The University of the State of New York

The State Education Department
State Review Officer
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No. 12-098

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:
Law Office of Lisa Isaacs, PC, attorneys for petitioner, Lisa Isaacs, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Seton Foundation for Learning (Seton) for the 2011-12 school year.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

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

[1] Both parents were named in the due process complaint notice; however, only the student's mother is named in the petition filed with the Office of State Review; accordingly, for purposes of this decision references to "the parent" refer to the student's mother alone.

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses including pervasive developmental disorder, mixed developmental disorder, and ocular motor apraxia, and experiences severe allergies to certain foods and environmental conditions (Tr. p. 124; Parent Exs. E at pp. 11-12; F at p. 3).[2] She attended a nonpublic preschool program affiliated with and colocated in the same building as Seton

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 60-61, 68; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

(the preschool) for the 2009-10 and 2010-11 school years at district expense, pursuant to IEPs developed by the district (Tr. pp. 156-57, 222-25, 239-40; Parent Ex. J; Dist. Mem. of Law Exs. I-II[3]).[4]

On May 25, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1).[5] Information considered by the CSE in developing the student's IEP included recent related service progress reports, an observation of the student in her preschool classroom, and information provided by the student's classroom teacher at the preschool and the parents (Tr. pp. 59-62; Dist. Exs. 3-8; 11). The IEP developed at the May 2011 CSE meeting recommended placement in a 12:1+1 special class in a community school; related services including speech-language therapy, occupational therapy (OT), physical therapy (PT), and vision education services; adapted physical education; and an individual health paraprofessional (Dist. Ex. 1 at pp. 11-13). The IEP included a note that the student had an airborne peanut allergy and stated that it was "suggested [she] be in a peanut free environment" (id. at p. 2). The IEP also noted that the student could not eat any foods not sent in to school with her and needed to carry Benadryl and an EpiPen

[3] The parent asserts for the first time on appeal that she was entitled to have the student's Seton tuition for the 2011-12 school year paid for by the district pursuant to the IDEA's pendency (stay put) provision (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). After an initial review of the parties' pleadings, I found that the hearing record contained insufficient evidence on this point and, in the interest of administrative economy, permitted the parties to submit memoranda of law and directed them to submit documentary evidence relating to the student's pendency placement at the time the impartial hearing was requested pursuant to 8 NYCRR 279.10(b). The district submitted two IEPs developed by its Committee on Preschool Special Education (CPSE) during the 2010-11 school year, dated July 20, 2010 (Dist. Mem. of Law Ex. I) and March 14, 2011 (Dist. Mem. of Law Ex. II).

[4] The preschool program has been approved by the Commissioner of Education as a preschool program with which school districts may contract to provide special education programs and services to preschool students with disabilities but Seton has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see Educ. Law § 4410[9][a]; 8 NYCRR 200.1[d], [nn], 200.7).

[5] There was some confusion at the impartial hearing about which document constituted the May 2011 IEP (Tr. pp. 34-45, 48-55). While the differences between two district exhibits comprising the IEP were discussed at length on the first hearing date (id.); the copies of the exhibits included in the hearing record submitted by the district are identical (compare Dist. Ex. 1, with Dist. Ex. 15). In response to a request for clarification (8 NYCRR 279.10[b]), counsel for the parent submitted a copy of the IEP (Parent Ex. G) that differs from the copies submitted by the district and reflects the discussion at the impartial hearing (Tr. pp. 37-40, 52-55; Compare Dist. Ex. 1 at pp. 2-3, 8, 12, with Parent Ex. G at pp. 2-3, 8, 12; see also Parent Ex. H). Although the district objects to my consideration of this evidence, I note that the IHO determined not to enter Exhibit G into evidence based on her conclusion that it was identical to Exhibit 1 (Tr. pp. 44-45). As the exhibits received by this office are not identical, it appears that one of the exhibits was mistakenly mislabeled and excluded from the hearing record forwarded to the Office of State Review by the district. Accordingly, because the information contained in the exhibit was before the IHO and properly constitutes a part of the hearing record, it will be considered, and I remind the district of its obligation to maintain a complete and accurate copy of the hearing record before the IHO (8 NYCRR 200.5[j][3][v]; 279.9[a]). To the extent that counsel for the district argues that it is speculative for counsel for the parent to conclude that Exhibit G was intended to be entered into evidence at the impartial hearing because neither appellate counsel was present, I note that the parents proceeded pro se at the impartial hearing and counsel for the district has provided no reason why she could not consult with her non-attorney colleague who represented the district at the impartial hearing or the impartial hearing officer.

with her at all times (id. at p. 3).[6] Finally, the IEP stated that an "Emergency Allergy Plan" would be developed by the school nurse in collaboration with other staff members including the paraprofessional, the parents, and the student, and provided for its implementation by the paraprofessional (id. at pp. 3, 13).[7]

By final notice of recommendation (FNR) dated June 7, 2011, the district summarized the recommendations made by the May 2011 CSE and informed the parents of the public school site to which the student had been assigned for the 2011-12 school year (Dist. Ex. 12). In a letter to the CSE dated August 5, 2011, the parent stated that she had attempted to visit the assigned school site and been "denied access during the school day" (Parent Ex. B). In the letter, the parent also stated her intention to place the student at Seton for the school year commencing September 2011 and requested that the student "receive all related services as stated on her IEP, as well as door to door transportation with the necessary special accommodations" (id.). On August 8, the parent signed a tuition agreement with Seton for the 2011-12 school year (Parent Ex. N).

A. Due Process Complaint Notice

By due process complaint notice dated August 12, 2011, the parents requested an impartial hearing (Parent Ex. C). The parent asserted that, on the basis of the student's allergies, she required placement in a peanut-free environment (id. at p. 2). With respect to the May 2011 IEP, the parent asserted that despite the student having required "an FM unit" in her preschool class, the IEP failed to make provision for such a device or indicate that she currently used one (id.).[8] The parent also contended that the current levels of functional performance contained on the IEP were contradictory and inconsistent (id. at pp. 2-3). Furthermore, the parent considered the goals to be "inappropriate and unrealistic" to expect the student to achieve in one school year (id.).[9] With regard to the recommendation that the student attend a special class in a community school, the parent contended that because the IEP indicated that the student could not participate in activities with non-disabled peers, the district had not offered the student a placement in the least restrictive environment (LRE) (id. at p. 3).[10] The parent also objected to the unilateral modification of the

[6] EpiPen is a brand name for a single dose epinephrine auto-injector and Benadryl is a brand name for an antihistamine; both are used in the treatment of anaphylaxis (see "Caring for Students with Life-Threatening Allergies," Dep't of Health/Educ. Dep't [June 2008], at pp. 11-12, available at http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/AnaphylaxisFinal62508.pdf).

[7] The CSE meeting minutes indicate that an "Allergy Response Plan was devised on 4/7/11" (Dist. Ex. 13 at p. 2); no such plan was included in the hearing record. Additionally, the copy of the IEP submitted by the parent indicates that the student's airborne peanut allergy had restricted her to a "peanut free room/peanut free environment, during preschool" (Parent Ex. G at p. 3).

[8] In a letter to the parent dated September 19, 2011, the district requested the parent's consent to modify the May 2011 IEP to include an FM unit (Parent Ex. I).

[9] At the impartial hearing, the parent indicated that the only goals to which she objected were those relating to the student's allergies and her ability to communicate episodes of anaphylaxis (Tr. pp. 70-73, 76-83).

[10] This claim was elaborated upon at the impartial hearing to include the district's failure to provide the student with any testing accommodations despite stating that her delays precluded her from participating in nonacademic activities with nondisabled peers (Tr. p. 17).

May 2011 IEP by the district subsequent to the CSE meeting (id. at p. 2).[11] Finally, the parent alleged that she was not permitted to visit the assigned school during the school day (id.). For relief, the parent requested direct payment of the student's Seton tuition for the 2011-12 school year.[12]

B. Impartial Hearing Officer Decision

An impartial hearing convened on February 28, 2012[13] and concluded on March 5, 2012 after two hearing dates (Tr. pp. 1-258).[14] In a decision dated March 23, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parents' request for reimbursement or direct payment of the student's tuition at Seton (IHO Decision). The IHO specifically noted that the May 2011 IEP identified the student's allergies and prior history of anaphylaxis, reflected the parents' concerns that she be placed in a peanut-free environment, indicated her restricted diet, specified that she required access to Benadryl and an EpiPen at all times, and provided for the development of an emergency allergy plan (id. at p. 16). The IHO also noted that the IEP contained three goals directed at addressing the student's needs arising from her allergies (id.). With respect to the parents' argument that the district denied the student a FAPE by preventing them from visiting the assigned school, the IHO found that the parent was given an opportunity to visit the assigned school but chose not to do so (id. at p. 16). Addressing the parents' argument that the assigned school would not have met the student's needs, the IHO found that the district had "provided the necessary precautions and goals to address" the risk to the student caused by allergens (id. at pp. 16-17). While the student's pediatrician testified at length about the

[11] The hearing record reflects that the district informed the parents by undated letter of its intent to modify the May 2011 IEP to include 30 one-hour sessions of vision therapy instead of the six 30-minute sessions per week of vision education services called for by the IEP (Parent Ex. H; see Dist. Exs. 1 at p. 12; 14). I note that the IEP submitted by the parent reflects the modification (Parent Ex. G at pp. 3, 8, 12), the parent indicated that she wished for the student to receive vision therapy during the impartial hearing (Tr. p. 43), and the parent stated that she had no objection to the related services the student was receiving (Tr. pp. 69-70). Nonetheless, I am concerned by the district's apparent modification of a student's IEP subsequent to a CSE meeting without first obtaining parental consent or reconvening the CSE, as required by the IDEA and federal and State regulations (20 U.S.C. § 1414[d][3][D], [F]; 34 CFR 300.324[a][4], [6]; 8 NYCRR 200.4[g]). While the district school psychologist in attendance at the May 2011 CSE meeting testified that "vision education service" was the only service that she could recommend on the IEP form (Tr. pp. 63, 65), I remind the district that it must provide services in accordance with each student's needs, rather than relying solely on prepopulated lists of services identified for convenience on the State model IEP form (see "General Directions to Use the State's Model Individualized Education Program (IEP) Form," Office of Special Educ. Mem. [Mar. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm).

[12] At the impartial hearing, the parent clarified that, in addition to those matters alleged in the due process complaint notice, she was also challenging the appropriateness of the assigned school on the basis that it could not provide the student with a peanut-free environment (Tr. p. 16).

[13] The hearing record indicates that the reason for the extraordinarily lengthy delay in convening the impartial hearing was that seven IHOs recused themselves from hearing this matter prior to the appointment of the IHO who presided over the proceedings and rendered the decision at issue (Tr. pp. 5-6, 8-9). I encourage the district to review its procedures for assigning IHOs based on availability from the rotational pool to hear cases so as to ensure the timely commencement of impartial hearings.

[14] I commend the IHO for her care and attention in ensuring that the exhibits in the hearing record were complete and not duplicative (Tr. pp. 18-48), and for completing the impartial hearing in two days, as contemplated by State regulation (8 NYCRR 200.5[j][3][xiii]).

student's needs relating to her allergies, the IHO found that the IEP included the precautions recommended by the pediatrician and noted that there was no indication in the hearing record that the student had suffered any ill effects from not attending peanut-free schools prior to the 2011-12 school year (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parent appeals, contending that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year and denying her request for public funding of the student's 2011-12 tuition at Seton.[15] The parent asserts that the IHO erred in finding that the district established that it had implemented appropriate precautions to ensure that the assigned school was appropriate to offer the student a FAPE and that the district failed to establish that the assigned school could keep the student reasonably safe because it did not provide the peanut-free environment the student required. The parent further argues that the goals relating to the student's allergies were insufficient to ensure her safety. The parent additionally asserts that the IEP should have specified a certain level of training for the student's paraprofessional. The parent also contends that the assigned school would not have met the student's academic needs. Finally, the parent contends that Seton was an appropriate placement and that equitable considerations support her request for reimbursement.[16]

The district answers, denying the parent's material allegations and requesting that the IHO's decision be upheld.[17]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the

[15] The parent asks that I excuse her untimely service on the district of the notice of intention to seek review (Pet. ¶¶ 35-50); as the district does not oppose this request (Ans. ¶¶ 11, 19 n.3) and the hearing record was timely filed with this office, I exercise my discretion and excuse the parent's untimely service of the notice of intention to seek review (see Application of a Student Suspected of Having a Disability, Appeal No. 12-014).

[16] As noted above, the parent also asserted that the district was liable for the student's tuition at Seton for the 2011-12 school year pursuant to the IDEA's pendency provision.

[17] The district initially argued that the parent could not raise the issue of pendency for the first time on appeal; it subsequently withdrew that argument and I need not address it here.

way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL

2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Stay Put/Pendency

Addressing first the parent's contention that the student was entitled to public funding for her placement at Seton pursuant to the stay put (pendency) provision of the IDEA, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; 8 NYCRR 200.16[h][3][i]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 08-009). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of

a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). However, even though a change in location does not necessarily constitute a change of placement, "parents are not free to unilaterally transfer their child from one school to another" (Application of the Bd. of Educ., Appeal No. 00-073; see Ambach, 612 F. Supp. at 235). Furthermore, the pendency provisions of the State Regulations do not require that a student who has been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible for reasons of age pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).[18]

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]; Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The United States Department of Education (DOE) has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP and can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented

[18] SROs, noting that the IDEA makes no distinction between preschool and school-age children, have long held that even if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Application of a Child with a Disability, Appeal No. 02-095; Application of a Child with a Disability, Appeal No. 01-023; Application of a Child with a Disability, Appeal No. 00-063; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-48; Application of a Child with a Disability, Appeal No. 94-33; see also Makiko D. v. Hawaii, 2007 WL 1153811, at *10 [D. Hawaii Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]).

IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163; see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 [6th Cir. 1990]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *4 [S.D.N.Y. Aug. 7, 2012]; Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006). Additionally, if a "private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute" (T.M., 2012 WL 4069299, at *4; see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1, *6, *8-*9 [S.D.N.Y. Mar. 17, 2010]; Ambach, 612 F. Supp. at 233-34).

During the 2010-11 school year, the student attended a 10:1+2 classroom at the preschool and received related services of speech-language therapy, OT, PT, and vision therapy, as well as the support of a 1:1 registered nurse (Tr. pp. 224-25, 239-40; Dist. Mem. of Law Exs. I at pp. 1-2, 21, 23-24; II at pp. 1, 17, 19-20). The July 2010 and March 2011 IEPs each provided that the student would receive individual speech-language therapy and OT three times per week for 30 minutes and two times per week for 45 minutes, individual PT five times per week for 30 minutes, and vision therapy three times per week for 45 minutes (Dist. Mem. of Law Exs. I at pp. 23-24; II at pp. 19-20).[19] During the 2011-12 school year, the student attended a 12:1+1[20] kindergarten classroom at Seton and received related services and the services of a 1:1 paraprofessional (Tr. pp. 171-72, 215; Parent Ex. L at p. 1).[21] The May 2011 IEP offered related services of speech-language therapy five times per week for 30 minutes, OT and PT three times per week for 30 minutes, and vision education services six times per week for 30 minutes (Dist. Ex. 1 at p. 12).[22] I note that despite being offered an opportunity to supplement the hearing record with "documentary evidence with regard to the student's pendency placement," the only additional items of documentary evidence submitted by the parties were the student's 2010-11 IEPs. Accordingly, it is unclear whether the student received related services in accordance with the 2010-11 IEPs or the May 2011 IEP during the 2011-12 school year (compare Dist. Mem. of Law Ex. II at pp. 19-

[19] The March 2011 IEP added an FM unit for use by the student (Dist. Mem. of Law Ex. II at pp. 2, 6) and modified certain of the student's annual goals from those on the July 2010 IEP (compare Dist. Mem. of Law Ex. I at pp. 8-20, with Dist. Mem. of Law Ex. II at pp. 8-16).

[20] Although the hearing record indicates that the student was in a 12:1+1 classroom (Tr. p. 215; Parent Ex. L at p. 1), testimony from Seton's elementary school director and the student's classroom teacher indicates that the classroom contained 10 children at the time of the impartial hearing (Tr. pp. 159, 172-73, 190-91).

[21] The hearing record indicates that the student's related services and 1:1 paraprofessional for the 2011-12 school year were provided at district expense through related service authorizations (RSAs) or by agencies with which the district had contracted to provide services to the student at Seton (Tr. pp. 171-72; Dist. Ex. 14; Parent Ex. L at p. 1).

[22] The version of the May 2011 IEP submitted by the parent does not include vision education services as a related service but instead states under the student's management needs that the student would "receive vision therapy for 30, 1 hour sessions to improve her eye hand coordination, eye pointing skills and basic visual processing skills," in conformity with the amendment letter sent to the parent by the district and the RSA entered into the record at the impartial hearing (Parent Ex. G at pp. 3, 12; see Dist. Ex. 14; Parent Ex. H). It is unclear how the CSE determined that 30 hours of vision therapy over the course of one year was the equivalent of three hours per week of vision education services.

20, with Dist. Ex. 1 at p. 12).[23] However, as the hearing record indicates that the district provided the student's related services and 1:1 paraprofessional during the 2011-12 school year (Tr. pp. 171-72) in accordance with the parent's request that the student "receive all related services as stated on her IEP" (Parent Ex. B), I find that, to the extent that related services and a registered nurse were not provided to the student in a manner consistent with the March 2011 IEP, the parent's request for services and the district's acquiescence thereto constituted an agreement of the parties that the student's pendency placement included these services as provided by the district (see 20 U.S.C. § 1415[j]; 34 CFR 300.518[a]). The question remaining before me is whether the parent's placement of the student in a 12:1+1 special class at Seton constituted a continuation of her current educational program. The parties apparently agree that the March 2011 IEP, recommending placement in a 10:1+2 special class, represented the last agreed upon IEP.

Whether a student's educational placement has changed depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 02-031). Student-to-staff ratio is a relevant factor in determining whether a student's placement has changed (M.K. v. Roselle Bd. of Educ., 2006 F. Supp. 2d 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Application of a Child with a Disability, Appeal No. 05-028; see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]). Furthermore, a district court recently held that, absent direct evidence of similarity in the hearing record, a 6:1+1 special class with the additional service of a 2:1 shared aide was not sufficiently similar to the last agreed upon placement in a 6:1+3 special class to constitute the student's pendency placement (G.R., 2012 WL 310947, at *8).[24] Despite being provided with the opportunity to supplement the hearing record with information regarding the student's placement at the preschool to support her argument that the student's placement at Seton was substantially similar (such as affidavits describing the student's placement at the preschool), the parent chose to submit only the student's July 2010 and March 2011 IEPs. Accordingly, although the parent asserts that the student's placement at Seton was "very" or "substantially" similar to her placement at the preschool, I find that the hearing record does not support a conclusion that the 12:1+1 special class the student was enrolled in at Seton was substantially and materially the same as the student's 10:1+2 special class at the preschool; precluding a finding that the student's pendency placement was in the 12:1+1 special class at Seton.[25] In particular, I find that the hearing record does not indicate that the provision of an additional supplementary school personnel in the student's preschool classroom had no bearing on

[23] The parent's memorandum on pendency seems to indicate that the student was receiving related services in accordance with the May 2011 IEP (Parent Mem. of Law p. 6).

[24] Although G.R. also involved the comparable services provision of the IDEA, regarding transfers of students between school districts (20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8][i]), the DOE has stated that "'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP" (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]), the court in G.R. was addressing a stay put placement issue (2012 WL 310947, at *4-*7), and courts have held that compliance with the pendency mandate requires provision of comparable services (see M.K., 2006 F. Supp. 2d 3193915, at *11).

[25] I note that the district recommended that the student be placed in a 12:1+1 special class for each of English Language Arts, math, social studies, science, music, and art (Dist. Ex. 1 at pp. 11-12), indicating that there is no practical dispute over what type of classroom placement the student requires, only whether the district remained obligated to fund her tuition at Seton pursuant to pendency.

its similarity to the special class the student attended at Seton.[26]

In the alternative, the parent asserts that the district was obligated to locate a placement for the student that was substantially similar to her placement at the preschool during the pendency of the impartial hearing, and implies that the district's failure to do so justifies any differences between the student's placement at the preschool and her placement at Seton. I find this contention unpersuasive under the facts of this case, considering the parent's letter to the district indicating her intention "to unilaterally place [the student] at [Seton] for the school year commencing September 2011" (Parent Ex. B). In this instance, the parent removed the student from her then current educational placement in order to unilaterally discontinue the services constituting her pendency placement and place her in the parent's preferred placement (see, e.g., M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 513 [S.D.N.Y. 2008]). The parent's argument that the district became obligated to implement a stay put placement for the student after the parent informed the district of her belief that the assigned school was not an appropriate location at which to implement the student's IEP is unavailing, as there is no entitlement to a stay put placement until a proceeding is pending (i.e. the filing of a due process complaint notice) (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). It would not serve the purposes of the pendency provision to require the district to provide the student with a stay put placement subsequent to a unilateral parental change to the student's placement, nor does the IDEA compel such a result when there has been no administrative or judicial finding that the district denied the student a FAPE (Burlington, 471 U.S. at 373-74; T.M., 2012 WL 4069299, at *4; Murphy, 86 F. Supp. 2d at 357-58; Application of the Bd. of Educ., Appeal No. 12-008; see Susquenita Sch. Dist., 96 F.3d at 86 [subsequent to a unilateral placement, "the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position"]).

I understand that from the parent's perspective the result reached here may seem to turn on an insignificant distinction; however, a student's stay put placement must be determined in accordance with the applicable law.[27] As noted above, the district provided the student with related services and a 1:1 paraprofessional at Seton during the 2011-12 school year (Tr. pp. 171-72; Parent Ex. B). Because the parties agreed to modify the student's current educational placement to this extent, the related services and 1:1 paraprofessional provided to the student by the district during the 2011-12 school year constitute a portion of the student's stay put placement, for which the district remains liable during the pendency of this proceeding (see Application of the Dep't of

[26] I have considered that, as of the time of the impartial hearing, there were ten students in the student's classroom at Seton and find that this does not cause the two placements to be substantially similar (Tr. pp. 159, 172-73, 190-91). Although relevant, it is the presence of an additional supplementary school personnel in the student's classroom and the absence of evidence to support another conclusion that leads me to the determination that her placement at Seton constituted a change in placement from the stay put placement (see G.R., 2012 WL 310947, at *8).

[27] I note that what is "appropriate" for the student is not relevant to the analysis of the "then current educational placement," which is automatic in nature.

Educ., Appeal No. 10-107).[28]

B. Scope of Review

Having found that the student's program at Seton did not constitute her pendency placement for the 2011-12 school year, I next turn to the scope of my review of the parent's appeal. Initially, the parent contends that the district failed to establish that the program recommended by the CSE would meet the student's academic, social, and emotional needs, or confer her with educational benefits. However, I note that the parent clarified at the impartial hearing that she had no dispute with the CSE's program recommendation—including the student-to-teacher ratio, academic goals, and related services recommendations—except insofar as it failed to sufficiently account for the student's allergies (Tr. pp. 69-73, 76-78, 117-20) and, accordingly, I find that the district was under no obligation to establish that the recommended program was appropriate for the student in these areas. Additionally, the parent did not appeal from the IHO's failure to rule on her claims regarding: the student's present levels of performance as stated on the May 2011 IEP; the district's failure to provide the student with unspecified testing accommodations; whether the recommended placement was not in the LRE for the student; the district's unilateral modification of the IEP after the CSE meeting; or the CSE's failure to recommend that the student have the use of an FM unit.[29]

Additionally, although on appeal the parent now asserts that the student's IEP "should specifically mandate the level of training that the health paraprofessional have," this contention was not raised in the due process complaint notice or at the impartial hearing (Tr. pp. 16-17, 249; Parent Ex. C at pp. 2-3). I accordingly decline to address this issue as it is not properly before me (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at **10-*11 [S.D.N.Y. Jan. 22, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4 [E.D.N.Y. Jan. 6, 2012]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-12 [S.D.N.Y. Oct. 28, 2011]). I also note that, even had this issue been properly raised before the IHO, neither the IDEA nor federal or State regulations require as a general matter that the duties or training of district staff be specified in a student's IEP (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320; 8 NYCRR 200.4[d][2]; see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012] [holding that the relevant inquiry is whether the appropriately certified or licensed providers can implement the IEP, not whether they have specific training in the student's particular disabilities]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]; M.P.G., 2010 WL 3398256, at *12), and the IDEA specifies that IEPs must contain only that information explicitly required to be included (20 U.S.C. § 1414[d][1][A][ii]; see 34 CFR

[28] Although the student was not required to remain in a preschool program now that she is no longer a preschool student with a disability (8 NYCRR 200.16[h][3][i]), the district would nonetheless be required to implement the educational placement specified in the March 2011 IEP developed by the CSE if the parent so requested (Application of the Dep't of Educ., Appeal No. 10-112).

[29] I note that because the IHO denied the parent's request for tuition reimbursement, she was aggrieved by the IHO's decision and was required to appeal any adverse aspects of it to preserve her challenges to the IEP (see NYCRR 279.10[d]; c.f. Dirocco v. New York City Dep't of Educ., 2013 WL 25959, at *13 [S.D.N.Y. Jan. 2, 2013]; D.N. v. New York City Dep't of Educ., 2012 WL 6101918, at *4-*5 [S.D.N.Y. Dec. 10, 2012]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *8-*10 [S.D.N.Y. Nov. 27, 2012]). Additionally, as noted above the district offered to amend the student's IEP to include the provision of an FM unit (Parent Ex. I).

300.320[d][1]).[30] Accordingly, my review is limited to whether the health goals contained in the IEP were appropriate to meet the student's needs and whether the district was required to implement the student's IEP in a peanut-free environment in order to offer her a FAPE.

C. Health Goals

With regard to the goals contained on the May 2011 IEP, the parent asserts that the goals assume a higher level of communication than of which the student was capable, and that it was inappropriate for the district to specify that the student would communicate discomfort, itching, or difficulty breathing to her paraprofessional on four out of five occasions, as the consequences of failure to communicate allergen exposure to an adult could be fatal. I find that the evidence in the hearing record, taken as a whole, does not support the parent's contentions. An IEP must, among other things, include goals required to address the student's identified needs (20 U.S.C. § 1414[d][1][A][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii][a]).[31]

With regard to the student's ability to communicate, the district school psychologist who participated in the May 2011 CSE meeting testified that the CSE did not intend for the student to verbally communicate her distress but, rather, that the student would make use of various communication strategies (Tr. pp. 80-81, 83). The student's pediatrician testified that the student would not be capable of recognizing and communicating that she was experiencing an allergic reaction (Tr. pp. 127-28, 130-34) but that someone familiar with the student would notice "a change in her behavior for the worse" and have to interpret the situation (Tr. pp. 146-48). A March 2011 pediatric neurology evaluation report indicates that the student's articulation was "generally poor" and "virtually unintelligible" (Parent Ex. F at pp. 1-2). Similarly, a January 2011 speech-language therapy progress report noted the student's "severe expressive language delays" but indicated that the student could communicate "using single words, some learned 2-word phrases, and simple gestures" (Dist. Ex. 7 at p. 2). A February 2011 neurodevelopmental evaluation report indicates that the student could use noun-verb phrases and had a vocabulary of at least 50

[30] To the extent that the parent's challenge can be read as asserting that a health paraprofessional without specific training could not properly implement the IEP, I do not hold that the district was free to use inadequately certified or undertrained paraprofessional staff to implement the student's IEP, but only hold that such training need not be specified on the IEP. I note that State guidance indicates that "the [EpiPen] auto[-]injector is designed for use by a lay individual, and the school nurse can train unlicensed school personnel to administer epinephrine by an auto-injector" ("Caring for Students with Life-Threatening Allergies," Dep't of Health/Educ. Dep't [June 2008], at p. 11, available at http://www.p12.nysed.gov/sss/schoolhealth/ schoolhealthservices/AnaphylaxisFinal62508.pdf; see "Use of Epinephrine Auto-Injector Devices in the School Setting," Office of Student Support Services Mem. [Mar. 2009], available at http://www.p12.nysed.gov/sss/ schoolhealth/schoolhealthservices/epipenuse.html).

[31] I assume without deciding for purposes of this portion of the decision that the student's needs relating to her allergies "result from [her] disability" (20 U.S.C. § 1414[d][1][A][II][aa], [bb]; 34 CFR 300.320[a][2][i][A], [B]; 8 NYCRR 200.4[d][2][iii][a][1], [2]), but note that "[a] student with allergies is not often considered a student with a disability" under the IDEA unless the allergies "cause acute health problems that affect the student's educational performance" ("Caring for Students with Life-Threatening Allergies," Dep't of Health/Educ. Dep't [June 2008], at p. 18, available at http://www.p12.nysed.gov/sss/schoolhealth/ schoolhealthservices/AnaphylaxisFinal62508.pdf; cf. Land v. Baptist Med. Ctr., 164 F.3d 423, 425 [8th Cir. 1999] [holding that a student's allergy to peanuts, although affecting her eating and breathing, did not constitute a disability under the Americans with Disabilities Act]; Slade v. Hershey, 2011 WL 3159164, at *4-*5 [M.D. Pa. July 26, 2011]; Kropp v. Maine Sch. Admin. Union # 44, 2007 WL 551516, at *16-*18 [D. Me. Feb. 16, 2007]; Smith v. Tangipahoa Parish Sch. Bd., 2006 WL 3395938, at *8 [E.D. La. Nov. 22, 2006]). The hearing record is devoid of any evidence regarding the effect of the student's allergies on her educational performance.

recognizable words (Parent Ex. E at p. 9). The neurodevelopmental evaluation report indicates that the intelligibility of the student's speech increased with familiarity and that "with careful attention, [her] utterances make sense" (id. at pp. 3, 6). The student used facial expression, posture, and manner to communicate emotions and could also communicate her needs nonverbally by arm movements and gestures (id. at pp. 5, 11). Additionally, a March 2011 speech-language progress note indicates that the student was "highly motivated to communicate her likes and dislikes, as well as engage in social communication" (Dist. Ex. 8 at p. 1). This report noted that the student's "functional communication ha[d] greatly increased" and that she was "now able to express her basic wants and needs, in addition to likes and dislikes within the environment" (id. at p. 2). While the student could "produce[] 3-4 word utterances with increasing intelligibility," her ability to do so was inconsistent due to "fluctuations in attention and fatigue" and her intelligibility decreased as utterance length increased (id. at p. 1). Nonetheless, the student could "answer simple questions and engage in social conversation" (id.).

Based on the above, the hearing record, taken as a whole, supports the district's argument that, while the student was capable of very limited verbal communication, she also communicated through gestures, her utterances become more intelligible with familiarity, and she was more likely to communicate when motivated to do so. That the district set the criteria for determining if the goal had been achieved at 80% compliance does not diminish the fact that the goal was appropriately directed at increasing the student's ability to alert adults to an episode of anaphylaxis.[32] I note that the district school psychologist indicated that discomfort, itching, and difficulty breathing were reported to be indications of the student having an allergic reaction (Tr. pp. 79-80) and I find that the goal, to be implemented by the student's full-time paraprofessional, reasonably addressed the student's needs relating to her allergies.

D. Allergy and Health Issues

I note that because the parent did not accept the recommendations of the CSE or the programs offered by the district, the district was not required to prove that it could implement the May 2011 IEP. Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). Although the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see

[32] The parent does not specifically challenge the appropriateness of the goals relating to the student's ability to follow her paraprofessional's cues not to consume foods that were not sent in to school with her (Dist. Ex. 1 at p. 9) and to demonstrate understanding of cues relating to the emergency allergy plan (id. at p. 10). In any event, I find the IHO's reasoning with respect to the appropriateness of these goals to be sound (IHO Decision at pp. 16-17), and note that the hearing record supports a finding that the student was capable of following simple and complex directions (Parent Ex. F at p. 1).

T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself, and the Second Circuit has explained that a parent's "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement (R.E., 694 F.3d at 195; see Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *15-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje, 2012 WL 5473491, at *14-*15; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012]). Furthermore, the assignment of a particular school in order to implement a student's IEP is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see R.E., 694 F.3d at 191-92; K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 419-20; 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; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).[33] Additionally, a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue and determined that parents may prospectively challenge the proposed implementation of an IEP (see B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *4-*7 [S.D.N.Y. Dec. 26, 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may challenge the adequacy of a "placement classroom" when a child has not enrolled in the school "if the alleged defects were reasonably apparent to either the parent or the school district when the parent rejected the placement"]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that under factual circumstances similar to those in this case in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Thus, in a case

[33] The Second Circuit has established that "'educational placement' refers to the type of educational program on the continuum—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756; A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

such as this one, when it became clear that the student was not going to be educated under the proposed IEP, there can be no denial of a FAPE due to speculation that there would be a failure to implement the IEP (see R.E., 694 F.3d at 195; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]; but see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *4, *11-*12 [S.D.N.Y. Mar. 26, 2013] [holding that where a student's IEP indicated that the student required a seafood-free environment, the district was required to demonstrate to the parent that the assigned school could implement that requirement]). In view of the forgoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site.

In this case, the parent is clearly asserting that the district failed to offer the student a FAPE because it would not have been able to address the student's needs related to her peanut allergy at the assigned public school site, specifically by failing to establish that the assigned school was reasonably safe. With regard to the health or safety of a student with a disability, a school district denies the student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006]; see Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ., 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding that a failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]). In this case, the parents rejected the IEP and enrolled the student at Seton prior to the time that the district became obligated to implement the student's IEP. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not require the conclusion that the district would have deviated from the IEP in a material way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. 2011]), or that the assigned school threatened the student's health to a degree that would have undermined her ability to learn (A.S., 414 F. Supp. 2d at 178; L.K., 2011 WL 127063, at *9).

Although neither party disputes the existence or seriousness of the student's allergies, I note that the information available to the CSE did not clearly state the modifications necessary to accommodate the student. A January 2011 OT report specified that the student had "severe food allergies including dairy, eggs, peanuts and some other nuts and beans" (Dist. Ex. 5 at p. 1). The February 2011 neurodevelopmental evaluation report indicated that the student had "highly allergic reactions" to wheat gluten, milk, eggs, peanuts, and white sugar (Parent Ex. E at p. 2). The March 2011 pediatric neurological evaluation report noted that the student experienced an episode of anaphylactic shock in summer 2010, "possibly" due to an airborne allergen (Parent Ex. F at pp. 1-2). I find that the district responded appropriately to this information by noting the "suggest[ion that the] student be in a peanut free environment," indicating that she could not eat food that was not sent to school with her, requiring that she carry Benadryl and an EpiPen in her backpack at all times, providing that an emergency allergy plan would be developed by the school nurse in conjunction with school staff and the parents, and offering the services of a full-time individual paraprofessional (Dist. Ex. 1 at pp. 2-3). Additionally, although the version of the IEP submitted by the parents indicates that the student's allergies had "restricted [her] to peanut free room/peanut

free environment, during preschool" (Parent Ex. G at p. 3), an August 2011 letter sent by Seton to parents of Seton students indicates that its physical plant, shared by Seton and the preschool, was not peanut free prior to September 1, 2011 (Parent Ex. J).[34] The hearing record is unclear with regard to on how many occasions the student has gone into anaphylaxis after exposure to allergens, as opposed to experiencing a less serious allergic reaction (Tr. pp. 124-36, 226; Dist. Ex. 13 at p. 2). The hearing record also contains no indication that the student has ever suffered an allergic reaction of any kind in school, despite having not previously attended a peanut-free school.[35] Finally, although the parent testified that the parents provided the CSE with documentation regarding the severity of the student's allergies, these documents were not included in the hearing record (Tr. p. 234). Accordingly, I find that based on the information available to the May 2011 CSE and considering that the CSE provided for the development of an emergency allergy plan, the IEP did not deny the student a FAPE by not requiring that she be in a peanut-free environment (L.K., 2011 WL 127063, at *9; see Application of the Bd. of Educ., Appeal No. 11-006; Westport [CT] Pub. Schs., 54 IDELR 329 [OCR 2009]).[36]

I find that the accommodations that could have been offered by the district if the student had enrolled in the assigned school correlate closely to the recommendations made by the student's pediatrician.[37] The pediatrician testified that the student had "severe food [and] environmental sensitivities and allergic reactions," including to dogs, cats, eggs, and peanuts (Tr. pp. 124-29). However, although the pediatrician testified that the student's allergies could lead to hives and difficulty breathing simply from being in a room which contained certain allergens (Tr. pp. 125-29), he could not identify a radius within which exposure to allergens might cause such reactions and, rather than recommend an altogether allergen free facility, he recommended that the student eat lunch at an allergy-free table or, preferably, in a separate room (Tr. pp. 130, 150-51; see P.K. v Middleton Sch. Dist., 2011 WL 839711, at *4 [D.N.H. Mar. 9, 2011] [finding a district's effort to promptly mitigate the risk of allergen exposure by its removal from the vicinity was reasonable]). With regard to management of the student's allergies, the pediatrician recommended that the student have someone with her on a full-time basis, such as a health paraprofessional, who could administer an EpiPen and swiftly remove her from the environment, as well as general monitoring of her environment to ensure that other students were not bringing allergens into the classroom (Tr. pp. 143-44, 151). As noted previously, the May 2011 IEP included an alert noting the student's airborne peanut allergy and specified that the student could not eat any food that was not sent to school with her, would have the services of a full-time health paraprofessional, and indicated that the student would always carry Benadryl and an EpiPen in her backpack (Dist. Ex. 1 at pp. 2-3, 12-13). The hearing record contains no indication that the district would not have trained its staff appropriately to implement the student's IEP, and I note in particular that the principal of the assigned school testified that multiple staff members, including the assistant principal and the school nurse, were already trained in the use of an EpiPen (Tr. p. 105). The

[34] It is possible that the student's preschool classroom was peanut-free; there was no testimony taken on that point.

[35] The student's pediatrician reported several occasions on which the student experienced allergic reactions in public; none of the referenced incidents occurred in her preschool program (Tr. pp. 127, 132-34).

[36] The CSE meeting minutes indicate that, at the time of the meeting in May 2011, the student had not experienced an episode of anaphylaxis in ten months (Dist. Ex. 13 at p. 2).

[37] I note that the hearing record contains no indication that the parent sought any specific accommodations to enable the student to attend the assigned school.

principal testified that another student in the assigned school had a severe peanut allergy and ate at peanut-free tables in the classroom and lunchroom (Tr. pp. 105, 114). The principal admitted some discomfort with respect to the airborne nature of the student's allergies, specifically by questioning the extent of the radius within which an allergic reaction could occur but stating that accommodations prescribed by a physician such as a separate table or location to eat would be approved (Tr. pp. 113-16).[38] The principal testified that, if necessary, the student's paraprofessional could bring her to the main office or the teacher's cafeteria to eat (Tr. pp. 112-13). Furthermore, after meals all lunch tables were wiped down and all students were required to wash their hands (Tr. pp. 116-17). I find that based on the foregoing, the hearing record contains no reason to conclude that had the student attended the assigned school, the district would not have taken reasonable steps to appropriately accommodate her needs relating to her allergies (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280-82 [3d Cir. 2012]; A.S., 414 F. Supp. 2d at 178; Application of a Student with a Disability, Appeal No. 11-098; Application of a Child with a Disability, Appeal No. 97-34; Application of a Child with a Disability, Appeal No. 96-56; Middleton Sch. Dist., 46 IDELR 298 [SEA NH 2006]).

Therefore, the evidence shows that, based on the evidence in the hearing record, the assigned school was capable of appropriately addressing the student's needs relating to her allergies. Although the parent's concerns with regard to potential health risks in the public school environment are understandable, I find that the hearing record demonstrates that the district was aware of the student's allergies and appropriately addressed them in her IEP. The evidence also shows that had the student attended the public school site, the district already has procedures and personnel in place to address students' needs resulting from their severe allergies, and that plans are made to accommodate such students and appropriately implement their IEPs.[39] I acknowledge that the parent may not find the district's measures to sufficiently safeguard the student's health and well-being for her peace of mind, but the IDEA does not require school districts to guarantee a student's safety. However, I strongly encourage the district to conduct an evaluation of the extent of the student's allergies and her needs relating thereto and, if it determines that the student does not require the accommodations requested by the parent, to provide the parent with appropriate notice thereof (20 U.S.C. § 1415[b][3], [c][1]; 34 CFR 300.503; 8 NYCRR 200.5[a] see Plumas

[38] The principal indicated that the assigned school may have a problem accommodating the student if her allergies were so severe that she could not smell peanuts because she could not "tell other parents to . . . send their children to school without peanuts" (Tr. p. 115). As the parent never requested accommodations from the assigned school prior to determining to unilaterally place the student at Seton, I decline to consider whether this apparent limitation on the assigned school's willingness to implement all potential recommendations that may have been made by the student's physician if the student had attended the assigned school led to a denial of FAPE.

[39] I note that, pursuant to the Allergy and Anaphylaxis Management Act of 2007 (L. 2007 ch. 579, § 3; see Pub. Health Law § 2500-h [Anaphylactic policy for school districts]), the Commissioner of Health, in consultation with the Commissioner of Education, has issued a guidance document containing best practices recommendations for use by districts in establishing policies regarding the management and treatment of allergies and anaphylaxis in a school setting ("Caring for Students with Life-Threatening Allergies," Dep't of Health/Educ. Dep't [June 2008], available at http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/AnaphylaxisFinal62508.pdf; see 21 U.S.C. § 2205[b], [d] [providing for the development of voluntary food allergy and anaphylaxis management guidelines by the Secretaries of Health and Human Services and Education]; see also "Safe at School and Ready to Learn: a Comprehensive Policy Guide for Protecting Students with Life-Threatening Allergies," National Sch. Bds. Assoc. [2011], available at http://www.nsba.org/Board-Leadership/SchoolHealth/Food-Allergy-Policy-Guide.pdf). Although this guidance is not dispositive of my resolution of this matter, I note that the hearing record does not indicate that the district failed to comply with the recommendations therein.

[CA] Unified Sch. Dist., 55 IDELR 265 [OCR 2010]).

VII. Conclusion

I find that the IHO did not err in finding that the district had appropriately addressed the student's needs relating to her allergies. Although the parent's desire for a guarantee of her daughter's safety is natural parental concern, it goes beyond what is required of the district by the IDEA. Having found that the district offered the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end and I need not determine the appropriateness of the student's unilateral placement or whether equitable considerations support the parents' request for reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).[40] I note that nothing in this decision should be construed as prohibiting the parent from seeking further accommodations or environmental modifications for the student by way of an emergency allergy plan or a Section 504 plan, and that I express no opinion with regard to the district's obligation to provide the student with an allergen-free environment beyond the manner raised here and insofar as it is based on the evidence contained in the hearing record and arises under the IDEA (see, e.g., A.C. v. Shelby County Bd. of Educ., 824 F. Supp. 2d 784, 790-91, 797 [W.D. Tenn. 2011] [noting accommodations made to limit allergen exposure of a student with a peanut allergy]; Gloucester County [VA] Pub. Schs., 49 IDELR 21 [OCR 2007] [finding a denial of FAPE under Section 504 for a district's failure to provide accommodations to a student with a peanut allergy]). I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 7, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

[40] However, had it been determined that there was a denial of a FAPE, the next question to address would be whether Seton was an appropriate placement for the student, as the only airborne allergen of which Seton was aware and for which it had taken school-wide precautions was peanuts (Tr. pp. 177-79), despite testimony from the student's pediatrician that the student had similar reactions to dog and cat hair (Tr. pp. 125-29, 135-36, 141-42). I note that the student's classroom teacher at Seton indicated that she did her best to ensure that dog and cat hair were not present in the classroom because of her own allergies (Tr. pp. 210-11).