The University of the State of New York

The State Education Department
State Review Officer
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No. 09-095

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied her request that a collaborative team teaching (CTT)[1] class be created for the student at respondent's (the district's) school that is closest to the student's home for the 2009-10 school year. The parent further appeals and the district cross-appeals from the impartial hearing officer's decision to provide a contingent award of special education teacher support services (SETSS) to the student for the 2009-10 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

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[1] "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities in a CTT class shall not exceed 12 students and school personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][1], [2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services. As part of a question and answer format, the guidance document states:

> "[Q.]34. *Must every school district offer integrated co-teaching services on the continuum of services?* No. However, the use of integrated co-teaching services is strongly encouraged. School districts may strategically determine, based on the needs of its students, to offer such services at certain grade levels, or in certain subjects. Implementation of integrated co-teaching could be gradually phased into a school district. [Q.]35. *Can a school district determine that it will offer integrated co-teaching services at some, but not all, of its classes, grade levels or subjects?* Yes"

(see http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

At the time of the impartial hearing, the student was attending a district school that was located in the same neighborhood as the student's home (Tr. p. 51; Dist. Ex. 2 at p. 1; Parent Ex. A at p. 1). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this proceeding (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8 [c][11]; 8 NYCRR 200.1[zz][11]).

The information in the hearing record regarding the student's educational history is sparse. The hearing record reveals that the student is easily distracted and reportedly has been identified as having an attention deficit disorder (ADD) (Dist. Ex. 2 at pp. 1, 8). The student exhibits receptive, expressive, and pragmatic language delays (id. at p. 4). She also demonstrates auditory processing and auditory memory deficits, as well as phonological and/or oral motor deficits which reduce her expressive speech intelligibility (id.). Additionally, the student is noted to have difficulty with sequencing, encoding, and decoding written information (id.). The student also exhibits difficulties with gross motor skills, fine motor skills, motor planning, perceptual skills, and writing skills (id. at p. 6).

A private speech-language progress report dated May 29, 2009, reflected that the goals of the student's individual speech-language therapy addressed her central auditory processing and memory deficits as well as her phonological and articulation delays (Parent Ex. D at p. 1). The speech-language pathologist reported that the student's additional goals included improving the student's ability to infer meaning from abstract material and decoding and encoding sound symbol combinations that coincided with phonological remediation and improving the student's recognition of verbal absurdities (id.). The progress report indicated that the student had improved her auditory processing and memory skills (id. at p. 2). The speech-language pathologist also noted that the student continued to require oral motor therapy through use of the "PROMPT" and "Beckman Oral Motor Therapy" techniques to improve her phonological and articulation delays (id. at pp. 1-2). The speech-language pathologist recommended that the student continue to receive three 30-minute individual sessions of speech-language therapy which she indicated "foster[ed] techniques which assist [the student] in her academics" (id. at p. 3). The speech-language pathologist further recommended that the student receive speech-language therapy on a 12-month basis due to demonstrated regression in the student's skills following holidays and other time periods when therapy was not provided (id. at pp. 2, 3).

On June 1, 2009, the Committee on Special Education (CSE) convened for an annual review for the remainder of the student's 2008-09 school year and for the 2009-10 school year (fourth grade) (Dist. Ex. 2 at p. 1). Attendees included: the parent, a district representative, a district special education teacher (SETSS teacher), a district regular education teacher, a literacy coach, and an occupational therapist (id. at pp. 2, 26). The CSE recommended that for the remainder of the 2008-09 school year, the student be educated in a general education setting with 10 periods of SETSS per week, five individual one-hour sessions with a health paraprofessional, three 30-minute sessions of individual speech-language therapy per week, and three 30-minute sessions of individual occupational therapy (OT) per week (id. at pp. 1, 22). For July and August 2009, the CSE recommended that the student receive three 30-minute sessions of individual OT per week (id. at p. 1). Thereafter, starting in September 2009, the CSE recommended that for the 2009-10 school year, the student attend a 12:1 CTT class with three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and five individual one-hour sessions with a health paraprofessional (id. at pp. 1, 24). The CSE also recommended that the student receive an FM unit to facilitate communication between the student and her paraprofessional (id. at p. 8). The resultant June 2009 IEP reflected that the student

functioned on a beginning to mid-second grade instructional level in reading and writing, and a beginning second grade instructional level in math (id. at p. 3). The IEP also reflected that the student's behavior did not seriously interfere with instruction and could be addressed by a regular education teacher (id. at p. 5). Additionally, the CSE developed annual goals for the student addressing the student's perceptual and fine motor; motor planning; receptive, expressive, and pragmatic language; oral motor, attending, organization, and math and reading needs (id. at pp. 9-18). The June 2009 IEP reflected testing accommodations for all tests over 40 minutes of separate location; 1:1 testing; extended time (2x); answers recorded in booklet; directions read, re-read, and clarified; questions read on tests not measuring reading comprehension; and use of masks and markers (id. at pp. 22, 24, 26). The June 2009 IEP reflected that the CSE considered a general education classroom with OT, but determined that such a program would not meet the student's language processing needs, attending difficulties, or her other academic needs (id. at p. 21). The CSE also considered a class with a 12:1 student-to-teacher ratio, but rejected such a program as too restrictive for the student (id.).

By "Notice of Recommended Deferred Placement" dated June 1, 2009, the district advised the parent that the CSE believed that it might be in the best interest of the student to defer placement in the recommended program until September 2009, that a placement would be available at that time, that a Final Notice of Recommendation (FNR) would be forthcoming on or before August 15, 2009, and that the FNR would advise of a specific site placement (Dist. Ex. 3). The parent checked a box indicating her agreement to the proposed program recommendation and her agreement to defer placement, and signed and dated the document on June 1, 2009 (id.).

By due process complaint notice dated June 15, 2009, the parent requested an impartial hearing (Dist Ex. 1 at p. 3). The parent alleged that the district's implementation of the CSE's recommended CTT program at a district school that was not the school which was closest to the student's home, violated the least restrictive environment (LRE) provisions in 8 NYCRR 200.4 and denied the student a free appropriate public education (FAPE)[2] (Dist. Ex. 1 at pp. 1-2; see 8 NYCRR 200.4[d][4][ii]; see also 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. § 300.116[b]). The parent asserted that pursuant to State regulation, CTT is "a supplementary aid and service" to be provided in a general education classroom and not a program recommendation; therefore, it was inappropriate for the district to transfer the student out of her "home zoned school just to have a special education teacher in her general education classroom" (Dist. Ex. 1 at pp. 1, 2). The parent also asserted that the testing accommodations recommended on the IEP, which addressed only tests in excess of forty minutes in length, were inadequate and violated 8 NYCRR 200.4(d) (id. at pp. 2-3; see 8 NYCRR 200.4[d][2][vi]). The parent also asserted that the district's in-school speech-language therapy would result in excessive pull-outs from class, and further that the student required that speech-language therapy be provided on a 12-month basis (Dist. Ex. 1 at p. 3). As

[2] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

relief, the parent requested that the district: (1) provide CTT "services" to be placed immediately in the student's general education class at her "home zoned" school; (2) provide testing accommodations, with the exception of separate location, for all of the student's tests; (3) provide speech-language therapy on a 12-month basis; and (4) provide the student's speech-language therapy via a related service authorization (RSA) to avoid pulling the student out of class (id.).

By FNR dated July 1, 2009, the CSE advised the parent of the placement at which the recommended program in the June 2009 IEP would be implemented (Dist. Ex. 4). The identified school was a different school than the neighborhood school that the student had been attending (id.). The FNR also provided contact information for a staff person at the district and indicated that if the parent disagreed with the recommendation or wanted to arrange another CSE meeting, she should contact the person listed (id.).

The impartial hearing took place on July 14, 2009 (Tr. pp. 1, 111; IHO Decision at p. 2). On July 17, 2009, the impartial hearing officer rendered his decision (IHO Decision at p. 6). The impartial hearing officer noted that the district agreed to provide the parent's requested testing accommodations (id. at p. 2). He therefore ordered the district to provide "full testing accommodations" (id. at p. 6). The impartial hearing officer also noted that the student was receiving 12 months of speech-language therapy, as had been requested by the parent (Tr. pp. 18-19; IHO Decision at p. 2). However, the impartial hearing officer found that the district's proposed pull-out speech program would be "detrimental to both the emotional make-up of [the student] and most likely to her academic achievement" (IHO Decision at pp. 3-4). Therefore, he ordered the district to provide the parent with an RSA for the student's speech-language therapy (id. at p. 6). Noting testimony by district personnel that the neighborhood school did not have a minimum number of six to seven students with special education needs appropriate for a CTT class, the impartial hearing officer found that the district did not have enough fourth grade students to create a CTT class at the student's neighborhood school (id. at pp. 4-5). He also disagreed with the parent's contention that CTT was a service to be provided individually for each child, finding instead that CTT is a program to be provided in a class consisting of general education students and a maximum of 12 students with special education needs (id.).[3] The impartial hearing officer noted that the parent did not object to the CTT program, but objected to the fact that there was no CTT program in the student's then current school (id. at p. 5). As such, he denied the parent's request to create a CTT class at the student's neighborhood school by placing a special education teacher in the student's general education class (id.). However, the impartial hearing officer further found that the CSE did not consider the social and emotional ramifications of deciding to remove the student from her neighborhood school (id.). He therefore ordered the district to conduct a new CSE meeting within two weeks of receipt of his decision (id.). The impartial hearing officer also ordered that if the parent decided that the proposed CTT program at another school was inappropriate, then the student would receive three hours of daily SETSS in her general education class at the neighborhood school to "cover the core subjects" and to "be her support as a CTT teacher would be in a CTT program" (id. at pp. 5-6).

The parent appeals, and asserts that although the district's proposed CTT recommendation for the 2009-10 school year was appropriate to meet the student's needs, it was improper for the district to remove the student from her neighborhood school to place her in a CTT class in a different school farther from her home. The parent asserts that State regulations provide that students shall be placed in schools that are as close as possible to their homes, and also in the

[3] See 8 NYCRR 200.6(g)(1).

school that they would have attended were they not disabled (see 8 NYCRR 200.4[d][4][ii][b]). The parent also asserts that the impartial hearing officer's decision that CTT is a program and not a supplementary service was incorrect because: (1) State regulations, specifically in 8 NYCRR 200.6(g), refer to CTT as an integrated co-teaching service; (2) New York State Education Department (SED) guidance documents state that CTT is a service provided to students in general education environments; and (3) the student's IEP specifically recommends a general education environment with only supplementary supports and services. The parent further asserts that removing the student from her neighborhood general education classroom to place her in a different school violates LRE mandates. The parent also asserts that: (1) the impartial hearing officer's determination that there were not enough students in the student's neighborhood school to create a CTT program was based upon inconsistent testimony from the district's placement officer regarding the minimum number of students needed to create a CTT class; (2) there is no minimum number of students needed for a CTT class to be created; and (3) the impartial hearing officer restricted the parent's presentation of evidence that would have revealed that the lack of a CTT class at the neighborhood school caused the district to send students who were recommended for CTT classes to other schools or alternatively, not recommended neighborhood students for CTT services. The parent contends that the impartial hearing officer improperly limited questioning and was overly concerned about how much the services would cost the district. Finally the parent asserts that the impartial hearing officer's alternate contingent order of three hours of SETSS was not sufficient to provide the student with adequate academic support. As relief, the parent requests that: (1) CTT be deemed a service and not a program; (2) the impartial hearing officer's contingent award of three hours of SETSS be overturned; and (3) the student be educated in her "home-zoned" school in a CTT environment, or in the alternative, be provided with a full-time consultant teacher in her general education classroom for the entire day.

In its answer, the district asserts that it offered the student a FAPE for the 2009-10 school year and that the impartial hearing officer correctly declined to order the creation of a fourth grade CTT class for the student in her neighborhood school. The district also asserts that the parent's contention that CTT is a service and not a program is erroneous. The district asserts further that it is not legally obligated to create a CTT class at the student's neighborhood school; that students must be educated in a school that is as close as possible to the student's home, not the school that is closest to the student's home; and further, that the selection of a school placement is an administrative function which is best left to the district. The district also asserts that the parent is precluded from being awarded the requested alternative relief of a fulltime consultant teacher to support the student in her general education class because this relief was not requested in the parent's due process complaint notice or at the impartial hearing.

The district also cross-appeals, and asserts that the impartial hearing officer erred in awarding contingent relief of fifteen hours of SETSS per week should the parent reject the district's proposed CTT class. The district contends that the impartial hearing officer should have confined his determination to the issues that were raised by the parent and that the parent should not be able to receive SETSS relief because she never requested SETSS in her due process complaint notice, nor did she request such relief at the impartial hearing. The district also asserts that the impartial hearing officer erred in ordering the district to conduct a new CSE meeting because the parent has conceded that the proposed CTT program was appropriate. However, the district admits in two footnotes in its answer that it did reconvene the CSE in compliance with the impartial hearing officer's order and developed an August 2009 IEP (Answer at pp. 9 n. 5, 13 n. 6). The district asserts that the resultant IEP recommended a program which changed the prior CTT

recommendation to a general education program with "'no less' than fifteen hours per week of SETSS, and the provision of related services" (Answer at p. 9 n. 5).

In her answer to the cross-appeal, the parent disagrees with the district's assertion that the impartial hearing officer's contingent order of fifteen hours of SETSS per week was a sua sponte order, asserting that the order was in response to the parent's request to place a full-time special education teacher in the student's general education class. The parent contends that the name of the service (SETSS, consultant teacher, or CTT) is not important; what the parent is seeking is a special education teacher in the student's general education classroom. In response to the district's assertion that the parent conceded the appropriateness of proposed CTT program, the parent argues that she clearly asserted in the due process complaint notice that she contested the implementation of district's recommended CTT program. The parent asserts further that the district's proposal to remove the student from the school she had attended for the previous five years was made without taking into consideration the student's social and emotional needs and functioning ability. Additionally, the parent asserts that the district did not meet its burden to establish that the proposed program was appropriate, and further asserts that the CSE was improperly constituted because the CSE team lacked a school psychologist and an additional parent member. The parent attaches a copy of an IEP dated September 22, 2009 reflecting that the CSE had reconvened and recommended a general education program with SETSS for English language Arts (ELA), math, science and social studies, and "direct service in the general education setting no less than fifteen hours per week" (Answer to Cross-Appeal Ex. 1). The parent asserts that this recommended program "nullifies the concerns of the [district] regarding the appropriateness of the [impartial hearing officer's] order for 15 hours of SETSS" (Parent Answer to Cross-Appeal ¶ 54).

By letter dated November 5, 2009, the district asserts that the June 1, 2009 IEP (the subject of the instant appeal) was never implemented and that it has been superseded by the September 22, 2009 IEP. The district also asserts that whereas the parent had initially opposed the impartial hearing officer's award of alternative relief of a general education program with fifteen hours of SETSS in her petition, in her answer to the district's cross-appeal, the parent indicated that she was in agreement with the impartial hearing officer's alternative award as adopted in the September 22, 2009 IEP. The district asserts that this change in position by the parent now renders the parent's appeal moot.

By letter dated November 10, 2009, the parent alleges that she was "forced" to accept the "inadequate" SETSS programs in both the August 3, 2009 IEP and in the subsequent September 22, 2009 IEP, otherwise the student would have had to "endure the trauma of a school switch" in order to receive the CTT program and services recommended in the contested June 1, 2009 IEP. The parent states that she chose to leave the student at the neighborhood school and hoped that her appeal would be upheld so that the student would receive the full-time support that the parent had requested (id.). Enclosed with the letter was a copy of the August 3, 2009 IEP previously referenced in the district's answer and cross-appeal.[4]

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a free and appropriate public education (FAPE) that emphasizes special education and related services

[4] This August 3, 2009 IEP, like the subsequent September 22, 2009 IEP, recommended that the student attend a general education program with SETSS for ELA, math, science and social studies, in addition to direct service in the general education setting of no less than fifteen hours per week.

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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; see also E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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 LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.4[d][4][ii], 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; 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]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The IDEA requires that a valid IEP be in effect "at the beginning of each school year" and that the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (K.Y. v. Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; 584 F.3d 412 [2d Cir. 2009]; Application of a Student with a Disability, 09-082; Application of a Student with a Disability, 09-074; Application of a Student with a Disability, 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability,[5] and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).[6] This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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 [2d Cir. 2008]; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with

[5] See 8 NYCRR 200.6 for New York State's continuum of services.

[6] The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist, 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007, therefore it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the instant case, initially I note that neither party appealed the impartial hearing officer's order that the district provide full testing accommodations and speech-language therapy via an RSA (IHO Decision at p. 6; see Tr. pp. 18-19). Similarly, neither party appealed the

impartial hearing officer's finding that the CSE failed to consider the social and emotional ramifications of taking the student out of the neighborhood school (IHO Decision at p. 5). Therefore, those aspects of the impartial hearing officer's decision are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

I will next address the parent's assertion that the June 2009 CSE was not properly composed. This issue was first raised in the parent's answer to the district's cross-appeal. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 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 impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parent's June 15, 2009 due process complaint notice did not raise the issue of CSE composition, there was no evidence at the impartial hearing regarding this issue, and the impartial hearing officer did not address the issue in his decision (see IHO Decision; Dist. Ex. 1). Therefore, I find that this issue is outside the scope of my review and I will not consider it (see Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *6-*7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

I now turn to the issue of whether the district's recommended program was provided in the LRE. The parent asserts that the district's placement recommendation where the student's June 2009 would be implemented was not in the LRE because the placement was not "as close as possible to the student's home" (Petition ¶¶ 3, 11; see 8 NYCRR 200.4[d][4][ii][b]). The hearing record does not support this contention nor does it support the parent's requested relief that the district be ordered to create a CTT program at the student's neighborhood school (see Tr. pp. 26-27; see also Tr. pp. 33-34, 35-36). The district contends that although the district placement was required to be "as close as possible to the student's home" (8 NYCRR 2004[d][4][ii][b]), this provision does not mandate that the district's school assignment must be the closest school to the

student's home (see White, 343 F. 3d at 381-82; AW, 372 F.3d at 682; Kevin G. v. Cranston Sch. Committee, 130 F.3d 481, 482 (1st Cir. 1997). The impartial hearing officer found and the hearing record reveals that, although many schools within the student's district had fourth grade CTT classes, the neighborhood school did not have enough fourth grade students to warrant the creation of a CTT class (Tr. pp. 26-27; see Tr. pp. 33-34, 35-36). Moreover, the district's placement officer testified that he tried to locate a CTT class that was in "the next, nearest school," to the student's home and that the district ultimately recommended a school that was approximately two miles from the student's home (Tr. pp. 28-29). There is no indication in the hearing record that the student would not be able to attend the recommended school. Moreover, the hearing record does not demonstrate that placement in a CTT general education classroom with both disabled and non-disabled peers is inappropriately restrictive for the student. Rather, the hearing record suggests that such a classroom placement is consistent with the LRE. The hearing record also reflects that the CSE considered and rejected placement in a 12:1 class in the student's neighborhood school, but rejected it as too restrictive (Dist. Ex. B at p. 20). The CSE also rejected placement in a general education class with occupational therapy as not appropriate to meet the student's "significant language processing, academic concerns and attentional difficulties" (Dist. Ex. 2 at p. 21). Under the facts of this case, I do not find the recommended CTT program violative of LRE requirements.

I will now address the impartial hearing officer's contingent award of fifteen hours of SETSS per week to the student (IHO Decision at pp. 5-6). The district objects to the contingent SETSS award on the ground that the parent never requested this relief in her due process complaint notice or at the impartial hearing. The parent also objects to the impartial hearing officer's contingent award of fifteen hours of SETSS per week, asserting that it was not sufficient to provide the student with adequate academic support. Pursuant to the IDEA, the due process complaint notice must provide "a proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. § 1415[b][7][A][ii][IV]; 34 C.F.R. § 300.508[b][6]; 8 NYCRR 200.5[i][1][v]). The parent did not seek additional SETSS in her due process complaint notice (see Dist. Ex. 1). The issue of SETSS was not raised at the impartial hearing nor did the parent seek to amend her due process complaint notice to include such a claim (see 20 U.S.C. § 1415[c][2][E], [f][3][b]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]). Therefore, I find that it was improper for the impartial hearing officer to sua sponte award 15 hours of SETSS to the student. Moreover, there is no basis in hearing the record for doing so.[7]

Additionally, I note that the contingent award is improper because it is advisory in nature (IHO Decision at pp. 5-6). The contingent SETSS award is based upon the impartial hearing officer's assumptions that, upon remand, the CSE would again recommend a CTT program and further that the parent would in turn reject that CTT proposal (id.). As both the August 3, 2009 and September 22, 2009 IEPs reveal, the CSE did not recommend a CTT class and therefore, the condition precedent necessary to trigger the impartial hearing officer's contingent SETSS award did not occur.

I will now turn to the district's assertion that the parent's agreement with the June 2009 CSE's recommendation for a CTT program rendered the impartial hearing officer's order for a new

[7] The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 09-027; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40).

CSE meeting moot and further, that the parent's agreement with the recommendations made in the superseding September 22, 2009 IEP, make this appeal concerning the June 2009 IEP moot.

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, 583 F. Supp. 2d at 428; 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]; Application of a Child with a Disability, Appeal No. 07-139). 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). However, 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]). 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). 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).

Although I agree with the district that the parent expressed agreement with the June 2009 IEP CTT program recommendation in the signed "Notice of Recommended Deferred Placement" (Dist. Ex. 3), and that the parent also indicated in her petition that the June 2009 IEP program and services recommendations were appropriate to meet the student's needs (Pet. ¶ 1), I also find that the parent clearly indicated in the due process complaint notice and in her pleadings on appeal that she contests the implementation of the June 2009 CSE's recommendations, specifically that the location of the recommended CTT class was not at the student's neighborhood school (Dist. Ex. 1

at p. 1; see Tr. p. 21). I also note that the school year in dispute is the current 2009-10 school year and that any decision herein would have an immediate effect upon the parties during this school year. Under these circumstances, I conclude that the issues relating to the placement recommendation for the current school year is still a live controversy and therefore precludes a finding of mootness.

I have examined the parties' remaining contentions and find that they are either without merit, or that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated July 17, 2009 is hereby annulled to the extent that it ordered that the student be provided with three hours of daily SETSS in a general education class if the parent decided that the district's proposed CTT program at another school was inappropriate.

Dated: **Albany, New York**
December 21, 2009

PAUL F. KELLY
STATE REVIEW OFFICER