The University of the State of New York

The State Education Department
State Review Officer
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No. 10-115

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

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

Law Offices of Anton Papakhin, P.C., attorneys for respondent, Anton Papakhin, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent (the student) for the 2008-09 and 2009-10 school years, and as relief, ordered the district to issue a Nickerson letter, to create an individualized education program (IEP) for the student recommending a residential placement, and for the student to be placed in a residential program at an out-of-State, approved nonpublic school (NPS) for the 2010-11 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was incarcerated at a correctional facility, where she had been confined since October 2007 (see Tr. pp. 5, 83-86).[1] Shortly after the student's incarceration in 2007, her criminal defense attorney (defense attorney) and the district attorney prosecuting the offense "agreed" to refer the student's criminal case to the Mental Health Court—a "treatment alternative court"—due to their mutual belief that the student suffered from

[1] Prior to her incarceration in October 2007, the student exhibited a "long history of hearing voices" and "self-mutilating behavior (in response to command auditory hallucinations)" (Parent Ex. C at p. 1; see Parent Ex. D at pp. 1-2). The student had also engaged in fire-setting behavior, elopements, substance abuse, and sexually promiscuous behavior (see Parent Exs. C at p. 1; D at pp. 1-2, 4-5). The student's first psychiatric in-patient hospitalization occurred when she was 11 years old in 2001. Since 2001, the student has continuously received treatment through either psychiatric in-patient hospitalizations or day treatment programs until December 2007, when she was discharged from such program as a result of her incarceration (see Parent Exs. C at pp. 1-2; D at pp. 1-7; see also Parent Ex. B at p. 1). The student has received diagnoses including psychotic disorder not otherwise specified (NOS); bipolar disorder NOS; moderate mental retardation NOS; learning disorder NOS; alcohol abuse and cannabis abuse; and post-traumatic stress disorder (Parent Exs. D at p. 5; E at p. 4; H at p. 3).

a mental illness (Tr. pp. 83-87).[2, 3] Once referred, a treatment team in the Mental Health Court conducted a psychiatric evaluation, dated October 9, 2009, and social work assessments of the student to determine that she was "appropriate for the court" (Tr. pp. 88-91, 114-15; see Parent Ex. H).[4] In addition to the Mental Health Court evaluations, the defense attorney's office obtained a forensic psychological evaluation, dated July 10, 2008, and a psychiatric evaluation in November 2008 (Tr. pp. 114-15; Parent Exs. E-F).[5] Upon transferring the student's criminal case to the Mental Health Court, the defense attorney advocated for an "alternative incarceration," and requested that the student "be placed in a residential facility, which addresse[d] her psychiatric needs" (Tr. p. 89; see Tr. pp. 94-95). The defense attorney testified that since the "beginning of the case," "many" discussions have occurred at court conferences regarding placements for the student, noting that "whether it be with an educational component, psychiatric component, we needed somewhere that [the student] could go where [the student] would be safe and [the student] would get the services she need[ed]" (Tr. pp. 94-95).

While proceedings occurred to transfer the student's criminal case to Mental Health Court, however, she remained incarcerated and attended the district's school located at the correctional facility during the 2007-08 school year (Tr. pp. 172-73; see Dist. Ex. 1).[6, 7] Shortly after her incarceration, the district administered the "STAR" evaluation to the student on October 25, 2007, which yielded a reading grade equivalent score of 2.6 and a mathematics grade equivalent score of 2.2 (Dist. Ex. 4 at pp. 1-2; see Tr. pp. 176-77).[8] According to the STAR reading diagnostic

[2] Although not well documented in the hearing record, the student's eligibility for special education programs and services as a student with an emotional disturbance is not in dispute (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; see also Tr. pp. 206-07; Parent Ex. A at pp. 1-3).

[3] Mental Health Court serves individuals charged with "serious felonies" and provides "an alternative to incarceration" with "monitor[ing]" by a Judge (Tr. pp. 87-88, 95, 97-98).

[4] Neither party submitted the social work assessments conducted by the Mental Health Court into evidence (see Tr. pp. 1-505; Dist. Exs. 1-5; 7; 9-11; Parent Exs. A-F; H-M; T; IHO Exs. 1-2).

[5] Although the hearing record contains a letter referring to a November 21, 2008 psychiatric evaluation of the student, the hearing record does not contain the psychiatric evaluation report (see Parent Ex. F at p. 1; see Tr. pp. 1-505; Dist. Exs. 1-5; 7; 9-11; Parent Exs. A-F; H-M; T; IHO Exs. 1-2). The letter, dated November 24, 2008, informed the Court, generally, of the evaluator's findings, and noted that the student suffered from "both a mental defect, namely mild to moderate mental retardation, as well as from a mental disease, namely, schizophrenia" (Parent Ex. F at pp. 1-2).

[6] The district's school provided educational services to incarcerated students Monday through Friday for 6.5 hours per day and 45-minute class periods (Tr. pp. 246-49). Staffing at the district's school included both regular and special education teachers, school psychologists, school social workers, and transitional counselors (Tr. pp. 246-47).

[7] Incarcerated youth are entitled to educational services (Educ. Law § 3202[7]; 8 NYCRR Part 118). An incarcerated youth who has been identified as a student with a disability and eligible for services under the Individuals with Disabilities Education Act (IDEA) is entitled to special education and related services that provide a free appropriate public education (FAPE) while incarcerated (34 C.F.R. § 300.102[a][2][ii]). If a student has an existing IEP prior to incarceration, the IEP must be implemented to the extent it can be implemented within a correctional facility (Handberry v. Thompson, 219 F. Supp. 2d 525, 548 [S.D.N.Y. 2002], aff'd in part, vacated in part 446 F.3d 335 [2d Cir. 2006]). If necessary, an IEP may be revised during the period of incarceration to fashion an appropriate special education program during the period of confinement (Handberry, 219 F. Supp. 2d at 548-49).

[8] The "STAR" evaluation is a "standardized test or assessment" used to determine a student's reading and mathematics skill levels (Tr. pp. 170-71, 199-201).

report, the student's scores indicated that she "probably had successful reading experiences with longer blocks of text" and had "mastered most of the basic sounds related to word recognition" (Dist. Ex. 4 at p. 1). The reading report noted that the student blended sounds and word parts to read words more quickly and smoothly (id.). The report identified tasks for the student to produce "optimal reading growth," such as developing oral reading fluency and rate, listening to books read aloud, increasing time spent on silent reading, and learning how to select books for independent silent reading practice (id.). The report also provided strategies to improve the student's reading skills (id.).

According to the STAR mathematics diagnostic report, the student exhibited skills "well below average for her grade," and indicated that she would benefit from additional daily mathematics instruction (Dist. Ex. 4 at p. 2). The mathematics report provided information about the student's proficiency with specific mathematics skills, noting that she could work with hundreds and use a calculator, that she was learning to regroup while adding and subtracting two-digit and three-digit numbers, and that she could learn to estimate simple problems (id.). The report identified specific mathematics concepts in which the student required instruction, and suggested instructional strategies (id.).

On November 29, 2007, the district convened an interdisciplinary team meeting—which included a regular education teacher, a special education teacher, a transitional coordinator, and a school social worker (who also acted as the district representative)—to develop the student's special education plan (SEP) (Dist. Ex. 1; see Tr. pp. 170-72, 175-77).[9] The SEP team discussed the results of the student's STAR assessments and her progress in counseling (Tr. pp. 175-77). Based upon "test results and observations from her teachers," the SEP team developed the student's goals in reading, mathematics, and counseling (Dist. Ex. 1; see Tr. pp. 176-77). The SEP team found the student eligible for extended school year services, and also recommended testing modifications (Dist. Ex. 1). The recommended instructional plan consisted of one period per day of direct special education teacher services, attendance at a skills support class, and one session per week of individual counseling (id.). In addition to the special education services recommended in the SEP, the student received instruction in a general education setting with 5 to 12 students who ranged in age between 16 and 18 years old (Tr. pp. 221, 248-50).[10] A "SETSS Teacher Student Plan" identified the student's reading and mathematics goals and contained objectives that described skills the student required in order to achieve the goals (Dist. Ex. 5).[11] On January 22, 2008, the district re-administered the STAR evaluation to the student, which yielded a reading grade equivalent score of 2.2 and a mathematics grade equivalent score of 2.4 (Dist. Ex. 3). According to the school social worker, the student "regularly" attended school during the 2007-08 school year, and was "well engaged" in school (Tr. pp. 173, 250).

[9] At the district's school, an incarcerated special education student would receive an SEP—"an equivalent of the Individualized Education Plan" (Tr. pp. 197-98). Although the school social worker did not specifically recall reviewing the student's IEP that existed before her incarceration to assist in the preparation of the student's October 2007 SEP, the hearing record suggests that she did, at some time, review the student's previous IEP because she knew the student's classification (see Tr. pp. 206-07).

[10] Although the student's SEP required only one 45-minute period per day of direct special education teacher services, the school social worker testified that the student "was seen way beyond the mandate by our special ed[ucation] teacher" (Tr. pp. 220-21, 248-49; see Dist. Exs. 1-2).

[11] The "SETSS" acronym typically refers to special education teacher support services.

During the 2008-09 school year, the student remained incarcerated, and the SEP team—which included three regular education teachers, a special education teacher, and a school social worker (who also acted as the district representative)—convened on October 16, 2008, to develop the student's SEP (Dist. Ex. 2; see Tr. pp. 177-78, 204-05). In the SEP, the team noted that a September 2, 2008, re-administration of the STAR evaluation to the student yielded a level of 3.4 in both reading and mathematics (Dist. Ex. 2). Similar to the October 2007 SEP meeting, the SEP team discussed the student's academic performance, classroom observations, and her progress in counseling at the meeting (Tr. pp. 177-78). The SEP team developed the student's mathematics, reading, and counseling annual goals and short-term objectives based upon the team's discussions (Tr. p. 178; Dist. Ex. 2). At that time, the SEP team determined that the student no longer required testing modifications (see Dist. Ex. 2). The recommended instructional plan consisted of one period per day of direct special education teacher services, attendance at a skills support class, and one session per week of individual counseling (id.). In addition, the student's transition plan indicated that she would have access to information and linkage to community resources (id.).

At the impartial hearing, the school social worker testified that she first learned that the student's criminal case had been transferred to the Mental Health Court in 2008 (Tr. pp. 222-23).[12] As a result of her counseling sessions with the student, the school social worker became concerned about the student's "case and it being prolonged" (see Tr. p. 223). Specifically, the student "fe[lt] that, . . . , her case was dragging, and that there was no one helping her in this process, in her legal case" (Tr. p. 225). The school social worker contacted the defense attorney's office (Tr. pp. 223-25). At that time, the director of the defense attorney's office was responsible for handling the student's criminal case (id.).[13] With the director's assistance, the student was transferred from the correctional facility to a psychiatric facility in December 2008 due to a deterioration in her mental health status (Tr. pp. 223-26).[14, 15]

Upon her discharge from the psychiatric facility in September 2009, the student returned to the correctional facility and registered for school in October 2009 (Tr. pp. 172-73). The school social worker testified that although she was not "certain," she "believe[d]" that an SEP had been developed for the student "in October of 2009" (Tr. pp. 179-81, 222).[16, 17] According to the school social worker, when the student returned to school in October 2009, "she was a very different young lady, and her interest in school had diminished tremendously, and her attendance was very poor" (Tr. pp. 173, 250, 260-61). Between October and December 2009, the student attended the

[12] The school social worker testified that neither she nor the district's school had access to the evaluations conducted by the Mental Health Court due to reasons of confidentiality (Tr. pp. 226-28).

[13] The defense attorney was on leave (Tr. p. 223).

[14] The student's transfer to the psychiatric facility had also been facilitated by a forensic social worker contacted by the school social worker (Tr. p. 262).

[15] The defense attorney admitted in her testimony that during the student's psychiatric hospitalization between December 2008 and September 2009, she suspended her efforts to locate an alternative placement (Tr. pp. 112-13; see Tr. pp. 223-26).

[16] Neither party submitted an SEP developed for the 2009-10 school year into evidence (see Tr. pp. 1-505; Dist. Exs. 1-5; 7; 9-11; Parent Exs. A-F; H-M; T; IHO Exs. 1-2).

[17] The school social worker testified that neither she nor the district's school has ever had access to the evaluations conducted during the student's psychiatric hospitalization from December 2008 through September 2009 due to reasons of confidentiality (Tr. pp. 226-28).

school for a total of 19 days, and between January and June 2010, she attended school for a total of 21 days (Tr. pp. 174-75; see Dist. Ex. 9).[18] The school social worker indicated that at the age of 19, the student "exercised her right to refuse school" because she did not want to attend school with the "adolescent population" and also because her "job" at the correctional facility was "more of a priority for her" since it was her "sole means of income" (Tr. pp. 173-75; see Tr. pp. 249-51, 260-61). According to the school social worker the student's psychiatric hospitalization resulted in a student who "returned very different in some ways, in positive ways, in that, she [was] more self-directed and appeared stable psychiatrically" (Tr. p. 254). The school social worker noted that the student had "aspirations" and that the treatment the student received during her hospitalization—which included medications—"really benefitted this young woman" (Tr. p. 255).

In the meantime, the defense attorney contacted NPS in January 2010, and she spoke with NPS's admissions personnel (see Tr. pp. 395-96).[19] Subsequently, NPS staff met with the student at the correctional facility and "continued to work closely" with the defense attorney regarding the student's potential placement at NPS (Tr. pp. 395-97).

To facilitate the student's transfer out of the correctional facility and into a residential facility, the defense attorney contacted the student's school social worker (see Tr. pp. 177-79; compare Tr. pp. 91-93, with Tr. pp. 170-72). During her initial conversation with the school social worker "around the end of May, middle of May" 2010, the defense attorney testified that she explained about attempting to locate a placement for the student and that "it might be helpful" if she could obtain the student's "educational records" (Tr. pp. 92-93). Subsequent conversations occurred with the school social worker, and the defense attorney testified that the school social worker requested "something in writing" from her, and advised that "because it was the end of the school year," the school social worker was uncertain about whether she could provide the defense attorney with the student's records (see Tr. p. 93).[20]

At the impartial hearing, however, the school social worker testified that her first contact with the defense attorney occurred on June 16, 2010 (Tr. pp. 230-31). In her testimony, the school social worker indicated that she was first contacted by an attorney representing the student at the impartial hearing (student's attorney) on June 15, 2010, who indicated that he was working with the defense attorney to obtain "residential treatment" for the student (Tr. pp. 230-31, 233-34, 251-52, 257). The school social worker explained that during her conversation with the student's attorney, he was not "clear as to what [he] needed," and later that same day, she initiated a telephone call to the student's attorney to seek clarification about his needs and to also advise that the district's school psychologist was ready to conduct "any type of evaluations or anything that would facilitate residential treatment" (Tr. p. 234). However, the student's attorney was supposed to send "the specific information and consent for [the student]" via facsimile, but after leaving "several messages" for the student's attorney, she did not receive the requested information (Tr.

[18] The school social worker testified that she did not otherwise have access to the student in the correctional facility to provide counseling services, unless the student attended school (Tr. pp. 231-32; see Tr. pp. 246-50). However, whenever the student did attend school between October 2009 and June 2010, the school social worker met with the student (Tr. pp. 231-33).

[19] Prior to her involvement with this student, the defense attorney had successfully diverted at least one other criminal client to NPS through the Mental Health Court (see Tr. p. 119).

[20] State law provides that the school year runs from July 1 to June 30 (Educ. Law § 2[15]).

pp. 234-35). On that same day, the school social worker met with the student to inform her about the telephone call from the student's attorney (Tr. p. 251).

According to her testimony, the school social worker received a telephone call from the defense attorney on June 16, 2010, who "reiterated" the information provided by the student's attorney on June 15, 2010 "about the possible transfer" (Tr. pp. 257-58).[21] At that time, the defense attorney expressed concern that the student would be "homeless" since the student could be released from the correctional facility in "two or three months," and further, that the student did not have a "support network" in place (id.). According to the school social worker, it became clear during this conversation with the defense attorney that she was asking for an "IEP that would denote that residential treatment [was] recommended" (Tr. p. 258).

During the conversations on June 15 and 16, 2010, the school social worker advised both the defense attorney and the student's attorney that she needed "consent for [her] to even have any further interaction with them regarding [the student's] case," and additionally, that she needed the student's consent to conduct an IEP meeting (Tr. pp. 233-35, 245-46, 259-60, 274). According to her testimony, neither of the student's attorneys provided her with the consent she had requested or with a "written request for a C[ommittee] [on] S[pecial] E[ducation] review or a reevaluation" before the end of the school year when she left for her vacation on June 30th (Tr. pp. 231-35, 245-46, 257-60, 274).

By due process complaint notice, dated June 17, 2010, the student alleged that, "[u]pon information and belief," the district failed to provide her with appropriate special education programs and services during her incarceration, which constituted a denial of a FAPE, for the 2008-09 and 2009-10 school years (Parent Ex. A at pp. 1-2). The student alleged that she required a "supportive therapeutic educational environment with a strong behavior modification component" and further, that she required an "immediate transfer to an appropriate residential educational program" (id. at p. 2). The student notified the district that NPS had reviewed her "referral packet" and "issued an acceptance letter" (id.). In her statement of proposed relief, the student requested that the impartial hearing officer make the following findings: the student required an immediate residential placement at either NPS or another State-approved nonpublic school; the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years based upon "substantive and procedural grounds;" NPS was the student's "least restrictive environment;" the district failed to provide the student with the "required special education services and program" while incarcerated; and the district failed to "properly evaluate the student and develop an appropriate recommendation (TEP)" (id.).[22] As relief, the student requested the following: direct the district to issue a Nickerson letter to allow the student to enroll at a State-

[21] Before her contact with the student's attorney on June 15, 2010, and with the defense attorney on June 16, 2010, the school social worker had no knowledge or information that the Mental Health Court had recommended a "diversion placement in a residential treatment center" for the student (Tr. pp. 229-31, 233).

[22] The acronym "TEP" refers to a "temporary education plan" (Tr. p. 198). Referring to District Exhibit 1 in evidence during her testimony, the school social worker explained that although the document was titled "SEP," it was "called a TEP," and at the school, the acronyms TEP and SEP were used "interchangeably" (id.).

approved nonpublic school;[23] direct the district to issue a Nickerson letter to allow the student to "immediately begin her treatment and education" at NPS; direct the district to amend the student's IEP to include placement at NPS; direct the district to prospectively fund the student's placement at NPS for the 2010-11 school year; direct the district to provide compensatory education services in the form of the student's continued residential placement at NPS for the 2011-12 school year; and direct the district to pay costs, fees, and any other relief deemed just and proper (id. at pp. 2-3).

On June 18, 2010, the school social worker met with the student, who advised that she met with her attorney and "signed the papers" for placement at NPS (Tr. pp. 231, 251-52). Before this meeting, the student had "never mentioned the possibility of attending a residential placement" to the school social worker (Tr. pp. 231, 233). At that time, the school social worker spoke with the student about the possibility of other options, including community assisted living programs and programs to assist with "vocational skills and employability" (Tr. p. 252). At the impartial hearing, the school social worker testified that she had also reconnected with the forensic social worker who had facilitated the student's transfer to the psychiatric facility in December 2008, and noted that he was prepared to "assist in putting together a community package, with assisted living and VESID and other services" regarding the student's transitional needs (Tr. 262; see Tr. p. 252).[24]

By letter dated July 1, 2010, NPS informed the defense attorney that the student had been accepted "as appropriate for immediate enrollment" into NPS's residential program (Parent Ex. I; see Tr. pp. 396-97). The defense attorney testified that after "many" unsuccessful efforts to locate an alternative placement for the student, NPS had been the "only treatment facility" to accept the student for placement (Tr. pp. 102-03).[25]

On July 28, 2010, the parties proceeded to an impartial hearing that occurred over the course of five nonconsecutive days, and concluded on October 1, 2010 (Tr. pp. 1, 380). Relevant to the instant appeal, the impartial hearing officer noted in his decision, dated October 18, 2010, that there had been "a late evaluation and placement for this child" and that district staff had been "aware of the need for evaluations since May and the need for a placement since June" (IHO Decision at p. 13). As a result, the impartial hearing officer determined that "a Nickerson letter should issue here," contrary to the district's arguments regarding the unavailability of "Jose P." relief in this matter and the student's disinterest in attending school (id.).

Alternatively, the impartial hearing officer determined that due to the "'breakdown' in [the] District's administrative processes," he had the "discretion to provide relief relating to school

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[23] A "Nickerson letter," which is only available to parents and students within the school district in the instant appeal, authorizes a parent to immediately place the student in an appropriate special education program in any State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *8 [E.D.N.Y. Aug. 25, 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

[24] The acronym "VESID" typically refers to the New York State Office of Vocational and Educational Services for Individuals with Disabilities.

[25] The district attorney prosecuting the student's criminal case opposed placing the student at NPS (Tr. pp. 100-01, 107-08, 115-23; see Tr. pp. 23-24).

location where a "'demonstrable deprivation of special education services' is likely to result" (IHO Decision at pp. 13-14; citing Application of a Student with a Disability, Appeal No. 08-103 n.9). The impartial hearing officer noted that based upon the hearing record, the district had not conducted an annual review of the student since October 2008, the district had not evaluated the student "although [the student's] personality appeared to change" after the student's psychiatric hospitalization from December 2008 through September 2009, and the student had not received instruction in a "self-contained classroom"—and that such setting was not available—while incarcerated (id. at p. 14).[26] Therefore, the impartial hearing officer determined that due to the breakdown of administrative processes in this case, it was "appropriate to order that [the student] be placed at [NPS] for the 2010-11 school year upon the appropriate order from [Mental Health Court]" (id.). Moreover, the impartial hearing officer noted that although the district disputed the appropriateness of NPS, testimonial evidence indicated that NPS was a "residential treatment facility that remain[ed] certified by New York State and employ[ed] appropriate methodologies" and that it was the "only school that will accept [the student] at this time" (id.). Thus, the impartial hearing officer directed the district to amend the student's IEP to reflect the student's placement at NPS (id.).

Finally, although the impartial hearing officer "agree[d]" that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years because the student had not been "evaluated," had not "received proper reviews," and had not been "attending special education classes," the hearing record failed to contain sufficient evidence to support a conclusion that the student should remain at NPS for two years, and he declined to award compensatory education services in the form of the student's continued placement at NPS for the 2011-12 school year (IHO Decision at p. 15).

The district appeals and initially asserts that the statute of limitations bars any and all claims arising prior to June 18, 2008. The district argues that the impartial hearing officer erred in directing the student's placement at NPS for the 2010-11 school year pursuant to Handberry v. Thompson, 219 F. Supp. 2d 525 (S.D.N.Y. 2002), aff'd in part, vacated in part, 446 F.3d 335 (2d Cir. 2006), because the student was not an "entitled inmate," and similarly, the impartial hearing officer erred in directing the student's placement at NPS for the 2010-11 school year pursuant to Jose P., because the hearing record indicates that the student had been timely evaluated and offered timely placements for the 2007-08, 2008-09, and 2009-10 school years.

With respect to the 2010-11 school year, the district asserts that to the extent that it's failure to reevaluate the student upon a request by the student's attorney or defense attorney in June 2010 "constituted and/or contributed to" a denial of a FAPE for the 2010-11 school year and that the student's attorney or defense attorney could properly provide consent for that reevaluation, the 60 days within which the district had to complete the reevaluation of the student fell within the 2010-11 school year and since the student did not allege a denial of a FAPE for the 2010-11 school year in her due process complaint notice, any allegations pertaining to the 2010-11 school year are beyond the scope of the instant appeal. Alternatively, the district argues that the student's placement at NPS for the 2010-11 school year is not proper relief under Jose P. even if the district

[26] The impartial hearing officer noted that the unavailability of a self-contained classroom setting for incarcerated students was not consistent with the decision rendered in Handberry v. Thompson, 219 F. Supp. 2d 525 (S.D.N.Y. 2002), aff'd in part, vacated in part, 446 F.2d 335 (2d Cir. 2006).

did fail to timely evaluate and place the student because the appropriate Jose P. relief would be to provide the student with an Nickerson letter to obtain an independent educational evaluation.

Next, the district contends that the impartial hearing officer erred in finding that a breakdown in the district's administrative processes provided a basis upon which to direct the student's placement at NPS for the 2010-11 school year. In addition, the district asserts that the impartial hearing officer properly concluded that the student was not entitled to a continued placement at NPS for the 2011-12 school year as compensatory education services. Finally, the district contends that although the student is currently placed at NPS pursuant to an order by the Mental Health Court, the instant appeal is not moot because whether the district is legally obligated to fund the student's placement remains a live controversy. As relief, the district seeks to annul those portions of the impartial hearing officer's decision directing the district to fund the student's placement at NPS for the 2010-11 school year, directing the district to amend the student's IEP to recommend a residential placement, and concluding that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years.

In her answer, the student denies nearly all of the district's allegations, and asserts the following as affirmative defenses: the district is barred from raising the statute of limitations defense on appeal because the district did not raise it below, and alternatively, the defense is without merit since the impartial hearing officer did not render any determinations regarding claims that accrued prior to June 18, 2008; the district is barred from raising the student's eligibility for educational services under Handberry because the district did not raise it below, and alternatively, the student meets the requirements to receive services as an "entitled inmate;" and the impartial hearing officer properly concluded that a breakdown of administrative processes occurred and properly directed the student's placement at NPS when the district failed to evaluate the student or offer an appropriate placement upon learning that the Mental Health Court intended to release the student "as part of its diversion program." In addition, the student argues that although the impartial hearing officer did not reach a determination regarding prospective funding, the student is entitled to such funding for the 2010-11 school year because the student sustained her burden to establish the appropriateness of NPS. Alternatively, the student requests that if, on appeal, it is determined that the student is not entitled to residential placement at NPS for the 2010-11 school year, that she is entitled to a Nickerson letter. Finally, the student seeks to uphold the impartial hearing officer's decision directing the district to fund the student's placement at NPS for the 2010-11 school year and dismissal of the district's petition.

In a reply, the district argues that contrary to the student's assertions, it may assert any defenses for the first time on appeal and that a State Review Officer may rely upon such defenses to render a decision.

Before turning to the merits of the appeal, I must initially address the parties' contentions related to the District Court and Circuit Court injunctions under Handberry. Although the student is not a named party in that class action, the parties, here, dispute her entitlement to the educational services consistent with the injunctive relief ordered in this litigation (see Handberry, 219 F. Supp. 2d at 546-51). To the extent that the parties seek a determination in this forum regarding whether the district, in the instant matter and specifically as to this student, has complied with the injunctive relief ordered in Handberry, I must decline to do so because no provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to resolve disputes over injunctions issued by a judicial tribunal. Jurisdiction over preliminary injunctions issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v.

Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]). Consequently, I do not have jurisdiction to resolve the parties' dispute regarding the extent to which the district may have violated the injunction(s) issued by the District Court or Circuit Court of Appeals.

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., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its Committee on Special Education (CSE) through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R.

§§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

Initially, I note that an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). In this case, the district has not appealed that portion of the impartial hearing officer's decision (to the extent that the impartial hearing officer concluded such) that NPS was an appropriate placement for the student, and thus, that portion of the impartial hearing officer's determination is final and binding upon the parties (Application of a Student with a Disability, Appeal No. 08-103; Application of a Student with a Disability, Appeal No. 08-077; Application of the Dep't of Educ., Appeal No. 08-017). In addition, the student has not appealed any portion of the impartial hearing officer's decision, consequently, the impartial hearing officer's determination that the student was not entitled to compensatory education in the form of continued placement at NPS at district expense for the 2011-12 school year is also final and binding upon the parties (Application of a Student with a Disability, Appeal No. 08-103; Application of a Student with a Disability, Appeal No. 08-077; Application of the Dep't of Educ., Appeal No. 08-017).

Turning to the district's appeal, an independent review of the hearing record indicates that contrary to the impartial hearing officer's decision, the district did evaluate the student and did offer the student an appropriate placement for the 2008-09 school year, and further, that the SEP team developed an educational program designed to confer educational benefits to the student for the 2008-09 school year. Prior to the development of the student's October 2008 SEP, the district re-administered the STAR evaluation, which indicated that while the student's reading and mathematics skills remained below grade level, the student had improved her performance in reading—raising her grade level from 2.6 to 3.4—and similarly improved her performance in mathematics—raising her grade level from 2.2 to 3.4 (Tr. p. 222; compare Dist. Ex. 1, with Dist. Ex. 2). At the October 2008 meeting, the SEP team reviewed the student's November 2007 SEP, and developed the student's annual goals in the areas of reading, math and social-emotional skills (Tr. pp. 205-06). The October 2008 SEP team continued the November 2007 SEP recommendations that the student receive one 45-minute session per day of direct special education teacher services and attendance at a skills support class (Tr. pp. 220-21, 248-49; compare Dist. Ex.

1, with Dist. Ex. 2). Additionally, the October 2008 SEP team recommended that the student continue to receive one session per week of individual counseling to continue to improve the student's interpersonal skills (Tr. pp. 208-13). In addition to the transition plan incorporated into the October 2008 SEP, the school social worker testified that the school worked "in concert with community programs," provided prerelease counseling, and informed students of different resources within the community (Dist. Ex. 2; see Tr. pp. 218-19). Given the student's progress during the 2007-08 school year in the same recommended program for the 2008-09 school year, the hearing record indicates that the student's October 2008 SEP accurately reflected the student's special education needs and was designed to produce progress, and thus, was reasonably calculated to enable the student to receive educational benefits during the 2008-09 school year and offered the student a FAPE. As such, I find that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE during the 2008-09 school year, and therefore, I annul that portion of the impartial hearing officer's decision.

With respect to the 2009-10 school year, an independent review of the hearing record indicates that the district failed to sustain its burden to establish that it offered the student a FAPE.[27] Specifically, the hearing record fails to contain sufficient evidence that the district developed an SEP for the student for the 2009-10 school year (Tr. pp. 179-81, 222). In addition, the evidence fails to indicate what, if any, measures the district took to ascertain the student's special education needs at that time, despite the student's recent release from a psychiatric facility in September 2009 and re-registration for educational services in October 2009 (see Tr. pp. 172-73, 223-26, 254-55). Notably, however, although the student did exercise her right to refuse to attend school during the 2009-10 school year, the hearing record does indicate that the student did attend school occasionally, and thus, a placement existed for the student (see Tr. pp. 173-75, 249-51, 260-61; see also Dist. Ex. 9). Notwithstanding this fact, however, the district did not provide sufficient evidence regarding the services the student received when she did attend school, other than counseling services provided by the school social worker (Tr. pp. 231-32; see Tr. pp. 246-50). Based upon the foregoing, I am constrained to find that the district failed to offer the student a FAPE for the 2009-10 school year.

Next, I will address the relief awarded by the impartial hearing officer, namely, directing the issuance of a Nickerson letter and placing the student at NPS for the 2010-11 school year "upon the appropriate order from [Mental Health Court]" (IHO Decision at pp. 13-14). Additional evidence submitted with the district's petition indicates that the Mental Heath Court ordered the student's placement at NPS in conjunction with the disposition of the student's criminal case on November 4, 2010 (see Pet. Ex. 1 at pp. 1-5). Even if a State Review Officer reviewed the impartial hearing officer's decision placing the student at NPS, neither party has offered any evidence to suggest that a contrary determination would in any way impact or alter the Mental Health Court's

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

order placing the student at NPS for the 2010-11 school year, and thus, would not afford the parties any meaningful relief. As such, that portion of the district's appeal is dismissed as moot.[28]

However, with regard to the parties' arguments regarding issuance of a Nickerson letter, I am inclined to annul that portion of the impartial hearing officer's decision directing the issuance of a Nickerson letter to fund the student's placement at NPS for the 2010-11 school year because consistent with the district's argument, relief fashioned in the form of a Nickerson letter that is styled after the relief in Jose P. is not warranted based upon the facts and circumstances involving the student in this case. As noted previously, Jose P. relief provided by the Court to the individuals falling within the class of plaintiffs was intended to remedy those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).[29] The facts and circumstances of this case are not consistent with the situations which Jose P. relief was intended to remedy. Here, as noted previously, an educational evaluation had been conducted prior to developing the student's 2008-09 SEP, and while the hearing record indicates that the district did not conduct an annual review to determine her special education needs for the 2009-10 school year, the hearing record also indicates that the student did attend school—albeit infrequently—and that she did receive counseling as a related service when she did attend school (see Tr. pp. 173-75, 231-32, 246-50, 260-61; see also Dist. Ex. 9). An appropriate equitable remedy for the district's failure to offer a FAPE to the student for the 2009-10 school year would be an award of additional educational services or an independent educational evaluation at district expense, but not a Nickerson letter entitling the student to prospective funding for the 2010-11 school year, particularly when the student did not allege in her due process complaint notice that the district failed to offer the student a FAPE for the 2010-11 school year, or, moreover, when the impartial hearing officer did not render any determinations regarding the district's obligations for the 2010-11 school year (Parent

[28] The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). Furthermore, the exception to the mootness doctrine is not applicable here because the student has not appealed the impartial hearing officer decision denying her request for compensatory education services in the form of continued placement at NPS for the 2011-12 school year, and thus, the conduct complained of is not capable of repetition

[29] It is unclear whether the student was asking the impartial hearing officer and now a State Review Officer to determine if the student was a member of the class of plaintiffs in Jose P. and to enforce the Court's injunction in that case or whether the student was simply seeking similar relief upon a similar theory.

Ex. A at pp. 1-3; IHO Decision at pp. 1-16). Therefore, I will annul that portion of the impartial hearing officer's decision ordering that the district issue a Nickerson letter to fund the student's placement at NPS for the 2010-11 school year.

After reviewing the parties' remaining contentions, I find that in light of the determinations herein, I need not reach them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that the district failed to offer the student a FAPE for the 2008-09 school year; and,

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it directed the issuance of a Nickerson letter to fund the student's placement at NPS for the 2010-11 school year.

Dated: **Albany, New York**
January 24, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER