, 2017 evaluation report included goals and objectives for the student for school as well as recommendations for behavioral supports at school (id. at pp. 1, 3-4, 5-6). Following the IBI evaluation, the IBI evaluator developed a behavior intervention plan (BIP) for the student, dated June 13, 2017 (Dist. Ex. 10 at p. 1). The BIP identified the behaviors to be targeted as (1) verbal and physical assertion (aggression) to peers in unstructured situations and (2) inappropriate comments toward peers (id. at p. 2). The student's BIP indicated that the student was observed across multiple settings and his behaviors had the highest incident rate in unstructured settings (id.). The BIP further indicated that the student's behavior in the park/playground would be targeted first due to an "increased rate of [] physical and verbal assertions" in that setting (id.). The BIP outlined the potential rewards/motivators to be used as well as the potential consequences to be implemented in order to modify the student's behavior (id. at p. 3). The BIP also included a treatment plan for target behaviors which indicated that the goals of the plan were to have the student comply with faded reminders, utilize strategies in order to replace physical aggression, and engage in appropriate verbal exchanges with peers (id. at p. 4).

The parent referred the student to the CSE in June 2017 at the end of his kindergarten school year (Tr. pp. 202-03).

After referral by the evaluator who conducted the March 2017 neuropsychological evaluation, on August 21, 2017, the student was evaluated by a speech-language pathologist from IBI (Dist. Ex. 13 at p. 1). According to the evaluation report, the evaluation was conducted in order to provide a comprehensive picture of the student's receptive, expressive, and pragmatic language skills, and to assist in the development of future educational and treatment recommendations for the student (id.). Results of an oral peripheral examination and assessment of the student's voice, fluency, and articulation/phonology were all judged to be within normal limits, while assessment of the student's auditory comprehension (receptive language skills) and expressive communication skills indicated high-average functioning in both areas (id. at pp. 2-3; see id. at pp. 4-6). Several informal pragmatic language assessment measures were also administered to the student which revealed the student exhibited a moderate pragmatic language delay (id. at pp. 7-9). The speech-language pathologist recommended that the student receive one 45-minute session of speech-language services and included suggested goals for appropriate use of conversational manners and comprehension and expression of language in social settings (id. at pp. 9-10).

On August 22, 2017, the student's kindergarten teacher prepared a progress report on the student based on his participation in her classroom during the 2016-17 school year (Dist. Ex. 6 at pp. 1-3; see Dist. Ex. 5).<sup>2</sup> The report reflected that the student was in a class of six students and

---

<sup>2</sup> The student's report card from the 2016-17 school year (kindergarten) indicated that the student was meeting or

one teacher and was functioning at a first-grade level in reading, writing, and mathematics (id. at pp. 1-2). However, the teacher described the significant concerns she had related to the student's social/emotional development including exhibiting severe tantrums that could last from 20-30 minutes (id. at p. 3). The student's kindergarten teacher indicated that the student's behavior was highly disruptive to the class and that his behavior was having a negative effect on his school work and on his relationships with peers (id.).

The parent obtained a private occupational therapy (OT) evaluation of the student from IBI due to a teacher report indicating difficulty with handwriting and that the student rushed to complete written tasks with decreased legibility and had a history of tantrums in the classroom (Dist. Ex. 12 at p. 1). The August 23, 2017 report recommended that the student receive OT services consisting of two individual 30-minute sessions per week to address his delays in visual motor skills and proprioceptive processing as they impacted his overall performance in school and academic success (id. at p. 4).

The student continued to attend the NPS for first grade during the 2017-18 school year, and a district special education teacher conducted a classroom observation on September 20, 2017 in preparation for the student's initial CSE meeting (Dist. Ex. 4). The observation report reflected that the student's classroom included one head teacher and eight students, and that the observation took place during a math and reading lesson for a period of 50 minutes (id. at p. 2). The observer noted that during both whole group and independent work, the student followed the teacher's directions the first time given and that the student required some redirection but did not require behavior interventions (id. at p. 3). The student's teacher reported that the student's need for redirection had improved that week; he was very intelligent and did not have difficulty getting ideas on paper, but he struggled more with fine motor skills and forming the letters (id.).

The hearing record contains a district functional behavioral assessment (FBA) form dated October 19, 2017 (Dist. Ex. 2 at p. 1). The FBA form reflected the student's name, age, date of birth, school, teacher and grade level and listed the names and titles of the participants in the FBA process (id.). Other than the above information and listing the targeted behaviors as "[s]elf injurious behaviors including head banging (on the wall/floor/desk), poking himself with sharp pencil, squeezing his hand between desks; [p]hysical [a]ggression including throwing chairs and or shoes across the room; screaming (for a 30 minutes duration)," the rest of the seven-page FBA form is blank (id. at pp. 1-7).<sup>3</sup>

A BIP, dated October 19, 2017, identified the student's target behaviors as self-injurious behavior, physical aggression, and noncompliance, and indicated that the behaviors occurred daily

---

exceeding grade level standards in his academics and was approaching grade level standards in his personal and social development (Dist. Ex. 5 at pp. 1-2).

<sup>3</sup> The hearing record does not contain any other FBA documents beyond the primarily blank October 19, 2017 district FBA (Dist. Ex. 2). However, a November 6, 2017 prior written notice reflected that an FBA dated November 2, 2017 was used in the development of the student's October 19, 2017 IESP (Dist. Ex. 8 at p. 2). Testimony by the district representative who attended the October 19, 2017 CSE meeting indicated that the CSE had a "functional behavior intervention plan that was developed by IBI," which the CSE utilized—along with information presented during the meeting from those who had day-to-day interactions with the student, teacher progress reports, and a classroom observation of the student—to develop a BIP for the student (Tr. pp. 132-33).

with variable duration for up to 30 minutes and impacted the entire class (Dist. Ex. 3 at p. 1). With regard to influencing factors that increased the likelihood of problem behaviors, the BIP indicated that at the home level, the parents strongly disagreed with each other on their perception of the student's behavioral functioning (*id.* at p. 3; *see* Dist. Ex. 14 at pp. 9-10). At the school level, the BIP reflected that teachers reported that positive behavior interventions and strategies had not been implemented consistently in the past (Dist. Ex. 3 at p. 3). In addition, the BIP reflected that the student had received a diagnosis of ADHD, predominantly hyperactive impulsive presentation and that in unstructured settings or times of transition, he became overstimulated by the demands of filtering out environmental distractions which created impulsive responses by the student in an effort to react and engage (*id.*). The BIP included intervention strategies, including how to prevent the conditions that increased the likelihood that the behavior would occur; antecedent strategies or ways to change the environment to reduce triggers for problem behaviors and increase the success of new behaviors; replacement behaviors and how these would be taught to the student; and consequence strategies such as increasing the reinforcer after new behaviors occurred and reducing the reinforcer after problem behaviors occurred (*id.*). The section of the BIP related to progress monitoring was left unfinished (*id.* at p. 4).

On October 19, 2017, the CSE convened for the student's initial eligibility determination meeting (Dist. Exs. 1 at p. 1; 2; 3; *see* Tr. pp. 78-79). The October 2017 individualized education services program (IESP) reflected that the student was in a first grade general education class of eight students with one teacher in the NPS and that although he was demonstrating at or above grade level academic skills, he had been referred to the CSE due to physical and emotional dysregulation difficulties (Dist. Ex. 1 at p. 2). According to the IESP, the "[c]ontinuum of services was reviewed and an [integrated co-teaching] ICT class setting was recommended" (*id.* at p. 3). However, the IESP reflected that the student's private school teacher and parent believed the student was in the right educational environment in the NPS, due to its small class setting (*id.*). The IESP went on to indicate that special education teacher support services (SETSS) were not appropriate because the student did not require academic support at the time (*id.*). Additionally, the IESP provided that the student "c[ould] access the general education curriculum with the support of related services in counseling, OT and an individualized Behavior Intervention Plan" (*id.* at p. 4). The October 2017 CSE determined that the student was eligible for special education as a student with an other health impairment and recommended that he receive one 30-minute session per week each of individual and group counseling and two 30-minute sessions per week of individual OT (*id.* at pp. 1, 7). The IESP projected that the student's services would begin on October 30, 2017 (Dist. Ex. 1 at p. 7).

In a prior written notice dated November 6, 2017, the district informed the parent of the CSE's recommendation for the student to receive individual and group counseling services and individual OT services (Dist. Ex. 8 at p. 1). The notice confirmed that the parent had placed the student in an NPS at her own expense and was seeking equitable services from the district (*id.* at p. 2). The notice further indicated that, as such, the CSE developed an IESP recommending the special education services that the student would receive (*id.*).

On November 8, 2017, the parents provided written consent for services for parentally placed students (Dist. Ex. 9 at p. 1). The consent form indicated that the district would contact the student's school to arrange for the services (*id.*). In addition, a typewritten clarification was added under the parents' signatures indicating that they were not in agreement with the "limitation of

services offered" and would "explore options" to secure additional services for the student to address his needs in the classroom (id.). The note indicated that in the interim, they requested that the services recommended be initiated (id.).

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

In a due process complaint notice dated December 19, 2017, the parent alleged that the district failed to recommend appropriate special education services for the student during the 2017-18 school year (Parent Ex. A p. 3). The parent contended that all of the CSE participants personally familiar with the student agreed that the student required "individualized push-in support during the school day"; however, the district refused to recommend individualized push-in support based solely on the student's high average cognitive ability and academic strengths (id. at p. 2). Regarding the parent's more specific claims, the parent alleged that the CSE did not meet within the regulatory timeframe after the student's initial referral, the CSE failed to complete an FBA and BIP that comported with the IDEA and State regulations, the CSE failed to recommend sufficient full time behavioral support, speech-language therapy, and parent training as recommended by the parent's private evaluators, the CSE failed to address the student's social skill deficits, and the district failed to provide the services (counseling and OT) that were recommended in the IESP (id. at p. 4).

As relief, the parent requested a finding that the student was deprived of educational benefits for the 2017-18 school year, and sought orders directing the CSE to immediately reconvene and amend the student's IESP to include 15 hours per week of special education teacher support services (SETSS), individual speech-language therapy once per week for 30 minutes, and funding for OT services, each at an enhanced rate with qualified providers of the parent's choice (Parent Ex. A at pp. 4-5).<sup>4</sup> The parent further requested funding for parent training once per month for the entirety of the 2017-18 school year, and reimbursement for privately obtained special education services for the 2017-18 school year, including social skills classes, behavioral support, speech-language therapy, and OT (id. at p. 5). Lastly, the parent requested compensatory services to include special education instruction, counseling, speech-language therapy, and OT for the time period the district failed to implement appropriate services (id.).

### **B. Second Complaint and Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing (see Tr. pp. 1-493). During the first two hearing dates, February 12, 2018 and May 11, 2018, the parties indicated that the matter was on a track toward settlement (Tr. pp. 1-11). At the third hearing date, August 27, 2018, the parties indicated that they were unable to settle the matter and the impartial hearing was scheduled to go forward on October 19, 2018 (Tr. pp. 15-17).<sup>5</sup>

---

<sup>4</sup> The term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]).

<sup>5</sup> The IHO who presided over the first two hearing dates recused himself under circumstances the parties and subsequent IHO questioned and which resulted in the matter being delayed to the extent that the IHO who presided over the remainder of the hearing noted was "a deprivation of due process" (Tr. pp. 22-24).

The parent filed a second due process complaint notice on September 4, 2018. The second due process complaint notice added claims regarding the 2018-19 school year (see IHO Ex. II-A).<sup>6</sup> The parent's allegations related to the 2018-19 school year are nearly identical to the December 19, 2017 due process complaint notice, with the exception that the parent argued the CSE failed to convene for the 2018-19 school year (id.).

The October 19, 2018 hearing was adjourned due to the district's witness being unavailable (Tr. pp. 24-25, 39, 41-42, 52-54, 57-58). In addition, although the IHO had initially declined to consolidate the due process complaint notices in an interim order dated September 15, 2018, he amended that ruling at the request of the parties during the October 19, 2018 hearing as reflected in a subsequent interim decision dated October 19, 2018 consolidating the two due process complaint notices (Tr. pp. 54-57; IHO Ex. IV).<sup>7</sup>

The impartial hearing proceeded on October 29, 2018 and the parties entered evidence and the district presented a witness (Tr. pp. 61-163). In addition, at the conclusion of the district witness' testimony, the parent requested that the IHO order the district to fund OT services because there was no dispute as to OT (Tr. pp. 155-61). After the parent's request, the IHO rendered the first interim decision on pendency on October 29, 2018 (IHO Ex. I). The IHO held that the student's pendency placement was set forth in the October 2017 IESP and ordered the district to fund two 30-minute sessions of OT at an enhanced rate of up to \$150 per hour (id. at pp. 3-4). The IHO further ordered the district to reimburse the parent upon proof of payment for privately obtained pendency OT services (id. at p. 4).

The impartial hearing continued with witness testimony on November 19, 2019 and December 19, 2018 and concluded on February 22, 2018 (Tr. pp. 164-493). In a second interim order on pendency dated March 27, 2019, the IHO increased the amount of the enhanced rate of OT from \$150 per hour to \$200 per hour (IHO Ex. II at p. 4). The parties submitted post-hearing briefs dated May 2, 2019 (IHO Exs. V; VI). After a total of eight days of proceedings and four interim decisions, the IHO rendered a final decision dated September 9, 2019.<sup>8</sup>

---

<sup>6</sup> The parent's second due process complaint notice was not included in the hearing record. By letter dated November 21, 2019, the Office of State Review notified the district of the missing exhibit and requested submission. The parent's second due process complaint notice was marked as IHO Ex. II; however, the hearing record includes another exhibit also marked as IHO Ex. II. For ease of reference, the second due process complaint notice is referred to as IHO Ex. II-A.

<sup>7</sup> Although the IHO's first interim order on consolidation dated September 15, 2018 was not marked as an exhibit, it was included with the hearing record and it is listed as "IHO Ex. III" in the exhibit list attached to the IHO's second interim order on consolidation dated October 19, 2018 (IHO Ex. IV at p. 4). The copy of IHO Exhibit III included with the hearing record is a list of case extensions (IHO Ex. III).

<sup>8</sup> The hearing record included forms completed by the IHO for extensions of the compliance dates for issuing a decision in this matter (IHO Ex. III). The last five of these extensions indicated that the reason for the extensions were to "Review submissions/record for decision" (id. at pp. 10-14). It is unclear why the IHO's final decision was not issued for four months after the parties submitted their post-hearing briefs as the IHO did not provide an explanation in the decision or set the record-close date. While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing



In the final IHO decision dated September 9, 2019, the IHO stated "I find that the IESP recommended for [the student] for the 2017/18 (and 2018/19) school years is inappropriate but not for reasons suggested by either party" (IHO Decision at p. 8). The IHO determined that the October 19, 2017 IESP was not appropriate because he found that IESP services could include special classes and the student's program should have included placement in a special class (IHO Decision at pp. 8-10). More specifically, the IHO found that consistent with the recommendations from the neuropsychological evaluation, the student required a supportive, structured classroom setting with a low student-to-teacher ratio with professionals specifically trained to teach highly intelligent students requiring therapeutic support to address emotional and behavioral dysregulation (*id.* at p. 10). The IHO then determined that the student's general education class at the NPS was not such an environment, noting that the student's teacher had testified that she could not attend to the student's behavioral needs in the class (*id.*). The IHO opined that the parent was seeking a level of special education services not required by the IDEA by placing the student in a general education setting, when the student "require[d] extraordinary support to function in the class" (*id.*). The IHO further noted that least restrictive environment (LRE) considerations are applicable to placement decisions for students placed by their parents in nonpublic schools and that in this instance, LRE considerations highlight the inappropriateness of a general education classroom as other students were negatively impacted by the student's placement in the classroom (*id.* at pp. 10, 11). The IHO noted that the CSE should consider balancing its obligation to recommend an appropriate placement for the student, including grouping him with other students with similar needs, and the parent's decision to place the student in the NPS (*id.* at pp. 11-12). The IHO then found that the IESP recommendations for the student for the 2017-18 and 2018-19 school years "were inappropriate and failed to provide [the student] with meaningful comparable services within the meaning of NY Ed[uc.] Law §3602-c)" (*id.* at p. 12). In addition to finding that the student's IESP was inappropriate, the IHO also determined that during the 2017-18 and 2018-19 school years the district had failed to implement the counseling and OT that was recommended in the October 2017 IESP and that the parent was entitled to compensatory education for those services (*id.* at p. 13).

Addressing the parent's request for reimbursement of privately obtained services, the IHO found that "ABA/SETSS" services obtained for the student were not appropriate and not reimbursable due to the student's lack of academic deficits requiring SETSS and that ABA behavior services were not appropriate as they did not enable the student to function appropriately in the general education classroom at the NPS (IHO Decision at p. 12).<sup>9</sup> The IHO then determined

---

timelines. . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>; see 8 NYCRR 200.5 [j][5][iii]).

<sup>9</sup> The May 30, 2017 IBI evaluation recommended 15 hours per week of "special education therapy" to be pushed into the classroom by a special education itinerant teacher (SEIT) (Dist. Ex. 11 at p. 5; see Parent Ex. A at p. 3). Throughout the hearing record this recommendation for 15 hours of direct services is interchangeably referred to as "therapy" to address behavior modification (Dist. 11 at p. 5), "individualized push-in support" (Parent Ex. A at p. 3), "full-time behavioral support," push-in behavioral support, and behavioral support (*id.* at p. 4; see Tr. pp. 33, 51, 121, 135, 141, 205, 213, 215, 235, 345, 346, 347, 366, 439, 442, 443, 447, 452, 486; Parent Ex. A at p. 5), "SETSS" (*id.* at pp. 4-5; see Tr. pp. 64, 129, 141, 184, 185, 189, 208), "SEIT/behavioral modification services", 1:1 SEIT (Tr. pp. 42, 302). The parent's private board certified behavior analyst (BCBA) who provided four

that for the 2019-20 school year the parent was entitled to an award of compensatory educational services in the form of prospective placement at a State-approved nonpublic school consistent with the recommendations set forth in the neuropsychological evaluation (*id.*). The IHO further found that the hearing record was insufficient to determine the student's need for additional relief and "on equitable grounds... there is no evidence the parent would accept such a recommendation" (*id.* at p. 13). Concerning the parent's request for compensatory educational services, the IHO found that the student required speech-language therapy to address pragmatic speech needs; however, the IHO did not order compensatory speech-language therapy for the student (*id.*). The IHO further found that the parent was not entitled to reimbursement for the social skills therapy the parent provided; however the IHO found that social skills therapy was appropriate for the student and awarded compensatory educational services of one hour per week of instruction for the 2017-18 and 2018-19 school years (*id.*). The IHO also determined that the parent was entitled to compensatory parent counseling and training for one hour per month for each month during the 2017-18 and 2018-19 school years (*id.* at pp. 13-14). Lastly, the IHO awarded two 30-minute sessions of counseling, and two 30-minute sessions of OT each at a reasonable market rate for each school week in the 2017-18 and 2018-19 school years (*id.* at p. 14).

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

The parent appeals and argues that the IHO erroneously denied reimbursement for 1:1 behavior therapy after improperly determining that the student's general education placement was inappropriate. The parent further argues that the IHO, in noting that the CSE should consider recommending an appropriate placement with students with similar needs, ignored evidence of the CSE's actual recommendations set forth in the October 19, 2017 IESP and that the CSE did not reconvene for 2018-19 school year.

The parent next alleges that the IHO erroneously ruled on an undisputed issue and improperly shifted the burden to the parent to prove the appropriateness of the student's placement. The parent argues that the IHO shifted the burden to the parent and examined the partial program in place as a unilateral placement. Further, the parent contends that the IHO found the October 2017 IESP inappropriate for reasons not raised in the due process complaint notice and exceeded his authority by determining the appropriateness of the parent's placement. The parent also asserts that the IHO misinterpreted State regulations pertaining to special classes and argues that they do not apply to students who are parentally placed. The parent further alleges that the IHO attributed undue significance to testimony that the student's behavior adversely impacted other students in

---

hours per week of direct services to the student testified that Bridge Kids "provides behavior therapy" (Tr. pp. 434, 437). The IHO's decision refers to "ABA/SETSS" obtained by the parent (IHO Dec. at p. 12), the district's attorney asserted during the hearing that the parent was "su[ing for having an ABA behavior therapist present with the student" and indicated that it was in the parent's due process complaint notice (Tr. p. 344), and the parent requests "815 hours of push-in ABA/behavior therapy" in her request for review (Req. for Rev. p. 9). However, the remaining hearing record included only two references to "ABA" in relation to the student, in the Bridge Kids BIP and the parent's closing brief (Parent Ex. K at p. 4; IHO Ex. VI at pp. 23, 24). Additionally, there is nothing in the hearing record to indicate that the student received applied behavior analysis (ABA) services or any type of discreet trial training. In her testimony, the parent's private BCBA consistently referred to the direct services she provided to the student as "behavior therapy" (Tr. pp. 434, 437, 444, 482). For the purpose of clarity, the parent's request for compensatory "push-in ABA/behavior therapy" will be referred to in this decision as behavior therapy in accordance with the terminology used by the student's provider.

his class at the NPS as the student's behavioral and management needs were not properly addressed by the October 2017 IESP.

Next the parent alleges that the IHO erroneously applied a FAPE standard to the parent's placement of the student at the NPS and failed to determine whether the district had established that the student's behavioral needs would be different in another placement.

Concerning reimbursement of the parent's privately obtained services, the parent argues that the IHO failed to address her request for reimbursement of OT, social skills group/speech-language therapy, social skills therapy from IBI, behavior therapy from Bridge Kids and further erred by not ordering direct payment to New York Therapy for counseling provided after February 22, 2019.<sup>10</sup> The parent further alleges that the IHO failed to consider that the student's social skills therapy also addressed pragmatic speech needs as well as counseling that the district failed to implement and further erred by finding the record insufficient to support reimbursement. Regarding behavior supports, the parent contends that the IHO erroneously found reimbursement was not appropriate because the student did not have academic deficits. The parent argues that she did not request academic SETSS and that the IHO also erroneously found behavior therapy not appropriate and not reimbursable because those services were insufficient support to enable the student to function in his general education class. The parent also asserts that the IHO ignored evidence that demonstrated behavior therapy services were appropriate and further failed to consider the benefit to the student or that the parent could only afford four hours per week of the 15 hours per week that had been recommended.

The parent further alleges that the IHO erroneously awarded compensatory OT and counseling and failed to award compensatory speech-language therapy. Additionally, the parent argues that reimbursement should have been based on equitable considerations given the district's failure to meet its burden and failure to provide appropriate supportive services. The parent argues that the IHO failed to consider equities, including the district's failure to recommend an appropriate public placement and services at the time the parent obtained private behavior therapy services.

As relief, the parent requests reversal of the IHO's decision regarding the appropriateness of the parental placement. The parent further requests direct funding of the student's counseling services from New York Therapy from February 22, 2019 through the end of the 2018-19 school year. The parent requests an order directing reimbursement for all privately paid services since September 2017. Lastly the parent seeks compensatory educational services of 815 hours of push-in behavior therapy, 54 hours of social skills therapy and 63 45-minute sessions of speech-language therapy.

In an answer with cross-appeal, the district challenges the IHO's award of prospective funding of a State-approved nonpublic school for the 2019-20 school year, arguing that a more appropriate course of action would be for the CSE to consider an NPS as a possible recommendation. The district also alleges that the IHO improperly applied FAPE and LRE

---

<sup>10</sup> The hearing record indicates that behavioral services were billed under the name "Incidental Behavioral Intervention" until January 2018, after which time they were billed under the name "Imagine Better Impact" (compare Parent Ex. K-1 at pp. 1-24, with Parent Ex. K-1 at pp. 25-38). The provider continued use of the abbreviation IBI and remained at the same address (id.).

standards to a parentally placed student. The district contends that the IHO should have assessed the appropriateness of the IESP using an "equitable services standard." However, the district agrees with the parent that it was not proper for the IHO to have made a finding regarding the appropriateness of the parent's placement of the student at the NPS. In all other respects, the district argues that the IHO's decision should be upheld and addresses the parent's arguments.

In an answer to the cross-appeal, the parent agrees that she did not seek placement at a State-approved nonpublic school as ordered by the IHO but disagrees with the district's assertion that the IHO should have directed the district's CSE to consider placing the student in a NPS as a possible recommendation. The parent reiterates her request for equitable reimbursement on the grounds that the IHO found the October 2017 IESP was inappropriate and insufficient and that the district failed to implement the recommended services.

## **V. Applicable Standards**

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>11</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).<sup>12</sup>

---

<sup>11</sup> State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

<sup>12</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter

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

## **VI. Discussion**

### **A. Scope of Review**

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. In the request for review, the parent alleges that the IHO erroneously found the October 2017 IESP inappropriate for reasons not raised by either party and improperly shifted the burden to the parent to demonstrate the appropriateness of the student's program and placement in the NPS. The parent further contends that the IHO erred by finding placement in a general education setting inappropriate for the student and erroneously applied FAPE and LRE standards to an equitable services matter. The parent's claims essentially distill to the allegation that the IHO improperly addressed the appropriateness of a parentally-placed student's program. On this issue, the parties are in agreement that the IHO erred by applying FAPE and LRE standards to the parent's selection of an NPS. Notwithstanding their agreement that the IHO's analysis was flawed, neither party appeals the IHO's determination that the October 2017 IESP was not appropriate. While the district contends that the IHO's application of LRE is an indication the IHO applied a FAPE standard, which the district objects to the use of, the district does not assert that the October 2017 IESP would have been appropriate under a different standard, or explain how the "equitable services standard" would affect the analysis of relevant facts of this matter (Ans. With Cross-Appeal ¶26). Additionally, the IHO specifically found that the IESP failed to provide the student "with meaningful comparable services within the meaning of N.Y. Ed. Law 3602-c" (IHO Decision at p. 10).

Separate from the parties' positions regarding the design of an appropriate IESP for the student, neither party challenges the IHO's conclusion that the district failed to implement the special education services that were included in the student's IESP (see IHO Decision at p. 13). As the determinations that the IESP as designed by the CSE was inadequate to address the student's needs and that the district also failed to implement the student's IESP services have not been challenged on appeal, they have become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

However, the parties correctly assert that the IHO erred by determining the appropriateness of the placement selected by the parent under the dual enrollment statute. State law authorizes parents of students with disabilities enroll their children in nonpublic schools of their choice and then also enroll the student in the public school at the same time in order to seek appropriate special

---

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

education services on an "equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (Educ. Law § 3602-c[2][b][1]). It was inappropriate to blame the parent for exercising a right afforded her under State law. The IHO was free to identify his viewpoint regarding an area of practical concern regarding the extent to which a student with reasonably strong academic skills could be appropriately supported in a general education classroom, especially with the IESP as designed; however, it was error for the IHO to rule on a matter as the primary foundation of his decision, especially without notice and an opportunity for the parties to be heard.<sup>13</sup> Additionally, the parent did not request placement in a State-approved nonpublic school at public expense in her requested relief and the parties also agree that the IHO erred by awarding authorization for the parent to place the student in a State-approved nonpublic school for the 2019-20 school year. As such the IHO's award of placement in a State-approved nonpublic school at public expense is reversed.

### **B. October 2017 IESP**

Initially, the district does not contest that that it did not provide the student with any special education or related services to the student for either the 2017-18 school year or the 2018-19 school year called for by the October 2017 IESP as well as in accordance with the State's pendency or "stay-put" provision (Educ. Law § 4404[4][a]). Rather, the district appears to argue that the IHO's award of compensatory educational services was appropriate because it was in line with what was recommended in the October 2017 IESP. However, the parent challenged the appropriateness of the October 2017 IESP and, as noted above, the district has not challenged on appeal the IHO's determination that the October 2017 IESP was inappropriate. Accordingly, the first question I will address in this matter is what compensatory services, if any, are appropriate to remedy any deficiencies in the program recommended in the October 2017 IESP and, thereafter, I will then turn to any additional compensatory education that flows from the district's failure to deliver IESP services required under pendency.

Turning first to relief related to the deficient IESP, in addition to the award of prospective placement noted above, the IHO awarded one hour per week of social skills therapy, two 30-minute sessions per week of counseling, two 30-minute sessions per week of OT, for each week of the 2017-18 and 2018-19 school years; and one hour per month of parent counseling and training for each month of the 2017-18 and 2018-19 school years. The IHO found that speech-language therapy was appropriate to address the student's pragmatic language needs but did not order compensatory speech-language therapy. The IHO more explicitly denied the parent's request for 15 hours per week of SETSS finding that "ABA/SETSS" was inappropriate for the student because he did not have any academic deficits and "ABA behavior services" were insufficient to enable the student to function in a general education setting. In her request for review, the parent requests compensatory education consisting of 815 hours of push-in 1:1 behavior therapy, 54 hours of social skills therapy, and 63 45-minute sessions of speech-language therapy.

---

<sup>13</sup> The IHO identified a number of supports that could be included on an IESP (most of which were not included on this student's IESP), but the IHO did not in that list exhaust all of the ways in which an IESP could be designed for a student with these type of deficits.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>14</sup> 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE or, in this case, equitable services (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should

---

<sup>14</sup> If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

be designed so as to "appropriately address[] the problems with the IEP"; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA").

In this case, a remedy for a deficiency in equitable services under State law should be similar to a remedy for a deficient service under the IDEA. The evidence in the hearing record, particularly the testimony of the parent's witnesses that the student was successful in the classroom when receiving appropriate supports was unrefuted by the district and indicated that the benefit the student was receiving from his educational programming supports an award of compensatory education (Doe v. E. Lyme Bd. of Educ., 262 F. Supp. 3d 11, 27 [D. Conn. 2017] [outlining variety of forms that compensatory education may take as an equitable form of relief in order to address different circumstances]).

Prior to determining what an appropriate compensatory remedy would consist of, a review of the student's needs, with particular attention to the evaluative information considered by the October 2017 CSE, is necessary.

The October 2017 IESP reflected that the CSE considered an April 2017 private neuropsychological evaluation report (Dist. Ex. 1 at p. 1). The neuropsychologist's report reflected information regarding the student's functioning and needs from various sources (see Dist. Ex. 14). The report noted that the student's general education kindergarten teacher reported that the student excelled when engaged in his work and worked best in a structured environment with explicit expectations (id. at p. 2). She further reported; however, that the student exhibited attention problems, variable impulse control, low frustration tolerance, and had difficulty with transitions and changes in routine, despite the small size of his kindergarten class of just six students (id. at pp. 2-3).<sup>15</sup> The student was reported to act out in response, by yelling, calling out, or throwing shoes (Dist. Ex. 1 at p. 3). His kindergarten teacher further reported that while he was largely meeting academic standards in core academics, the student needed improvement in his ability to follow classroom rules and routines, adapt to changes, sustain attention, approach tasks with flexibility/inventiveness, interact easily with peers and familiar adults, and improve his ability to identify feelings and show empathy to others (Dist. Ex. 14 at p. 3).

Consistent with the teacher's report regarding the student's cognitive abilities and academic functioning, the neuropsychological evaluation report revealed that results of standardized testing indicated a full scale IQ of 118, in the high average range of functioning, on the administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), and academic functioning between the average or "at expected level" to the superior range on selected subtests from the Wechsler Individual Achievement Test-Third Edition (WIAT-III) and the

---

<sup>15</sup> The neuropsychological report indicated that the student's kindergarten class included six students and was "atypically small due to enrollment" that year (Dist. Ex. 14 at p. 2).



Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-II) (Dist. Ex. 14 at pp. 6-9, 12-13; see Dist, Exs. 1 at p. 2; 5; 6 at pp. 1-2). Testimony by the district representative was consistent with test results, indicating that the student was doing very well academically and did not demonstrate any kind of academic-based deficits (Tr. pp. 111, 130). In addition, the student's verbal and language-mediated abilities were assessed using selected subtests of the WPPSI-IV, the WIAT-III, the NEPSY-II, and the Comprehensive Assessment of Spoken Language (CASL), all which yielded scores in the average to the superior range of functioning (Dist. Ex. 14 at p. 7).

With regard to executive functioning skills, the neuropsychological evaluation report reflected that the student's performance on formal measures (selected NEPSY-II and WIAT-III subtests) ranged from average to very superior on various subtests, with the exception of one score on a task of motor persistence and inhibition where the student's score fell in the "below expected level" range and at the second percentile (Dist. Ex. 14 at pp. 9-11). Here the student was instructed to stand like a statue, (quiet and still), for a total of 75 seconds while inhibiting the impulse to respond to sound distractors, such as the sound of knocking on the table or a pencil dropping (id. at p. 11).

According to the evaluation report the student's mother, father, and teacher completed the Behavior Rating Inventory of Executive Function (BRIEF) (Dist. Ex. 14 at p. 9). The student's mother and teacher rated the student's behavior in the areas of impulsivity, difficulty shifting from one activity to the next, and difficulty managing his emotions as "elevated" (id. at p. 10). The student's mother also rated working memory issues and difficulties with planning and organization as "elevated" (id.). However, the student's father did not report any areas of clinical concern (id.). The evaluator opined that taken as a whole, the results indicated "the need for executive-based strategies to support [the student's] academic progress" (id.). The student's parents and kindergarten teacher also completed ratings on the Behavior Assessment System for Children—Second Edition (BASC-2), with regard to the student's emotional functioning (id. at p. 13). The student's mother and teacher indicated the student had difficulty regulating his emotions and behaviors (id.). However, the student's father's responses indicated scores within normal limits (id.). The neuropsychologist indicated that the student's weakness in executive function skills and his mother's and teacher's reports of disruptive, impulsive behaviors, were suggestive of Attention Deficit/Hyperactivity Disorder, Predominantly Hyperactive-Impulsive Presentation (id. at pp. 14-15).

The neuropsychologist provided recommendations to address the student's needs, which included that he required a nurturing learning environment with consistent behavioral support, increased structure, explicit expectations, and positive reinforcement and further suggested that the family obtain support and consultation from a behavioral specialist for the home setting (Dist. Ex. 14 at p. 15). A lengthy list of recommendations were included in the evaluation report outlining the type of classroom the student should be in (e.g., a supportive, structured class with a low student to teacher ratio, staffed with professionals who are specifically trained to teach highly intelligent students who require therapeutic support to address emotional and behavioral dysregulation), as well as specific supports the student required including a behavior management paraprofessional to address the student's difficulty with transitions, changes in routine, and situations that arise at school; counseling services to provide the student with an outlet to develop appropriate coping skills and strategies; an OT evaluation to determine appropriate supports with

the classroom related to the student's difficulties with self-regulation; physical therapy (PT) in a sensory gym for access to sensory activities such as pushing/pulling, deep pressure, and tactile activities to help the student regulate his body; in-home parent training with behavioral specialists to provide training and behavioral interventions; incentive planning for the student such as writing a contract with the student specifying the behavior/goal and the reinforcement that will be given when the behavior/goal has been met (a behavior reinforcement chart could accompany this to provide a visual reminder of the goal) or following a less desirable activity with a more desirable one while making the completion of the first activity necessary to perform the second (*id.* at pp. 15-16). The report also included specific recommendations for targeting executive functioning weaknesses including preferential seating, praise, multimodal presentation of information, provision of strategies to address initiation difficulties/compliance such as increased structure and routines, and assistance with organization and planning (*id.*).

In May 2017 the parents obtained a private behavior evaluation from IBI, which described the extent of the student's behavioral deficits and needs (Dist. Ex. 11). The report indicated that the student was observed in the classroom setting several times as well as in the evaluator's office, in a 1:1 setting (*id.* at p. 2). On each of these occasions, the student presented challenges with intermittent behavioral compliance, self-regulation, and fleeting attention, scattered levels of impulsivity commensurate with unstructured activities, compromised processing, and social pragmatic language delay (*id.*). The evaluator indicated that these behaviors interfered with the student's ability to fully engage in unstructured tasks without teacher reminders and that they were disruptive to the classroom flow (*id.*). She further indicated that the purpose of the student's behavior was to seek attention and to avoid work, and that his behavior could escalate to a full tantrum where he screamed and cried loudly and was difficult to console (*id.* at pp. 2-3). The behavior evaluation report included goals and objectives for the student during school including increasing the student's ability to follow directions the first time, within a group and without teacher reminders; self-regulating by keeping an arm's distance from peers at all times (playgroup, carpet, line up); making transitions without delay, interruptions or resistance in order to keep up with the class and the routine; keeping his hands to himself when seeking the attention of a peer or during play; staying on topic when asking questions, given reminders; refraining from teasing, mimicking, and sticking out his tongue at peers when his feelings are hurt or he feels rejected; completing written work on his own without copying peers' work; using appropriate social/pragmatic language by initiating, maintaining and closing a conversation; participating in sensory/OT work—navigating his body in space and regulating when he is either overly stimulated or angry, doing heavy work, organizing his work, and practicing handwriting; and increasing social skills including sharing, pragmatics, and general social rules within a group (*id.* at pp. 3-4). The report also included recommendations for behavioral supports at school including 15 hours per week of special education therapy provided by a behaviorally trained special education itinerant teacher (SEIT); speech-language therapy at school and at home; behavior modification services at school and at home; parent training; and OT to address handwriting skills and sensory integration (*id.* at pp. 5-6).<sup>16</sup> The behavior therapist opined that given the student's age, expressive language

---

<sup>16</sup> Testimony by the parent indicated that according to the neuropsychologist who conducted the March 2017 private neuropsychological evaluation, the student was extremely bright but also had challenges, so he needed to be in an environment that understood how bright he was, but at the same time supported his behaviors and social/emotional challenges such as his frustration intolerance and sensory needs (Tr. p. 251). The parent testified that the neuropsychologist suggested that the student receive 1:1 "qualified help" with his behavior and at the

abilities and academic skills, he should remain in a mainstream environment provided that the student attended a small to medium sized classroom where a structured teaching style was employed and where SEIT and speech-language therapy were pushed into the classroom (id. at p. 6).

Following completion of a behavior evaluation of the student, on June 13, 2017 the private behavior therapist from IBI developed a BIP that further reflected the student's needs (Dist. Ex. 10). The report indicated that the primary antecedents of the student's behaviors were sensory/regulation impairment, executive functioning/processing issues, delayed social/pragmatic language, and poor attention set (id. at p. 1). The behavior therapist also indicated that the incident rate of the student's behaviors was highest in unstructured group settings and that specific consequences, replacement behaviors, and a social skills training/group were likely to solve the noted issues and behaviors (id. at p. 2).

The progress report prepared by the student's kindergarten teacher on August 22, 2017 reflected the significant concerns she had related to the student's behavior and social/emotional development including that he exhibited severe tantrums involving screaming, head banging, removing shoes, and throwing chairs, which occurred when the student did not get his way, with some examples identified as events such as not getting a desired seat, having to share a manipulative, or his snack falling on the floor (Dist. Ex. 6 at p. 3). The student's kindergarten teacher indicated that the tantrums lasted from 20 to 30 minutes, that the student's behavior was highly disruptive to the class and that his behavior was having a negative effect on his school work and his relationships with peers (id.). With regard to the student's academic management needs, the kindergarten teacher indicated in her report that 1:1 intervention was "crucial" for the student's overall academic needs and "vital" to his overall development in school and in life (id. at p. 2).

Similarly, testimony by the student's first grade teacher for the 2017-18 school year indicated that on the first day of school, the student kicked and knocked over the furniture and banged his head and she had to call the parent (Tr. p. 309-10).<sup>17</sup> She further indicated that throughout that school year she never knew what the student's behavior would be on a given day (Tr. p. 311). She stated that some days he would be defiant and would not want to do a particular activity, for example, if she asked him to write something that he didn't want to write he might "have a breakdown, start scribbling on the paper, or if [she] asked him to erase something, he erased the paper so hard that he erase[d] a hole in it" (id.). At other times the student could escalate to banging his head on the floor or punching himself in the head (id.). She further indicated that the student exhibited a range of behavior with the less extreme occurring "pretty much every day,"

---

same time recommended "consulting to support" the student's social/emotional needs (Tr. pp. 251-52).

<sup>17</sup> Although the October 2017 IESP was developed during the 2017-18 school year, when the student was in first grade, the student's first grade teacher was unavailable and the student's kindergarten teacher from the 2016-17 school year attended the CSE meeting (Tr. pp. 271-72; see Dist. Exs. 1 at p. 10; 5 at p. 1). If I were conducting a prospective analysis of the whether the IESP was appropriate at the time it was drafted, based upon information that was provided to (or should have been considered by) the CSE, I would not consider the first grade teacher's testimony for that purpose. However, the determination that the student's IESP was insufficiently supportive was not appealed, and in terms of my discretionary authority to fashion appropriate equitable relief, I have included consideration of the first grade teacher's testimony with respect to determining what may assist the student as relief.

whereas the extreme behaviors could occur once every one or two weeks (Tr. p. 311; see Tr. pp. 312-14). She testified that when the larger adverse behaviors occurred, they consumed the rest of the school day (Tr. p. 335). She would end up calling the parent to come and get the student because it was hard to get the student back on track (id.).

Testimony by the student's private school kindergarten teacher who attended the October 19, 2017 CSE meeting, indicated that she had conversations with the student's first grade teacher at the private school confirming that the student's difficulties continued from kindergarten into first grade (the 2017-18 school year) (Tr. pp. 269-71). According to the student's kindergarten teacher, the first grade teacher indicated that she was having difficulty with the student with regard to his social-emotional skills and his behavioral challenges, noting that he exhibited head banging behavior as a first grader (Tr. p. 271). The kindergarten teacher indicated that based on the first grade teacher's feedback she believed the student required daily push-in support in the classroom (Tr. p. 273). Her testimony indicated that the student's emotional skills, social skills and his behaviors were significantly below par compared to his peers, that he required 1:1 assistance to address his challenges and help him refocus and get back to the task at hand, and that the student's behavior was impacting his social interactions with peers because other children did not want to play with him or interact with him (Tr. pp. 273-74; see Dist. Ex. 6 at p. 3). Both teachers indicated that when a tantrum occurred, "everything basically stopped" in the classroom (Tr. pp. 274, 335; see Dist. Ex. 6 at p. 3). Some of the student's peers became visibly upset and were unable to finish the tasks they had been working on (Tr. p. 274; see Dist. Ex. 6 at p. 3).

In contrast to the input provided by the student's teachers, a September 20, 2017 classroom observation of the student completed by a district special education teacher who participated in the October 2017 CSE meeting, indicated that during both whole group and independent work, the student followed the teacher's directions the first time asked and that the student required some redirection but did not require behavior interventions (Dist. Ex. 4 at p. 3). The district special education teacher testified that during her observation of the student he did not demonstrate any significant difficulties related to attentiveness, engagement, or inappropriate behavior with respect to gaining attention from the teacher and was able to complete his work independently and ahead of his peers (Tr. pp. 177-78, 180-82). She testified that she did not observe the student demonstrating any inappropriate social interactions with his peers during her observation (Tr. p. 186).<sup>18</sup>

Overall, while the classroom observation and the student's father's reporting on the BRIEF and BASC-2 were an indication that the student's behaviors may not have been as serious as what was described by others, those reports were a small subset of information in comparison to the information provided by the parent, the student's teachers (including the August 2017 teacher progress report), the April 2017 private neuropsychological evaluation report, the May 30, 2017 private behavior evaluation report, and the June 2017 BIP (see Dist. Exs. 4; 6; 10-11; 14). In addition, the reporting of the student's more serious behaviors—including self-injurious behaviors,

---

<sup>18</sup> The parent testified that she discussed the classroom observation with the student's first grade teacher, who, according to the parent, indicated that she disagreed with what was reported in the observation report by the district special education teacher (Tr. pp. 203-04). While the student's first grade teacher testified during the hearing, neither side questioned her regarding the content of the observation report or what happened during the observation (see Tr. pp. 305-50).

physical aggression, and non-compliance—were central in the development of the district's barely completed FBA and BIP (see Dist. Exs. 2 at p. 1; 3 at p. 1). Accordingly, it is not difficult to understand the context of the IHO's unappealed decision that the counseling and OT contained within the October 2017 IESP was not sufficient to address the student's behavioral needs, thus any notion that a compensatory award could be limited to the services called for but the IESP (but later went undelivered) would be insufficient relief.

Having discussed the evaluative information available to the October 2017 CSE related to the student's behavioral needs and the information from the student's first grade teacher, I next turn to the parent's challenge to the IHO's rejection of her request for 15 hours per week of compensatory behavioral support.

As discussed above, behavioral support was first recommended for the student as part of the May 2017 IBI behavioral evaluation (Dist. Ex. 11). Specifically, the report recommended 15 hours per week of behavioral support; however, the parent was only able to provide the student with 4 hours per week of behavior therapy because she could not afford additional services (Tr. p. 234; Dist. Ex. 11 at p. 5).

The parent's private BCBA testified that the student first received "behavioral support services" from Bridge Kids in May 2018 (Tr. pp. 437, 440). She indicated that the student went through an intake process which included an interview with the parent and an observation of the student in the setting where he had difficulties (Tr. p. 436). She further testified that at that time Bridge Kids developed a BIP for the student, which she later modified when she started working with him (Tr. pp. 440-41; see Parent Ex. K). The BCBA testified that Bridge Kids initially recommended 15 hours per week of direct services because the student displayed "pretty constant behavioral difficulties" (Tr. pp. 441-42).

According to the BCBA, the student's classroom teacher, and notes on the BIP, when the BCBA was not in class with the student, the BIP was not fully implemented due to the classroom teacher's position that she, as a general education teacher who had no education or training in dealing with children with special needs or behavior problems, could not effectively implement the BIP (Tr. pp. 451-52; see Tr. pp. 398, 412; Parent Ex. K). The BCBA further opined that a paraprofessional was not capable of implementing the student's BIP (Tr. pp. 464-65). Both the BCBA and classroom teacher testified that the student required more support than what he was receiving, noting that for most of the 2018-19 school year the student received no behavioral support three days per week (Tr. pp. 397-99, 483, 485; see Tr. p. 318). The BCBA testified that while she "obviously want[ed] [the student] to have more hours than this"... "there [were] financial limitations from the family. They [could] only provide four hours a week" (Tr. p. 485). The BCBA also indicated that the student had not been receiving consistent behavioral support for about a month prior to his recent increase in behaviors due to school closures, cancellations, religious holidays and scheduling conflicts and that she was only seeing the student two hours per week (Tr. pp. 483-84, 486-87). The BCBA testified that this was "completely insufficient for what [the student] needs" (Tr. p. 484).

The parent testified that it was a financial hardship to obtain private services for the student (Tr. p. 210). She stated that she could not afford to pay for the BCBA to provide the recommended 15 hours per week and that she "basically hired her for the minimum amount of time that they were willing to send someone there. And that was four hours" (Tr. p. 224; see Tr. p. 234). The parent

also reported that the BCBA provided behavior therapy to the student for two hours on Mondays and Thursdays (Tr. p. 224; see Tr. p. 485).

The parent's testimony indicated that the BCBA assisted the student with his challenges of staying focused, engaged and participating (Tr. p. 225). She indicated that the BCBA used a chart with increments on it to show what the student achieved for a certain period of time, which motivated the student to focus and do what his teacher asked (id.). The parent briefly described the reward program where the student earned a star for every good behavior he exhibited and that when he earned a certain number of stars, he got a break to do something he liked such as play chess, or play with slime for a few minutes (Tr. p. 235). However, consistent with testimony from the BCBA, the parent indicated that the student's teacher was not able to implement the chart like the BCBA did because it was difficult for her to stop teaching and take care of the student's needs (Tr. pp. 225, 234). As a result, when the BCBA was not present, the student's behavior deteriorated and disruptive and eloping behaviors returned (Tr. p. 225).

The parent further testified that she asked the BCBA to be with the student during social studies and science because the student had repeatedly tried to elope during that time, when his class joined another class and there was an increase in stimulation and in the student's anxiety, and it was even more difficult for the student to control himself (Tr. p. 236). The parent further indicated that one of the important things the BCBA did was to make sure that the student's teacher sent home any work that the student did not complete in school that was a result of his eloping, being disruptive, or refusing to comply (Tr. p. 227).

As described above, one objective of compensatory education is to place the student in the position he or she would have been in had the district complied with its obligations to offer appropriate special education based on the student's unique needs. Rather than directing arguments at what service would compensate the student, it appears both attorneys and the IHO became entangled in the ever-changing name of the parent's request for 15 hours of push-in 1:1 behavior therapy (see Parent Ex. A at pp. 4-5; IHO Ex. VI at pp. 23-25). The IHO categorically determined that "ABA/SETSS" was inappropriate for the student based on the representation that the student did not need SETSS because he did not have academic deficits and on the student's inability to function in his classroom with four hours of "ABA behavior services" (Tr. pp. 129-30, 185, 189; Dist. Ex. 1 at p. 3; IHO Dec. at p. 12). However, as discussed above, neither of these terms is an entirely accurate description of the behavioral services recommended in the IBI evaluation report and provided by Bridge Kids (see Tr. pp. 434, 437, 444, 482; Dist. Ex. 11 at p. 5). Additionally, as I have repeatedly warned the district in the past, it is not clear at all that all parties to impartial hearings and IHO's are consistently working with the same definition of "SETSS," a term that, unlike all of the elements of the student's programming, is not described in New York State's continuum of special education services (see, e.g., Application of a Student with a Disability, Appeal No. 19-047; Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 16-056). The lack of consistency in the use of the term between the parties and the IHO in this case is no exception. To that end, I have warned the district previously that I will not take judicial notice of the meaning of the term or favor one party over another as to its meaning (Application of a Student with a Disability, Appeal No. 17-103). It is the district's burden to produce evidence that describes the SETSS as proposed for each student that becomes the subject of a due process proceeding, and the district has failed to address that burden in this proceeding (see Application of a Student with a Disability, Appeal No. 19-047).

Instead of focusing on what the parties called the service (i.e. labels), the parties and the IHO should have focused on whether the behavior therapy recommended by IBI and to some extent obtained by the parent was beneficial in addressing the student's undisputed behavioral needs.

Of particular note, due to the district's failures, the student went without any direct behavioral supports until mostly through the 2017-18 school year in May 2018. In order to make up for that denial of behavioral services, the parent requests a compensatory award based on a quantitative approach, consisting of 15 hours per week of behavioral services from October 2017 through April 2018 computed by the parent as 25 weeks, and 11 hours per week of behavioral services (the 15 recommended hours less the 4 hours provided by the parent) from May 2018 through the date of the parent's post hearing brief in May 2019, computed by the parent as 40 weeks, totaling 815 hours (IHO Ex. VI at p. 23).

While behavior therapy as described by the BCBA does not represent the only appropriate way to have addressed the student's needs, in the absence of any other proposed remedy and the district's failure to provide appropriate supports or offer an alternative to remedy the denial of services, the parent is entitled to her requested relief in the interest of developing an award that has a reasonable likelihood of placing the student in the position he would have been if the district had offered an appropriate program. Accordingly, the student is awarded 815 hours of behavioral therapy to be provided by a BCBA in the student's classroom.

In addition, the parent is requesting reimbursement for the four hours per week of behavioral therapy provided by Bridge Kids beginning in May 2018 through the 2018-19 school year. In this instance, although the student undoubtedly would have benefited from more of the service than the parent was able to provide through her own means, the hearing record, as described above, supports a finding that the behavioral services provided by Bridge Kids benefited the student and the parent is entitled to reimbursement for the services provided by Bridge Kids during the 2017-18 and 2018-19 school years.

Finally, the IHO erred by failing to award compensatory speech-language therapy after determining that the student required speech-language therapy to address pragmatic language deficits.

The student's needs related to his speech and language development were reflected in an August 21, 2017 private speech-language evaluation report (Parent Ex. E). Results of the speech-language evaluation revealed no deficits in the student's oral-peripheral mechanism, his voice, fluency, or his articulation/phonology skills (id. at p. 2). Formal assessment of the student's language using the Preschool Language Scale-Fifth Edition (PLS-5) also reflected no deficits, with scores in the high average range of functioning on both receptive and expressive language skills (id. at pp. 2-3).

However, the speech-language pathologist noted in her report, that the student required numerous verbal prompts and redirection to enter the examination room and sit down, had considerable difficulty attending to structured activities during the assessment, and required frequent short breaks during testing (Parent Ex. E at pp. 1-2). The student also fidgeted frequently in his seat, put his arms inside his shirt and often asked "how much longer" the testing would take (id. at p. 2).

With regard to pragmatic language, the speech-language evaluation report reflected that the student's strengths included his ability to look at the speaker, use appropriate vocal volume, gesture appropriately, request and comment, and use appropriate facial expressions, while he demonstrated difficulty orienting his body toward a speaker, following a speaker's eye gaze, standing or sitting an appropriate distance away, repairing communication breakdowns, giving background information during storytelling, initiating social greetings and staying on topic (Parent Ex. E at p. 9).<sup>19</sup> Clinical impressions indicated that the student presented with moderately delayed pragmatic language skills as well as a delay in his ability to attend to structured, non-preferred activities (id.). Based on formal and informal testing, the student's greatest weaknesses included his ability to re-tell a story with a clear beginning, middle and end; his ability to produce a coherent narrative in spontaneous speech; decipher tone of voice and identify feelings; and his ability to comprehend "Theory of Mind" tasks (id.).

The district representative who participated in the October 2017 CSE meeting testified that based on the student's speech and language assessment performance, he exhibited moderate pragmatic language weaknesses, which the speech-language pathologist discussed at the October 2017 CSE meeting (Tr. pp. 100-01, 103, 120-21; see Tr. pp. 105). Weaknesses included the student's difficulty demonstrating appropriate conversational manners, being on topic, making appropriate topic transitions, and using appropriate turn-taking in conversation (Tr. p. 121).

Based on the hearing record, it could have been argued that, considering the student's proficiency in expressive and receptive language skills, the student did not necessarily require speech-language services to address pragmatics in that those needs could have been addressed by other services. However, the IHO determined that "speech services addressing pragmatic speech [we]re appropriate for [the student] and that counseling, alone [wa]s insufficient" (IHO Decision at p. 12). Accordingly, it appears that the IHO's failure to award speech-language services was more of an oversight than an intentional omission. Additionally, as the district does not clearly appeal from the IHO's finding that speech-language services addressing pragmatic language skills was appropriate (instead arguing that the parent's "request for SLT services, was properly denied by the IHO") and, notably, does not propose any alternative plan for addressing the IHO's finding of a lack of speech-language services, the parent is awarded the requested 63 sessions of 45-minute compensatory speech-language therapy.

Finally, the parent is also requesting reimbursement for services rendered by IBI, which are identified as social skills/speech-language therapy. The parent testified that she put speech-language services in place for the student in first grade, the 2017-18 school year, and that it was combined with a social group that the student received from IBI (Tr. pp. 210, 213). Her testimony indicated that this service included pragmatic language therapy (see Tr. p. 210).<sup>20</sup> The hearing

---

<sup>19</sup> The August 21, 2017 speech-language evaluation report defined pragmatic language as the ability to appropriately use language (to persuade, request, inform, or reject), to change language (talk differently to different audiences, provide background information to unfamiliar listeners and speak differently in different settings., etc.), and to follow conversational rules such as taking turns, introducing topics, rephrasing sentences, maintaining appropriate physical distance during conversation, and using facial expressions and eye contact, all which combine into the student's general ability to appropriately interact with others in a variety of settings (Parent Ex. E at p. 7).

<sup>20</sup> The transcript of the parent's testimony seemingly contains an error wherein the parent's reference to "social



record includes invoices for "Social Group/Speech & Language Therapy" services provided by IBI and Imagine Better Impact beginning August 8, 2017 through April 19, 2018 (Parent Ex. K-1 at pp. 3, 4, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20, 22, 24, 25, 28, 30, 32, 33, 35, 37).<sup>21, 22</sup> Some of the invoices related to these services have corresponding insurance claims/explanation of benefits and photocopies of insurance reimbursement checks suggesting the services were provided (*id.* 5, 8, 11, 14, 17, 20).<sup>23</sup> Based on the invoices and insurance claims, the student generally received two one-hour sessions per week (*id.* at pp. 4, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20, 22, 24, 25, 28, 30, 32, 33, 35, 37; *see id.* at p. 3), initially at an hourly rate of \$220 (*id.* at p. 4) and at an hourly rate of \$250 from September 2017 through February 15, 2018 (*id.* at pp. 7, 8, 10, 11, 13, 16, 17, 19, 20, 22, 24, 25, 28, 30), and at an hourly rate of \$200 per hour from February 20, 2018 through April 19, 2018 (*id.* at pp. 32, 33, 35, 37). However, there is very little detail in the hearing record as to what this service entailed, how it addressed the student's pragmatic language needs, and of particular note, the hearing record does not identify the qualifications of the provider of these services, i.e. whether the provider was a speech-language pathologist or other qualified provider. Considering the absence of this very basic information about the service, it would not be proper to award reimbursement for it. However, in consideration of the IHO's unappealed finding that speech-language services for pragmatic language instruction is appropriate, the student is still entitled to the full 63 sessions of compensatory speech-language therapy. In the event that the parent presents additional information to the district, it is possible for the parent and district to come to some sort of agreement regarding this service.

### **C. Implementation of the October 2017 IESP and Pendency Services**

In addition to the allegations discussed above—that the October 2017 CSE failed to offer equitable services to the student—the parent also argues that the district failed to provide the recommended services of individual and group counseling and individual OT as set forth in the October 2017 IESP. The parent asserts that the IHO failed to address and improperly denied her requests for reimbursement of privately obtained services.

---

group/pragmatic language therapies" appears as "social group/magic language therapies" (Tr. p. 210).

<sup>21</sup> According to the transcript, the only parent exhibits admitted into the record were Parent Exhibits A, I, and J (Tr. pp. 62, 71). The transcript reflects that the parent's attorney believed that she had submitted exhibits through Parent Exhibit N (Tr. p. 373). The IHO decision lists parent's exhibits of A, I-N, without dates of admission (IHO Decision at p. 17). The hearing record also included two different exhibits marked as Parent Exhibit K. For purposes of clarity, the second exhibit K—the parent's invoices for privately obtained services—will be referred to as Parent Exhibit K-1.

<sup>22</sup> While the description of these services on most of the invoices reflected "Social Group/Speech & Language Therapy," two of the invoices for these services provided by Imagine Better Impact during March and April 2018, described the services as "Social Group/Speech & Language Therapy (pragmatics)" (Parent Ex. K-1 at pp. 35, 37).

<sup>23</sup> Bills related to services from August 8, 2017 through December 19, 2017 are on IBI letterhead (Parent Ex. K-1 at pp. 4, 7, 10, 13, 16, 19, 22), while bills related to services provided from January 16, 2018 through April 19, 2018 are on Imagine Better Impact letter head (Parent Ex. K-1 at pp. 28, 30, 32, 33, 35, 37). The hearing record contains two separate bills for services provided on January 9 and 11, 2018, which appear to be duplicative, one on IBI letter head and the other from Imagine Better Impact for the same services (compare Parent Ex. K-1 at p. 24, with Parent Ex. K-1 at p. 25).

Specifically, the parent argues that the IHO erred by denying her requests for reimbursement of OT, a social skills group at Ready, Set, Play!, and social skills/speech-language therapy from IBI and further erred by not ordering direct payment to New York Therapy for counseling provided after February 22, 2019 through the end of the 2018-19 school year. The parent further alleges that the IHO erroneously awarded compensatory OT and counseling instead of reimbursement for services.

The district representative who participated in the October 2017 CSE meeting testified that once a parent consents to receive services from the district, she requests related service authorization (RSA) forms to be sent to the parent so that the parent can locate an independent provider (Tr. p. 143). When asked if the district offered any assistance to a parent beyond mailing RSAs for IESP based services, the district representative testified that a parent receives a booklet of service providers from which to secure an independent provider (Tr. pp. 143-44). The district representative further testified that in order to obtain additional assistance a parent would have to contact her and request help in securing a provider and that she would have no way of knowing a parent was struggling if she wasn't notified (Tr. p. 144).

The parent testified that the district took no steps to implement the student's services (Tr. p. 208). Although much of the parent's testimony focused on behavioral supports, which are discussed above, the parent testified that she attempted to obtain an OT provider from the district's list, but received no responses (Tr. pp. 208-09). In addition to the behavior services discussed above the parent testified that she obtained private services for the 2017-18 school year consisting of OT and social group/speech-language therapy for pragmatic language instruction (Tr. p. 210).

While the statutory scheme of Education Law section 3602-c places the responsibility of selecting and placing the student in a nonpublic school on the parent, the implementation of the services called for by a student's IESP falls on the district insofar as "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). While it may very well be permissible for a district to include the parent in the identification of a particular provider, especially if the parent is willing and able to do so, it does not follow that the responsibility to redress a parent's inability to locate a provider is shifted permanently to the parent. In this case, at no point during the impartial hearing did the district offer any evidence that it attempted to select or assign an OT or counseling provider to deliver the services required by the October 2017 IESP during the 2017-18 or 2018-19 school years and for the 2018-19 school year there is no indication that the district developed an IESP for the student. The district did not demonstrate that the parent was mailed RSAs or the provider list as the district's general practice was described by the district representative in her testimony. The district also does not challenge that the parent was authorized to select providers of her choosing for OT and counseling. The core of the district's defense seems to be that it has a practice of identifying available providers by mailing the parent a list. Implied in the district's position is that the parent failed in a duty to select a provider and proceed with arranging the services, but the district does not provide any legal authority that explains how this duty to participate in the implementation of the IESP by finding the provider willing falls on the parent's shoulders or any factual evidence showing the specific steps the district took to arrange services for the student.

At the outset, I note that the IHO should have issued an interim decision on pendency that included individual and group counseling as well as OT. While this case concerns the failure to

implement an IESP under section 3602-c, that section provides that a "[r]eview of the recommendation of the committee on special education may be obtained by the parent . . . pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law 3602-c § [2][b][1]), and the Education Law provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014] [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

Although the parent specifically requested OT under pendency, the student was entitled to all of the services listed on the October 2017 IESP, as it is an automatic injunction the district is responsible for implementing pendency services and the parent is not required to request each service individually.<sup>24</sup> The hearing record reflects that, during the hearing on February 22, 2019, the parent requested direct funding to New York Therapy for counseling (Tr. pp. 380-81). The IHO did not issue a subsequent pendency order and did not award the requested direct funding. The parent was entitled to pendency services from the date of the due process complaint notice. As the district did not arrange for pendency services, to the extent that the parent obtained services on her own as a result of the district's failure, the parent is entitled to reimbursement from the district for the amount she spent (see T.M., 752 F.3d at 172).

The IHO awarded compensatory OT services but denied the parent's request for reimbursement for privately obtained OT from IBI and Magnum Bonum.

An August 23, 2017 private OT evaluation report from IBI reflected the student's needs in this area related to his performance in school (Dist. Ex. 12 at p. 4). Results of the administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI) revealed the student's strong visual perceptual skills (79th percentile) in contrast to his poor visual motor skills (13th percentile) (id. at p. 3). With regard to sensory processing, the evaluation report revealed no deficits in visual, tactile, vestibular or auditory functioning; however, it indicated that the student presented with difficulties with proprioception based on his decreased ability to control his lines during letter formation, his letter and number reversals, and his difficulty grading

---

<sup>24</sup> In her closing brief, the parent alleges that the district failed to implement pendency (IHO Ex. VI at p. 2).

movements when throwing or catching a ball (*id.* at pp. 2, 4). The evaluation report further reflected that the student exhibited difficulty with position in space or not being aware of where his body was in relation to those around him and that when working on a shared task, he would often get too close to another person (*id.*). Recommendations included that the student receive two 30-minute sessions per week of individual OT to address his delays in visual motor skills and proprioceptive processing as they impacted his overall performance in school and in his academic success (*id.* at p. 4).

The parent provided invoices with dates of service beginning on September 14, 2017 through October 25, 2018 (Parent Exs. K-1 at pp. 9, 12, 15, 18, 21, 23, 26-27, 29, 31, 34, 36, 38; M at pp. 1-6). Under pendency, the parent is entitled to reimbursement for the actual cost of OT services from December 19, 2017 through June 30, 2019 and direct funding for counseling provided by New York Therapy from February 22, 2019 through June 30, 2019.

In addition to the OT covered by pendency discussed above, the parent requests reimbursement of privately obtained services as relief for the district's failure to implement the October 2017 IESP. The parent argues that the IHO improperly denied her requests for reimbursement of OT from September 14, 2017 through December 18, 2017 and social skills groups. The parent contends that the IHO failed to consider that the student's social skills groups addressed both the student's pragmatic language and counseling needs. In its cross-appeal, the district does not contest that the October 2017 IESP was not implemented (Answer with Cross-Appeal at p. 5). The district maintains that the IHO correctly denied reimbursement of the parent's privately obtained services as excessive and not required for the student to receive equitable services, and that the IHO's award was adequate to remedy the district's failure to implement the IESP.

A district cannot be absolved of its statutory obligation to implement services recommended for the student simply by asserting that the parent did not engage the services of the providers to whom the district referred her. The district had the obligation to provide services to the student in conformity with his IESP (Educ. Law § 3602-c[2][a], [b][1]; see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see also 20 U.S.C. § 1414[d]; 34 CFR 300.320). The district has not offered any evidence that it attempted to implement the student's October 2017 IESP. For that reason, the IHO's denial of the parent's request for reimbursement of privately obtained services must be reversed. Regarding OT services obtained prior to filing her due process complaint notice the parent is entitled to reimbursement of the actual cost of the OT services from October 30, 2017 (when the service was scheduled to commence) through December 18, 2017 as a remedy for the district's failure to implement the recommended services on the October 2017 IESP.

Regarding counseling services, the parent contends that the privately obtained social skills group and social skills/speech-language therapy were offered "in lieu of counseling" (Tr. p. 367; see Parent Ex. A at p. 5; IHO Ex. VI at p. 21). The IHO agreed with the parents that social skills therapy was appropriate for the student for the 2017-18 and 2018-19 school years but at a frequency of one hour per week (the student began receiving social skills therapy in May 2018 and received 1.5 hours per week during the remainder of the 2017-18 school year) (IHO Decision at p. 13; Parent Ex. I at p. 1). However, the IHO further found that the record was insufficient for reimbursement for the social skills group that the student attended at Ready, Set, Play! during the

2017-18 school year (IHO Decision at p. 13).<sup>25</sup> Specifically, the IHO indicated that the "one paragraph description" of the services in the provider's affidavit was insufficient for reimbursement for the social skills group (IHO Decision at p. 13; Parent Ex. I at p. 1).

The student's needs related to social skills were reflected in several of the counseling goals on the October 19, 2017 IESP (Dist. Ex. 1 at pp. 6, 7). It was the intent of the CSE to address improving the student's ability to identify interpersonal triggers, identify and use coping strategies appropriately in times of stress, increase his pragmatic language skills including his appropriate use of conversational manners, staying on topic, making appropriate topic transitions, and turn taking in conversations, as well as his ability to use self-calming strategies when feeling frustrated or overwhelmed and demonstrate increased safe and cooperative behaviors such as sitting with calm hands, waiting his turn, walking safely and using kind words with peers and adults (id. at pp. 6-7).

The student's social skills group services at Ready, Set, Play! were provided by a special education teacher, who prepared an affidavit (Parent Ex. I at p. 1). The social skills provider's affidavit reflected that the student began receiving social skills group services on May 2, 2018 and was expected to receive instruction one time per week for the remainder of the 2017-18 school year, for a total of eight weeks and at a cost of \$180 per 90 minute session (id.). The student's provider averred that the purpose of the social skills group was to assist the student in managing his interfering behaviors, his compromised attention set, and his deficits in social skills (id.). She further stated that the student was initially screened at a rate of \$75, to determine if he was an appropriate fit for the social group service and that the social group service was comparable to the counseling services provided in school settings (id.). The provider further averred that the "anticipated maximum expense for [the student's] social skills classes" at Ready Set Play! was \$1515 or \$1440 for eight weeks of social skills group sessions, plus \$75 for the screening fee (id.). However, a review of the invoices from Ready, Set, Play! reflects that the cost of the 90 minute social skills group was \$165 per session for the first five sessions (May 2, 2018 through May 30, 2018) and \$180 per 90 minute session for the last three sessions (June 6, 2018 through June 20, 2018) for a cost of \$1365 (Parent Ex. N at pp. 1, 2).

The student's participation in a social skills group would allow him to interact with and essentially practice the skills described in the annual goals included in the October 2017 IESP, as reflected above, with other students and as such, could appropriately address the student's needs as depicted on his IESP (see Dist. Ex. 1 at pp. 6-7).<sup>26</sup> While the hearing record does not contain detailed information about how the social skills group functioned, the provider averred that the purpose of the group social skills class was to assist the student in managing his interfering behaviors, his compromised attention set, and his deficits in social skills, all of which are needs consistent with the goals on the student's October 19, 2017 IESP and that could be appropriately

---

<sup>25</sup> It is unclear whether or not the IHO appreciated that the student participated in two social skills groups for which the parent seeks reimbursement. The hearing record includes invoices from IBI, the provider of the social skills group/speech-language therapy; and from Ready, Set, Play!, the provider of the social skills playgroup, which is referenced in the record as a social skills group (Parent Exs. K-1 at pp. 4, 7, 10, 13, 16, 19, 22, 24-25, 28, 30, 32, 33, 35, 37; N at pp. 1-2). The hearing record does not include an affidavit from the IBI provider.

<sup>26</sup> I note that the October 2017 IESP recommended both group and individual counseling services and that the social skills group only met in a group (Dist. Ex. 1 at p. 7).

addressed in a social skills group (compare Parent Ex. I at pp. 1; with Dist. Ex. 1 at pp. 5-7). As noted above, the student's counseling goals on his IESP addressed increasing the student's appropriate use of conversational manners by staying on topic, making appropriate topic transitions and taking turns in conversations, as well as using kind words with peers and adults (Dist. Ex. 1 at pp. 6, 7). A description of the Ready, Set, Play! social skills playgroups annexed to the district's closing brief appears to support the parent's position that the student's social skills services also addressed his speech-language needs (IHO Ex. V at pp. 20-21). According to the description provided by the district, the Ready, Set, Play! social skills group addressed understanding the perspectives of others in a group, improving conversational skills and improving negotiating skills, which aligned with the student's areas of need, particularly his pragmatic language deficits (id.). Arguably, the student's participation in the social skills group and social skills group/speech-language therapy would require using and practicing pragmatic language skills and would address some specific goals identified and included in the student's October 2017 IESP (Parent Ex. I at p. 1).

Overall, the evidence in the hearing record shows that the reimbursement of the parent's privately obtained services is an appropriate remedy for the district's failure to implement the October 2017 IESP. As such, the IHO erred by denying the parent's request for reimbursement of OT, social skills group, social skills group/speech-language therapy and behavior therapy.

In addition, the parent is entitled to compensatory services for counseling during the period of time the student did not receive counseling or a social skills group. The parent requested 54 sessions of social skills therapy consisting of one hour per week for services missed from October 2017 through May 2, 2018 (when the student began receiving a social skills group) and for the 2018-19 school year (IHO Ex. VI at pp. 23-24). However, to the extent that the parent provided a service, such as the social skills group and social skills/speech-language therapy, and the district is now directed to pay for that service in the form of direct payment or reimbursement, any compensatory remedy for must be reduced to account for the provision of that service. The student received eight weeks of social skills group therapy from Ready, Set, Play!, which was provided for 1.5 hours per week (see Parent Ex. N); accordingly, the overall award of compensatory counseling is reduced by a total of four hours, for the additional time per week of social skills group therapy the student received from Ready, Set, Play! (compare Dist. Ex. 1 at p. 7, with Dist. Ex. N). The student is awarded 50 hours of compensatory counseling services; however, such award may be further reduced if the district paid for counseling pursuant to pendency during the 2018-19 school year (see Tr. pp. 380-85).

## **VII. Conclusion**

As discussed above, the evidence in the hearing record supports the parent's requested relief for the district's failure to develop an appropriate IESP for the 2017-18 and 2018-19 school years and for the district's failure to implement the October 2017 IESP. The parent is entitled to compensatory education services of 815 hours of 1:1 behavior therapy, 50 hours of counseling, and 63 sessions of 45-minute speech-language therapy. The parent is further entitled to reimbursement of the actual cost of privately obtained OT, social skills group therapy, and the behavior therapy services she arranged for the student for the 2017-18 and 2018-19 school years upon presentation of proof of payment. The parent is also entitled to direct funding of counseling and for any out-of-pocket expenses for OT from December 19, 2017 through the end of this proceeding pursuant to pendency.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED**

**IT IS ORDERED** that that the IHO's decision dated September 9, 2019, is modified by reversing those portions which ordered prospective placement of the student at a State-approved NPS for the 2019-20 school year, denied compensatory behavior therapy, and denied reimbursement for OT, social skills group, and behavior therapy; and

**IT IS FURTHER ORDERED** that the student's placement for the pendency of this proceeding consists of individual and group counseling once each per week for 30-minute sessions and two individual 30-minute OT sessions per week from the filing of the due process complaint notice until a final adjudication of the underlying cause of action is realized; and

**IT IS FURTHER ORDERED** that pursuant to pendency, the district shall directly fund the cost of counseling services obtained by the parent between February 22, 2019 through June 30, 2019; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 815 hours of 1:1 behavior therapy, 50 hours of social skills therapy, and 63 45-minute sessions of speech-language therapy; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district shall reimburse the parent for the costs of privately obtained OT from October 30, 2017 through December 18, 2017 upon submission of proof of payment; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district shall reimburse the parent for the costs of privately obtained social skills therapy and behavior therapy upon submission of proof of payment in accordance with the body of this decision.

**Dated:** Albany, New York  
March 9, 2020

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