The University of the State of New York

The State Education Department
State Review Officer
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No. 15-093

Application of the BOARD OF EDUCATION OF THE ORCHARD PARK CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hodgson Russ, LLP, attorneys for petitioner, Ryan L. Everhart, Esq., of counsel

Goldstein, Ackerhalt & Pletcher, LLP, attorneys for respondent, Patrick M. McNelis, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2014-15 school year were inappropriate. The appeal must be sustained in part.

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 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 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 hearing record indicates that the student exhibited significant academic, social, fine motor, gross motor, visual motor, and speech-language needs (Joint Exs. G at pp. 3-8; BB at pp. 3-7). The student presented with limited expressive language skills, producing primarily one to two word spontaneous utterances and her speech sound development was severely delayed, which significantly impacted her intelligibility (Joint Ex. G at p. 4). Additionally, she had received a diagnosis of Down syndrome (Tr. p. 243).

During the 2013-14 school year, the student attended a nonpublic school located in a school district outside of her district of residence (former district of location) (Joint Ex. AA at p. 1).[1] The student received special education services as a student with a speech or language impairment pursuant to an individualized education services program (IESP) (id.; see generally Joint Ex. B). On May 20, 2014, the parent completed a student registration form with the district that is a party to this proceeding, which was also located outside of the student's district of residence (Joint Ex. D at p. 1; see also Joint Ex. AA at p. 3).[2]

On May 28, 2014, the former district of location convened a CSE to conduct the student's annual review and to develop the student's IESP for the 2014-15 school year (Joint Ex. BB at p. 1). The May 2014 IESP recommended two 30-minute sessions per week of indirect consultant teacher services; five 30-minute sessions per week of resource room services in math; five 45-minute sessions per week of resource room services in English language arts (ELA); one 30-minute session per week in occupational therapy (OT) individually across all settings; three 30-minute sessions per week of speech-language therapy individually in a therapy room; and two 30-minute sessions per week of speech-language therapy individually in a general education classroom (id. at pp. 9-10). Additionally, the May 2014 IESP recommended a "personal aide" to be provided daily to assist the student with "sustaining attention to academic or non-preferred tasks, as well as support with academic tasks" and a behavioral consult once per month for 30 minutes (id. at pp. 9, 12-13).[3]

On June 24, 2014 the nonpublic school the student attended closed (Joint Ex. AA at p. 3). Subsequently, the parent enrolled the student in a different nonpublic school located within the district (id.; Joint Ex. D). The student began attending this nonpublic school on September 4, 2014 (Joint Ex. AA at p. 3).

On September 9, 2014, the district convened a CSE to develop an IESP for the student (Joint Exs. G at p. 2; AA at p. 3; see also Joint Ex. E). Finding the student eligible for special education and related services as a student with a speech or language impairment, the September

[1] At the IHO's suggestion, the parties stipulated to many of the pertinent facts (see Tr. pp. 17-18; Joint Ex. AA). The IHO is commended for maximizing the efficiency of the hearing process in this manner (Tr. pp. 17-18).

[2] The parent submitted a registration form to the district as she was made aware that the student's previous nonpublic school would soon close (see Tr. pp. 477-78). The parent testified that the student's former district of location nevertheless conducted a CSE meeting on May 28, 2014 because it remained the student's district of location on that date (Tr. pp. 477-78).

[3] While a personal aide is not defined in State regulations, a "teacher aide" is defined as an individual assigned to "assist teachers in such nonteaching duties as: (1) managing records, materials and equipment; (2) attending to the physical needs of children; and (3) supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]; see also NYCRR 200.1[hh] [defining supplementary school personnel as "a teacher aide or a teaching assistant"]). State guidance issued in November 2013 further indicates that a teacher aide may perform "non-instructional duties" under supervision determined by the local school district ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Updated Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). While it appears that the duties of a personal aide, as understood by the parties, are similar to those of a "teacher aide," this decision conforms to the parties' nomenclature and uses "personal aide" throughout.

2014 CSE recommended the following services: four 45-minute sessions per week of resource room services; one 45-minute session per week of direct consultant teacher services in math; one 45-minute session per week of direct consultant teacher services in ELA; one 30-minute session per week of OT individually in a therapy room; and three 30-minute sessions per week of speech-language therapy individually in a therapy room (Joint Ex. G at p. 10).[4] Additionally, the September 2014 IESP recommended the following supports for school personnel on behalf of the student: a behavioral consult once per month for 30 minutes; a speech-language consult once per week; and a team meeting with the parents twice per month (id. at p. 13). The September 2014 CSE did not recommend a personal aide for the student (see Joint Exs. F at p. 1; G at p. 10; AA at p. 3).

By prior written notice dated September 15, 2014, the district summarized the recommendations of the September 2014 CSE (Joint Ex. H at p. 1).

A. Due Process Complaint Notice

In an amended due process complaint notice dated October 28, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Joint Ex. M at p. 3). Specifically, the parent alleged that the district failed to conduct any evaluations or observations of the student (id.). The parent also argued that none of the student's previous special education teachers or services providers attended the September 2014 CSE meeting (id.). The parent additionally contended that the September 2014 CSE failed to provide the student with necessary supplementary aids and services to maintain the student in a general education classroom (id.). The parent further alleged that the September 2014 IESP did not include provision for sufficient special education, related services, or supplementary aids and services to ensure that the student would make progress in the general education curriculum and toward the IESP's annual goals (id.). The amended due process complaint notice also contained allegations pertaining to a 12:1+1 special class discussed at the September 2014 CSE meeting (id.). Specifically, the parent contended that the district failed to include the CSE's recommendation of a 12:1+1 "self-contained program" on the September 2014 IESP and that a 12:1+1 special class was "overly restrictive" for the student (id.). Next, the parent argued that the district did not implement the student's pendency (stay-put) placement until October 2014 (id.).[5] Specifically, the parent contended that the student had not yet received any speech-language therapy services pursuant to pendency (id.).

For relief, the parent requested that the district "develop and implement" an IESP that included appropriate services, including a personal aide, in order to maintain the student in a general education setting (Joint Ex. M at p. 4). Further, the parent requested that the district develop and implement an IESP consistent with the level and nature of services identified on the May 2014 IESP developed by the student's former district of location (id.). The parent also

[4] 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 proceeding (Tr. p. 4; Joint Ex. AA at p. 1; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[5] The student's entitlement to remain in her then-current educational placement arose upon the filing of the original due process complaint notice on September 12, 2014 (see Joint Ex. J at pp. 1-2).

requested that the district implement the May 2014 IESP developed by the student's former district of location during the pendency of the proceeding (id. at p. 3). The parent further requested that the district provide the student with additional services to compensate for its "delay and/or failure" to provide pendency services during the 2014-15 school year (id. at p. 4). Finally, the parent requested that the district reimburse her for any costs incurred in providing special education, related services, or supplementary aids and services to the student as a result of the district's failure to do so (id.).

B. Impartial Hearing Officer Decision

After three prehearing conferences, on June 8, 2015, the parties proceeded to an impartial hearing, which concluded on June 9, 2015 (see Tr. pp. 21-526; IHO Exs. I at pp. 1-2; IV).[6] In a decision dated August 10, 2015, the IHO concluded that the district failed to offer the student a FAPE for the 2014-15 school year (IHO Decision at p. 16-24).[7] Preliminarily, the IHO found that the question of whether a 12:1+1 special class placement would have provided the student with a FAPE was not before her as the district did not recommend this placement in an IEP or an IESP (id. at pp. 16, 19). The IHO also found that information as to how the student's pendency placement—i.e., the May 2014 IESP developed by the former district of location—was implemented during the 2014-15 school year was inapposite to an assessment of the September 2014 IESP (id.).[8]

Next, the IHO found that the issues raised in the parent's due process complaint were not moot, noting that the parent's requests for compensatory education and "whatever equitable relief the impartial hearing officer deem[ed] appropriate" prevented the case from becoming moot (IHO Decision at p. 16). Further, the IHO found that the harm alleged by the parent fell within the "capable of repetition, yet evading review" exception to the mootness doctrine (id.).

The IHO proceeded to find that the September 2014 IESP failed to offer the student a FAPE (IHO Decision at p. 19). Specifically, the IHO found that the September 2014 IESP unjustifiably reduced the combined number of hours that the student would receive either resource room or consultant teacher services and failed to provide an adequate amount of speech-language therapy services (id.). The IHO also found that the student required the support of a personal aide in order

[6] The IHO appropriately conducted multiple prehearing conferences with both parties at which issues were clarified, witnesses expected to provide testimony were identified, dates were established for completion of the hearing, and other administrative matters were addressed as deemed necessary by the IHO to complete a timely hearing, which, in turn, resulted in the completion of the impartial hearing in two days, as contemplated by State regulation (Tr. pp. 1-19; see 8 NYCRR 200.5[j][3][xi], [xiii]).

[7] While this case concerns special education services delivered under Education Law § 3602-c, the IHO and the parties proceeded under the supposition that the district owed the student a FAPE (see generally Application of a Student with a Disability, Appeal No. 15-055). Accordingly, the above discussion utilizes this language to accurately summarize the IHO's findings as well as the parties' contentions on appeal.

[8] The IHO also found that the question of whether the student required a personal aide in order to receive an appropriate education in a general education setting was not before her (IHO Decision at p. 16). The nature of this finding is unclear, especially as the IHO proceeded to address whether the September 2014 CSE should have included recommendation for a personal aide on the student's IESP (see id. at p. 19).

to assist with "breaking assignments into . . . manageable parts," and to keep the student on task (id. at p. 20). Thus, the IHO concluded that the September 2014 IESP failed to provide sufficient "adult support" in a general education setting with 24 students and one teacher (id.). The IHO rejected the district's argument that the student's "gradual progress" during the 2014-15 school year demonstrated the appropriateness of the September 2014 IESP because the services identified in this IESP were not implemented during the pendency of the impartial hearing (id.).

Having found that the district did not offer the student a FAPE for the 2014-15 school year, the IHO ordered that the district evaluate the student in all suspected areas of disability, including assistive technology (IHO Decision at p. 23). The IHO further ordered the district to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (id.). The IHO additionally ordered that the CSE convene prior to the 2015-16 school year to make an "appropriate recommendation for the student," taking into consideration the ordered evaluations (id.).[9] Finally, the IHO found that the student was entitled to compensatory additional services consisting of tutoring in math and ELA and speech-language therapy based on the district's failure to implement the student's pendency placement from the start of the school year in September until October 29, 2014, the date the parent filed the amended due process complaint (id.). The IHO further ordered that the amount of compensatory services be determined by a joint audit conducted by the parties (id. at pp. 23-24).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the district failed to offer the student a FAPE for the 2014-15 school year. As a preliminary matter, the district alleges that the IHO erred by rejecting the district's contention that the parent's claims became moot upon the expiration of the 2014-15 school year. The district further contends that the IHO erred in finding that the student required a personal aide. According to the district, the student did not require a personal aide and the parent's desire to have the aide provide instructional support was inconsistent with State policy regarding the duties of supplementary school personnel. The district also avers that the September 2014 IESP included reasonable and appropriate levels of special education services considering the parent's decision to enroll the student in a private school. The district further contends that the IHO improperly ordered the district to provide compensatory education services because there was no evidence that the student was harmed based on the district's failure

[9] The IHO ordered that the placement provided in the May 2014 IESP (i.e., the student's pendency placement) would continue until the district changed the student's placement with an appropriate IESP or the parties otherwise agreed as to the student's placement (IHO Decision at p. 23).

to implement pendency services. The district requests that the decision of the IHO be reversed in its entirety.[10]

In an answer, the parent responds to the district's allegations and argues to uphold the IHO's decision in its entirety.[11]

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for

[10] The district also appeals "each and every aspect" of the IHO decision (Pet. ¶ 31). However, it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3d Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is insufficient to preserve a specific challenge]; N.L.R.B. v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 [11th Cir. 1998] [noting that "[i]ssues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived"]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). Therefore, any additional arguments beyond what the district has articulated in its petition will not be considered on appeal.

[11] The parent submits additional evidence with her answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the parent submits evidence that was provided to the IHO after the last date of the impartial hearing but was not introduced into evidence (see Tr. pp. 372-76; Parent Mem. of Law at pp. 11-15). Specifically, this additional evidence consists of a supplemental memorandum of law submitted to the IHO and an e-mail communication from the IHO pertaining to this memorandum (Ans. Exs. A, B). State regulations provide that "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" are part of the hearing record (8 NYCRR 200.5[j][5][vi][b]). Therefore, because it should have been included in the hearing record in the first instance, this evidence has been accepted.

services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.). Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; 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. September 2014 IESP

1. Mootness

The district argues that the parent's claims in this matter became moot upon the expiration of the 2014-15 school year and that, at the time the district submitted its petition, a CSE "was poised to develop a new educational program . . . for the 2015-2016 school year" (Dist. Mem. Of Law at p. 2). 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]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4). 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 generally Lillbask, 397 F.3d at 87-88 [2d Cir. 2005]; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]).

It is generally accepted that a claim for compensatory education or additional services presents a live controversy (Student X, 2008 WL 4890440, at *15; see Lesesne v. Dist. of

Columbia, 447 F.3d 828, 833 [D.C. Cir. 2006]; Lillbask, 397 F.3d at 89-90; Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 17-18 [1st Cir. 2003]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 [8th Cir. 2001]; Fullmore v. Dist of Columbia, 40 F. Supp. 3d 174, 178-79 [D.D.C. 2014]). However, in this instance, the compensatory services awarded by the IHO related to her determination that the district failed to implement the student's pendency placement and not to her finding that the September 2014 IESP failed to offer the student a FAPE (see IHO Decision at pp. 23-24). The district has not appealed the relief awarded by the IHO to the extent that such relief related to the adequacy of the September 2014 IESP; to wit, that the district evaluate the student in all areas of suspected disability, conduct an FBA and develop a BIP, and reconvene to develop an appropriate educational program for the student for the 2015-16 school year (see id. at p. 23). Moreover, the parent has not interposed a cross-appeal contesting the IHO's failure to award additional compensatory services based on her determination that the district failed to offer the student a FAPE for the 2014-15 school year. Accordingly, these aspects of the IHO's decision have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Thus, it is unclear what utility a discussion of the September 2014 CSE's recommendations would have at this juncture, as the district was responsible for implementing the May 2014 IESP preferred by the parents (or is responsible for compensatory services relating to its failure to implement the same pursuant to pendency) for the 2014-15 school year, which is now complete, and the adequacy of the September 2014 IESP is only marginally relevant to any new IESP generated at a different CSE meeting, at which the district would be required by the IDEA and by the IHO's final and binding order to assess the student's continuing development in a new annual review process (see 20 U.S.C. § 1414[d][4]; (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]).

Therefore, the claims relating to the September 2014 IESP have been rendered moot by virtue of pendency and the compensatory services award discussed below. It does not appear that those district court decisions holding that an exception to the mootness doctrine applied even when the requested relief had been achieved as a result of pendency are applicable here, as those cases arose in the context of tuition reimbursement claims (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. Jul. 29, 2011]; but see V.M., 954 F. Supp. 2d at 119-20 [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O., 899 F. Supp. 2d at 254-55; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S., 734 F. Supp. 2d at 280-81 [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]). Nevertheless, in the interest of administrative and judicial economy, I have addressed the merits of the district's appeal relating to the September 2014 IESP

out of an abundance of caution even though my view is that this matter is moot and that no exceptions apply in this case.

2. Personal Aide

The district argues that the IHO erred by finding that the September 2014 CSE should have recommended a personal aide because the CSE recommended accommodations and services in the September 2014 IESP to address the student's attention and behavior needs. Furthermore, the district argues that the parent desired a personal aide in order to provide instructional and academic support, which is precluded by State regulations as well as State policy guidance. In response, the parent argues that the IHO correctly determined that the student's individual needs necessitated the inclusion of a personal aide in the September 2014 IESP. A review of the hearing record supports the parent's argument.

State guidance issued in January 2012 describes the considerations for determining if a student requires a one-to-one aide, as well as the roles and responsibilities of a one-to-one aide (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). In pertinent part, the memorandum indicates that the decision to recommend an individual aide for a student must weigh factors that include, but are not limited to, the student's individual needs (id. at pp. 2-3). Moreover, the memorandum states that "assignment of a one-to-one aide may be unnecessarily and inappropriately restrictive," noting that a goal for all students with disabilities is to "promote and maximize independence" (id. at p. 1). In addition, while a "teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s)" (id.). A "teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" (id.).[12]

In order to assess whether the September 2014 CSE should have recommended a personal aide, it is necessary to assess the information considered by the CSE. The only information available to the September 2014 CSE was the May 2014 IESP generated by the student's former district of location (Tr. pp. 63-64; 130-31; Joint Exs. F at p. 1; AA at pp. 1, 3). The district's director of special education explained that the CSE requested, but did not receive, evaluative material from the student's district of residence which had been used by the former district of location to develop the May 2014 IESP (Tr. pp. 107-08, 130-31; Joint Ex. BB at p. 1).[13] The May 2014 IESP, as noted above, indicated that the student required a personal aide to assist her ability to pay "attention to task[s]" and to "break [] assignments into small manageable parts" (Parent Ex. BB at p. 6).

[12] See also "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009], available at http://www.highered.nysed.gov/tcert/career/tavsta.html.

[13] The IDEA requires a district to which a student has transferred to take reasonable steps to promptly obtain from the old district the student's records, including "the IEP and supporting documents and any other records relating to the provision of special education or related services to the child" (20 U.S.C. § 1414[d][2][C][ii][I]; 34 CFR 300.323[g][1]; 8 NYCRR 200.4[e][8][i]).

The evidence in the hearing record, including minutes of the September 2014 CSE meeting, reveals that the September 2014 CSE discussed the student's need for a personal aide and decided not to recommend such a service (Joint Ex. F at p. 1). According to the director of special education, a CSE would only recommend the services of a personal aide if information "substantiating a medical or behavioral need" was presented to the CSE (Tr. pp. 89-90).[14] The director further testified that the parent requested a personal aide for purposes of "academic support" in the classroom and that the CSE could not accede to this request as it was inconsistent with State requirements (Tr. pp. 79, 89-90). The parent testified that the CSE was "adamant" in its refusal to consider recommending a personal aide for the student (Tr. p. 511).

The only information considered by the CSE, however, (i.e., the May 2014 IESP) indicated that the student required a personal aide (Parent Ex. BB at p. 6). Moreover, the parent, who was the only member of the September 2014 CSE familiar with the student, indicated that a personal aide was necessary to meet the student's needs (Tr. pp. 482, 509). The director of special education additionally testified that it was "documented" in the May 2014 IESP that the student "had difficulty with sustaining focus and attention" and, further, that she was a "flight risk" (Tr. p. 91). According to the evidence in the hearing record, the school psychologist who served on the September 2014 CSE suggested that the district conduct an FBA of the student instead of or prior to recommending a personal aide (Tr. pp. 116-17, 499-500). However, this recommendation was not included on the IESP and the district did not "follow through" on this suggestion (Tr. pp. 117; see Tr. p. 500; Joint Ex. G).

This evidence supports the IHO's finding that the September 2014 CSE erred by failing to recommend the services of a personal aide. The district elected not to conduct any evaluations of the student and, instead, the CSE relied upon the description of the student's needs set forth in the May 2014 IESP developed by the former district of location, copying verbatim the student's present levels of performance, including the statement that the student "require[d] the support of a personal aide with attention to task and breaking assignments into small manageable parts" (compare Joint Ex. G at p. 7, with Joint Ex. BB at p. 7).[15] Further, there is no basis in the hearing record to conclude that the September 2014 CSE had before it any different information about the student's needs in this respect.

Finally, the IHO did not err in finding that evidence as to how the student performed in school during the 2014-15 school year was irrelevant to an assessment of the September 2014 IESP. As the IHO observed, the district implemented the May 2014 IESP, and not the September

[14] The director of special education's view that a student may only require a personal aide for medical or behavioral reasons is unduly narrow (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," supra, at pp. 1-5).

[15] The district further argues that the parent desired a personal aide to provide academic instruction and that this is an impermissible role for an aide according to State regulation and policy. The district's concerns find some support in State guidance: the January 2012 memorandum indicates that personal aides should "not be used as a substitute for certified, qualified teachers" (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," supra at p. 1). However, as the September 2014 IESP explicitly indicates that the student required the aide to help the student manage attention and tasks (compare Joint Ex. G at p. 7), the parent's views about the aide's role are immaterial in the instance.

2014 IESP, as the student's pendency placement during the 2014-15 school year (IHO Decision at p. 20; see Tr. p. 95; IHO Ex. III). Thus, the student's progress under this IESP has no bearing on the appropriateness of the September 2014 IESP. Moreover, even assuming for purposes of argument that the district implemented the September 2014 IESP, evidence concerning the implementation of this IESP would constitute impermissible retrospective evidence (see R.E., 694 F.3d at 187). The Second Circuit has explained that, for purposes of an IEP analysis, "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan," not a retrospective assessment of how the IEP could or should have been implemented (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. Jul. 24, 2013], quoting R.E., 694 F.3d at 187). Thus, the evidence in the hearing record demonstrates that the district failed to provide appropriate services to the student on an equitable basis by failing to recommend the provision of a personal aide.

3. Resource Room / Consultant Teacher Services

The district additionally argues that the September 2014 IESP provided a reasonable and appropriate level of special education and related services in relation to the parent's placement of the student in a general education setting in a nonpublic school. The parent responds that the IHO correctly found that the September 2014 IESP impermissibly reduced the student's then-current level of special education and related services relative to the May 2014 IESP developed by the student's former district of location.

The September 2014 IESP's present levels of performance indicate that the student exhibited deficits in the academic areas of reading, writing, and math (Joint Ex. G at pp. 4-8). The IESP indicated that the student was reading at approximately a kindergarten level, experienced difficulty with handwriting and letter formation, and was able to complete some topics in math such as shapes, simple data graphs, simple addition and subtraction problems and time (id. at p. 5).

As noted above, the September 2014 IESP contained the same present levels of performance and management needs word-for-word that appeared in the May 2014 IESP (compare Joint Ex. G at pp. 3-8, with Joint Ex. BB at pp. 2-7). And, as was the case with the "personal aide" discussed above, the focus of the parent's claims, the IHO's analysis, and the district's argument, both during the impartial hearing and on appeal, centered on the question of whether or not the district appropriately recommended a different level of educational services for the student than the former district of location without considering new or different information about the student's needs.[16]

With respect to academics, relative to the May 2014 IESP, the September 2014 CSE reduced the amount of resource room services and removed indirect consultant teacher services

[16] A comparison of the May 2014 IESP and the September 2014 IESP is of questionable utility as it is not conclusive from the hearing record that the May 2014 IESP was appropriate for the student in the first instance. Further, as the May and September 2014 IESPs were designed for implementation in different nonpublic schools, the district's consultation process for making special education services available to students enrolled privately by their parents in nonpublic schools may have impacted service recommendations (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

(compare Joint Ex. G at p. 10, with Joint Ex. BB at pp. 9-10). On the other hand, the September 2014 CSE added direct consultant teacher services to be delivered in the classroom (Joint Ex. G at p. 10). State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher to a student with a disability to aid such student to benefit from the student's regular education classes (8 NYCRR 200.1[m][1]). Indirect consultant teacher services are defined as consultation provided by a certified special education teacher to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes (8 NYCRR 200.1[m][2]). Finally, State regulation provides that a resource room program is a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day (8 NYCRR 200.1[rr]).

The district argues that the reduction in recommended services relative to the May 2014 IESP (in particular, the reduction in resource room services and the removal of indirect consultant teacher services) was counteracted by the student's receipt of direct consultant teacher services (Dist. Mem. of Law at p. 6). The director testified that the September 2014 CSE "adjusted the services because [the CSE] wanted to maximize the amount of time [the student] was spending in the gen[eral] ed[ucation] classroom" and because the parent indicated that she was enrolling the student in the current nonpublic school for socialization purposes (Tr. pp. 88, 94-95, 484-85).

Reviewing the description of the student's needs as set forth in the September 2014 IESP, it cannot be said that the CSE's shift from the greater amount of pull-out resource room to the smaller resource room mandate and the push-in direct consultant teacher services contributes to a finding that the district failed to offer the student appropriate services on an equitable basis. That is, the September 2014 IESP indicated that the student required "pull out services in the areas of ELA and math in order to reinforce grade level skills" (Joint Ex. G at p. 8), which would support the resource room services as State regulation contemplates such supplemental instruction (NYCRR 200.1[rr]). Then again, the September 2014 IESP also indicated that the student required direct instruction in reading, writing, and math and that the student needed support in a resource room setting (Joint Ex. G at pp. 5, 7), which would tend to support the shift to the direct consultant teacher services recommended by the CSE (8 NYCRR 200.1[m][1]) in combination with the resource room services. An informed determination of this issue would be better made upon a full examination of the student's strengths and deficits, which is not possible given the limited information in the hearing record regarding the September 2014 CSE meeting. Therefore, while the district's direct consultant teacher recommendation does not, in this instance, contribute to a finding that the September 2014 IESP was inappropriate, given the ultimate outcome of the present case, the district is encouraged, upon completion of the evaluations ordered by the IHO, to examine the student's academic needs and consider which service and/or setting is sufficient to permit the student to benefit educationally from that instruction.

4. Speech-Language Therapy and Occupational Therapy Services

As to the speech-language therapy and OT sessions recommended in the September 2014 IESP, the district argues that the related services were sufficient to address the student's needs.

According to the September 2014 IESP, the student achieved a standard score of 55 in the Expressive One Word Picture Vocabulary Test (Parent Ex. G at p. 3). The IESP noted that, with respect to receptive language, the student followed simple verbal directions and directions that included a spatial concept (id. at p. 4). As for expressive language, the IESP indicated that the student used one to two word spontaneous utterances in the school setting (and three to four word utterances in the home) that mainly consisted of nouns but also used phrases and sentences that included verbs and adjectives when engaging in choral speaking or imitative tasks (id.). As the student increased the length and complexity of utterances, however, the IESP indicated that the student demonstrated difficulty stringing the words together even with a model (id.). The IESP stated that the student's functional communication skills were "significantly delayed" (id.). As for speech sound development, the IESP also reported that the student was "significantly delayed (id.). Specifically, according to the IESP, the student was able to imitate and spontaneously produce most phonemes in isolation but that her spontaneous speech was characterized by sound substitutions, initial and final consonant deletions, distortions, and cluster reductions (id.). While the student demonstrated delays with conversational production, the IESP indicated that the student demonstrated good accuracy with repetitive drills at the word level (id.). Reflecting the student's speech sound development delays, the IESP noted her poor speech intelligibility and school staff's inability to understand the student's verbalizations (id.). As for pragmatic language, the IESP indicated that the student's skills in this area were adversely affected by her delays in expressive language and speech sound production (id.). The IESP noted the student's use of verbal and nonverbal language to request items or assistance, negate, protest, label, ask and answer questions, and comment (id.). According to the IESP, the student generally refused to speak with adults if not presently working with them (id.). The IESP noted the student's use of augmentative/alternative communication during speech-language therapy sessions in drill format but noted that such communication had not yet been attempted in the classroom (id. at pp. 4-5).

As for the student's needs related to OT, the September 2014 IESP indicated the student's need to improve her fine motor, visual motor, and visual perceptual skills (Joint Ex. G at p. 7). The IESP indicated that the student showed improvement in visual motor skills; showed improved letter formation for the letter "A" and overall better letter formation when copying from a model and after given an opportunity to trace; held her writing implement with the appropriate grasp pattern but did not always stabilize the paper and pressed hard when writing; and demonstrated the ability to cut with scissors but had varying attention and speed on such tasks (id.). The IESP also noted that, in the area of visual perceptual skills, the student was working on picking out similar items from small groups and had become proficient at this task within a group of three items (id.).

To the extent relevant, the September 2014 IESP made changes to the amount and location of the recommended related services relative to the May 2014 IESP (compare Joint Ex. G at p. 10, with Joint Ex. BB at p. 10). Specifically, while the May 2014 IESP recommended two 30-minute sessions per week of speech-language therapy in the general education classroom and three 30-minute sessions per week of speech-language therapy in a therapy room, the September 2014 CSE recommended three sessions per week of speech-language therapy to be provided in the therapy room, thereby removing the two sessions that would have been provided in the general education setting (id.). Furthermore, the September 2014 IESP recommended one 30-minute session per week of OT in a therapy room, while the May 2014 IESP recommended OT be provided "across

all settings," which would have allowed for the session to be provided in the general education classroom (id.).

Given the student's receptive, expressive, functional communication, speech sound development, intelligibility, and pragmatic language deficits, described above, the speech-language therapy mandate recommended in the September 2014 IESP was insufficient (Joint Ex. G at pp. 4-5, 10). To the extent that the district points to testimony that the student would receive speech-language support in the resource room, such evidence constitutes an impermissible attempt to rehabilitate a deficiency in the IESP and is, thus, insufficient to overcome the otherwise inadequate service recommendation (see R.E., 694 F.3d at 186). Moreover, the district's argument that the reduction in the speech-language therapy mandate would allow the student more time in the general education classroom is without merit, as the sessions removed from the educational program relative to the May 2014 IESP were to be delivered within the classroom (compare Joint Ex. G at p. 10, with Joint Ex. BB at p. 10). Accordingly, there is no basis in the hearing record to reverse the IHO's determination that the insufficiency of the speech-language therapy recommended in the September 2014 IESP contributes to a finding that the district offered the student insufficient services on an equitable basis. However, the OT mandate in the September 2014 IESP, while limited in location to delivery in a therapy room, appears sufficient to address the student's identified needs in this area (see Joint Ex. G at pp. 7, 10).

B. Compensatory Pendency Services

Finally, the district argues that the IHO's award of compensatory education services was improper because there was no evidence that the student was harmed due to the pendency services missed. A review of the evidence in the hearing record supports the IHO's conclusion.

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]; see Student X, 2008 WL 4890440, at *20; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). 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]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

In this matter, the district agreed to implement the May 2014 IESP as the student's pendency placement (Joint Ex. V at p. 13; see also IHO Ex. III). On appeal, the district does not contest the IHO's determination that the district failed to implement pendency services until October 2014 (IHO Decision at p. 22; see Pet. ¶¶ 31-36). Accordingly, this finding has become

final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Moreover, the district does not dispute the underlying fact that it failed to implement pendency services between September 12, 2014, the date of the original due process complaint notice, through October 2014 (see Joint Ex. J at pp. 1-2).

While the parties dispute whether or not the student was harmed by the district's pendency violation, "harm" is not the correct legal standard for which an award of compensatory services is based as the parties have framed the issue. Courts in the Second Circuit have held that students should receive the pendency services to which they were entitled as a compensatory remedy where a district fails to implement a student's pendency placement (see E. Lyme Bd. of Educ., 790 F.3d at 456 [awarding full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; Student X, 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [finding that services that district failed to implement under pendency awarded as compensatory services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]; see also G.L. v. Ligonier Valley Sch. Dist. Auth., 2015 WL 5559976, at *21 [3d Cir. Sept. 22, 2015] [stating that if a district fails to provide a FAPE, students are "entitled to be made whole with nothing less than a 'complete' remedy" and that "[c]ompensatory education is crucial to achieve that goal"]; but see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that equitable considerations did not support a compensatory award for a pendency violation where the parents failed to respond to the district's offer to implement pendency services in a timely manner]). Thus, in any event, the district's argument would "allow [it] to unilaterally terminate rights to which a student is automatically and unconditionally entitled and would eviscerate the Supreme Court's admonition that the pendency provision . . . 'means what it says.'" (Student X, 2008 WL 4890440, at *26 ([E.D.N.Y. Oct. 30, 2008], quoting Honig, 484 U.S. at 325). Accordingly, the IHO did not err by awarding compensatory additional services to make up for the district's obligation to provide pendency services.

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the September 2014 CSE failed to offer an appropriate service recommendation on an equitable basis based on the student's individual needs for the 2014-15 school year (see Educ. Law § 3602-c[2][b]). Moreover, the evidence in the hearing record supports the relief awarded by the IHO. I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated August 10, 2015, is modified to the extent that it ordered the district to provide compensatory education services for the timeframe commencing with the start of the school year in September 2014; and

IT IS ORDERED that the district shall provide compensatory education services in accordance with the IHO's order for the time period from September 12, 2014, the date that the parent filed the due process complaint notice, through October 29, 2014.

Dated: **Albany, New York**
October 15, 2015

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SARAH L. HARRINGTON
STATE REVIEW OFFICER