



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-167

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the XXXXXXXXX

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

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)¹ appeals from a decision of an impartial hearing officer which denied her request to direct the district (respondent) to provide reimbursement to the parent for a vision evaluation for her son and also denied the parent a "Nickerson letter" or order of placement at a State-approved nonpublic school.

II. Overview—Administrative Procedures

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

¹ The parent proceeds pro se in this matter and, therefore, is not identified, however, she is an attorney with experience litigating on behalf of other parties in IDEA due process proceedings.

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

In this case, the student was not classified as a student with a disability for the 2011-12 or 2012-13 school years by the district's CSE. The student has attended a public charter school within the district since kindergarten and was in the fourth grade for the 2012-13 school year.

On October 27, 2011, the parent first requested evaluations for the student due to her concerns about his functioning in the classroom, but did not receive a response (Parent Ex. S; Tr. p. 1132). The parent filed for an impartial hearing and on April 2, 2012, an IHO ordered evaluations because he could not determine whether the student had a disability (Parent Ex. G).

A CSE meeting was held on May 4, 2012. The parent filed for an impartial hearing after this CSE meeting and on August 8, 2012, an IHO ordered a new CSE meeting be conducted, which was held in late August 2012, based upon the CSE failure to allow the parent meaningful participation because the CSE did not consider the parent's privately obtained evaluations (Parent Ex. H). The IHO also ordered the district to pay the parent for private evaluations that the IHO found were necessary to fully access the student in the areas of suspected disability (Parent Ex. H, at p. 6).

On August 31, 2012, the CSE convened and found that the student was not a child with a disability entitled to a FAPE (Dist. Exs. 2, 3, Parent Ex. V, Tr. pp. 1133-34). The CSE considered evaluations including the psychoeducational evaluation performed by the district on April 30, 2012 and a private neuropsychological evaluation dated May 6, 2012 obtained by the parent (IHO Decision, p. 8, Dist. Exs. 4, 6).

A. Due Process Complaint Notice

In a due process complaint notice dated September 20, 2013, the asserting that the August 31, 2012 IEP meeting was held late pursuant to the IHO's order, and also that the district improperly failed to classify the student and provide accommodations, denying him a FAPE to which he was entitled (Parent Ex. A). The parent asserted that the student had been denied a FAPE for the 2011-12 and 2012-13 school years despite testing that showed that he should be eligible for special education as a student with a disability (*id.*). The parent requested the following relief: reimbursements for private testing; a Nickerson letter; deferment to the CBST for non-public school placement; compensatory tutoring; an order striking the August 31, 2012 IEP meeting as null and void; an order directing an IEP meeting be held to develop an appropriate educational program and accommodations for the student (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 26, 2012 and concluded on May 15, 2013, after 10 nonconsecutive hearing dates (Tr. pp. 1-1152).

In a decision dated August 1, 2013, the IHO found that, for the 2012-13 school year, the student was a student with a disability that adversely affects his educational performance and is in need of special education and related services consisting of at the least occupational therapy and counseling (IHO Decision at p. 21). The IHO determined that the district had denied the student a FAPE (*id.*). Regarding the parent's requested relief, the IHO first found that the parent's request for reimbursement for private evaluations was previously determined at a prior impartial hearing and therefore denied this request (*id.* at pp. 21-22). Regarding the parent's request for a Nickerson letter, that IHO noted that the parent's requested relief encompassed only the 2011-12 and 2012-13 school years (*id.* at pp. 22-23). The IHO determined it would be

inappropriate to issue a Nickerson letter for school year that had passed and also found that it would be inappropriate to issue one for a future school year that had not been the subject of the impartial hearing (*id.*). The IHO noted that compensatory tutoring could be an appropriate form of relief, but that the record was insufficient to award compensatory tutoring because there was no detail of the specific nature or amount required (*id.* at p. 23). Regarding the parent's request for deferment to the Central Based Support Team (CBST) for nonpublic school placement, the IHO found no authority to issue such relief and noted that the parent cited no such authority (*id.* at p. 24). The IHO granted the relief of the parent to strike the IEP meeting of August 31, 2012 as null and void for failure to comply with IDEA and the Education Law (*id.* at p. 24). The IHO ordered an IEP meeting to be held to develop an appropriate program and accommodations for the student for the 2013-14 school year (*id.*).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision to the extent that it denied parental reimbursement for a visual perceptual evaluation performed on September 12, 2012. The parent argues that reimbursement for this evaluation, which was performed after the last impartial hearing, could not be collaterally estopped based on the fact it had not occurred at the time of the last hearing.

The parent also requests that the IHO's decision be reversed to the extent it failed to grant the parent a Nickerson letter and/or failed to grant an order of placement at a State approved non-public school. The parent argues that because the hearing concluded after the school year at issue in the due process complaint notice had ended, the IHO was not precluded from granting relief that would affect the 2013-14 school year.

The district answers, denying the allegations contained in the petition asserting that the IHO properly denied reimbursement for the visual perceptual valuation, and also properly denied the parents request for a Nickerson letter and in order for placement of state approved non-public school for the 2013-14 school year. The district argues that the parent has failed to establish that there is a meritorious basis for reversing the IHO's decision on these issues. Specifically, the district argues that the issue of reimbursement for the visual perceptual evaluation is barred by the doctrine of collateral estoppel because it was addressed and could have been addressed in the second impartial hearing. Regarding the parent's request for a Nickerson letter and deferral to the CBST, the district argues that such remedies are moot because the school year that is the subject of the due process complaint notice has passed and also that the SRO does not have jurisdiction or authority to issue such relief.

The parent replies to the district's answer, arguing that additional evidence submitted by the district should not be permitted because it post dates the impartial hearing and also not necessary for a decision in the instant appeal. The parent also reiterates her arguments that her request for reimbursement for the visual perceptual evaluation should not be barred by collateral estoppel and that the parent's request for an appropriate determination on placement should have been determined by the IHO.

V. Applicable Standards

Evaluative Data

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. 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; 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 district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Procedural Issues

First, I will address two procedural issues arising on appeal. First, the parent has requested that the district's answer be struck due to problems with clarification of the record before the IHO. I note that the admission of evidence before the IHO was often a lengthy process and with contests and many exhibits were admitted into evidence by both sides. In this case, I provided both parties with the opportunity to settle the record and submit clarification regarding the proper exhibits that were admitted into evidence. The proper exhibits admitted into evidence before the IHO have been clarified and submitted to the Office of State Review. I do not find it appropriate in this instance to strike the answer of the district and I decline to do so.

The second procedural issue is the parent's objection to the district's reference and submission of two documents that were not before the IHO relating to the 2013-14 school year. The first document is an August 29, 2013 IEP for the student finding the student eligible for special education, and the other is a due process complaint challenging the adequacy of the September 2013 IEP. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, I find that it is necessary to allow the admission of the documents for the limited purpose of clarifying the position now taken by the parties on appeal—that the district has not challenged the IHO's the relief directed by the IHO in this case that the student should be classified as eligible for special education and related services as well as that the August 2013 CSE did not recommend placement of the student at the Summit School as the parent requested in this proceeding and that parent initiated a challenge to the resulting August 2013 IEP for the 2013-14 school year.

B. Reimbursement for Vision Evaluation

I find no fault with the IHO's determination that the claim for reimbursement for the September 2012 visual perceptual evaluation obtained by the parent is barred by the doctrine of collateral estoppel (IHO Decision, at pp. 21-22; see Parent Ex. J). The parent argues that because the visual perceptual evaluation was performed after the August 2012 IHO decision, such evaluation's reimbursement should not be barred by collateral estoppel. The district argues that the prior IHO's August 2012 decision necessarily decided which evaluations were necessary and subject to reimbursement and therefore this issue is precluded by the doctrine of collateral estoppel.

Collateral estoppel precludes a party from relitigating an issue that was decided in an earlier proceeding (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]). To prove collateral estoppel, a party must show that:

(1) the identical issue was raised in a previous proceeding; (2) the issue was 'actually litigated and decided' in the previous proceeding; (3) the party had a 'full and fair opportunity' to litigate the issue; and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits.'

(Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, * 6 [N.D.N.Y. Dec. 19, 2006] [quoting Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

I note that the parent's visual skills report dated June 14, 2012 recommended a further visual evaluation (Parent Ex. I). One of the recommendations of this report is as follows: "A visual perceptual evaluation to determine whether or not there is a visual perceptual component to [the students] academic difficulties." (Parent Ex. I at p.3). The IHO who rendered the August 8, 2012 decision was in receipt of the visual skills report (Parent Ex. H at pp. 4, 8). The IHO considered the assessments deemed necessary and concluded that "I will order that the CSE reimbursed the parent for the neuropsychological evaluation and occupational therapy evaluation that have been submitted herein and are necessary to fully assess the student in all areas of suspected disability" (Parent Ex. H at p. 6). Therefore, despite the fact that the visual perceptual evaluation was not performed until after the impartial hearing resulting in the August 8, 2012 decision, it is clear that the basis for requiring this additional assessment, and payment for it, was in front of the IHO at that time (Parent Ex. H). The IHO noted that the private neuropsychological evaluation of the student assessed the student's visual perceptual abilities (Parent Ex. H at p. 4). The August 2012 IHO decision is clear that it was considering and determining exactly what evaluations were required for a full evaluation and assessment of the student in all areas of suspected disability and this decision did not mandate a further visual perceptual evaluation (Parent Ex. H). For all the foregoing reasons, and based upon the doctrine of collateral estoppel, I concur with the IHO's determination that the parent cannot be reimbursed for the visual perceptual evaluation conducted on September 12, 2012 issue in this proceeding.²

C. Nickerson Letter

With regard to the next issue, I find no reason to disturb the IHO's determination that a Nickerson letter would not have been appropriate. As noted by the IHO, the relief sought by the parent was for the 2011-12 and 2012-13 school years, and therefore a Nickerson letter for school year 2013-14 would have been beyond the scope of the relief sought in the due process complaint notice.

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

² The although reimbursement for the private evaluation is not proper in this proceeding, the parent is within her right to have the CSE consider the private visual perception evaluation in accordance with regulation (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi][a]).

U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 - *7 [S.D.N.Y. Sept. 16, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579 at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 19122442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

Additionally, I do not find that either that IHO or myself would have authority to issue a Nickerson letter. A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 44 [S.D.N.Y. 2011]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rest with the district court in circuit courts of appeal (see 28 U.S.C. §1292 [a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011] aff'd, R.E., 694 F.3d 167. No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Instead, "[i]t has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]).

Consequently, neither the IHO, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]; Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has consistently distinguish systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from

technical questions of how to define entreat individual students' learning disabilities, which are best addressed by the administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also, R.E., 785 F. Supp. 2d at 43-44; E.Z.-L., 763 F. Supp. 2d at 594; Dean v. Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).

While it has been noted that if the hearing record is properly developed, appropriate relief for a particular student by an administrative officer may include relief similar to that granted to the plaintiff class in Jose P. (see Application of a Student with a Disability, Appeal No. 10-115), the IHO noted that the record was not developed to that extent in this case to permit such compensatory education services to be considered (IHO Decision, at p. 23), however, I note that the lack of a hearing record was due in part to the IHO's decision to preclude testimony regarding the Summit School over the parent's objection (Tr. p. 1026). While at the time of the impartial hearing I might have opted to allow the parent some additional leeway to offer some evidence of why she believed the Summit School could have addressed the student's needs, I am not convinced, as further described in the next section regarding LRE, that this unduly prejudiced the parent because under the circumstances of this case appropriate relief need not include future removal from public school and prospective placement in a nonpublic school for the 2013-14 school year in order to receive a special education program to address his needs. Additionally, the IHO awarded relief in the form of a finding that the student should have been designated a special education student and an order directing the district to convene a CSE meeting to create an IEP for the student. These portions of the IHO's decision have not been appealed. I find that the IHO fashioned an appropriate equitable remedy under all the circumstances.

For the foregoing reasons, I concur with the IHO's decision to deny issuance of a Nickerson letter for the student for the 2013-14 school year.

D. Placement in State-Approved Nonpublic School

According to the IHO, the parent did not provided authority for the IHO to defer the student's placement to the CBST, requiring placement in a State-approved nonpublic school (IHO Decision, p. 24). The authority referenced by the parent involves a prior SRO decision that is factually and legally distinguishable insofar as the district and parent in that case agreed that the recommended public school placement was not appropriate for the student and the exception to the mootness doctrine was operative in the case (Application of a Student with a Disability, Appeal No. 11-048). The CSE is empowered to recommend appropriate services as noted by the IHO (IHO Decision, p. 24). To the extent that deferral to the CBST at this juncture would be relate to placement for the 2013-14 school year, as noted above, the relief sought in the due process complaint notice was not inclusive of this school year, and the CSE is should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment

that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"). The discussion of the student needs during the CSE meeting and even the private evaluations offered by the parent do not suggest at this stage that removal from the public school was warranted at the time the CSE meeting was conducted (see, e.g. Dist. Ex. 21; Parent Exs. E; F; I; J). Thus, the IHO fashioned appropriate equitable relief, as noted above, which was supported by the record and was in accordance with the IHO's authority.

VII. Conclusion

Based on the hearing evidence, I find that that IHO properly considered and denied the parent's requested relief seeking an award of reimbursement for a visual perceptual evaluation, a "Nickerson letter", and an order of placement at a State-approved nonpublic school for the student for the 2013-14 school year.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
November 12, 2013



JUSTYN P. BATES
STATE REVIEW OFFICER