The University of the State of New York

The State Education Department
State Review Officer
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No. 11-054

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Diane da Cunha, Esq., of counsel

Legal Services NYC-Bronx, attorneys for respondent, Oroma Homa Mpi, Esq., of counsel

DECISION

Petitioner (the district) appeals from the portion of a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered the district to provide a transportation accommodation to the student, as well as pay the costs of the student's tuition at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Rebecca School in an ungraded classroom with nine students, one head teacher, and three assistant teachers and receiving occupational therapy (OT), speech-language therapy, and adapted physical education (Tr. pp. 1226, 1387-88, 1504, 1510-11; Parent Ex. Q at pp. 1, 5, 6).[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[1] A December 2010 Rebecca School interdisciplinary progress report indicated that the student was in an 8:1+3 classroom; however, the student's teacher testified at the impartial hearing on February 23, 2011 that there were 9 students in the class (Tr. p. 1513; Parent Ex. Q at p.1).

Background

Due to the nature of the issues presented in this appeal, a detailed recitation of the student's educational history is unnecessary. Briefly, the hearing record reflects that the student has reportedly received diagnoses of autism and mental retardation, and received early intervention services at the age of three (Parent Ex. D at pp. 1-2). The student primarily communicates by a combination of gestures, signs, verbal approximations, and augmentative and alternative communication consisting of a communication book and a voice output device (Tr. p. 502; Dist. Ex. 23 at pp. 3-4; Parent Exs. D at p. 1; Q at p. 1). The student is ambulatory, however, she exhibits deficits in her gross and fine motor skills as well as in sensory processing and sensory integration (Tr. pp. 1226-27; Parent Ex. D at p. 3). The student exhibits inconsistent attention, but typically transitions well unless transitioning from a preferred activity (Dist Ex. 19 at pp. 1-3; Parent Ex. Q at p. 1). She enjoys music but dislikes loud activities and avoids them in the classroom (id.). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On January 26, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and develop her individualized educational program (IEP) for the 2010-11 school year (IHO Ex. 1 at pp. 1-2).[2] Participants included a district representative who also attended as a special education teacher, a district school psychologist who previously conducted a November 2009 classroom observation of the student, an additional parent member, a social worker from the Rebecca School, the student's special education teacher from the Rebecca School (by telephone), both of the student's parents, a bilingual social worker who translated for the parents, and the parents' attorney (Tr. p. 87; IHO Ex. 1 at p. 2). Documents considered by the January 2010 CSE included a December 2009 Rebecca School progress report, a November 2009 classroom observation report, the student's previous IEP, and all of the materials contained in the student's "clinical file" (Tr. p. 101).

According to the December 2009 progress report, the student was alert and attentive to her environment, had started to participate in classroom activities with the support of a preferred adult, and willingly entered into "two-way purposeful back and forth interactions"(Parent Ex. C at pp. 1-2). She also exhibited picture recognition of familiar objects, greater understanding of words allowing her to follow direction with less support, and interest in books being read to her (id. at pp. 2-3). The December 2009 progress report further indicated that the student utilized a visual schedule and noted the student's sensory "dysregulation" in loud environments, or when she cannot have a desired object or perform a desired activity (id. at p. 4). The progress report also noted that she demonstrates motor planning ability and is able to generate ideas, sequence, and execute simple tasks (id. at p. 5). The student was reported to have made significant gains in her expressive language skills, exhibiting frustration by screaming and crying when she is not understood (id. at p. 6). The progress report further reported that the student continued to be a "picky eater" (id.).

The academic performance and learning characteristics section of the resultant January 26, 2010 IEP reflected that the student's adaptive functioning was in the very low range in all areas (IHO Ex. 1 at p. 3). The student's verbal language was described as emerging, and the January

[2] The hearing record reflects that the January 2010 CSE met for approximately one to two hours (Tr. p. 91).

2010 IEP noted that the student utilized a variety of means to communicate including a picture exchange communication system (PECS) book (id.). The IEP also indicated that the student identified several colors but not shapes, and that she was working on pre-academic skills (id.). In the area of social/emotional performance, the January 2010 IEP reflected that the student was generally alert, attentive, and engaged, but in "auditory overstimulated or frustrating environments," the student exhibited dysregulation (id. at p. 4). According to the IEP, the student "shared attention" with others and engaged in experiences when she was supported by a preferred adult (id.).

The January 2010 CSE continued the student's classification as a student with autism and recommended a 12-month special education program consisting of placement in a 6:1+1 special class in a special school (IHO Ex. 1 at p. 1). Related services recommendations included special transportation and three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a small group (2:1) (id. at pp. 1, 14). The CSE also identified the student's academic management needs as visual [learning], frequent repetition, and consistent rules; and social/emotional management needs as access to sensory materials, a brushing protocol, a therapeutic listening program, and a PECS book to cope with frustration (id. at pp. 3-5). The January 2010 IEP also contained annual goals and short-term objectives to address the student's needs in academic skills, number sense, sensory processing and regulation, motor planning and sequencing, visual and spatial skills, core strength, endurance and balance, engagement, expressive language skills, oral motor articulation and feeding skills, and pragmatic and receptive language skills (id. at pp. 6-11).

The January 2010 CSE considered both an 8:1+1 and a 12:1+1 special class in a special school, but rejected both programs as "insufficiently supportive" and having student-to-teacher ratios that were too large for the student to achieve her IEP goals (IHO Ex. 1 at p. 13). The January 2010 CSE further noted that the student still required 12-month services and therefore, any program that did not provide a 12-month school year was rejected as insufficiently supportive (id.). The hearing record reflects that the entire CSE, including the parents, their attorney, and the student's teacher from the Rebecca School, was in agreement with the recommendation for a 6:1+1 program, as well as the related services mandated on the IEP, and the decision not to develop a behavioral intervention plan (BIP) for the student (Tr. pp. 132, 142-46; see Tr. p. 383). The hearing record also reflects that the parents indicated at the January 2010 CSE meeting that they were happy with the Rebecca School and "actually weren't seeking a public school placement" (Tr. pp. 131, 133, 1784, 1791, 1792; Dist. Ex. 16).

The school psychologist who attended the January 2010 CSE meeting reported that the parent was given a Health Insurance Portability and Accountability Act of 1996 (HIPPA) form for transportation accommodations at the January 2010 CSE meeting (Tr. p. 147, see Tr. p. 312; Dist. Ex. 16). She further explained that once the CSE receives the completed HIPPA form from the parent, the CSE forwards the HIPPA form to the district's physician who would then call the student's physician to discuss the student's transportation needs (Tr. pp. 309-10, 312). The hearing record indicates that in October 2009, the parent submitted medical documentation to the CSE from the student's physician and requested a "smaller bus" and shorter bus ride (not to exceed 45 minutes) for the student (Parent Ex. E). The hearing record also contains two documents titled "OSH Physician's Review: Medical Request for Transportation Accommodations," (OSH form),

one dated January 12, 2010 and one dated February 18, 2010, each signed by a different reviewing district physician (Dist. Exs. 9 at p. 2; 11). The OSH form dated January 12, 2010 did not indicate that the district's physician had spoken with the student's physician and recommended a "mini-bus" for the student (Dist. Ex. 9 at p. 2). The OSH form dated February 18, 2010 indicated that a different district physician had spoken to the student's physician and that the district's physician recommended the student receive an air-conditioned "Miniwagon" (Dist. Ex. 11; see Tr. p. 310). Neither OSH form recommended limited travel time (see Dist. Exs. 9 at p. 2; 11).

On March 2, 2010, the CSE reconvened for a requested review of the student's educational program for the 2010-11 school year (Parent Ex. F at pp. 1-2).[3] In attendance at the March 2010 CSE meeting were a school psychologist who attended as a district representative, a special education teacher, and a bilingual social worker; none of these individuals were members of the January 2010 CSE (id. at p. 2; see Tr. pp. 74, 291-98; IHO Ex. 1 at p. 2). The parent and the parent's attorney also participated at the March 2010 CSE meeting (Parent Ex. F at p. 2). The March 2010 CSE modified the student's January 2010 IEP by adding limited travel time to the IEP and changing the projected start date of the IEP to March 2010 (id. at pp. 1-2). The remainder of the March 2010 IEP was identical to the January 2010 IEP (compare IHO Ex. 1, with Parent Ex. F).

On April 15, 2010, the CSE reconvened for a requested review of the student's educational program for the 2010-11 school year (Parent Ex. G at pp. 1-2).[4] In attendance at the CSE meeting were a district school psychologist and district representative who also attended as a special education teacher, both of whom had attended the January 2010 CSE meeting; an additional parent member; a speech pathologist from the Rebecca School; a translator; the parent; and the parent's attorney (id. at p. 2; see IHO Ex. 1 at p. 2). As a result of this meeting, the April 2010 CSE removed limited travel time from the student's IEP, added the transportation comment "air-conditioned mini-bus" to the IEP, and added the assistive technology device and related goals and short-term objectives as recommended in a March 23, 2010 assistive technology evaluation report (id. at pp. 1-2; Dist. Ex. 7). The April 2010 CSE also changed the projected date of initiation of the IEP from March 2010, as it had been reflected on the March 2010 IEP, back to July 1, 2010, as it had been reflected on the January 2010 IEP (compare Parent Ex. F at p. 2, and IHO Ex. 1 at p. 2, with Parent Ex. G at p. 2). In all other respects, the April 2010 IEP was identical to the January and March 2010 IEPs (compare Parent Ex. G, and IHO Ex. 1, with Parent Ex. F).

In May 2010, a Rebecca School interdisciplinary progress report update detailed the student's progress relative to her functional emotional development as well as described the student's progress in her educational instruction, OT, PT, speech-language therapy, and music therapy (Parent Ex. K).

In a letter dated June 1, 2010, the district summarized the recommendations made by the April 2010 CSE and notified the parent of the school to which the district assigned the student

[3] The district school psychologist testified that she was not clear as to who had requested the March 2010 CSE review (Tr. p. 173).

[4] According to the testimony of the CSE chairperson, she initiated the April 15, 2010 review of the student's IEP (Tr. pp. 290-92).

(Dist. Ex. 2). On June 2, 2010, the parent signed a contract enrolling the student in the Rebecca School for the 2010-11 school year (Parent Ex. L at pp. 1-2).

On July 9, 2010, the parent visited the assigned school (Tr. pp. 1800-04; Parent Ex. A at p. 1). In a letter dated September 20, 2010, the parent stated that she was providing the district with "ten days notice" of her intention to enroll the student at the Rebecca School for the 2010-11 school year at public expense (Parent Ex. B at p. 1). The parent's September 2010 letter detailed her visit to the assigned school on July 9, 2010, and her concerns regarding the school (id. at pp. 1-3). Specifically, the parent alleged that she had spoken to the occupational therapist at the assigned school who informed her that OT sessions were conducted in a group on a push-in basis, which, the parent further alleged, would not be appropriate for the student (id. at p. 2). The parent also noted, among other things, that the student's IEP did not acknowledge that her behavior seriously interfered with instruction and required additional adult support (id. at pp. 3-4).

Due Process Complaint Notice

In a due process complaint notice dated October 12, 2010, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) and requested an impartial hearing to adjudicate her claim for payment of the student's tuition costs at the Rebecca School for the 2010-11 school year (Parent Ex. A). The parent asserted numerous procedural and substantive arguments in her due process complaint notice, including that the student's IEP failed to recommend counseling; that the IEP did not acknowledge that the student's behavior seriously interfered with instruction and required additional adult support; that the assigned school failed to provide OT services consistent with the IEP; that the student's OT goals in the IEP could not be met because the assigned school did not have a sensory gym; and that the transportation accommodation for limited travel time had been added to the March 2010 IEP and thereafter rescinded in the April 2010 IEP without justification (id. at pp. 1-3, 5).[5]

Impartial Hearing Officer Decision

An impartial hearing convened on December 7, 2010, and concluded on March 9, 2011, after eight days of testimony (Tr. pp. 1, 220, 562, 772, 904, 1212, 1501, 1709). In a decision dated April 20, 2011, the impartial hearing officer noted that the CSE relied on the student's December 2009 Rebecca School interdisciplinary progress report in developing the student's IEP (IHO Decision at pp. 20-21; see Parent Ex. C). In reviewing the appropriateness of the district's recommended program, he determined that the district failed to offer the student a FAPE because the district would not be able to implement the student's IEP in the school and classroom that it assigned the student (IHO Decision at pp. 21-22). Specifically, the impartial hearing officer found that the district would be unable to implement the IEP because: (1) the classroom teacher was not a "highly qualified special education teacher" as defined in 34 C.F.R. § 300.18(b)(1)(ii); and (2) the assigned school had no occupational therapist at the site during the school day and the district failed to show that issuing related services authorizations (RSAs) for OT was an appropriate alternative (id. at pp. 20-22).

[5] The parent's due process complaint notice does not specify which IEP she is referring to for the majority of her claims (see Parent Ex. A).

In addition, the impartial hearing officer found that the Rebecca School was an appropriate placement for the student and that the parent was not precluded from seeking tuition reimbursement at a for-profit institution like the Rebecca School (IHO Decision at pp. 20-21). The impartial hearing officer also determined that equitable considerations supported an award of tuition to the parent because she provided oral notice at the January 2010 CSE meeting of her intention to have the student return to the Rebecca School and cooperated with the CSE (id. at pp. 20-21). Accordingly, the impartial hearing officer awarded the parent the costs of the student's tuition at the Rebecca School for the 2010-11 school year (id. at p. 23).

Regarding the parent's claim that the district improperly removed a transportation accommodation from the student's IEP, the impartial hearing officer found that the April 2010 CSE's decision to remove from the student's IEP the limited travel time accommodation that had been added by the March 2010 CSE was unwarranted in that the removal of the accommodation was "unilaterally imposed without the benefit of parental comment or participation" (IHO Decision at pp. 23-24). The impartial hearing officer ordered that the travel accommodations provided for in the March 2010 IEP be reinstated for the duration of the 2010-11 school year (id.).

Appeal for State-Level Review

On appeal, the district argues that the impartial hearing officer erred in finding that the classroom and school that it assigned to the student could not have properly implemented the student's IEP. Regarding the impartial hearing officer's finding that the district's classroom teacher was not a highly qualified teacher, the district contends that the classroom teacher held a "provisional license," which indicates that she is authorized to teach under State law and shows that the State has determined her qualified to teach. According to the district, the fact that the teacher holds a provisional license did not provide a basis for the impartial hearing officer to determine that she was not qualified. Moreover, the district contends that the impartial hearing officer did not cite to any evidence in the hearing record to support a conclusion that the teacher was not qualified to teach the class. In addition, the district notes that teachers at the assigned school receive regular professional development training and the district will arrange for specific training when appropriate. For these reasons, the district argues that the impartial hearing officer erred in finding the district could not implement the student's IEP because the classroom teacher held a provisional license.

Regarding the impartial hearing officer's finding that the assigned school was inappropriate because it did not have an occupational therapist on site, the district first asserts that the parent did not raise this issue in her due process complaint notice. The district also contends that the assigned school had an occupational therapist on staff at the beginning of the school year. The district argues that the absence of an occupational therapist at the assigned school at the time of the impartial hearing is irrelevant because the student did not attend the assigned school. The district asserts that in the event that it could not provide OT at the assigned school, the student would have received an RSA and the issuance of an RSA does not amount to a denial of a FAPE. The district further asserts that the student's IEP mandated that the student's OT be conducted outside of the classroom; therefore, there was no requirement that the student's OT services be provided in the school itself. In addition, the district argues that the hearing record indicates that the assigned school had a sensory gym, that the classroom teacher would have incorporated "occupational activities" in her daily routine, that sensory material was available in the classroom, and that

classroom staff could be trained to implement the brushing technique prescribed for the student. Thus, the district asserts that the impartial hearing officer erred in determining that the district denied the student a FAPE because there was no occupational therapist at the assigned school at the time of the impartial hearing.

The district does not appeal the impartial hearing officer's finding that the parent's unilateral placement of the student at the Rebecca School was appropriate. However, the district contends that equitable considerations do not support relief for the parent because although the parent stated "as early as the January 2010 CSE meeting" that she wanted the student to attend the Rebecca School for the 2010-11 school year, she never rejected the district's program and failed to specify any objections to the IEP at any of the three CSE meetings or in writing until after the start of the school year. The district also asserts that tuition reimbursement is barred because the Rebecca School is operated as a for-profit business. Lastly, the district contends that the impartial hearing officer's order providing for limited travel time was improper because it is impractical to set a 45-minute limit on transportation for the student given the distance between the parent's home and the location of the Rebecca School. The district further asserts that the provision for limited travel time in the March 2010 IEP was made "in error" and that it was appropriately corrected in the April 2010 IEP.

In an answer, the parent does not cross-appeal from any of the impartial hearing officer's findings and determinations and asks that his decision be affirmed in its entirety. Specifically, the parent argues that the impartial hearing officer correctly determined that the district would be unable to implement the student's IEP at the assigned school because the teacher was not a "highly qualified, certified special education teacher" in accordance with federal law. According to the parent, the district's classroom teacher has an "internship certificate," which does not indicate that she is certified or licensed to teach special education. The parent further asserts that an internship certificate is not a provisional license and does not authorize the holder of the certificate to teach in a class. The parent next asserts that the classroom teacher was not "qualified" to teach the student because she lacked the training and experience to instruct students with autism and mixed sensory profiles. The parent also argues that the district failed to prove that it offered a class with a highly qualified teacher at the start of the 2010-11 school year because the district offered conflicting evidence regarding which teacher would be in the class during the first two months of the 12-month school year.

The parent further argues that the district failed to prove that the student's OT and sensory needs could be met at the assigned school because there was insufficient sensory gym equipment and materials available and no evidence that the students in the classroom received their mandated OT. The parent also asserts that the assigned school could not implement the student's IEP as it pertained to OT because it would be impossible to accomplish the IEP's OT goals without a therapist on site at the school to provide instruction on how to generalize sensory regulatory skills throughout the school environment, and because there was no evidence that there was communication between the classroom teacher and any therapists that may have been obtained by RSAs. Regarding the impartial hearing officer's order providing for limited travel time, the parent asserts that the district impeded the student's right to a FAPE by removing transportation from the April 2010 IEP without input from the parent or a developmental pediatrician. Lastly, the parent argues that the law allows reimbursement for tuition at a for-profit institution and that there are no equitable considerations precluding an award of tuition. Based on the foregoing, the parent alleges

that the impartial hearing officer properly awarded the parent the costs of the student's tuition at the Rebecca School for the 2009-10 school year and requests that the impartial hearing officer's decision be upheld.

Applicable Standards

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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 least restrictive environment (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; 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Unappealed Determinations - Finality

Initially, I note that neither party has appealed the impartial hearing officer's determination that the Rebecca School was an appropriate placement for the student; thus, this determination is final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In addition, the district asserts in its petition that the impartial hearing officer determined that the student's IEP was "appropriate both in substance and procedure" (Pet. ¶ 31; see Pet. ¶ 5). The parent does not deny this assertion and argues in her answer that the impartial hearing officer correctly determined that the district could not implement the student's IEP at its assigned school (Answer at pp. 2-12). I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the district is not aggrieved by the impartial hearing officer's decision not to address the substantive and procedural allegations the parent asserted below concerning the IEP and, furthermore, the parent did not cross-appeal any aspect of the impartial hearing officer's decision. Therefore, I will focus my review on whether the impartial hearing officer properly found a denial of a FAPE based on a failure to implement the student's IEP. I express no opinion regarding the appropriateness of the student's IEP for the 2010-11 school year, since neither party has raised such arguments in this appeal.

Assigned School

Teacher Certification

Turning to the district's assertion that the impartial hearing officer erred in finding that the district's assigned school would be unable to implement the student's IEP, I note that the student did not attend the district's assigned school for the 2010-11 school year and therefore it is speculative to ascertain the degree to which the district would have implemented or failed to implement the student's IEP during the 2010-11 school year. Notwithstanding the speculative nature of this argument, I will first address the district's contention that the hearing record demonstrates that the district's classroom teacher was properly certified. For the reasons set forth below, I find that had the student attended the district's assigned school for the 2010-11 school year, there is not an adequate basis to conclude that the teacher would be unable to instruct the student appropriately such that a denial of a FAPE would have occurred. Furthermore, the hearing record, in its entirety, does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; Application of the Dep't of Educ., Appeal No. 11-016; Application of a Student with a Disability, Appeal No. 11-008; Application of the Dep't of Educ., Appeal No. 10-104).

Specifically, I find that the impartial hearing officer erred in his determination that the classroom teacher in the assigned class was not a "highly qualified special education teacher," as defined in 34 C.F.R. § 300.18(b)(1)(ii) in that she was not certified to teach in class (IHO Decision at pp. 20-22). The federal regulations require in pertinent part, that in order for a special education teacher to be "highly qualified," the teacher must have obtained State certification as a special education teacher; the certification requirements must not have been waived on an emergency,

temporary, or provisional basis; and the teacher must hold at least a bachelor's degree (34 C.F.R. § 300.18[b][1][i-iii]). According to the hearing record, the teacher of the assigned class holds a valid teaching certificate issued by the State Education Department and has a bachelor's degree (Tr. p. 613; Dist. Ex. 26). The specific type of certificate the teacher holds is an internship certificate in special education, which is defined in State regulations as a "certificate issued a student in a registered or approved graduate program of teacher education which includes an internship experience(s) and who has completed at least one-half of the semester hour requirement for the program and may, at the request of the institution, be issued an internship certificate without fee" (8 NYCRR 80-1.1, 5.9; see Tr. p. 613; Dist. Ex. 26). An internship certificate is "recognized by the State Education Department as a valid credential authorizing the holder to act within the area of service for which the certificate is valid" and does not mean that the person holding an internship certificate is an "uncertified teacher" (Appeal of Coughlin, 41 Ed. Dep't Rep. 484, Decision No. 14,751). Moreover, a parent may not use the due process procedures under the IDEA to assert that a particular teacher is not "highly qualified" (34 C.F.R. § 300.18[f]; see Matter of the Educ. of a Student and Brookings-Harbor Sch. Dist., 2007 WL 4695246 [OR.Off.Admin.Hgs April 16, 2007]; see also "Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities," US Dep't of Educ. [revised June 2009] available at http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C).

Occupational Therapy

Likewise, the impartial hearing officer's conclusion that the student's IEP would not have been properly implemented at the assigned school because the student would not have received OT services at that school, is speculative insofar as the parent did not attend the district's assigned school for the 2010-11 school year. Moreover, the hearing record does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297; Cerra, 427 F.3d at 192; see Van Duyn, 502 F.3d 811; Bobby R., 200 F.3d at 349; see also Catalan, 478 F. Supp. 2d 73). Notwithstanding the speculative nature of this argument, I find that the hearing record contains sufficient evidence that the district would have been able to provide the student with OT and address her sensory needs and therefore, I decline to find a denial of a FAPE based on a material failure to implement the student's IEP.

First, the hearing record demonstrates that OT was available at the district's assigned school at the beginning of the school year and the school had an occupational therapist on staff at that time. The district must have an IEP in effect for each student with a disability at the beginning of each school year (20 USC § 1414(d)(2)(a); see Tarlowe, 2008 WL 2736027, at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; Application of a Student with a Disability, Appeal No. 08-088). The student has a 12-month IEP, thus, the district must have offered her a placement before July 2010.[6] Here, the hearing record indicates that in June 2010 the district had notified the parent of the student's assigned school and that OT was available at the assigned school at that time (see Tr. p. 740; Dist. Ex. 2).

[6] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

The hearing record further demonstrates that the assigned school had a sensory gym and the classroom had sensory materials available like sensory balls, play dough, and molding clay to assist those students who had sensory needs (Tr. pp. 630-31, 661). Additionally, the hearing record indicates that classroom staff could be trained to implement the brushing technique recommended for the student in her IEP (Tr. pp. 630-31, 656-57, 1231-33). Testimony by district staff further reveals that if an occupational therapist was not available at the assigned school, the district would have issued RSAs to students who were not receiving OT (Tr. pp. 588, 653-54, 683, 707-08). According to a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents, it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. The document states that:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1])

(http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html, Question 5; see http:// www.p12.nysed.gov/ resources/contractsforinstruction/). Thus, I decline to find that the issuance of RSAs to the student for her OT services as mandated on her IEP would have denied the student a FAPE (see Application of the Dep't of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 10-055).

Transportation

Lastly, I will consider the district's argument that the impartial hearing officer erred in directing the district to provide the student with limited bus travel time of 45 minutes during the 2010-11 school year. 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]; 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).

In the present matter, the 2010-11 school year has expired and the parent does not seek any reimbursement for transportation expenses. Accordingly, I find this issue to be moot and decline to further address it in this decision as a State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

Conclusion

In conclusion, I find that the hearing record does not support the impartial hearing officer's determination that the student would have been denied a FAPE for the 2010-11 school year because the district would have been unable to implement the student's IEP at its assigned school and classroom (see A.P., 2010 WL 1049297). Therefore, I will annul the impartial hearing officer's decision to the extent that he found a denial of a FAPE and it is unnecessary for me to reach the

issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement (see Burlington, 471 U.S. at 370).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated April 20, 2011 that found that the district did not offer the student a FAPE and ordered the district to pay for the costs of the student's tuition at the Rebecca School for the 2010-11 school year is hereby annulled.

Dated: **Albany, New York**
July 21, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER