



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-052

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

Appearances:

Law Offices of Martin Marks, attorneys for petitioners, by Martin Marks, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail M. Eckstein, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered appropriate educational services to their daughter and denied their requests for an evaluation and the provision of specific special education services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with the student's educational history and the procedural history of this proceeding is presumed and will not be recited in detail here. The hearing record is relatively sparse regarding the student's early educational history. According to the parents, in January 2016

a Committee on Preschool Special Education (CPSE) convened and recommended a 12-month program of 10 hours per week of special education itinerant teacher (SEIT) services and one 30-minute session per week of individual counseling for the student (Parent Mem. of Law ¶4). Subsequently, the parties engaged in due process litigation that resulted in interim pendency decisions setting forth the student's pendency program pursuant to the January 2016 CPSE IEP (Parent Ex. A at p. 1).¹

The student attended a nonpublic school during the 2018-19 school year (second grade) where she received "dual-lingual" instruction primarily in Yiddish and some English, 1:1 paraprofessional services, three sessions per week of counseling, and pursuant to pendency, 10 hours per week of home-based special education teacher support services (SETSS) (see Tr. pp. 105-06, 120, 134-35; Dist. Exs. 1 at pp. 1, 2; 3 at p. 6; Req. for Rev. ¶40). The CSE convened on November 6, 2018, to formulate the student's IESP for the remainder of the 2018-19 school year, at which time it recommended that the student receive three 30-minute sessions per week of individual counseling (Dist. Ex. 1 at pp. 1, 4).²

The student continued in the same nonpublic school for the 2019-20 school year (third grade) in a general education class of 18 students and received in-school counseling and home-based SETSS (Dist. Ex. 2 at p. 5; see Tr. pp. 105-06, 120, 134; compare Dist. Exs. 1 at p. 1, with Dist. Ex. 3 at p. 1). On May 27, 2020 the CSE convened for the student's annual review and to develop an IESP for the 10-month 2020-21 school year (fourth grade) (Dist. Ex. 2). Beginning in September 2020, the CSE recommended that the student receive two 30-minute sessions per week of counseling in a group, and one 30-minute session per week of individual counseling (*id.* at p. 6). During the 2020-21 school year, the student continued at the nonpublic school she had been attending and received privately-obtained full-time paraprofessional services and 10 hours per week of home-based SETSS (see Tr. pp. 117, 120, 134-35; Dist. Ex. 9 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated June 23, 2020, the parents alleged that the district failed to "fulfil its equitable duties in the development of an educational program for this student for the 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years" and failed to afford the parents an opportunity for meaningful participation in the development of the student's educational program (see Parent Ex. A).³ The parents asserted that the student's pendency program arose from her January 28, 2016 IEP and the unappealed "[o]rders of [p]endency" which directed the district to provide 10 hours of special education itinerant teacher (SEIT) services and one 30-minute individual session of counseling on a 12-month basis (*id.* at p. 1). As to the parents' specific allegations, they asserted that they disagreed with the CSE's evaluations of the student; argued that

¹ The hearing record does not contain either the student's January 2016 IEP or any of the pendency orders upon which the parents assert the student's pendency program is based (see Parent Ex. A; Dist. Exs. 1-10; IHO Ex. I).

² The student's eligibility for special education services as a student with an emotional disturbance is not in dispute on appeal (8 NYCRR 200.1 [zz] [4]).

³ The June 2020 due process complaint notice was filed by the student's mother, and was prepared by a different attorney than is currently representing both parents on appeal (see Parent Ex. A). For purposes of consistency, both parents are referenced throughout this decision.

the IESPs developed for the 2019-20 and 2020-21 school years were deficient because they did not offer the student a 12-month program, failed to provide 1:1 SETSS to implement the student's functional behavioral assessment (FBA) and behavioral intervention plan (BIP) and support her "general classroom participation," and that the district failed to implement all of the student's counseling services pursuant to prior pendency orders (*id.* at p. 2). The parents requested that the IHO direct that an independent neuropsychological evaluation and an independent FBA and BIP of the student be conducted in an interim order, as they alleged those evaluations were "needed to review the student's current educational needs" (*id.*). As further relief, the parents requested continuation of the student's SEIT services on a 12-month basis, the addition of one hour of indirect SETSS for the 2019-20 and 2020-21 school years to "assist the general education teacher in curriculum modification," the provision of full-time paraprofessional services for the 2019-20 and 2020-21 school years, and authorization of a "bank" of counseling services that the student "missed" during the 2017-18, 2018-19, and 2019-20 school years but was entitled to pursuant to prior pendency orders (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 25, 2020 and concluded on December 21, 2020 after three days of proceedings (Tr. pp. 1-139). In a decision dated January 2, 2021, the IHO "limited the [h]earing to the IESPs entered into evidence and the school years encompassed by each" (IHO Decision at p. 4).⁴ Next, the IHO gave consideration "to the fact that [the student's] services have been delivered via [p]endency, and relief sought is forward looking, for the [20]20-21 school year" (*id.*; *see* Tr. p. 10). Regarding the November 2018 and the May 2020 IESPs, the IHO determined that the district "acted appropriately and drafted a sufficient IESP for the [s]tudent, based upon the information provided at the IESP meeting" (IHO Decision at pp. 15-18). The IHO concluded that the district "provided a sufficient" IESP for the student "for the years included in the IESPs submitted"; the 2017-18, 2018-19, 2019-20, and 2020-21 school years (*id.* at p. 21). Finally, the IHO determined that the parent had "neither objected to any [district] evaluation, nor evidenced the need for any specific evaluation," and as he found that each IESP was "created with sufficient information" regarding the student's needs, denied the parent's request for independent educational evaluations (IEEs), and dismissed the due process complaint notice (*id.* at pp. 20-21).

IV. Appeal for State-Level Review

The specific details of the parents' arguments in the request for review are familiar to the parties and will not be discussed here in detail. The gravamen of the parents' appeal is that the IHO erred by denying the parents' request for SEIT services/SETSS, full-time paraprofessional services, and an FBA/BIP.⁵ As relief, the parents request an order directing the district to continue

⁴ The IHO's decision is not paginated. For ease of reference in this decision, the pages of the IHO decision will be referred to in numerical order, with the cover page designated as page "1" and the remaining pages assigned page numbers "2" through "22" (*see* IHO Decision).

⁵ In the request for review, the parents also took issue with the format and content of the IHO's decision, specifically his failure to discuss or analyze the "annotated" descriptions of the witness testimony and exhibits, failure to apply the law to the facts of the case, and failure to clearly rule on all of the parents' claims (*see* Req. for Rev. ¶¶ 4-8).

the "SEIT Direct services as set forth" in the January 28, 2016 IEP, granting 10 hours per week of SETSS, and ordering the district to conduct an FBA and develop a BIP.⁶

In an answer, the district generally responds to the parents' allegations and argues that the IHO properly found that the district offered equitable services to the student pursuant to the IESPs for the 2017-18, 2018-19, 2019-20, and 2020-21 school years. The district also asserts that the IHO properly found that the student's behavior did not necessitate the provision of paraprofessional services or an FBA or BIP.

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]).⁷ "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

⁶ As has been noted by SROs in previous cases, in a case such as this where SEIT services are in part a form of relief sought by the parent, but by regulation such services are typically not allowed for school-aged students whereas SETSS could be permissibly recommended for the student, which a district school psychologist described as a direct service provided by a special education teacher in a group of up to eight students to help them access the classroom curriculum, it is not helpful that the hearing record lacks more testimony or evidence that clearly defines the contours and features of SETSS versus SEIT services as understood by the parties (see Tr. pp. 45, 69). However, whether denominated as SEIT services or SETSS, the substance of the relief sought in the instant matter is the provision to the student of educational services by a special education teacher who assists the student in addition to the classroom program.

⁷ 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]).

education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).⁸

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. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Scope of the Impartial Hearing and Review

As an initial matter, it is necessary to identify which of the parents' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

While the parent alleged that the district "failed to fulfil its equitable duties" in the development of the student's educational program for a time period including the 2017-18 and 2018-19 school years, review of the due process complaint notice shows that the parent's claims regarding the sufficiency of the student's IESPs related only to the 2019-20 and 2020-21 school years (see Parent Ex. A at pp. 1-2). The evidence entered into the hearing record shows that the district presented a November 6, 2018 IESP—which the IHO found "ran through the end of the 19-20 school year"—and a May 27, 2020 IESP (Dist. Exs. 1; 2; IHO Decision at p. 13). The parents do not appeal the IHO's consideration of the November 2018 IESP as the operative IESP for the majority of the 2019-20 school year.

Additionally, the parents limit their appeal to a review of the IHO's denial of their request for SEIT services/SETSS, the support of a 1:1 paraprofessional, and an FBA and BIP (Req. for Rev. ¶ 3). In support of these requests, the parents generally allege that the IESPs developed for the student were not appropriate to address the student's needs because they did not include recommendations for SETSS or paraprofessional support and compare the recommendations in the November 2018 and May 2020 IESPs with the recommendations from the January 2016 IESP

⁸ State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf)). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

(*id.* ¶¶ 20, 23-37, 40, 46). However, the school years encompassed by the November 2018 IESP—according to the IHO, the 2018-19 and 2019-20 school years—have been completed and at this juncture the parents are not seeking compensatory education or any other form of relief for the denial of appropriate equitable services during those school years (*see* Tr. pp. 10-11; Parent Ex. A at p. 2; IHO Decision at p. 13). As such, the analysis in this decision will pertain to whether the student's May 2020 IESP provided appropriate equitable services.

The parent also asserted in her due process complaint notice that not all of the student's counseling sessions mandated under previous pendency orders were provided; however, that claim was withdrawn during the hearing and is not asserted in the parents' request for review; therefore, it will not be further addressed here (Tr. p. 102; Parent Ex. A at p. 2). Finally, the parent requested an independent neuropsychological evaluation of the student in her due process complaint notice, the IHO specifically denied this request in his decision, and review of the parents' request for review shows that the parents are not appealing that portion of the IHO's decision (*compare* Req. for Rev., *with* Parent Ex. A at p. 2, *and* IHO Decision at p. 21). Accordingly, the issue of a neuropsychological IEE is deemed abandoned and will not be addressed further, and the IHO's determination on that matter is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

B. May 2020 IESP

While the present levels of performance in the May 2020 IESP are not in dispute in this matter, a discussion thereof provides context for the issue to be resolved, specifically, whether the student required 12-month, 1:1 paraprofessional services and SETSS in order to receive appropriate equitable services (*see* Tr. p. 104).

The May 2020 IESP reflected portions of the student's January 2020 psychoeducational evaluation report (*compare* Dist. Ex. 2 at pp. 1-3, *with* Dist. Ex. 3). According to the IESP, during the evaluation, the student presented with an "euthymic mood and subdued affect," "was able to sustain eye contact," "spoke in full sentences," and "appeared [to be] adequately related" (Dist. Ex. 2 at p. 1). The student appeared to be "outwardly attentive," and put forth effort during the evaluation, although reportedly she was somewhat anxious and "remained guarded and reserved" (*id.*). Additionally, the IESP reflected reports that the student exhibited "adequate internal regulation abilities, stayed engaged through the completion of tasks, and did not demonstrate "issues related to motivation or low frustration tolerance (*id.* at p. 3). Results of formal cognitive assessments yielded scores in the average range on tasks measuring fluid reasoning, general fund of knowledge, quantitative reasoning, visual-spatial processing, and working memory (Dist. Ex. 2 at p. 1; *see* Dist. Ex. 3 at p. 4). The student achieved composite standard scores in the average range for total reading, basic reading, reading comprehension and fluency, and mathematics (Dist. Ex. 2 at pp. 1-2; *see* Dist. Ex. 3 at p. 5). Her oral language and written expression composite standard scores on formal measures were in the below average range (Dist. Ex. 2 at p. 2; *see* Dist. Ex. 3 at p. 5). Specifically, the IESP indicated that the student exhibited below average receptive/expressive vocabulary skills, noting that "[u]sually, such vocabulary develops while being exposed to English literacy and during systemic formal instruction in [English language arts] ELA" (Dist. Ex. 2 at p. 2). According to the IESP, the student's oral discourse comprehension, oral expression, and oral word fluency skills were in the average range (*id.*).

Next, the May 2020 IESP reflected reports about the student's skills and needs from the parents, and the student's then-current classroom teacher and SETSS provider who participated during the CSE meeting (see Tr. pp. 134-35; Dist. Exs. 2 at pp. 3-5; 9).⁹ The classroom teacher reported that the student was "generally performing on par" but needed to be "constantly engaged" or she would "disengage in class" (Dist. Ex. 2 at p. 3). The student read well in Yiddish, answered questions demonstrating good understanding, and had a "good grasp" of multiplication (*id.*). The IESP reflected that the student may benefit from visual web organizers to enhance her written expression skills in Yiddish (*id.*). The SETSS provider also taught the student to use organizational tools and although she did not have skill deficits, when needed, provided clarification for math "to avoid potential problems" (*id.*). According to the SETSS provider, the student was "bright" and her math responses were accurate (*id.*).

Further, the classroom teacher reported that the student was "respectful and cooperative" but that her behavior fluctuated depending on her mood (Dist. Ex. 2 at p. 4). At times the student was easily frustrated with her environment, but the classroom teacher did not find "particular triggers" for the student's frustrations, noting that it was unpredictable, and could be a reflection of impatience, mood, and poor social skills (*id.* at pp. 3, 4). However, "for the most part" the classroom teacher reported that the student was cooperative and followed the rules although she needed to "engage more in problem solving and improve classroom behavior, when she [became] impatient or fe[lt] bored" (*id.*). The classroom teacher reported that the student exhibited ineffective coping skills to manage her emotions, such as when she tended to "walk out" of the classroom, although she returned "immediately" and completed her work "when she [was] in a better mood" (*id.*). The classroom teacher also indicated that she used behavior strategies in the classroom, and the student took a drink when she needed to relax (*id.*). According to the IESP, "[n]o assistance of a paraprofessional was reported by the classroom teacher, as part of intervention," and the teacher denied consulting with "any special education providers involved" (*id.* at p. 3). The IESP indicated that there were "no incidents reported for the past two years," that the student had the support of the counselor in school, and that the classroom teacher "applie[d] flexibility and reminders with" the student (*id.*).

The May 2020 IESP reflected the SETSS provider's report that she worked with the student "to learn [] how to be a student in the classroom" and used social stories to teach her about "what others are thinking when she behaves in a certain way" (Dist. Ex. 2 at pp. 3, 4). The provider further indicated that the student did not know how to speak properly to teachers, adults, and peers (*id.* at p. 4). The IESP reflected the parents' request that the student receive direct instruction by a special education teacher and full-time behavior support (*id.* at p. 3). Additional concerns of the parents were that the student was still learning appropriate behaviors, engaged in conflict with siblings at home, and exhibited rigidity, outbursts, low frustration tolerance, and conflicts with peers at times (*id.* at pp. 3, 4).

⁹ The May 2020 IESP also includes information from an October 2018 classroom observation from when the student was in second grade (see Dist. Ex. 2 at pp. 2-3). The student was observed to "actively" participate in a group lesson, write on the board, remain alert and attentive, play appropriately with peers, and transition from the classroom to recess without difficulty (see *id.* at p. 2). Staff reports obtained at that time indicated that the student was doing "well academically" although she had "a lot of difficulty with recess and transitions" including remaining in the classroom after others had left (see *id.* at pp. 2-3).

The May 2020 CSE determined that the student did not require a BIP at that time, "as [the student] want[ed] to please her teacher, stay[ed] in the classroom and complete[d] her work" (Dist. Ex. 2 at p. 4). Additionally, the CSE concluded that the student required "counseling to help her improve coping skills and emotional regulation, as it pertain[ed] to classroom performance and social[ly] appropriate functioning" and to improve social, classroom functioning, and problem solving skills (id. at pp. 4, 5).¹⁰ An annual goal in the May 2020 IESP to improve written language skills was that using web organizers, the student would improve her ability to compose paragraphs to express her ideas (id. at p. 5). Regarding the student's classroom behavior, the CSE developed an annual goal for the student to learn and use adaptive coping skills when frustrated or upset in class and learn and use adaptive prosocial skills, including demonstrating respect for others and applying those skills during conflicts with peers (id.). Another annual goal to improve the student's classroom behavior was to follow classroom rules and teacher directions, complete tasks, and stay in the classroom when feeling bored (id. at p. 6). Finally, the IESP provided an annual goal to increase the student's awareness of the effect of her behavior, engage in efficient problem solving, and take responsibility for her accomplishments (id.).¹¹

To address the student's "coping skills, social skills, and classroom functioning skills," the May 2020 CSE recommended that the student receive two 30-minute sessions per week of counseling in a group, and one 30-minute session per week of individual counseling on a 10-month basis (Dist. Ex. 2 at pp. 5, 6). The CSE also identified management needs of the student including that she needed classroom management strategies and reinforcement of rules, close consultation with the counselor to promote the new learned skills, use of visual charts, organizers as strategies for learning, clarification as needed, redirection and positive reinforcement, promotion of leadership skills and personal interests to enhance positive participation, and modeling and guidance for socially appropriate responses, reminders, and reinforcement of alternate behaviors (id. at pp. 4-5).

The district school psychologist who participated in the May 2020 CSE meeting testified that the psychoeducational evaluation results and reports from the student's teacher indicated that the student had "intact" cognitive abilities and academically she was "doing very well" (Tr. pp. 45, 48). The school psychologist opined that the student did not need SETSS because the classroom teacher reported that the student had shown "tremendous improvement" and that with "reasonable flexibility" the student was doing well in the classroom; she participated, enjoyed being a leader, was friendly with other students, and was working on "her social skills" (Tr. pp. 56-57). The CSE discussed the parents' request for paraprofessional services, which according to the school psychologist was based on the behaviors the student exhibited at home (Tr. pp. 54-55).¹² The school psychologist stated that the CSE did not have "data" supporting the student's need for a paraprofessional in school, as the classroom teacher was "positive" and the CSE was not informed

¹⁰ The May 2020 IESP reflected the parents' opinion that the student's in-school counseling addressed coping skills but not classroom behavior (Dist. Ex. 2 at p. 4).

¹¹ I note that the student's social/emotional and behavior annual goals were similar to those drafted by the student's counselor during the 2019-20 school year (Tr. pp. 47-48, 54; compare Dist. Ex. 2 at pp. 5-6, with Dist. Ex. 6).

¹² The SETSS provider testified that the nonpublic school "required" the student to have paraprofessional services in order to attend (see Tr. pp. 134-35).

about any "incidents" happening at school (Tr. p. 55). At the time of the May 2020 CSE meeting, the teacher reported that the student stayed in the classroom "most of the time" and completed her work; when the student was frustrated and left the classroom, she got a drink of water and came back in a "very short time," which the school psychologist described as a "coping strategy" that was helping the student (Tr. pp. 55-56, 79). According to the school psychologist, no one at the CSE meeting mentioned that the student "elope[d]" and that there was "no at-risk behavior that she would not return to the classroom" (Tr. p. 79). The school psychologist testified that none of the CSE participants requested 12-month services, nor did the CSE receive a "letter" with justification explaining why the student needed summer services (Tr. p. 56).

The student's SETSS provider during the 2019-20 school year testified that she worked with the student after school (Tr. p. 134).¹³ According to the SETSS provider, the student had difficulty paying attention to the details and overall picture, worked fast and impulsively, skipped over instructions, and had difficulty with higher executive functioning skills; therefore, she needed academic support "so that she c[ould] function and participate in a classroom like her peers on grade level and do her work appropriately like her peers on grade level" (Tr. pp. 106-08). The SETSS provider disagreed that the student was "on par" with her class academically, rather, she testified that the student did not "produce the same quality work as many of her peers, and she [did not] produce the work the way the teacher expecte[d] it to be done" (Tr. pp. 116-17). She testified that the student exhibited impulsivity in the classroom, and behaviors such as leaving the classroom when upset, grabbing papers from a teacher, and having verbal outbursts, such that she required an FBA or BIP to make "meaningful academic progress" (Tr. pp. 109-10). The SETSS provider further testified that she expressed her concerns about the student's academic and behavioral needs at the May 2020 CSE meeting, and recommended that the student "have a para[professional] in school at all times, and an increase of SETSS," or at least to maintain the same amount of SETSS (Tr. pp. 108, 110-11, 132). The SETSS provider did not recall whether at the May 2020 CSE meeting she requested that the student receive 12-month services (Tr. pp. 132-33).

Regarding the student's need for SETSS, the psychoeducational evaluation results showed that academically the student exhibited deficits in written language, specifically in sentence building—writing a sentence using target words (Dist. Ex. 2 at p. 2). The May 2020 IESP reflected the classroom teacher's suggestion that the student may benefit from "visual web organizers to enhance her written expression skills" and the CSE developed an annual goal for the student to use web organizers to compose paragraphs to express her ideas (Dist. Ex. 2 at pp. 3, 5).¹⁴ Additionally, the SETSS provider testified that the student was making progress academically due to the SETSS provider's collaboration with the classroom teacher "to make certain modifications for [the student] in the classroom so that she could produce" (Tr. pp. 117-18). As to the student's behavioral needs, although the evidence in the hearing record shows that the student may have exhibited behaviors in school in the past that required additional adult support, the information available to the May

¹³ Although she provided after school services, the SETSS provider testified that she was "in touch" with the student's private paraprofessional who had given her "feedback" and that there was "a lot" of collaboration between the SETSS provider, the paraprofessional, and the classroom teacher (Tr. pp. 112, 117).

¹⁴ There is no indication in the hearing record that the SETSS the student received during the 2020-21 school year addressed this area of need (see Tr. pp. 48-49, 106-08, 135; Dist. Ex. 2 at p. 3).

2020 CSE shows that while the student continued to work on classroom behaviors and performance, she was receptive and responsive to teacher directions as well as classroom management strategies, which together with counseling services the IESP provided to address those needs, as such, the evidence in the hearing record supports the IHO's finding that the May 2020 IESP provided appropriate services and that the student did not require the full-time, 1:1 paraprofessional services and SETSS the parents sought (see Dist. Exs. 2 at pp. 1-5; 6; 10 at pp. 2-3). Additionally, review of the hearing record shows that it lacks a basis to overturn the IHO's determination regarding the appropriateness of the IESP insofar as it did not provide the student with 12-month services (see Tr. pp. 56, 132-33).

C. IEE

Turning to the parents' appeal relating to the FBA/BIP IEE, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see *K.B. v Pearl Riv. Union Free Sch. Dist.*, 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; *R.L. v Plainville Bd. of Educ.*, 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

In the June 2020 due process complaint notice, the parents sought an FBA/BIP as an IEE. The IHO found that the evaluative information before the CSE was sufficient and that the parents did not disagree with any evaluation conducted by the district (IHO Decision at p. 21). In the request for review, the parents assert that without an FBA and BIP, the CSE had insufficient knowledge about the effect of removing paraprofessional services and SETSS—services currently provided through pendency—on the student and allege the IHO erred in determining they did not show the need for an FBA. For relief, the parents request an order requiring "preparation of an

FBA and BIP for the student." It is unclear if the parents still seek that the FBA be conducted by an independent evaluator as an IEE or if they now are requesting that the district conduct the FBA.

Relevant to the parents' request for an FBA as an IEE, the Second Circuit discussed the idea of a comprehensive evaluation or re-evaluation of a student forming the basis of an IEE request, as opposed to a single assessment (i.e., an FBA) (see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 162-68 (2d Cir. 2020); see also T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, 1291 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). The Court held that parents may base a request for an IEE on the last full evaluation conducted by the district (D.S., 975 F.3d at 169-70 ["Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated."]). Although the parents indicated in the due process complaint notice that they disagreed with the district's evaluation, on appeal, the parents' request for an FBA and a BIP is not connected to an evaluation or reevaluation of the student, but rather to allegations that the student exhibited behaviors during the 2019-20 school year that should have triggered the district to conduct an FBA (see Req. for Rev. ¶¶ 28, 39-42; Parent Mem. of Law ¶¶ 12-13). Accordingly, the parents' request for an independent FBA is similar to the situation in D.S. where the FBA was not conducted as part of a student's initial evaluation or reevaluation and therefore could not be the subject of a request for an IEE. Accordingly, there is insufficient basis to grant the parents' request for an independent FBA at this juncture.

Nevertheless, at this time, the CSE should be preparing to conduct the student's annual review by May 26, 2021, and as the parents have requested that an FBA be conducted and there is sufficient indication in the hearing record that an FBA may be a beneficial tool in developing the student's program, it is strongly recommended that the district conduct an FBA of the student and consider those results at the student's next CSE meeting (see Dist. Ex. 2 at p. 1).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student equitable services for the 2020-21 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 30, 2020**

**STEVEN KROLAK
STATE REVIEW OFFICER**