



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-042

Application of the [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from interim decisions of an impartial hearing officer (IHO) denying the petitioner's (the district's) recusal motion and determining respondents' (the parents') daughter's pendency placement during a due process proceeding and appeals from a final decision of the IHO finding that the district failed to properly implement the district's recommended educational program for the student for the 2013–14 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

The decision of an IHO is binding upon both parties unless appealed (see Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).¹

III. Facts and Procedural History

On November 12, 2014, the undersigned was designated to conduct the review of this case. The student in this case has received diagnoses of Cerebral Palsy and Periventricular Leukomalacia (Tr. p. 487; see Dist. Ex. 3 at p. 2; see also Dist. Ex. 2 at p. 2).² The student has severely impaired gross and fine motor functioning and requires full-time physical support throughout the school day to navigate her educational environment and to perform fine motor functions for her, including taking notes and scribing for written exercises, quizzes, and tests in the classroom (Tr. pp. 78–79, 93–95, 266, 487–91; see Dist. Ex. 3 at pp. 2–10; see also Dist. Ex. 2). The student also presents difficulty with tracking and processing visual information, including discriminating one piece of visual information from another and reading charts, graphs, and diagrams (Tr. pp. 94–95, 491; see also Dist. Exs. 2 at p. 2; 3 at pp. 2–10). The student is also easily fatigued due to physical and ocular demands of her educational environment and presents difficulties with information processing, attention, and short and long-term memory (see Tr. pp. 295, 355–57, 488, 492, 502–03, 530, 590; Dist. Ex. 3 at pp. 2–10; see also Dist. Ex. 2 at p. 2). Despite the student's challenges, she has excelled in school and has been described as a very determined and strong-willed student: she has taken college-level and college-credit courses, is a member in the National Honor Society; has volunteered in an elementary school classroom, and plans to pursue a degree from a four-year university after she graduates (see Tr. pp. 453, 494, 516, 533, 609–10 [v.5]; Dist. Ex. 3 at pp. 2–3).

On May 13, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013–14 school year (Dist. Ex. 3 at pp. 3–23). The CSE found the student eligible for special education and services as a student with an orthopedic impairment for

¹ The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

² The pagination in volume five of the transcript is not correct. Volume four of the transcript (November 1, 2013) includes pages 422–622 (Tr. pp. 422–622). Volume five of the transcript (January 9, 2014), however, includes pages 444–647 (Tr. pp. 444–647). Due to the overlap in pagination, where a page in volume five of the transcript is cited, a parenthetical "v.5" will be noted immediately after that citation to the January 9, 2014, transcript.

the 2013–14 school year (id. at p. 1).³ The CSE recommended a special education program consisting of consultant teacher services (direct) and adapted physical education (5:1) (id. at pp. 1, 14). The CSE also recommended that the student receive related services consisting of occupational therapy, physical therapy, speech-language therapy, and assistive technology (id.). The CSE recommended supplementary aids and modifications/accommodations, which included: testing accommodations; extended time for completing homework; visual modifications to classwork and/or homework; preferential seating; enlargement of font, color highlighting, and horizontal/vertical alignment in instructional materials to provide visual tracking support; a laptop (with an external touch pad and key label stickers) and text-to-speech computer software to provide writing and math supports; a scribe for "all writing tasks" including "all work and answers on all exams" (id. at pp. 14–16, 19–21). Given the extent of the student's need for academic and physical supports throughout the school day, the CSE also recommended the provision of a 1:1 "building aide" (two hours each day outside of the classroom) to assist the student with modifying and reformatting classroom and curricular materials, and—relevant to the underlying dispute in this case—a 1:1 full-time teacher aide to provide the student with academic supports within the classroom each day (six hours and 15 minutes each day) (id. at pp. 16–18). Assistive technology services recommended for the student included: a slant board; access to adaptive seating; a reading stand; a wheelchair; a computer for written work; access to speech recognition software; and access to computer software including a computer generated graphing calculator emulator to assist the student with all mathematical calculations (id. at p. 17).

With regard to the full-time 1:1 aide that had been recommended by the CSE in the May 2013 IEP, for the three school years prior to the 2013–14 school year, the student's educational program also included the services of a full-time 1:1 aide ("TA1") to assist the student during the school day and to provide the student with physical and academic supports (e.g., Tr. p. 338).⁴ Prior to the commencement of the 2013–14 school year, TA1 was "excessed" due to budget "limitations" and "cuts" within the district (Tr. p. 81). The district selected another teaching assistant ("TA2"), who was a level-two certified teaching assistant, to assist the student during the school day and to provide physical and academic supports (e.g., Tr. p. 82).

By e-mail dated July 1, 2013, and by letter dated July 3, 2013, the district informed the parents that it wanted to schedule the training for the student's new full-time 1:1 aide ("TA2"), and requested dates from the parents that would be convenient for them (see Dist. Exs. 5; 6).

³ The student's eligibility for special education program and related services as a student with an orthopedic impairment is not in dispute in this appeal (see IHO Decision at p. 3; see generally 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

⁴ The aide (TA1) assigned to the student for the 2009–10, 2010–11, and 2012–13 school years was a level-one certified teaching assistant who was pursuing her master's degree in special education (Tr. pp. 335–37). According to TA1, she was certified as a level-three teaching assistant in July 2013 (Tr. p. 337). Under State regulations, a teacher aide may "assist teacher in such nonteaching duties"—such as managing records, materials, and equipment and attending to the physical needs of children—while a teaching assistant may provide, among other things, direct instructional service to students (8 NYCRR 80-5.6[a], [b][1][i]). To be certified as a level-three teaching assistant, the most-advanced teaching assistant level, a candidate must have been previously employed in the "classroom teaching service" as a level-one or level-two teaching assistant (see 8 NYCRR 80-5.6[b][2][ii][c]).

By letter dated July 12, 2013, the parents informed the district of their concerns regarding the district's request to make the student available during the summer in order to assist TA2 with the training that TA2 required to effectively assist the student during the 2013–14 school year in conformity with the May 2013 IEP (see Dist. Ex. 7). In particular, the parents noted their concern that because of the student's "other essential activities" during the summer, finding time in the student's schedule to make her available to the district to assist with the training of TA2 would not be "easily done" (id.). By e-mail dated July 15, 2013, the district responded to the parents' letter of July 12, 2013, and informed the parents that the "length of training required" would be "dependent upon the response to the training by the participants" (Dist. Ex. 8).

A. Due Process Complaint Notice and District Response

By due process complaint notice dated July 22, 2013, the parents alleged that the district had failed to offer the student a free appropriate public education (FAPE) for the 2013–14 school year (Parent Ex. A at p. 1). The parents alleged that the district failed to provide an appropriately trained, skilled, and experienced 1:1 full-time aide to address the student's needs (id. at p. 2). Specifically, the parents alleged that the student required an aide who: was "highly skilled as a scribe and who ha[d] accurate spelling"; had "the ability to handle upper and college level courses"; had "the knowledge, experience and ability to work with and handle a high level French language class, . . . [the majority] of which [wa]s conducted in French"; had "the ability to print clearly and quickly"; had "the ability to handle a laptop and peripheral equipment, as well as the necessary software"; and had "the ability to organize electronic documents so that [those files were] easily and quickly accessible" to the student (id. at pp. 2–3).

The parents also alleged that the district's request to make the student available during the summer months, outside of the ten-month school year, "using hours and days of her time" was discriminatory and in violation of "Section 504 of the Rehabilitation Act's prohibition against discrimination against individuals with disabilities" (Parent Ex. A at p. 5). The parents reasoned that, because no such demands were placed upon nondisabled students, an "appropriate public education to which she is entitled comes at a cost to her—it is not free . . . because it demands significant quantities of [the student's] personal time" (id.).

For relief, noting that the district had provided in previous school years an appropriate aide, TA1, who possessed the requisite skills and qualifications necessary to serve as the student's full-time aide, the parents requested the provision of an aide for the 2013–14 school year who was "appropriately skilled, trained, and experienced" to address the student's complex needs (Parent Ex. A at p. 6). Alternatively, the parents requested that the district hire, or reimburse the parents for the hiring of, an individual identified by the parents to serve as the student's full-time 1:1 aide for the 2013–14 school year (id.). Thus, the gravamen of the parents' claims and requested relief set forth in their due process complaint notice was that the parents sought the rehiring and reinstatement of TA1 for the 2013–14 school year because TA1 had been the student's full-time 1:1 aide for the previous three school years, and TA1, unlike TA2, would not require training to serve as the student's full-time 1:1 aide for the 2013–14 school year (see id. at pp. 2–6). The parents also asserted their "pendency rights" and requested that the district

continue to provide and fund the provision of TA1, who had been assigned to the student during the previous three school years (*id.* at p. 6).⁵

By letter dated August 1, 2013, the district responded to the parents' due process complaint notice (Dist. Ex. 1). In its response, the district asserted: that the district was required to lay off TA1 due to budget cuts and applicable laws governing layoffs; that the district identified TA2 as the aide who would work with the student for the 2013–14 school year; that, while TA2 did not have the experience working with the student that TA1 had, TA2 possessed a bachelor's degree in elementary education, was a certified level-two teaching assistant, and was eligible for a level-three teaching assistant certification; and that to the extent that the parents claimed that under pendency the district was required to provide TA1 who served as the 1:1 full-time aide during the 2012–13 school year, as opposed to the placement and services recommended in the June 2012 IEP, the district averred that pendency requires the district to provide the current educational placement and not a particular aide or school building (*id.* at pp. 1–2).⁶

B. Impartial Hearing Officer Decisions

On August 7, 2013, an impartial hearing convened in this matter and concluded on January 9, 2014, after five nonconsecutive days of proceedings (*see* Tr. pp. 1–601, 444–627 [v.5]).⁷ Following three days of pendency proceedings on September 25, 2013, October 11, 2013, and November 1, 2013 (Tr. pp. 33–601), the district, by letter dated December 24, 2013, submitted a motion seeking recusal of the IHO and requesting that the next IHO issue a pendency decision and order based on the then-current hearing record (*see* IHO Ex. VII at pp. 1–3). In support of its recusal motion, the district alleged, among other things, that the IHO

⁵ The parents' due process complaint notice also contained a reservation of the parents' "right to raise any other procedural or substantive issues that may come to their attention during the pendency of the litigation of this matter," including challenging the composition of the CSE; challenging the qualifications of district staff and service providers assigned to work with the student; challenging the appropriateness of the recommended placement as it related to appropriate staffing (Parent Ex. A at pp. 5–6). A general reservation of rights, however, does not preserve arguments not specifically raised in the due process complaint notice (*see T.G. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 320, 335–36 [S.D.N.Y. 2013] [holding that "catch-all allegations" in a due process complaint notice are insufficient to bring an issue within the scope of an impartial hearing]; *B.P. v. New York City Dep't of Educ.*, 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [rejecting the proposition that a general reservation of rights in a due process complaint notice preserves additional procedural arguments later in the proceeding]; *see* 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; *Application of the Dep't of Educ.*, Appeal No. 12-058; *Application of a Student with a Disability*, Appeal No. 12-046; *Application of the Dep't of Educ.*, Appeal No. 12-039; *Application of a Student with a Disability*, Appeal No. 12-026; *Application of a Student with a Disability*, Appeal No. 12-024; *Application of the Dep't of Educ.*, Appeal No. 12-013; *Application of a Student with a Disability*, Appeal No. 11-154; *Application of the Dep't of Educ.*, Appeal No. 11-141; *Application of a Student with a Disability*, Appeal No. 11-010).

⁶ Toward the end of August 2013, the district rehired TA1 to provide the physical supports recommended by the CSE in the May 2013 IEP, with the expectation that TA2 would provide the student with academic support in conformity with the May 2013 IEP (*e.g.*, Tr. p. 88; Dist. Ex. 3).

⁷ On August 7, 2013, a telephonic prehearing conference was conducted by another IHO, who recused herself due to timing and scheduling conflicts (*see* Tr. pp. 24–28).

demonstrated bias against the district during the impartial hearing by overruling various objections made by the district; by requiring the district to incur the additional cost of an expedited transcript; by rejecting an application for an adjournment based on the unavailability of counsel; by issuing extensions requested by the parents without acknowledging the district's objection to those extensions; by scheduling hearing dates without input from the district; and by ordering subpoenas without obtaining the position of the district or affording it an opportunity to respond to the subpoenas (see id. at pp. 1–3).

By interim decision and order dated January 17, 2014 (recusal decision), the IHO denied the district's recusal motion in a fifteen-page decision addressing and rejecting each of the district's allegations raised in its recusal motion (IHO Ex. XXVIII at p. 15). Specifically, the IHO found that the district had been unwilling to make an affirmation in support of its claim that the IHO was incompetent and had engaged in misconduct; that many of the district's objections had been sustained and that there was no evidence in the hearing record of any rulings that reflected bias against either of the parties; that the parties agreed to a three-day expedited transcript as part of the briefing schedule, which was at the district's request; that the IHO had granted two of the district's requests for adjournment of two hearing dates; that the evidence in the hearing record reflected that the district's objection to a compliance-date extension was acknowledged and considered; that the district failed to object to a 24-hour extension given to both parties to submit briefs addressing the matter of pendency; that all hearing dates were scheduled on notice and that there was extensive correspondence between the parties and IHO regarding the scheduling of hearing dates; and that the district had an opportunity to object to submit objections to the subpoenas but declined to do so (see id. at pp. 7–13 [citing Tr. pp. 596–97; IHO Exs. III at pp. 8–9, 17, 19–20; X; XI; XII; XIII; XV; XVII; XVIII; XX; XXI; XXII]).

By interim decision and order on pendency dated January 17, 2014 (pendency decision), the IHO ordered the district to provide the student with, during the pendency of the underlying proceedings and the instant appeal, a single full-time 1:1 aide with a substantially similar level of qualifications, training, and experience as TA1 (IHO Ex. XXIX). Although the parties agreed that the student's June 11, 2012, IEP was the relevant IEP for purposes of pendency, the IHO found that the pendency placement was the June 2012 IEP as implemented during the 2012–13 school year because the services provided by TA1 "were much broader than the services listed in the June 11, 2012 IEP" (id. at p. 11). The IHO noted that the services provided by TA1 during the 2012–13 school year were more akin to "the services and supports described in the May 14, 2013 IEP," which was developed for the 2013–14 school year (id.). Thus, because TA1 provided services during the 2012–13 school year that included services described in the May 2013 IEP, the IHO found that there was "a significant enough change from the accommodations, modifications, and support" recommended in the June 2012 IEP to constitute an actual change in the student's current educational placement and to support her finding that the student's current educational placement was the June 2012 IEP as implemented during the school year (id. at p. 13). Next, the IHO found the district had failed to provide the student with the appropriate level of services during the pendency of the underlying proceedings because TA2, who provided full-time 1:1 academic support to the student during the 2013–14 school year, "did not have the requisite skills or training to provide the student's pendency-mandated 1:1 aide services" (id. at p. 14). Specifically, the IHO reasoned that TA2 had no experience working with high school students; that TA2 was not given adequate instruction or training on how to scribe or how to take

accurate and comprehensive class notes; that TA2 was not given instruction or training on how to implement the student's testing modifications/accommodations; and that TA2 had no experience using a laptop to take class notes (id. at p. 13). The IHO stated that although the "easiest way to provide [the services required under pendency] would be for the [d]istrict to assign [TA1] as the [s]tudent's full-time 1:1 aide," the IHO also explained that the selection of the individual who would provide the services was "a matter within the district's purview" (id. at p. 14). Accordingly, the IHO ordered the district to provide the student during the pendency of the underlying proceedings with a single full-time 1:1 aide with a substantially similar level of qualifications, training, and experience as TA1 (id.).

By decision dated February 12, 2014 (final decision), the IHO concluded that, although the parties were in agreement that the educational program and recommendations in the May 2013 IEP were appropriate for the student, the district failed to properly implement the student's IEP for the 2013–14 school year (see IHO Decision at pp. 6–16). Specifically, the IHO found that the evidence in the hearing record demonstrated that TA2 "did not have the requisite skills, experience, or training" to provide the Student with the 1:1 aide academic supports mandated by the Student's 2013–14 IEP (id. at p. 14). Concluding that the district failed to provide the student with 1:1 aide services in conformity with the student's IEP, the IHO found that the student did not receive appropriate note-taking and scribing services from TA2 (id. at pp. 10–14). In particular, the IHO found that class notes taken by TA2 included "misspelling, incorrect words, and omitted material on the notes from French class" and that the scribed math notes were incomplete, lacked explanatory and contextual material, were inaccurate, and were visually inaccessible (id. at pp. 11–12). With regard to the parents' claim under section 504 of the Rehabilitation Act, the IHO found that the district did not oppose the parents' claims under section 504 and that the district's failure to provide the student with appropriate 1:1 aide services in the classroom and appropriate testing accommodations to address her disability constituted a denial of the benefit of an appropriate education (id. at pp. 17–18). As relief for the district's failure to implement the May 2013 IEP and for the section 504 violation, the IHO ordered the district to provide to the student an appropriately trained and experienced 1:1 aide to the student, in conformity with the May 2013 IEP (id. at p. 19). The IHO also ordered the district to provide a 1:1 aide who had at least one year of experience in providing full-time 1:1 support to a student with physical disabilities, cognitive functioning, and visual tracking/discrimination issues that were similar to the student's disabilities, functioning, and visual issues (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the district's answer thereto is presumed and will not be recited in depth here. As discussed in more detail below, the district seeks to overturn the IHO's recusal decision, pendency decision, and final decision. With regard to the IHO's recusal decision, the district argues, among other reasons, that the IHO was incompetent and failed to progress the impartial hearing in a timely manner and consistently exhibited bias against the district during the course of the impartial hearing. Relative to the IHO's pendency decision, the district argues that the IHO erred in concluding that the district (and, specifically, TA2) failed to adequately provide the

required academic supports during the pendency of these proceedings.⁸ Similarly, the district also argues that the IHO erred in finding that the district failed to appropriately implement the student's May 2013 IEP for the 2013–14 school year because a flawless or perfect implementation of the student's IEP is not the correct legal standard. Specifically, the district contends that all of the services recommended in the student's May 2013 IEP were provided to the student and that there is no evidence in the hearing record demonstrating that the implementation of the student's IEP in this case resulted in a denial of a FAPE, especially given the student's record of continuing academic success in her classes. Further, the district avers that there is no evidence in the hearing record to suggest that TA2 could not provide to the student the academic supports required to enable the student to make meaningful educational gains. As relief, the district requests reversal of the IHO's recusal, pendency, and final decisions.

In an answer, the parents respond to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013–14 school year. As an initial matter, the parents argue that the IHO did not err in denying the district's recusal motion because the IHO did not evidence any bias towards the district.⁹ With regard to the provision of academic supports and a full-time 1:1 aide to the student, the parents argue that, although the district was not required to provide a specific full-time 1:1 aide, the IHO correctly found that the district failed to provide an appropriately trained full-time 1:1 aide capable of providing the academic supports recommended in the student's IEP during the 2013–14 school year and during the pendency of the underlying proceedings. The parents also argue that the district does not appeal from the IHO's determination that the district failed to provide a reasonable accommodation to the student to access and benefit from general education, and, as such, the IHO's determination with regard to the parents' section 504 claim should be deemed final.

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. 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

⁸ During the impartial hearing, the parents' attorney represented that the parents were not challenging the manner in which TA1 was providing the physical supports to the student outside of the classroom during the 2013–14 school year (Tr. pp. 56–57).

⁹ To the extent that the parents argue that paragraph 14 of the district's petition—which is broken down into two subparagraphs labeled "a" and "b"—runs afoul of State regulations requiring that a petition for review be set forth in "numbered paragraphs" (8 NYCRR 279.8[a][3]), there is no evidence that the district's use of subparagraphs was designed to avoid circumvention of the State requirement governing the length of the district's petition (see 8 NYCRR 279.8[a][5]). To the extent that two paragraphs in the district's petition are "lettered" and not "numbered," this technical irregularity is of no consequence in this appeal.

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]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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573–80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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. Mootness

In general, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3–*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

In this case, there is no longer a live controversy relating to the parties' dispute over the program offered by the district for the 2013–14 school year. Assuming for the sake of argument that the IHO correctly determined that the district failed to appropriately implement the student's May 2013 IEP, in this instance such a failure would have no actual effect on the parties because the 2013–14 school year expired on June 30, 2014, and the parents did not seek compensatory education for relief. Accordingly, the parents' claims relative to the 2013–14 school year are moot.

However, an exception provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318–23 [1988]; Lillbask, 397 F.3d at 84–85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal

No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714–15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In addition, neither the decisions of the IHO nor a decision rendered by the undersigned in this case would affect the district's obligations going forward and for subsequent school years because the student has presumably completed her final year of high school (cf. New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9 [S.D.N.Y. July 29, 2011] [explaining that although the at-issue school year had passed, a decision on the merits would "control [the student's] pendency placement going forward"]). In this case, the hearing record does not support a reasonable expectation or a demonstrated probability that the parties dispute over the student's educational placement would reoccur. In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The district need not reevaluate a student with a disability whose eligibility terminates on the basis of age or graduation with a local high school or Regents diploma (20 U.S.C. § 1414[c][5][B][i]; 34 C.F.R. § 300.305[e][2]; 8 NYCRR 200.4[c][4]).

Because the student was a high school senior during the 2013–14 school year¹⁰ and was due to receive a Regents Diploma with Advanced Designation at the end of the school year (Dist. Ex. 3 at p. 1), thereby terminating her eligibility for special education and related services as a student with a disability (see 20 U.S.C. § 1412[a][1][B][i]; Educ. Law § 4402[5]; see also Somoza v. New York City Dep't of Educ., 538 F.3d 106, 113 n.6 [2d Cir. 2008]), the parents' claims in this case—and a determination of those claims—are not "capable of repetition, yet evading review" (see Honig, 484 U.S. at 318–23; Lillbask, 397 F.3d at 84–85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). There is not a "reasonable expectation" that the parents would be "subject to the same action again," or that there would be a recurrence of the conduct that the parents complained of in this case, because

¹⁰ While the evidence in the hearing record does not include a copy of the student's diploma, there is no indication whatsoever that the student, whose academic record was exemplary, would not be graduating in June 2014.

the student has completed high school, and, therefore, a change in the student's pendency placement is irrelevant, and this matter is now moot (see Murphy, 455 U.S. at 482; Russman, 260 F.3d at 120; Application of a Student with a Disability, Appeal No. 14-068; Application of a Child with a Disability, Appeal No. 07-139; see also F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254–55 [S.D.N.Y. 2012]; V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119–20 [N.D.N.Y. 2013]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *8–*9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280–81 [E.D.N.Y. 2010]; J.N., 2008 WL 4501940, at *3–*4).¹¹ Nevertheless, in the interest of administrative and judicial fairness, a discussion of the merits of the parties' dispute follows.

B. The District's Recusal Motion

Turning next to the parent's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability; Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). In addition, an IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (see 20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, having undertaken an independent review of the hearing record, the evidence reflects that the IHO, in a well-reasoned and well-supported decision, correctly denied the district's recusal motion of December 24, 2013 (see IHO Exs. VII at pp. 1–3; XXVIII at pp. 5–15). In her recusal decision of January 17, 2014, the IHO accurately recounted the relevant facts of the case and addressed seriatim each of the district's claims that it raised in support of its motion (see IHO Ex. XXVIII at pp. 5–15). Thus, the following findings and conclusions of the IHO with respect to the denial of the district's recusal motion are adopted: (1) that the IHO's non-issuance and alleged delay of a final decision at the time of the recusal motion did not require

¹¹ Mootness may be raised at any stage of litigation (see In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

recusal of the IHO where the district initially objected to addressing the question of pendency through written submissions (but later requested the opportunity to submit briefs), where the district presented its case-in-chief during the pendency hearing, which contributed to the delay of a decision, and where the district's allegations of incompetence and misconduct were unsubstantiated and without any citation to evidence in the hearing to record to support such allegations (see Tr. p. 596; IHO Exs. III at pp. 3–4; VI; VII at pp. 1–2; XXVIII at pp. 5–7); (2) that the IHO's rulings on the district's evidentiary objections did not warrant recusal of the IHO, where a review of the transcript reflects that the IHO provided the district with an opportunity to articulate each of its objections on the record and where objections raised by each of the parties were both sustained and overruled throughout the impartial hearing (see Tr. pp. 1–601, 444–627 [v.5]; IHO Exs. VII at p. 2; XXVIII at pp. 7–8); (3) that the IHO did not require the district to incur the additional cost of an expedited transcript of the proceedings of November 1, 2013, where the expedited transcript was a result of the parties' agreement to a three-day expedited transcript as part of the briefing schedule (see Tr. pp. 596–98; IHO Ex. VII at p. 2); (4) that the IHO's rejection of the district's request for an adjournment of the November 1, 2013, hearing date was not a product of bias against the district because the district had made its request for an adjournment just four days prior to the hearing date, because the IHO had granted other adjournment requests made by the district, and because the IHO's granting of the parents' request for an adjournment of the December 13, 2013, hearing date was due to the parents' attorney's illness, which could have jeopardized the student's ability to attend the hearing, and not due to the IHO's bias against the district (see Tr. pp. 597–98; IHO Exs. III at pp. 8–9, 17, 19, 20; VII at p. 2; XI at pp. 1, 4–5, 9–10; XII; XXIII; XXVIII at pp. 8–10); (5) that the IHO did not issue a "false and fraudulent" compliance date extension, where the IHO informed the parties that the parents' request for an adjournment and extension of the compliance date was granted after having considered the emails sent from each party regarding the parents' request and where the IHO explained to the parties that it was the IHO's "intention to make sure that [the district] had the opportunity to respond to the adjournment request so that [the IHO] could consider the [d]istrict's position" (see IHO Exs. VII at p. 3; X at pp. 8, 14; XI at pp. 1, 10; XXVIII at pp. 10–11; see also IHO Ex. XIX at p. 4); (6) that the IHO did not show bias against the district by granting an application submitted by the parents' attorney to extend the time period in which the pendency briefs were required to be submitted by 24 hours, where the IHO advised both parties that they would each have an additional 24 hours to submit their pendency briefs and where the district informed the IHO by email that it consented to the 24-hour extension request made by the parents' attorney (see IHO Exs. VII at p. 3; XX at pp. 1–2, 4; XXVIII at p. 11); (7) that the IHO did not unilaterally establish hearing dates without input from the district, where the evidence in the hearing record established that the hearing dates were scheduled on notice to each of the parties and where the district had an opportunity to respond to emails regarding, and object to, the proposed hearing dates but did not do so (see IHO Exs. III; VII at p. 3; VIII; XV at pp. 4, 9, 11; XXVIII at pp. 11–12); and (8) that subpoenas "so ordered" by the IHO were not issued without obtaining the position of the district, where the evidence in the hearing record reflects that the district indicated to the IHO by email that the district intended to review the subpoenas that same day but then failed to submit any objections to the IHO regarding the subpoenas at any point that day or thereafter, prompting the IHO to sign the subpoenas nine days after the district indicated that it would review the subpoenas and submit any objections that it might have had to them (see IHO Exs. VII at p. 3; XVII at p. 1; XVIII; XXVIII at pp. 12–13).

Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no basis in the hearing record to disturb the January 17, 2014, decision of the IHO denying the district's recusal motion (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Accordingly, consistent with the findings of the IHO, there is no evidence in the hearing record that the IHO was hostile, uncivil, or demonstrated any bias or animosity towards the district. Nor is there any evidence that the IHO was not fair or impartial during the course of the underlying proceedings. The January 17, 2014, recusal decision of the IHO is therefore affirmed.

C. Pendency

Turning next to the parties' dispute regarding the IHO's pendency decision, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; 8 NYCRR 200.16[h][3][i]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 08-009). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). However, even though a change in location does not necessarily constitute a change of placement, "parents are not free to unilaterally transfer their child from one school to another" (Application of the Bd. of Educ., Appeal No. 00-073; see Ambach, 612 F. Supp. at 235).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]; Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359

[S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073).¹² The United States Department of Education (DOE) has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; see also John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 715–16 [7th Cir. 2007] [stating that in general "the terms of the IEP should be enforced, without exception, as the stay-put relief"]). "Even if a school has provided a particular service in the past, it need not be provided in a stay-put situation if it was not within the governing IEP" (John M., 502 F.3d at 715; see also Cordrey v. Euckert, 917 F.2d 1460, 1468 [6th Cir. 1990]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1313–14 [9th Cir. 1987]). In addition, under usual circumstances, it is "unnecessary to go beyond the four corners" of the student's IEP in order to ascertain the student's pendency placement (John M., 502 F.3d at 716); however, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP and can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 290 F.3d 476, 483–84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163; see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *4 [S.D.N.Y. Aug. 7, 2012]; Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006).

In general, the term "'[e]ducational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419–20 [2d Cir. 2009]; see R.E., 694 F.3d at 191–92; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x. 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; Concerned Parents, 629 F.2d at 753, 756 ["[W]e nonetheless believe that the term 'educational placement' refers only to the type of educational program in which the child is placed."]). Thus, it has been held that a change from one school building to another (i.e., a

¹² There is no entitlement to a stay-put placement until a proceeding is pending (i.e., the filing of a due process complaint notice) (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526–27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["[A] child's right to remain in the current educational placement attaches when a due process complaint is filed."]).

change in location), without more, does not necessarily constitute a change in educational placement (Concerned Parents, 629 F.2d at 753–54; see also G.R., 2012 WL 310947, at *6).¹³

Whether a student's educational placement has changed depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 02-031). For example, student-to-staff ratio is a relevant factor in determining whether a student's placement has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14–*15 [D. N.J. Oct. 31, 2006]; Application of a Child with a Disability, Appeal No. 05-028; see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60–61 [D. N.H. 1999]). In making determinations regarding whether there has been a change in educational placement, a case-by-case analysis is generally undertaken, and a number of factors must be considered, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]).¹⁴

In this case, although there is no dispute that the student's June 11, 2012, IEP was the relevant IEP for purposes of pendency, the parties dispute whether the IHO correctly found that the pendency placement was the June 2012 IEP as implemented during the 2012–13 school year because, according to the IHO, the services provided by TA1 "were much broader than the services listed in the June 11, 2012 IEP" (id. at p. 11). Thus, the IHO reasoned that because the services provided by TA1 during the 2012–13 school year were more akin to "the services and supports described in the May 14, 2013 IEP," which was developed for the 2013–14 school year, a change in placement had occurred, and the June 2012 IEP was no longer the last agreed to current educational placement at the time of the filing of the due process complaint notice (id.). While it is understandable that such a determination is desirable by the parents in this case because TA1 provided full-time 1:1 services to the student for the three previous school years, the student's stay-put placement must be determined in accordance with the applicable law and standards identified above.¹⁵ Thus, at the time that the parents filed their due process complaint notice, the current educational placement was the placement described in the student's most recently implemented June 2012 IEP, which was the last agreed-to placement unless the parties otherwise agreed to a change in placement during the 2012–13 school year (see Mackey, 386 F.3d at 163; Murphy, 86 F. Supp. 2d at 359; see also John M., 502 F.3d at 715–16; Raelee, 96 F.3d at 83).

¹³ However, a "change in placement" is defined by regulation in New York to mean "a transfer of a student to or from a public school, BOCES or schools enumerated in articles 81, 85, 87, 88 or 89 of the Education Law or graduation from high school with a local high school or Regents Diploma" (8 NYCRR 200.1[h]).

¹⁴ A "change in program" is defined as a "change in any one of the components of the [IEP] of a student as described in [8 NYCRR] section 200.4(d)(2)" (8 NYCRR 200.1[g]). This includes a change in a student's placement (8 NYCRR 200.4[d][2][xii]).

¹⁵ What is "appropriate" for the student is not relevant to the analysis of the "then current educational placement," which is automatic in nature.

Here, a review of the evidence in the hearing record reflects that there was no change in the student's educational placement that would have modified or superseded the June 2012 IEP. For example, during the course of the 2012–13 school year, there was "no writing," such as prior written notice, setting forth the terms of any new placement recommendations for the student; there was no "documentary evidence" indicating that a change in placement had occurred; there was no change in any the student-to-staff ratio or type of classroom setting recommended for the student in the June 2012 IEP; there was no addition or subtraction of related services from those recommended in the June 2012 IEP; the CSE did not reconvene to modify or revise the June 2012; there was no change to the extent to which the student was educated with nondisabled peers; no change in the extent to which the student could participate in nonacademic and extracurricular activities; and no change to the student's placement on the continuum of placements (see Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see also Concerned Parents, 629 F.2d at 753–54 [explaining that a change in "educational placement" would not include "mere variations in the program itself"]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 247–48 [S.D.N.Y. 2013]; Evans, 921 F. Supp. at 1187–88).

Thus, to the extent that the IHO found that the student's pendency placement was the June 2012 IEP as implemented, that determination must be reversed because there is no evidence in the hearing record demonstrating that the parties agreed to modify the student's last agreed-to current educational placement—to wit, the June 2012 IEP—and, therefore, the June 2012 IEP constituted the student's stay-put placement (see Application of the Dep't of Educ., Appeal No. 10-107).¹⁶ Furthermore, to the extent that the IHO found that the district failed to provide the academic supports and services of the 1:1 aide during the pendency of the underlying proceedings because there were "several specific supports/services that the 1:1 aide was providing to the [s]tudent in 2012–13 (per the description of the 1:1 aide services in [the student's May 2013 IEP]," that finding must also be reversed (see IHO Decision at pp. 12–13). As discussed in more detail below, at the moment that the parents filed their due process complaint notice, the district was required to and did provide the services of a full-time 1:1 aide consistent with the June 2012 IEP during the pendency of these proceedings and the 2013–14 school year.

D. Implementation of the Services of the Full-Time 1:1 Aide

The gravamen of the parties' dispute in this appeal is whether the district provided the full-time 1:1 aide in the student's IEP.¹⁷ In particular, the parties dispute the IHO's finding that

¹⁶ As noted above, the only modification of the student's educational placement or program that the parties agreed to was that TA1 would provide the physical supports recommended in the student's IEP, an aspect of the student's placement and educational program not at issue on appeal (see Tr. pp. 56–57, 87–88).

¹⁷ Due to the nature of pendency, and because the parents raised objections to the May 2013 IEP in their due process complaint notice (see Parent Ex. A at p. 2), the district was obligated during the pendency of these proceedings (i.e., the 2013–14 school year) to provide the services of the full-time 1:1 aide in conformity with only the June 2012 IEP and not the May 2013 IEP (see Tr. pp. 98–99 [acknowledging that the May 2013 IEP was not the pendency IEP]). Nevertheless, as discussed herein, the services of the full-time 1:1 aide (TA2) provided by the district during the 2013–14 school year were in conformity with both the June 2012 IEP and May 2013 IEP and provided the student with a FAPE.

the district failed to provide adequate academic supports, including scribing, modification of class materials, and class note taking, to the student in conformity with the student's IEP. The IHO reasoned that an IEP is appropriately implemented when the mandates and services of that IEP are "implemented so as to convey a meaningful benefit" (IHO Decision at p. 7). Appropriate implementation of an IEP, however, does not require manifestation or actual receipt of a meaningful benefit, and, therefore, the IHO neither identified nor applied the correct legal implementation standard in this case as discussed in more detail below.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimis failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524–25 [3d Cir. 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP"]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D. D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the IHO found that TA2, who provided the full-time 1:1 academic support to the student during the 2013–14 school year, "did not have the requisite skills or training to provide the student's pendency-mandated 1:1 aide services"; that TA2 had no experience working with high school students; that TA2 was not given adequate instruction or training on how to scribe or how to take accurate and comprehensive class notes; that TA2 was not given instruction or training on how to implement the student's testing modifications/accommodations; and that TA2 had no experience using a laptop to take class notes (see IHO Decision at pp. 13–14). A review of the documentary and testimonial evidence in the hearing record, however, does not support a conclusion that the services of the 1:1 aide were either not provided to the student or that those services were delivered in a manner that deviated substantially, significantly, and materially from the recommended services set forth in the student's IEPs. For example, consistent with the

recommendation in the student's IEPs that the student receive the services of a full-time 1:1 aide, the evidence reflects that TA2 was a level-two certified teaching assistant with a bachelor's degree in elementary education and that TA2, as a teaching assistant, was certified under State law to provide and perform additional services beyond those "nonteaching duties" that a teacher aide is certified to only provide (compare 8 NYCRR 80-5.6[a], with 8 NYCRR 80-5.6[b]; see also Tr. pp. 82–84, 138, 257). Thus, at the time that the parents filed their due process complaint notice, their claims that TA2 could not implement the services recommended in the student's IEP were unfounded, speculative, and had not yet materialized (cf. R.E., 694 F.3d at 186–88).

In addition, consistent with the required academic supports set forth in the student's IEPs (see Dist. Exs. 2 at p. 14, 18–20; 3 at pp. 10–11, 15–16), there is insufficient evidence in the hearing record to demonstrate that the district failed to implement substantial or significant provisions of the student's IEP or that the district failed to provide the academic supports in a manner materially inconsistent with the student's IEP. For example, the evidence establishes: that the district made good-faith efforts to provide TA2 with appropriate and ongoing training to prepare TA2 for the responsibilities that she would assume throughout the 2013–14 school year (see, e.g., Tr. pp. 154, 179–83, 192–97, 261–63, 267, 281–88, 295–97, 352, 469; Dist. Exs. 9); that a full-time 1:1 aide assigned to work with the student would not be expected to completely understand the student's individual needs right away (see Tr. pp. 357–58, 377–78, 449, 464); that TA2 exhibited good-faith and diligent efforts to implement the academic supports that the student required consistent with the student's IEP (see Tr. pp. 385–88, 456–57, 512 [v.5]; see also Tr. pp. 297, 316 [explaining that consultant teacher support in math class was also provided to the student]); that TA2 did provide the academic supports and services recommended in the student's IEP, including, among other things, organization of the student's work, enlargement of text, color coding of class notes, use of a slant board, and scribing of class notes both by hand and by laptop (see, e.g., Tr. pp. 198–200, 331–32, 242–44, 264–69, 278–79, 435, 460–61 [v.5], 508–09 [v.5]); that when TA2 typed up class notes for the student during the course of the school year, those class notes did not ever have to be retyped (see Tr. pp. 469–70); that the student's relationship with TA2 was "[v]ery friendly, a normal relationship, [and] a working relationship" through which the work is delivered to the student and gets done (Tr. p. 508 [v.5]; see also Tr. pp. 385, 456–57, 467–68 [v.5]); that the student had not complained to her teachers about the adequacy of the academic supports that TA2 provided (see Tr. p. 468 [v.5], 474 [v.5]); that the student communicated her needs to TA2 during her classes (see Tr. pp. 272–75); that the amount of class notes provided by the teacher in the student's French class was minimal and designed to only reinforce what the students should already have known or what had already been covered in class (see Tr. p. 485–86 [v.5], 489–90 [v.5], 506–07 [v.5]; see also Tr. p. 486 [v.5]); that since TA2 assumed the responsibility of providing academic supports to the student in September 2013, the parents did not ask TA2 to provide "any additional supports or to do anything else that [TA2 had] not been able to do" (Tr. p. 297; see also Tr. pp. 388 [stating that TA2 had not expressed to TA1 any inability to properly provide the required academic supports], 397); and that TA2 provided the student with and oversaw the testing accommodations recommended for the student (see Tr. pp. 278–79, 327–28).

Notwithstanding the testimonial evidence in the hearing record reflecting that on unspecified times and dates, TA2 made errors in scribing and visually modifying the student's class notes and that there were imperfections in the substance and presentation of material that

TA2 produced for the student (see, e.g., Tr. pp. 530–61; but see Tr. pp. 462 [v.5], 486 [v.5], 489 [v.5], 506 [v.5]), the district is simply not held to a standard requiring "flawless implementation" of the student's IEP in order to provide the student with the services mandated by an IEP and to provide the student with a FAPE (see Application of a Student with a Disability, Appeal No. 11-027). Indeed, where the related services recommended in a student's IEP are provided to the student, as they were in this case, omissions and mistakes in the provision of those services, such as relatively minor mistakes in the student's scribed class notes, while unfortunate, simply do not constitute a substantial or significant deviation from the student's IEP or rise to the level of a denial of a FAPE. Moreover, the evidence in the hearing record demonstrates that despite the challenges faced by the student, she continued to receive meaningful educational benefits and demonstrated continued success and excellence in all of her academic classes during the 2013–14 school year (see Dist. Exs. 10; 11; see, e.g., Tr. pp. 292–93, 472 [v.5], 605–10 [v.5]). Indeed, even assuming for the sake of argument that each of the parents' allegations are accurate and fully supported in the hearing record, the parents' factual allegations under the circumstances of this case do not support a conclusion, based on the totality of the evidence, that the student's right to a FAPE was impeded or that the student was deprived of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525–26; R.E., 694 F.3d at 190).

E. Section 504 Claims

In their answer, the parents argue that the IHO properly found that the district's actions deprived the student of her rights under section 504 of the Rehabilitation Act of 1973, (Pub. L. No. 93-112, 87 Stat. 394 [Sept. 26, 1973] [codified at 29 U.S.C. § 794]), and that since the district failed to appeal this adverse finding, the IHO's determination relative to the parents' section 504 claims should be deemed final (Pet. ¶ 67). While unappealed findings of the IHO are generally final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6–*7, *10 [S.D.N.Y. Mar. 21, 2013]), the case to which the parents cite in support of their argument neither involved section 504 claims brought by the parents nor a district's failure to appeal from the decision of the IHO resolving 504 claims in favor of the parents (see Application of a Child with a Disability, Appeal No. 00-035). In addition, regarding the parent's section 504 claims, New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart."]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]).¹⁸ Therefore, a state review officer has no jurisdiction to review any portion of the parent's claims regarding section 504 or the IHO's findings relative to those claims in this case (see Application of the Bd. of Educ., Appeal No. 11-122 [stating that New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and that a State Review Officer does not review section 504 claims]; Application of a

¹⁸ The IHO acknowledged in a footnote in her decision that her findings and order relative to the parents' section 504 claims were "not appealable to the New York State Review Officer" (IHO Decision at p. 6 n.2).

Student with a Disability, Appeal No. 11-121 [stating that regarding the parents' section 1983 claims, due to the limited scope of an impartial hearing under the IDEA, the parents' claims would be reviewed to the extent that they asserted violations of the IDEA and State regulations]; see also Application of the Dep't of Educ., Appeal No. 12-221).

VII. Conclusion

Having determined that the IHO erred in finding that the district failed to properly implement the student's educational program during the pendency of these proceedings and during the 2013–14 school year, the IHO's January 17, 2014 order on pendency is reversed, and that portion of the IHO's February 12, 2014, findings of fact and decision ordering the district to provide a different full-time 1:1 aide is also reversed. The IHO's recusal decision of January 17, 2014, is affirmed. In view of the foregoing, any of the parties' remaining contentions need not be examined in light of the determinations reached herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's January 17, 2014, decision and order denying the district's recusal motion is affirmed.

IT IS FURTHER ORDERED that the impartial hearing officer's January 17, 2014, decision and order on pendency is reversed and that portion the impartial hearing officer's February 12, 2014, findings of fact and decision ordering the district to provide a different full-time 1:1 aide is reversed.

Dated: **Albany, New York**
 December 31, 2014

MATTHEW J. ZAPPEN
STATE REVIEW OFFICER