



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-511

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

### **Appearances:**

The Harel Law Firm, P.C., attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the cost of her daughter's tuition at Big N Little: TOL/OYYL Program (the private school) for the 2023-24 school year. The appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

On June 6, 2023, a CPSE convened for an initial meeting, determined the student to be eligible for special education as a preschool student with a disability, and developed an IEP with

a projected implementation date of September 7, 2023 (Dist. Exs. 1 at p. 1; 3 at pp. 3-5; 7 at p. 1). At the time of the June 2023 CPSE meeting, the student was nearly three years old, attending preschool at a nonpublic school, and aging out of early intervention (EI) (see Dist. Ex. 4 at pp. 4-7, 12). As part of the student's transition from EI services to CPSE services, the district conducted a home language survey in April 2023; a health examination, social history, behavioral observation, bilingual psychological evaluation, bilingual educational evaluation, and a bilingual speech and language evaluation in May 2023; and an occupational therapy (OT) evaluation in June 2023 (see Dist. Exs. 2 at pp. 1-6; 4 at pp. 2-18, 24-27).

The June 2023 CPSE recommended the student receive the following supports and services on a 10-month basis: five 60-minute periods of special education itinerant teacher (SEIT) services per week; two 30-minute sessions of individual speech-language therapy per week; one 30-minute session of speech-language therapy in a group setting per week; and two 30-minute sessions of OT in a group setting per week (Dist. Exs. 1 at pp. 22-23; 3 at pp. 1, 3-5). The parent participated in the June 2023 CPSE meeting and consented to the provision of preschool services as recommended (Dist. Ex. 3 at pp. 1, 4-6).

On August 28, 2023, the student underwent a private psychoeducational evaluation (Parent Exs. H at p. 1). The evaluator recommended placement in a 12:1+2 special class along with speech-language therapy and counseling on a 12-month basis (id. at p. 5). The evaluator further recommended that the student undergo OT and physical therapy (PT) evaluations (id.).

On September 4, 2023, the parent signed an enrollment contract with the private school for the 2023-24 school year (Parent Ex. C at pp. 1, 3). Under the contract's terms, the parent was "unconditional[ly]" obligated to pay \$12,000.00 per month for tuition from September 2023 through June 2024 (id. at p. 1). Thus, the total contracted cost of the student's tuition for the 10-month school year was \$120,000.00 (id.). The contract provided no right to any "deduction, credit, [or] prorated apportionment of refund for any reason, including, without limitation, withdrawal, dismissal, or illness or the student" (id.).

On October 9, 2023, the parent, through her attorney, provided the district with notice of her intent to unilaterally place the student at the private school for the 2023-24 school year (Parent Exs. L ¶ 3; I at pp. 1-2). On January 30, 2024, the parent, through her attorney, sent a follow-up letter to the district in which she requested that the district re-evaluate the student, reconvene an IEP meeting, and place the student in a full-time special class and reiterated her intent to unilaterally place the student at the private school (Parent Exs. at L ¶ 4; J at pp. 1-2). The district did not respond to the aforementioned letters, and the student attended the private school for the 2023-24 school year (Parent Exs. K ¶ 11; L ¶¶ 2, 5).

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

In a due process complaint notice dated June 11, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year on substantive and procedural grounds (Parent Ex. A). More specifically, the parent alleged that the recommended program, which consisted of SEIT services and related services, failed to adequately address the student's needs, as the student required a 12:1+1 special class and

a behavioral plan to make meaningful progress (id. at pp. 3-4). The parent further alleged that the district failed to reevaluate the student and reconvene the CPSE after the parent disagreed with the recommended program and placement (id. at p. 4). As relief, the parent requested direct funding and/or reimbursement of the cost of the student's private school tuition for the 2023-24 school year (id.).

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

Following a prehearing conference, an impartial hearing convened on September 5, 2024 before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) (see Tr. at pp. 1-59). The parent presented various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 24-29). Among the parent's exhibits were affidavits of the program supervisor at the private school and the parent herself (see Tr. pp. 24-25; Parent Exs. K; L). The program supervisor also gave live testimony during the hearing (see Tr. pp. 34-44). The district presented no testimony but did offer various documents, each of which the IHO admitted into evidence (see Tr. at pp. 21-23; Dist. Exs. 1-7).

In a decision dated September 27, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year and denied the parent's request for relief (IHO Decision at pp. 8, 12). The IHO found that the district provided a cogent and responsive explanation for its recommendations by presenting the evaluative materials used to create the June 2023 IEP, many of which were quoted verbatim throughout the IEP (id. at pp. 6, 8). The IHO found that the evaluations considered by the CPSE, which represented all the data available to the district at the time, provided "an overall picture of [the] [s]tudent's learning, attentional, social-emotional, and behavioral profile," and the IHO deemed the reasoning supporting the CPSE's recommendations to be "credible and convincing" (id. at pp. 7-8). The IHO further found that the student's deficits and needs were documented and that the CPSE developed appropriate goals, similar to those developed at the private school, that addressed the student's areas of need (id.). Thus, according to the IHO, the district's recommended program was reasonably calculated to provide educational benefits to the student in the least restrictive environment (id. at pp. 6-7).

Then, despite concluding that the district offered the student a FAPE for the 2023-24 school year, the IHO analyzed, in the alternative, whether the parent met her burden of proving that the private school provided an appropriate educational program for the student (IHO Decision at p. 8). According to the IHO, the program supervisor's testimony, as well as the private school's assessments, plans, and reports, together, established that the private school addressed the student's individual educational needs and provided instruction reasonably calculated to enable the student to receive educational benefits (id. at 10).

Finally, the IHO determined that, even if the district had denied the student a FAPE for the 2023-24 school year, the equities would warrant denial of the requested relief (IHO Decision at p. 10). The IHO reasoned that the parent sent her 10-day notice and follow-up letter after she was already unconditionally obligated to pay the full cost of the private school tuition for the 2023-24 school year (id. at p. 11). Thus, according to the IHO, the parent did not give the district's recommended program due consideration (id. at pp. 10-11). The IHO further reasoned that an award of district funding of annual tuition in the amount of \$120,000.00 for a preschool student

on her first IEP could not be justified (*id.* at p. 11). The IHO expressed particular concern that the private school's flat rate of \$12,000.00 per month for all preschool students, regardless of the specific services they receive, was not adequately explained (*id.*).

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

The parent appeals for state-level review. The parties' familiarity with the issues raised in the parent's request for review and the district's answer is presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parties' dispute is whether the IHO erred in determining that the district offered the student a FAPE for the 2023-24 school year and, if so, whether equitable considerations warrant denial of the requested relief.

#### **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>1</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist.

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<sup>1</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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 Impartial Hearing and Review**

Before addressing the merits, I must determine which claims were sufficiently raised before the IHO and which claims are properly before me on appeal.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

State regulation provides that a pleading must set forth "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 specifies 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 Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at \*6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

As an initial matter, neither party has appealed the IHO's determination that the parent met her burden of proving that the private school provided an appropriate educational program for the student. That unappealed determination has, therefore, become final and binding on the parties

and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992 (S.D.N.Y. March 21, 2013).

In her due process complaint, the parent alleged that "[t]he [district] failed to evaluate, reconvene an IEP meeting, create a timely and appropriate [p]rogram, implement the [p]rogram that it did create, and provide a placement for the student" (Parent Ex. A at p. 4). As for the alleged lack of implementation, which the IHO's decision did not address, the parent provided no supporting factual details (see id. at pp. 3-4). Thus, it is unclear whether the parent meant that the district failed to implement the June 2023 IEP or that the district failed to implement a new program following the desired reevaluation of the student and reconvene of the CPSE. The alleged lack of implementation is beyond the scope of the impartial hearing because, without more detail in the due process complaint, the district lacked notice of the allegation it was required to rebut (cf. Application of a Student with a Disability, Appeal No. 24-397 [concluding that the parent sufficiently alleged the district's failure to implement the student's mandated services where the parent alleged that the district failed to supply a provider for the 2023-24 school year]). In her request for review, the parent asserted that the district "failed to show it implemented the [p]rogram that it did create" without explaining how the IHO erred in that regard (Req. for Rev. ¶¶ 10-11). Therefore, the matter is beyond the scope of review on appeal and will not be further addressed. The request for review is silent with respect to the district's alleged failure to reevaluate the student and reconvene a CPSE (see Req. for Rev. ¶¶ 10-15). Those issues are therefore deemed abandoned and will not be reviewed on appeal.

## **B. The June 2023 IEP**

### **1. Burden of Proof**

The parents contend, on appeal, that the district failed to properly defend the June 2023 IEP at the hearing. Specifically, the parents argue that the district presented no testimony to explain the documents the CPSE relied on in creating the June 2023 IEP or the rationale for the recommendations contained in the IEP. Thus, according to the parent, the IHO's determination that the recommended program was reasonably calculated to provide an educational benefit to the student lacks support in the hearing record. The district argues that the IEP itself references the evaluations that contributed to the IEP's development and that the district may, indeed, sustain its burden of proof based on documents alone.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).<sup>2</sup> Under State law, however, the burden of proof has been placed on the school district during

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<sup>2</sup> Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).



an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Thus, the district has the burden of proving that the IEP it created was appropriate to meet the student's special education needs.

In Andrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). While the district's burden does not require that the district call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations. If the district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

Here, the district presented documentary evidence including the June 2023 IEP itself, notices to the parent, parental consents, and other materials pertaining to the district's initial evaluation of the student and development of the IEP (see Tr. pp. 21-23; Dist. Exs. 1-7). Additionally, the district presented the evaluative materials which the CPSE used in developing the student's IEP (see Tr. pp. 21-23; Dist. Exs. 2; 4). Those evaluative materials included a home language survey, social history, behavioral observation, bilingual psychological evaluation, bilingual educational evaluation, bilingual speech and language evaluation, and an OT evaluation (see Dist. Exs. 2 at pp. 1-6; 4 at pp. 3-18, 24-27).

Contrary to the parent's contention, the district's presentation of documentary evidence was sufficient to sustain its burden of proof (see Application of a Student with a Disability, Appeal No. 24-084 [reversing the IHO's determination that the district failed to meet its burden of proof without testimony "to explain why it was appropriate . . . to rely on [the evaluative information] and why the IEP was appropriate"]). The basis for the CPSE's recommendations is evident from the June 2023 IEP, reviewed in conjunction with the aforementioned evaluative materials. Indeed, the IEP referenced specific assessments administered to the student and quoted verbatim from the various evaluation reports (compare Dist. Ex. 1 at pp. 1-4, with Dist. Exs. 2 at pp. 1-6; 4 at pp. 3-4, 6-18, 24-27). As further explained below, the district's presentation provided sufficient information to enable a fact-specific analysis of the parent's particular challenges to the IEP's substantive adequacy.

## **2. The Student's Needs**

A review of the student's needs and then-current functioning will provide the further background necessary to evaluate the substantive adequacy of the June 2023 IEP.

The district's psychological, educational, speech-language, and OT evaluations included the following assessments of the student: a home language survey; a social history in Hebrew and in English; parent, teacher, and therapist interviews; a behavioral observation; the Stanford Binet Intelligence Scales for Early Childhood—Fifth Edition (Early SB5); interviews of the student's parent, therapist, and teacher via the Vineland Adaptive Behavior Scales Third Edition (Vineland-III); the Revised Brigance Diagnostic Inventory of Early Development; the Hawaii Early Learning Profile (HELP); classroom observation; the Preschool Language Scales-Fifth Edition (PLS-5) and an attempted administration of the Goldman Fristoe Test of Articulation; the Peabody Developmental Motor Scales (PDMS-2); and the Sensory Profile (Dist. Exs. 2 at p. 1; 4 at pp. 3-18, 24-27, 40-41).<sup>3, 4</sup>

Administration of the Early SB5 to the student yielded results which reflected a full-scale IQ within the borderline impaired range of intelligence and "a significant difference between [the student's] verbal and nonverbal abilities" (Dist. Ex. 4 at pp. 8, 10).<sup>5</sup> Administration of the Vineland-III to the student's mother, therapist, and teacher yielded results which reflected an overall adaptive behavior composite within the moderately low range (Dist. Exs. 1 at p. 1; 4 at p. 9). A comprehensive interview with the student's teacher, conducted as a part of the May 2023 bilingual educational evaluation, highlighted the student's difficulties in grasping concepts, participating appropriately in group projects, interacting appropriately with peers, following through with tasks, joining classroom activities, and focusing (Dist. Ex. 4 at p. 14).

The student's present levels of performance, as described in the June 2023 IEP, are consistent with the information contained in the May 2023 evaluation reports (compare Dist. Ex. 1 at pp. 1-3, with Dist. Ex. 4 at pp. 6-10, 13-17). According to the June 2023 IEP, the student "present[ed] with concerns in the areas of cognition, expressive/receptive language, social/emotional development, fine motor development[,] and classroom functioning" (Dist. Ex. 1 at p. 1).

According to the IEP, the student's teacher expressed "concern that [the student] [was] lagging behind her peers in her academic development skills" (Dist. Ex. 1 at p. 1). For example, the student had difficulty understanding and following simple directions, answering questions, and following the classroom schedule and routine (id.). The IEP reported that the student was able to match like objects, "act[] out a few requested motions," and "point[] to some body parts," but the student struggled to sort by color and shape, point to or identify any primary colors or shapes,

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<sup>3</sup> The bilingual psychological, educational, and speech-language therapy evaluations were conducted in Hebrew and in English, while the OT evaluation was conducted solely in English (see Dist. Exs. 2 at p. 2; 4 at pp. 6, 10, 13, 24).

<sup>4</sup> The preschool student evaluation summary report includes descriptors from the "DAYC-2," although administration of the assessment is not reflected in the evaluations that were conducted (see Dist. Ex. 4 at pp. 40-41). DAYC-2 is presumed to refer to the Developmental Assessment of Young Children-Second Edition.

<sup>5</sup> According to the certified bilingual school psychologist who conducted the evaluation, the results of the evaluation "should be interpreted with caution because of the absence of appropriate norms and deviations from standard procedures to accommodate bilingual issues" (Dist. Ex. 4 at pp. 6-7). The IEP noted that the student did not speak during the evaluation (Dist. Exs. 1 at p. 2-3; 4 at p. 7).

"verbally identify body parts and articles of clothing," and "understand the concept of many/few and big/little" (*id.* at p. 2). The IEP further reported that the student took "a long time to finish a specific activity" and required reassurance, prompting, and redirecting throughout the day (*id.* at pp. 1, 3).

Moreover, the IEP reported delays in the student's attention span and focusing skills, describing the student as "slow moving" and insufficiently aware of stimuli in her environment (Dist. Ex. 1 at pp. 2-3). According to the June 2023 OT evaluation, the student "was able to transition easily from one activity to the next" and "sit and attend to the activities that were presented to her for brief periods of time" (Dist. Ex. 2 at pp. 2-3). According to the parent, the student "usually transition[ed] easily from activity to activity," and, while the student "c[ould] stay focused on tasks" and "imitate[] some relatively complex actions," she "d[id] not follow many directions" and "ha[d] difficulty using words to express herself" (Dist. Ex. 4 at p. 5).

As for the student's receptive and expressive language development, administration of the PSL-5 to the student revealed moderate expressive and receptive language delays (Dist. Exs. 1 at p. 1; 4 at pp. 25, 26). According to the IEP, the student had a limited vocabulary and difficulty communicating effectively (Dist. Ex. 1 at p. 1). The report of the bilingual educational evaluation indicated that the student "respond[ed] to simple questions using [one to two-word] utterances" (Dist. Ex. 4 at p. 16). The IEP likewise indicated that the student "was unable to use three and four[-]word phrases," "produce a variety of parts of speech in spontaneous speech," use "verb + ing," use plurals, "respond to basic questions with and without visual cues," name described objects, "tell how an object is used," or respond to logical questions (Dist. Ex. 1 at p. 2). The IEP further indicated that the student "would not approach her teacher to express her wants and needs or to indicate if something [was] bothering her" (*id.* at p. 3). The parent reported that the student was able to make simple requests and use phrases with a noun and verb but expressed concern regarding the student's ability "to describe things, ask many 'wh' questions, or tell about experiences" (Dist. Ex. 4 at p. 4).

As for the student's physical development, administration of the PDMS-2 and the Sensory Profile Questionnaire, along with clinical observation and parent and teacher reports, yielded a score on the visual motor domain that fell at the 16th percentile rank, a score on the grasp domain that fell at the ninth percentile rank, and a score that was two standard deviations below the mean in the area of taste/smell sensitivity on the Sensory Profile Questionnaire (Dist. Exs. 1 at p. 1; 2 at pp. 5-6). The IEP indicated that the student "scored in the [b]elow [a]verage range in the [f]ine [m]otor [d]evelopment and [a]daptive [b]ehavior domains" but "scored in the [a]verage range in the [g]ross [m]otor [d]evelopment domain" (Dist. Ex. 1 at p. 3). The IEP further indicated that the student "had difficulty positioning and holding a crayon," coloring within a thick border, "beading large sized beads together," and turning puzzle pieces to fit into a puzzle (*id.*). According to the IEP and the OT evaluation report, the student "present[ed] with overall low muscle tone," apparent upper body weakness, and "range of motion in her upper extremities within normal limits" (Dist. Exs. 1 at pp. 1, 3; 2 at p. 3).

As for her social/emotional development, the student was described as a generally happy and active girl who was "shy and quiet with new people and new situations," "engage[d] in some pretend play," interacted with other children, and "sometimes share[d] and t[ook] turns" (Dist. Exs.

1 at p. 3; 4 at pp. 5, 10). The IEP indicated that, while the student "enjoy[ed] being in the company of other children," she was quiet in the classroom, would not initiate activities with other children, and "tend[ed] to only play with her sister who [was] in her class" (Dist. Ex. 1 at p. 2). The IEP indicated that, while the student "ha[d] difficulty interacting appropriately with other children," "[s]he [was] not aggressive when interacting with her peers" (*id.* at p. 3). The IEP further reported that the student would "wander aimlessly around the classroom" and would not "do things on her own" (*id.*). According to the IEP, the student needed "redirecting and prompting to join in on classroom activities and to keep up with the rest of the class" (*id.*).

### **3. Interfering Behaviors (FBA/BIP)**

The parent contends that the June 2023 IEP failed to adequately address the student's social, cognitive, and academic challenges in that it failed to recommend placement in a full-time special education classroom and a "behavioral plan." The district argues that, based on the evaluative materials available to the CPSE at the time of the June 2023 meeting, the resulting IEP adequately addressed the student's needs. I will first address the parent's contention that the district should have developed and implemented a behavioral plan.

In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172). A district is also required to conduct a functional behavioral assessment (FBA) in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a behavioral intervention plan (BIP) for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally,

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

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing

consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Review of the June 2023 IEP, along with the evaluative materials that contributed to the IEP, reveals that, while the student demonstrated delays across all developmental domains, the student did not demonstrate interfering behaviors such that a BIP based upon an FBA was needed (see Dist. Exs. 1 at pp. 1-4; 2 at p. 5; 4 at pp. 4-5, 8, 13-15, 26-27, 40-41).<sup>6</sup> Consistent with the parent's own description of the student, the June 2023 IEP described the student as a "generally

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<sup>6</sup> As discussed in more detail below, the June 2023 CPSE identified management needs, developed goals, and recommended services to address each area of need (see Dist. Ex. 1 at pp. 1-12, 21-22).

happy girl who" "engages in some pretend play," "interacts with other children," "sometimes shares and takes turns," and "usually transitions easily from activity to activity" (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 4 at p. 5). Moreover, the June 2023 IEP reported that the student "[was] not aggressive when interacting with her peers" based on information obtained from the student's preschool teacher (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 4 at pp. 13-14).<sup>7</sup> Thus, based on the information available to the June 2023 CPSE, the district was not required to develop and implement a BIP (see Application of the Bd. of Educ. of the Northport-East Northport Union Free Sch. Dist., Appeal No. 24-383 [concluding that an FBA was not necessary where the student "sometimes struggled to cope effectively" when frustrated but was otherwise described as cooperative, friendly, and respectful]; cf. Application of a Student with a Disability, Appeal No. 24-416 [upholding the IHO's determination that the district's failure to develop an updated BIP denied the student a FAPE where the contested IEP noted the student's inability "to participate in social play and activities of [daily] living (ADLs) until his [aggressive] behaviors were 'managed'"]).<sup>8</sup>

#### **4. Educational Placement**

As a final matter, I will address the parent's contention that the student required a 12:1+1 special class to make meaningful progress.

In developing the recommendations for a student's IEP, the district must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

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<sup>7</sup> The Bilingual Educational Evaluation included a description of testing behavior that indicated the student was uncooperative, refused to engage in activities, and did not respond well to positive reinforcement and motivation but also stated that she cooperated with all the objectives of the assessment to the best of her abilities (Dist. Ex. 4 at p. 14).

<sup>8</sup> While it appears the private psychologist's report was not available to the June 2023 CPSE, the parent submitted it as evidence during the impartial hearing (see generally Parent Ex. H). As further context to the discussion of whether or not the student required an FBA or BIP in order to receive a FAPE from the district, I note that the parent appears to have based her request for a behavioral intervention plan on the psychoeducational evaluation conducted on August 28, 2023 by a school psychologist who is referred to as the "school counselor" at Big N Little (Parent Ex. H at pp. 1, 5; see Parent Ex. G at p. 2). As part of the private school psychologist's evaluation of the student, the student's teacher served as informant for the Vineland-3 and her responses yielded much lower scores than the previous administration of the Vineland-3 three months earlier (compare Parent Ex. H at pp. 4-5 with Dist. Ex. 4 at pp. 4-5). In the socialization domain, the teacher reported that the student "had difficulty controlling her emotions when she did not get her own way or when plans change" (Parent Ex. H at p. 4). This was not reported by the student's mother, teacher, or therapist when they were interviewed in May 2023. The private school psychologist reported that the student received an internalizing behavior score in the elevated range in the maladaptive behavior domain (Parent Ex. H at p. 4). In addition, there are discrepancies regarding Vineland-3 scores within her evaluation report (compare Parent Ex. H at p. 2 with Parent Ex. H at pp. 4-5).

The IDEA requires that a student's recommended programming be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]).

The hearing record supports the IHO's finding that the evaluations conducted as part of the student's transition from EI services to CPSE services provided the CPSE with "an overall picture of [s]tudent's learning, attentional, social-emotional, and behavioral profile" (IHO Decision at p. 7; compare Dist. Ex. 1 at pp. 1-4, with Dist. Exs. 2 at p. 5; 4 at pp. 4-5, 8, 13-15, 26-27, 40-41).<sup>9</sup> As explained in more detail above, the June 2023 CPSE determined the student's present levels of academic achievement and functional performance with information from various district assessments of the student's needs across all developmental domains (compare Dist. Ex. 1 at pp. 1-4, with Dist. Exs. 2 at p. 5; 4 at pp. 4-5, 8, 13-15, 26-27, 40-41). Moreover, the CPSE considered the parent's input regarding the student's cognitive, language, social/emotional, fine motor, and sensory needs (see Dist. Ex. 1 at pp. 2-4).<sup>10</sup>

The June 2023 IEP reflected the CPSE's determination that the student's global delays impacted her ability to access the general education curriculum without the support of SEIT services and related services (Dist. Ex. 1 at p. 4).<sup>11</sup> In addition to the recommendation for daily

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<sup>9</sup> Although the student underwent a private psychoeducational evaluation on August 28, 2023, as previously noted, the hearing record lacks evidence that the parent provided a copy of the resulting report to the district (Parent Ex. H at p. 1).

<sup>10</sup> The IEP noted that, during the CPSE meeting, "the parent said that her daughter [was] developing as an average child her age" (Dist. Ex. 1 at p. 2).

<sup>11</sup> State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including

SEIT services, as well as speech-language therapy and OT, the IEP identified the student's management needs (id.). Specifically, the IEP indicated that the student would benefit from verbal cues, visual cues, warning of transitions, and explicit vocabulary instruction (id.). Moreover, the June 2023 CPSE developed approximately 10 annual goals to address the student's needs in the areas of cognition, receptive and expressive language, social/emotional development, fine motor skills, gross motor skills, visual perception, and sensory processing (id. at pp. 5-13).<sup>12</sup> Each goal reflected short term instructional objectives, criteria to determine if the goal had been achieved, the method of how progress for each goal would be measured, and a schedule for when progress would be measured (see id.). In addition to the aforementioned management needs, the June 2023 CPSE recommended various strategies to assist the student in meeting her goals including the use of modeling, positive reinforcement, and multi-sensory activities (see id. at pp. 7-12).

Contrary to the parent's contention, the information available to the CPSE at the time of the June 2023 meeting did not justify the student's removal from the general education setting (see Application of a Student with a Disability, Appeal No. 24-318 [concluding that the district offered the student a FAPE, despite the parents' desire for a more restrictive placement, where the CSE used evaluations completed within the previous three months in developing the contested IEP]; Application of the Dep't of Educ., Appeal No. 23-120 [concluding that the district offered the student a FAPE, despite the parents' desire for a more restrictive placement, where, in addition to recommending integrated co-teaching services and related services, the CSE identified the student's management needs, recommended strategies to meet the student's management needs, and developed "approximately 19 annual goals to support the student's social/emotional, executive

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but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

<sup>12</sup> To address the student's cognitive skill development, the June 2023 IEP included a goal for the student to sort objects according to size, shape, and color with decreasing prompts; count with 1:1 correspondence from 1-10 with decreasing prompts; count by rote from 1-10; and understand the quantitative concepts of one, one more, and all with decreasing prompts (Dist. Ex. 1 at p. 5). Regarding the student's executive functioning needs, the IEP included a goal for the student to demonstrate age appropriate focusing skills (id. at p. 8). In terms of visual perceptual skills, the IEP included a goal for the student to assemble a 10 to 15-piece puzzle independently; imitate three-to-six cube designs; and trace on a line (id. at pp. 12-13). Further, with respect to expressive communication, the IEP included a goal for the student to use words to respond to instructions or "wh" questions during structured activities with fading visual and verbal cues (id. at pp. 9-10). Regarding the student's fine motor skills, the IEP included a goal for the student to imitate circles, crosses, and squares; to cut across a paper, cut on a line; cut out shapes; and to write using a mature three finger grasp (id. at pp. 10-11). To target the student's social/emotional needs, the IEP included a goal for the student to demonstrate age appropriate social/emotional skills, e.g., able to share, express emotions, and engage in a conversational exchange during unstructured activities (id. at p. 7). To further address the student's social/emotional needs, the IEP reflected another goal for the student to join teacher and peer activities, e.g., initiate and maintain social interactions with peers, play cooperatively with others, participate in parallel play, and engage in associative play (id. at pp. 7-8). To target the student's sensory processing needs, the IEP included a goal to tolerate eating one new food during mealtime and loud noises without crying for a half-hour, and to follow two-step instructions with less than three prompts, both following the completion of a sensory diet (id. at p. 11).



functioning, and academic needs").<sup>13</sup> Although the student presented with developmental delays and some self-directed behavior, on at least some evaluations the student exhibited age-appropriate self-help skills, socialization skills, and fine and gross motor skills (see Dist. Ex. 4 at pp. 9-10). Notably, the student was not even three years old at the time of the evaluations that contributed to the contested IEP, the student's first preschool level IEP (see Dist. Ex. 4 at pp. 4, 6, 10, 12-13, 17, 24, 40). Considering the student's young age and the district's obligation to provide the recommended programming in the LRE, the hearing record supports the IHO's determination that the district's recommendation for SEIT services, along with related services, was reasonably calculated to provide educational benefits to the student.

## VII. Conclusion

Having determined that the record evidence supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end, and I need not reach the issue of whether equitable considerations support the parent's request for relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 22, 2025**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**

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<sup>13</sup> The August 2023 private psychoeducational evaluation, which recommended a more supportive placement, is inconsequential, as "a substantively appropriate IEP may not be rendered inadequate" by subsequent events or evaluative information "not before the CSE" (D.A.B. v. N.Y. City Dep't of Educ., 973 F.Supp.2d 344, 361-62 [S.D.N.Y. 2013]; see also S.W. v. N.Y. City Dep't of Educ., 92 F.Supp.3d 143, 158 [S.D.N.Y. 2015]). Moreover, while the district was required to provide the parent an opportunity to participate in the development of the student's IEP, the district was not required to accede to the parent's requests (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. 2018]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006]).