The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 09-134

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

Appearances:
Law Office of Anton Papakhin, PC, attorneys for petitioner, Anton G. Papakhin, Esq., of counsel

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 for an order directing respondent (the district) to amend her son's individualized education program (IEP) to place the student in a private out-of-State residential program and to directly fund the program for the balance of the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in a 6:1+1 special class in a district specialized middle school (Tr. pp. 27, 154; Dist. Ex. 8 at p. 1). According to the hearing record, the student has received diagnoses of a mood disorder, not otherwise specified (NOS); an impulse control disorder, NOS; autism; mental retardation; asthma; features of Cushing's syndrome; and obesity (Dist. Ex. 4 at p. 1; Parent Exs. E at p. 4; F at p. 1; H at pp. 1, 3). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record confirms that the student has been enrolled in public school from pre-kindergarten to the present (Tr. p. 154; Dist. Ex. 1 at p. 2; Parent Ex. H at p. 2). The parent and the student's grandmother advised that they first observed developmental delays in the student during his early childhood (between the ages of three and four), and the hearing record notes a history of Early Intervention (EI) services (Tr. pp. 118-19, 152-53; Dist. Ex. 1 at p. 2). The parent and the student's grandmother further reported that the student began manifesting behavioral

concerns in September 2008, when, at ten years of age, the student "trashed" his home; this incident resulted in a two week hospitalization and the initiation of pharmacological treatment (Tr. pp. 121-25, 153, 156; see Dist. Ex. 5 at p. 1; Parent Ex. E at p. 1). On November 27, 2008, the student was involved in another incident in which, according to the parent, "[h]e began pulling my hair, and kicking me. He was choking my mother and holding her down as well" (Dist. Ex. 5 at p. 1).[1] In February 2009, the student was involved in another incident in which he pulled his grandmother's hair (Tr. pp. 125-26; see Dist. Ex. 5 at p. 1). This incident resulted in hospitalization of the student for two days (id.).

On March 19, 2009,[2] the Committee on Special Education (CSE) convened for the student's annual review (Parent Ex. C). In attendance were the student's special education teacher and the parent (id. at p. 2). The CSE recommended continuing the student's classification as a student with autism and recommended a 12-month program consisting of a 6:1+1 special class in a specialized "District 75" school,[3] related services consisting of occupational therapy (OT) twice per week for 30 minutes per session in a 1:1 setting, physical therapy (PT) twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy three times per week for 30 minutes per session in a 1:1 setting, and the services of a 1:1 paraprofessional throughout the day (id. at pp. 1, 3-4, 12, 14).[4]

In March 2009, the student underwent a third hospitalization after he physically struck the parent and his grandmother, pulled their hair, and held them down (Tr. pp. 126-27, 158-59; Dist. Ex. 5 at p. 1; Parent Ex. E at p. 1).

In April or May 2009, the student's grandmother visited the residential program at the Judge Rotenberg Center (JRC) in Massachusetts, identified in the hearing record as a non-profit private school that the Commissioner of Education has approved as a school with which districts may contract to instruct students with disabilities (Tr. pp. 128-31, 173-77; see 8 NYCRR 200.1[d], 200.7). On May 1, 2009, JRC formally accepted the student into its residential program (Parent Ex. J).

On May 5, 2009, the district's social worker interviewed the parent and updated the student's social history due to the parent's "behavior concerns" regarding the student (Dist. Ex. 1 at p. 1). The social history update report revealed that "[a]cademically, [the student] is okay" (id. at p. 2). Behaviorally, the parent stated to the social worker "that [the student] gets a lot of tantrums, likes to hit, fight, and pull hair," adding that "he attends school regularly with minimum

[1] The student's grandmother referenced an incident occurring "around January or February [2009]," in which the student was pulling her hair, but it is unclear from the hearing record if she is referring to the November 27, 2008 incident or the subsequent incident (Tr. pp. 125-26).

[2] In the exhibit list attached to the impartial hearing officer's decision, the impartial hearing officer erroneously ascribes a date of "March 9, 2009" to the resultant IEP developed at this CSE meeting (IHO Decision at p. 8; see Parent Ex. C).

[3] While not identified in the hearing record, the reference is presumably to the district's District 75 (see http://schools.nyc.gov/Offices/District75/default.htm).

[4] The March 19, 2009 IEP did not contain dates delineating the duration of the recommended program (see Parent Ex. C at p. 2).

absences" (id.). The parent informed the social worker that the student was treated by a private psychiatrist every two weeks and was continuing with pharmacological treatment for his tantrums (id.). The social worker gleaned that the parent believed that the student needed residential placement "due to his behavior at home" (id. at p. 3).

On May 17, 2009, "after an episode of significant aggression toward his grandmother in the home," the student was again hospitalized (Parent Ex. E at pp. 1, 3; see Tr. pp. 127, 159-60; Dist. Ex. 5 at p. 1). On May 27, 2009, the student was discharged with a "strong" recommendation from the treatment team that he "be considered for residential placement due to difficulties at home" (Parent Ex. F at p. 5).

On June 8, 2009,[5] the student's special education teacher prepared a student progress report (Dist. Ex. 2). With regard to the student's academic functioning, the special education teacher reported that the student could identify all upper and lower case letters, could identify pictures, and was working on matching words to pictures (id. at p. 1). In math, he was able to identify numbers 1 through 40, could accurately match coins to a designated amount, could demonstrate 1:1 correspondence, and was able to recognize colors (id.). The special education teacher confirmed that the student "ha[d] a 1:1 paraprofessional with him at all times," and "work[ed] independently on specific programs;" however, she also noted that the student "ha[d] a very short attention span. He complete[d] his programs however at a slow rate" (id.). With regard to social/emotional functioning, the special education teacher opined that the student "thrive[d] in a structured environment. He follow[ed] [the] schedule and the routine of the class" while adding that his "[s]ocialization skills [were] low" (id. at p. 2). She concluded the progress report by recommending that the student continue to receive the services of a 1:1 paraprofessional in the educational setting, commenting that the student "completes his programs in a 1:1 setting" and performs optimally with a 1:1 paraprofessional, and surmising that in comparison to his peers, the student had made progress during that school year (id.; see Tr. pp. 28-30).

On June 12, 2009, the student's private psychiatrist forwarded a letter to the CSE relative to the student's upcoming CSE review (Dist. Ex. 3).[6] The private psychiatrist confirmed that thestudent had been hospitalized on four separate occasions since October 2008[7] and characterized his then current condition as "unstable, despite psychiatric medications and social interventions" (id.). He further apprised that the student's "behavior remains disruptive and aggressive" despite

[5] The hearing record indicates that the student's special education teacher signed the progress report on June 9, 2009 (Dist. Ex. 2 at p. 2).

[6] The hearing record contains duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District exhibit and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 09-124; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

[7] The hearing record references another incident occurring on an unspecified day in June 2009 in which the student was taken to the hospital, but was not admitted (Dist. Ex. 5; Parent Ex. H at p. 1).

pharmacological interventions, and concluded "[t]he recommendation is to start the process for placement in a [r]esidential facility to ensure adequate medical and psychiatric care" (id.).

On June 15, 2009, at the parent's request, the district's school psychologist conducted a psychoeducational reevaluation of the student (Dist. Ex. 4). The school psychologist noted that the student exhibited "extreme behavioral problems at home that include over eating, hitting family members with his toys, breaking glass frames and vases, pulling family members' hair and kicking them. In contrast, his behavior at school does not include the extreme behaviors exhibited at home" (id. at pp. 1, 3). However, the reevaluation report also noted two in-school incidents in which the student allegedly "attacked" a teacher in the cafeteria and physically struck a bus driver and bus matron (id. at p. 2). The school psychologist characterized the student's overall academic and cognitive functioning as "extremely delayed" and reported that he "is functioning at the low end of his class" (id. at pp. 1, 3). The school psychologist commented that "[a]ccording to his teacher he is progressing well in her class" and "his behavior is not negatively impeding upon his academic progress at this time" (id. at pp. 2-3). While attempting to administer the Test of Non-Verbal Intelligence (TONI) to the student, she reported that the student was "non-testable," as he persisted in "pick[ing] at a cut on his lip until it bled" (id.; see Tr. pp. 84, 87-89).[8] However, she also observed the student "working appropriately" with his paraprofessional in the classroom, "seated correctly and using flash cards for instructional purposes" (Dist. Ex. 4 at p. 3). The school psychologist stated that the reevaluation would be shared with the parent and the CSE "to be combined with further multidisciplinary reports to decide on the most appropriate setting for [the student]" (id.).

On June 18, 2009, the parent and the student's grandmother forwarded separate correspondence to the district requesting that the student "be re-evaluated and placed in an appropriate environment for his education and well being" and identifying JRC as the preferred residential placement (Dist. Exs. 5; 6; see Tr. p. 138).

On June 19, 2009, the CSE convened for a "Requested Review" meeting to develop an educational program for the 2009-10 school year, with a district representative who was also the "site coordinator;" two school psychologists, one of whom conducted the student's June 15, 2009 psychoeducational reevaluation; a special education teacher; an "SLP;"[9] an additional parent member; the parent; and the student's grandmother in attendance (Dist. Ex. 8 at pp. 1-2). The June 19, 2009 CSE recommended the identical program contained in the March 19, 2009 IEP (compare Dist. Ex. 8 at pp. 1-4, 8, 11, with Parent Ex. C at pp. 1, 3-4, 12, 14). The June 19, 2009 IEP listed effective dates of July 5, 2009 to June 18, 2010 (Dist. Ex. 8 at p. 2). The June 19, 2009 CSE noted in the IEP that it considered several alternative programs, including an 8:1+1 setting, which it ultimately rejected because the CSE did not believe that it would adequately address the student's cognitive, social/emotional, and speech delays; a 12:1+4 setting or a day treatment program, which it ultimately rejected because the CSE believed that the student was progressing in his then current setting and it did not deem a more restrictive setting to be warranted; and a residential setting, which it ultimately rejected because the CSE "explained to the parent that [the student's] behavior

[8] The psychoeducational reevaluation report does not identify which edition of the TONI was administered by the school psychologist.

[9] Although not defined in the hearing record, "SLP" is presumed to stand for "speech-language pathologist."

at school d[id] not warrant this restrictive placement" (id. at p. 10; see Tr. pp. 89-90). On June 25, 2009, the district forwarded a copy of the June 19, 2009 IEP and "any other supporting documents that may have been used to construct the IEP" to the parent and indicated that if the parent had any questions, she should contact the person listed on the letter (Dist. Ex. 7).

On July 10, 2009, a private agency assisting the parent in her attempt to secure home-based services for the student conducted a "psychosocial" evaluation of the student (Parent Ex. H at pp. 1, 3-4; see Tr. pp. 107-11). It appears from the hearing record that the resultant evaluation report was based upon a two hour interview with the parent, as it contains only background history information and is devoid of clinical observations (Parent Ex. H). Included among the evaluator's five recommendations for the student were obtaining weekend and emergency respite services for the student, assigning a case manager to oversee his case, continuing his then current program of related services, securing a residential placement for the student, and conducting a psychological examination of the student (id. at p. 4). I note that although the comprehensive psychological evaluation indicated that "a comprehensive psychological evaluation" of the student was scheduled for August 18, 2009, the hearing record contains neither any indication that such evaluation took place, nor a copy of any resultant report (id. at p. 1).

On August 17, 2009, the parent, through counsel, filed a due process complaint notice alleging that the district failed to offer the student a free appropriate public education (FAPE)[10] on both procedural and substantive grounds (Parent Ex. A). The complaint referenced the educational program developed at the March 19, 2009 CSE meeting, but failed to specify the parent's specific concerns regarding both the March 19, 2009[11] and the June 19, 2009 IEPs, generally stating that the program recommended therein was "ineffective for her child" and was "inappropriate for her child and deprive[d] him of FAPE" (id. at p. 2). The parent sought an order from an impartial hearing officer directing immediate placement of the student at JRC, and posited that "JRC's residential setting is the least restrictive environment [LRE] in which [the student] can make reasonable academic and emotional progress" (id.). The due process complaint notice stated that the parent "reserved the right" to unilaterally enroll the student at JRC at district expense "on or after ten (10) school days" after the district received the complaint, and, alternatively, requested an order from an impartial hearing officer compelling the district to directly fund the student's tuition at JRC for the 2009-10 school year (id. at pp. 2-3).

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[10] 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).

[11] In the due process complaint notice, parent's counsel erroneously identified the date of this IEP as "March 9, 2009," instead of the correct date of March 19, 2009 (compare Parent Ex. A at p. 2, with Parent Ex. C at pp. 1-2).

On September 2, 2009, the district responded to the parent's due process complaint notice (Parent Ex. B). In its response, the district confirmed its recommendation of a 6:1+1 special class in a District 75 school with related services consisting of PT, OT, speech-language therapy, and a "crisis paraprofessional;" maintained that the June 19, 2009 CSE relied upon a psychoeducational evaluation and a classroom observation of the student in developing its recommendations; and contended that the June 19, 2009 IEP as developed was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at pp. 2-3).

According to the hearing record, the student was hospitalized for approximately ten days as the result of another behavioral incident occurring in school during the last week of September 2009, the specifics of which are not explained in the hearing record, and the student returned to school on October 2, 2009 (Tr. pp. 66-68).

On October 2, 2009, an impartial hearing convened and concluded on October 6, 2009, after two days of testimony. In a decision dated October 22, 2009, the impartial hearing officer determined that the special education program recommended in the June 19, 2009 IEP was appropriate for the student, noting that it provided both the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) and Applied Behavioral Analysis (ABA) methodologies on a daily basis, and opining that the recommended program "more than appropriately addressed [s]tudent's academic needs" (IHO Decision at p. 5). The impartial hearing officer further concluded that "the provision of a [m]anagement paraprofessional has been successful in appropriately addressing [s]tudent's behavioral and management needs" (id.). While acknowledging that the testimony of the parent and the student's grandmother evidenced that they saw the student as a threat to their physical well-being due to his aggressiveness and size, the impartial hearing officer concluded that these concerns were not the responsibility of the district, which was solely charged with providing the student with a FAPE for the 2009-10 school year (id.). Nor did the impartial hearing officer find merit in the parent's contention that the student's periodic absences from school due to his multiple hospitalizations presented an "educational concern" for the district (id. at pp. 5-6). The impartial hearing officer further determined that the recommendation in one of the hospital discharge reports that the student attend a residential placement was made "'due to difficulties at home'" (id.). Consequently, the impartial hearing officer dismissed the parent's due process complaint notice in its entirety (id. at p. 6).

The parent, through counsel, appeals, seeking annulment of the impartial hearing officer's decision and an order from a State Review Officer directing the district to amend the student's IEP to place the student at JRC for the balance of the 2009-10 school year, or, alternatively, for an order directing the district to prospectively fund the student's tuition for the 2009-10 school year directly to JRC. The parent adduces three principal arguments in the petition. First, she contends that the impartial hearing officer erroneously determined that the district's recommended program was appropriate for the student because: (1) although the district's special education teacher testified that the student was "doing fine" behaviorally and educationally in the district's recommended class, during a subsequent CSE meeting she was among the CSE members recommending a residential placement for the student; (2) contrary to the impartial hearing officer's determination, the district failed to produce any clinical or factual support for its determination that the student's behavior could be adequately managed in the district's recommended program; (3) none of the district's witnesses proffered any evaluative data demonstrating that the student made any reasonable academic or social/emotional progress during

the past school year; and (4) the district failed to meet its burden of proving that it offered the student a FAPE in the LRE. Second, she argues that she met her burden of proving that JRC is an appropriate residential placement for the student. Third, she maintains that equitable considerations support her request for residential placement of the student at JRC for the 2009-10 school year. The parent attached additional evidence to her petition for consideration on appeal.

Through counsel, the district answers, contending that it is in the process of attempting to place the student in one of several State-approved non-public residential programs within the State, and that at least one such program was reviewing the student's application for enrollment as of December 21, 2009. The district also raises three affirmative defenses, alleging first that the evidence contained in the hearing record demonstrates that the district offered the student a FAPE for the 2009-10 school year because: (1) the June 19, 2009 IEP was reasonably calculated to confer meaningful educational benefits upon the student in the LRE; (2) the evidence contained in the hearing record also demonstrates that at the time of the formulation of the June 2009 IEP, the student's disability was not adversely affecting his educational progress (as contrasted to his behavior at home), therefore relieving the district of an obligation to fund the non-education related portions of a residential program under the Individuals with Disabilities Education Act (IDEA); in the alternative, the district maintains that even if it was under such an obligation, the CSE's recommendation that the student receive a full-time behavior management paraprofessional addressed the student's behaviors, and refutes the parent's argument that the district's failure to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) deprived the student of a FAPE; and (3) the district is not required to fund a residential program deemed necessary to "generalize" skills learned by the student in the school environment; furthermore, even if the IDEA required such funding, the parent failed to demonstrate how a residential program would be necessary for the student in order to generalize such skills. Next, the district asserts that the issue of the appropriateness of JRC's program for the student for the balance of the 2009-10 school year is not yet ripe for adjudication as a matter of law because the parent is not immediately entitled to a residential program outside of the State without first exhausting in-State residential placement possibilities. Finally, the district counters that even if the district did not provide the student with a FAPE for the 2009-10 school year, the parent is not entitled to prospective or direct tuition funding as a matter of law.[12] The parent submitted a reply to the district's answer.

At the outset, I will address several procedural matters arising on appeal. First, by letter dated December 23, 2009, the district requests that the parent's reply be rejected because it exceeds the permissible scope of a reply under the State regulations. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary

[12] In the answer, the district misreads Application of the Dep't of Educ., Appeal No. 09-001. Under certain circumstances, the issuance of an order directing placement of a student at a State-approved private school to ensure that a FAPE is offered would be appropriate (see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-71 ["In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate," the United States Supreme Court held, "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school"]; Application of a Child with a Disability, Appeal No. 08-103; see also 34 C.F.R. § 300.104; 8 NYCRR 200.6[j]). Therefore, the district's argument on this point, given the placement sought by the parents, is without merit.

evidence served with the answer (8 NYCRR 279.6; see Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the district did not serve any additional evidence with its answer. Accordingly, I will accept and consider the reply only to the extent that it responded to procedural defenses interposed by the district (see Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Student with a Disability, Appeal No. 08-031; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002).

Next, the parent requests that I consider additional documentary evidence in the form of an IEP dated October 16, 2009, developed subsequent to the impartial hearing, which is attached to the petition as "Parent Ex. Q."[13] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 09-085; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Dep't of Educ., Appeal No. 08-061; Application of the Dep't of Educ., Appeal No. 08-044; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Dep't of Educ., Appeal No. 07-140; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of the Bd. of Educ., Appeal No. 07-005; Application of a Child with a Disability, Appeal No. 06-058; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of a Child with a Disability, Appeal No. 05-020; Application of the Bd. of Educ., Appeal No. 04-068). In the instant matter, the evidence in question did not exist at the time of the impartial hearing, and, in my determination, is necessary in order to render a decision. Furthermore, not only does the district not object to the introduction of this additional documentary evidence, but it also incorporates the October 16, 2009 IEP directly into its answer (Answer ¶¶ 66-67, 82). Accordingly, I will consider it in this appeal for the limited purpose of establishing: (1) that another IEP has been created subsequent to the formulation of the IEPs in dispute herein; and (2) that the district now concurs with the parent that a residential placement is appropriate for the student.[14]

The October 16, 2009 CSE meeting was attended by a school psychologist who also acted as district representative, the student's special education teacher from the district, the assistant

[13] According to the hearing record, at the conclusion of the impartial hearing, the district agreed to reconvene the CSE to revisit the issue of the appropriateness of a residential placement for the student based upon the July 10, 2009 private psychosocial evaluation (Parent Ex. H) and the student's hospitalization at the end of September 2009, neither of which were considered by the June 19, 2009 CSE (Tr. pp. 214-18). The parties' dispute neither that the CSE did in fact reconvene on October 16, 2009, nor that the document attached to the petition as "Parent Exhibit Q" is the resultant IEP from that CSE meeting.

[14] In the reply, parent's counsel indicates that the parent has filed a separate due process complaint notice relative to the October 16, 2009 IEP and is proceeding in that appeal "without prejudice to her rights and claims asserted in this … appeal" (see Parent Reply ¶5).

principal, the site coordinator, an additional parent member, and the parent (Parent Ex. Q at p. 2).[15] With regard to the student's social/emotional performance, the CSE noted that "[e]xtensive collected documentation attest[s] to aggressive behaviors towards peers and staff alike. [The student] grabs, pushes others. He continually behaves in a physically aggressive and in an out of control manner" and concluded that "[a]dults both at school and at home are unable to manage his behaviors" (id. at p. 4). The October 16, 2009 IEP indicates that the CSE considered maintaining the student's placement in a 6:1+1 District 75 program, but determined that "[t]his program is not sufficient to meet [the student's] needs. He needs a 12-month school year residential setting" (id. at p. 12). A BIP attached to the IEP cites the student's "aggressive, perseverative and self-injurious behaviors" and advises that "he grabs, pushes and hits others, pulls their clothes and hair, spits at them, touches his genitalia and tries to touch others. He also injests [sic] non-edible items" (id. at p. 14). In order to reduce these behaviors, the CSE recommends daily/weekly behavioral charts and a behavior modification plan utilizing tangible rewards, and it suggests a crisis management paraprofessional and utilization of a time-out room as supports in furtherance of that goal (id. at pp. 4, 14).

The October 16, 2009 CSE recommends continuing the student's autism classification and related services, while modifying the student's prior IEP by referring the case to the district's central based support team (CBST) to place the student in an in-State non-public residential placement in a 6:1+1 setting (Parent Ex Q. at pp. 1-4, 13). The CSE indicated that the effective dates of the program recommended in the October 2009 IEP would be November 2, 2009 through October 16, 2010, and that a copy of the IEP was forwarded to the parent on October 16, 2009 (id. at p. 2).[16,17] There is no indication in the hearing record as to the current status of the district's placement efforts relative to the October 16, 2009 IEP.

Turning to the instant appeal, 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]; 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 a Student with a Disability, Appeal No. 09-003; 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). The IDEA requires a CSE to review and if necessary revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]), and each new IEP supersedes the prior IEP in addressing

[15] The October 16, 2009 IEP also indicates the attendance of an individual identified as a "CIT," a term which is not defined in the hearing record (Parent Ex. Q at p. 2).

[16] In the petition, the parent contends that she did not receive a copy of the October 16, 2009 IEP until November 16, 2009 (Pet. ¶ 72).

[17] There is no indication in the hearing record that a copy of the October 16, 2009 IEP was either furnished to or received by the impartial hearing officer prior to his issuing the October 22, 2009 decision.

the student's needs (see Application of the Bd. of Educ., Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 06-060; Application of a Child with a Disability, Appeal No. 06-046; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-063). Exceptions to the mootness doctrine apply only in limited situations and are severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). 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 this appeal, I conclude that there is no longer any live controversy relating to the parties' dispute over the program recommended by the district in the March and June 2009 IEPs as raised in the parent's August 17, 2009 due process complaint notice (see Parent Ex. A). The hearing record reveals that the March and June 2009 IEPs that were the subject of the parent's due process complaint notice and are before me on appeal have been superseded by the October 16, 2009 IEP, which recommended a residential placement.[18] I note that in her due process complaint notice, the parent maintained that a "residential setting is the [LRE] in which [the student] can make reasonable academic and emotional progress" (Parent Ex. A at p. 2); in the October 16, 2009 IEP, the district recommends a residential placement (Parent Ex. Q at pp. 1, 12).[19] Here, the hearing record demonstrates that the IEPs in dispute have been superseded, the superseding IEP is not in dispute in this appeal, but rather is being disputed in another forum, and the superseding IEP is substantially different from the IEP disputed herein. Moreover, the record herein reflects that the superseding IEP was based, in part, on additional evaluative data that was not before the impartial hearing officer below and is not before me on appeal. Because the October 16, 2009 IEP, which recommended a different program than the March and June 2009 IEPs, supersedes both the March and June 2009 IEPs, the parent has no reasonable expectation that the student could be subject to the same action again.

Based upon the foregoing, I am constrained to conclude that the parent's claims relating to the March 19, 2009 and June 19, 2009 IEPs have been rendered moot and need not be further addressed here. A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-032; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-

[18] I make no determination regarding the appropriateness of the October 16, 2009 IEP in this appeal.

[19] I note that the parties do not dispute the continuation of the student's related services from the June 19, 2009 IEP. Because the parent did not appeal the impartial hearing officer's determination that the recommended related services proposed by the district in the June 19, 2009 IEP were appropriate, this aspect of the impartial hearing officer's October 22, 2009 decision is final and binding upon 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. 09-096; 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).

086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Under the circumstances presented here, I decline to review the merits of the parent's appeal.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

Lastly, I remind the district of its obligations contained in part 200.4[e][1] of the State regulations.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 29, 2010

PAUL F. KELLY
STATE REVIEW OFFICER