The University of the State of New York

The State Education Department
State Review Officer
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No. 12-205

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

Appearances:
New York Legal Assistance Group, attorneys for petitioner, Laura Davis, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined, among other things, that the program recommended on the student's 2012-13 individualized education program (IEP) and the public school classroom to which the student was assigned was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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

At that time of the events giving rise to this proceeding, the student was enrolled in an 8:1+1 special education class at the Reece School (Reece), which is a State-approved nonpublic school that the student had been attending since third grade (Tr. pp. 16, 114). The record indicates that the student is an "intelligent and engaging student," but that she experiences "very low self-esteem" and is "acutely vulnerable to being victimized" (Dist. Ex. 3 at p. 2; Dist. Ex. 10 at p. 2). In addition, testimony given at the hearing in this matter suggests that the student had a history of elopement from the classroom (Tr. pp. 84, 115-116).

A CSE meeting was convened on May 16, 2012 to conduct an annual review and develop the student's IEP for the 2012-13 school year (Dist. Ex. 5). The CSE determined that the student was eligible for special education programs and services as a student with a learning disability (id.

at p. 1).[1] At the time of the May 2012 CSE meeting, the student was aging out of Reece's program and an alternative placement was under consideration (Tr. pp. 13-14, 16, 23-24, 141-144). The parent asserted that due to a variety of social/emotional/behavioral challenges and the student's "average" intellectual functioning, her daughter's educational needs would be best addressed in a "small, highly supervised . . . individualized program" in another nonpublic school, with "other students at her same intellectual level" (Tr. pp. 86, 114-15; Dist. Ex. 3 at pp. 2-3). The May 2012 CSE, however, recommended that the student be educated in a "District 75 program," a recommendation with which the parent disagreed (Tr. pp. 114, 141-43; Dist. Ex. 3 at p. 2; Dist. Ex. 5 at pp. 5, 7).[2] Specifically, the May 2012 CSE recommended a 12-month special education program in an 8:1+1 special class in a district specialized school, with one individualized 30-minute counseling session per week and one small group (2:1) 30-minute counseling session per week (Dist. Exs. 5 at pp. 5, 7-8; 6 at p. 3).

By final notice of recommendation (FNR) dated June 14, 2012, the district summarized the recommendations made by the May 2012 CSE and informed the parent of the particular public school site to which it had assigned the student to attend (Dist. Ex. 7).

A. Amended Due Process Complaint Notice

By amended due process complaint notice dated July 6, 2012, the parent—proceeding pro se—requested an impartial hearing and alleged that the "District 75 program" recommended in the May 2012 IEP was not appropriate (Dist. Ex. 3).[3] In particular, the parent contended that due to the emotional fragility of the student, a special class in a district specialized school would not provide the student with the continuous emotional support she required to function successfully (id. at p. 2). Furthermore, the parent maintained that the large size of the specialized school would make constant supervision of the student difficult and provide her with opportunities to interact with and be influenced by a variety of students, as well as creating a possibility that the student would be victimized (id.). Finally, the parent alleged that a specialized school would not provide the student with an appropriate peer group (id.). For relief, the parent requested a referral to the central based support team (CBST) for consideration of a nonpublic school placement (id. at p. 3).

B. Impartial Hearing Officer Decision

On August 29, 2012 an impartial hearing was convened and after three days of proceedings, concluded on September 11, 2012.[4] The first day of the impartial hearing was limited to determining the student's pendency (stay-put) placement (Tr. pp. 3-42). In an interim decision

[1] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] Though not defined in the record, a "District 75 Program" (denoted in the May 2012 IEP as a "D75" program) is essentially a placement in a specialized district public school.

[3] The parent initially filed a due process complaint notice dated June 18, 2012 (Dist. Ex. 1). On June 26, 2012, the IHO determined that the parent's due process complaint notice was insufficient and the parent was given until July 13, 2012 to amend her request (Dist. Ex. 2).

[4] The parent appeared pro se at the impartial hearing.

dated August 30, 2012, the IHO ordered that the student's pendency placement was at the School for Language and Communication Development (SLCD) (Interim IHO Decision; see Tr. p. 95).[5]

In a final decision dated September 21, 2012, the IHO found that a 12-month program in an 8:1+1 special class in a specialized district school with the related service of counseling was appropriate for the student (IHO Decision at p. 7). Furthermore, the IHO determined that the proposed class at the specific assigned public school site was appropriate (id.) In reaching her conclusion, the IHO concluded that the student suffered from low self-esteem and required an environment that was supportive of her academic and social needs (id.). Based on the testimony presented at the impartial hearing, the IHO determined that a special class in a specialized school could provide that environment (id.). Furthermore, with regard to the parent's concern that the student would be victimized in a public school setting, the IHO found that the student would have been provided with continuous supervision throughout the day by either the teacher of the proposed classroom or a paraprofessional (id.). Finally, the IHO determined that the student would be appropriately grouped with students of similar needs and abilities (id.).

IV. Appeal for State-Level Review

The parent, now represented by counsel, appeals and contends that the district "did not meet its Prong I burden of proof." The parent presents two arguments in support of this assertion: (1) the "large climate" of the district specialized school would not provide the student with the small setting and continuous supervision that she required to function successfully;[6] and (2) the student would not be appropriately grouped in the proposed class because the other students in the class were classified as having emotional disturbances and the student was classified as having a learning disability. Additionally, the parent alleges that her due process rights were violated because she was not informed at the CSE meeting of her right to counsel at an impartial hearing, she did not offer any evidence at the impartial hearing in support of her case, and the IHO did not assist her. The parent also raises as an additional issue for consideration in her petition that the district failed to conduct a Functional Behavioral Assessment (FBA) of the student.

In an answer, the district generally denies the parent's allegations and asserts that the May 2012 CSE properly recommended an "8:1+1 staffing ratio for the Student in a District 75 [p]rogram," and that this was an appropriate placement. The district also argues that since the parent rejected the school to which the student was assigned (and the student never attended it), any claims regarding its appropriateness are speculative. In addition, the district contends that had the student attended the school that she was assigned to, she would have been appropriately supervised and grouped there. Further, and with regard to the parent's claim regarding the lack of an FBA, it is the district's position that an FBA was not warranted for the student because her

[5] The district did not appeal the IHO's interim decision regarding the student's pendency placement at SLCD nor do they now cross-appeal the IHO's final decision. Accordingly, the district is required to provide the ordered remedy for the entirety of the 2012-13 school year as well as for the duration of these proceedings (Interim IHO Decision at p. 5).

[6] Though not expressly identified as a basis for appeal in the petition, the parent's amended due process complaint notice raises this as an issue (Dist. Ex. 3 at p. 2), and she eludes to this allegation in her petition (Pet. ¶ 19). In addition, the parent's testimony at the impartial hearing indicated that her primary concern was with respect to the number of students in the public school, and how that number might impact the district's ability to supervise the student (Tr. pp. 115-17). Accordingly, I will address this issue as if it were raised as a basis of appeal in the petition.

behavior did not interfere with her learning or that of others and that, in any event, if the student required an FBA, the failure to conduct one was a procedural error that in and of itself, did not constitute a denial of a FAPE. Finally, the district contends that the parent's due process rights were not violated, that the IHO assisted the parent throughout the hearing, and that since it was the parent's choice to proceed pro se at the impartial hearing, she should not now be able to claim that her due process rights were violated.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matter—Additional Claim Raised on Appeal

In the petition, the parent raises as a new issue for consideration that the district failed to conduct an FBA of the student (Pet.¶¶ 82-83). In response, the district asserts that it was

unnecessary to conduct an FBA of the student because the student's behaviors did not impede her learning or that of others (Answer ¶¶ 35-37).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see, e.g., Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*10 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 E.D.N.Y. 2012]; M.R. v. S, Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8).

Upon review, I find that the parent's amended due process complaint cannot reasonably be read to include allegations regarding the district's failure to conduct an FBA (Dist. Ex. 3). The hearing record demonstrates that the issue presented to the IHO for review was limited to whether the recommended placement of the student in a specialized district school was appropriate (Tr. at p. 57). Consequently, these allegations are outside the scope of my review and, therefore, will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611).[7]

B. Impartial Hearing

In her petition, the parent alleges that her due process rights were violated at the impartial hearing (Pet. ¶¶ 89-96). Specifically, the parent contends that she did not provide evidence, give an opening or closing statement, or ask any questions of the witnesses (Pet. ¶ 92). Additionally, it is her position that the IHO did not assist her in presenting her case (Pet. ¶ 94).

At an impartial hearing, "the parents, school authorities and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing" (8 NYCRR 200.5[j][3][xii]). Furthermore, it is well settled that the IHO may assist an unrepresented party by providing information relating to the hearing process (8 NYCRR 200.5[j][3][vii]). An IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the record (id.). In this case, and contrary to the contentions of the parent, the hearing record does not support a finding that the parent's due process rights were violated at the impartial hearing. An

[7] Even if this issue had been raised in the amended due process complaint notice, the evaluative information does not indicate, nor does the parent allege, that the student exhibited any behaviors that interfered with her instruction or that of other students so as to warrant an FBA. Furthermore, the May 2012 IEP contained annual goals designed to address the student's behavioral needs, including one indicating that the student would be provided with social skills instruction and a classroom behavior management plan to assist her in following directions (Dist. Ex. 5 at p. 4).

independent review of the record demonstrates that the parent was provided with an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see, e.g., Tr. pp. 10, 48-55, 74-75, 78-83; 20 U.S.C. § 1415[g]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i][ii]; 8 NYCRR 200.5[j]). Furthermore, the hearing record demonstrates that the IHO attempted to assist the parent, who was unrepresented by counsel, by briefly explaining the hearing process and requesting clarification of issues when appropriate (Tr. pp. 11-13, 91-93). The parent was provided with an opportunity to present an opening and a closing statement, and when she indicated she was unprepared, the IHO explained that she could "reserve" her opening for the next time (Tr. pp.79, 116-117, 169-170).[8] The parent was given opportunities throughout the hearing to question witnesses and when she chose not to, the IHO questioned the witnesses in order to more fully develop the hearing record on the issues (Tr. pp. 6-9, 74-75, 78-83, 91-93; 8 NYCRR 200.5[j][3][vii]). In light of the foregoing, I find the parent's assertion that her due process rights were violated is without merit.[9]

C. May 2012 IEP

1. Mootness

Before addressing the merits of the parent's challenge to the student's IEP, I note that the parent has received public funding pursuant to pendency for a nonpublic school placement for the student and that the 2012-13 school year which is at issue in this appeal has expired (see Interim IHO Decision 5). It is well settled that 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]). 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]; M.S. v. New York City Dept. of Educ., 734 F.Supp.2d 271, 280-81 [E.D.N.Y. 2010]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-

[8] I note that the parent provided an opening statement during the pendency proceeding (Tr. at p. 17).

[9] To the extent that the parent asserts that the district failed to inform her at the May 2012 CSE meeting of her right to counsel at an impartial hearing, the district is required to provide parents with "[a] copy of the procedural safeguards available to the parents of a child with a disability" at least once per year and certain specified times, including upon the district's receipt of the first due process complaint notice filed by a parent in a school year (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, the district is not required to inform the parent of the procedural safeguards at the time of the CSE meeting. The parent does not assert that she did not receive the procedural safeguards after filing her due process complaint notice, nor that she was unaware of her right to counsel.

028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

In this case, there is no longer any live controversy relating to the student's placement for the 2012-13 school year. The student was entitled to attend SLCD for the entirety of the 2012-13 school year pursuant to the IHO's pendency determination, and the relief initially sought by the parent—deferral to the CBST for consideration of a nonpublic school placement for the student for the 2012-13 school year—is no longer available (and may not be appropriate at this juncture). Accordingly, the parent's request for relief is moot. Nevertheless, in the interests of administrative and judicial economy, I will address the merits of the parent's arguments.

2. Adequacy of a Public School Recommendation

As an initial matter, it is not entirely clear from the pleadings and documents before me whether the parent, who complained about the recommendation of a "District 75 program" in her amended due process complaint notice, and who now appears to challenge the district's "recommended placement" (Pet. ¶85), is presenting a challenge to the student's IEP, or whether her claims simply relate to the school to which the student was assigned.[10] This is especially true since a "placement" can be equated to a student's "educational placement" which, as has been noted by the Second Circuit Court of Appeals, generally refers to the "general education program—such as the class and individualized attention and additional services a child will receive—and not the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). Further, IEPs are generally required to contain, among other things, a "placement recommendation" which is the type of setting, such as a district public school or a state-operated school, where a student will receive special education services ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 57, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Accordingly, since the nature of the parent's claim is unclear, and further since the parent's claims (especially in light of the relief she seeks) can be read as a challenge to the decision not to recommend a placement in a nonpublic school (i.e., to the "placement recommendation" in the May 2012 IEP), I will first consider the parent's claims as a challenge to the adequacy of the IEP insofar as it does not recommend that the student be educated in a nonpublic school (Dist. Ex. 3 at p, 3; Pet. at p. 14).

In general, where a CSE finds that an appropriately developed IEP can be implemented in a public school, it need not consider placing the student in a nonpublic school program. Rather, and as has been noted:

> The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those

[10] The distinction is not trivial in that the record indicates that the parent did not attempt to enroll the student at the assigned school, and instead requested an impartial hearing on June 18, 2012, prior to the start of the 12-month school year (Dist. Ex. 1). As discussed below, in situations similar to this, the Second Circuit has indicated that the sufficiency of a program offered by a district must be based on the "written plan" (i.e., the IEP) offered to the student (see, e.g., R.E., 694 F.3d at 195; see also, e.g., K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]).

> services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school.

(W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]; see R.H. v. Plano Independent Sch. Dist., 607 F.3d 1003, 1014 -1015 [5th Cir. 2010] [holding that the IDEA makes removal to a private school setting the exception, not the default]; see also Connors v. Mills, 34 F. Supp. 2d 795, 798 [N.D.N.Y.1998] [finding that the IDEA favors placing students in the least restrictive environment which often is the student's public school]).[11]

The record reflects that the May 2012 CSE did not consider a nonpublic school placement because it determined that the student's needs could be met in a public school setting (Tr. pp. 141-142). The issue, therefore, in assessing the sufficiency of the May 2012 IEP's recommendation for a public school placement is whether this determination is supported by the record. I find that it is.

Specifically, the evaluative information available to the May 2012 CSE (which is not challenged in this matter) noted the student's strengths and weaknesses, such as her ongoing struggles with self-esteem and managing her frustration with adults and peers, (Dist. Exs. 5 at p. 1; 10 at p. 4; 12 at p. 6). The Reece counseling report identified problem-solving strategies to address these needs, such as having an opportunity to share her feelings with a trusted adult (Dist. Exs. 5 at p. 1; 12 at p. 2). The May 2012 IEP also described the parent's concerns about the student's social/emotional functioning and acknowledged the ongoing need for support and encouragement in order for the student to be successful (Dist. Exs. 3 at p. 3; 5 at p. 1). There is nothing inherent about such needs that would require placement in a nonpublic school.

Further, the evaluative reports available to the May 2012 CSE identified the student's need for a small, structured class and a therapeutic environment (Dist. Exs. 5 at p. 2; 9 at p. 2; 10 at p. 4; 12 at p. 3). In this regard, the record reflects the May 2012 CSE recommended a small class for the student (i.e., an 8:1+1 special class),[12] and there is no dispute that such classes are not available

[11] Relatedly, when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *9 [E.D.N.Y. Mar. 31, 2014] ["once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

[12] An 8:1+1 special class is a class with only 8 students, one teacher and one classroom paraprofessional. The appropriateness of an 8:1+1 ratio by itself—as opposed to an 8:1+1 placement "in a District 75 program" (see, e.g., Pet. ¶ 3)—is not explicitly challenged in this matter. In fact, the record reflects that the student was educated in a class with such a ratio at Reece (Tr. pp. 16, 88, 144), and there is no basis to conclude that this ratio, by itself, would be insufficient to provide an educational benefit to the student.

within the district. In addition, the record reflects that the teacher of the class to which the student was assigned testified that his classroom provided "a calm, therapeutic, structured environment" (Tr. p. 63), consistent with the statements in the student's IEP that the student required support and encouragement, adult attention, and a "small, structured environment" (Dist. Ex. 5 at pp. 1-2).[13] Accordingly, there is no basis upon which to conclude that the district, in general, was not in a position to offer such classes in one of its schools.

Finally, there is nothing in the evaluative data used by the CSE that supports the parent's assertion that the student required a private school placement in order to make educational progress. In this regard, I note that the parent's concern appears to relate in large part to school size, but there is nothing inherent about private schools that differentiates them from public schools based on size alone (i.e., both public and private schools can be large or small). Upon review of the record, therefore, I cannot find that the May 2012 CSE was required to consider (or recommend) placement in a nonpublic school in order to provide a FAPE.

D. Assigned Public School Site

As noted above, the parent's contentions in this matter can be read as challenging not just the recommendation for a "District 75 program" as discussed above, but the particular school to which the student was assigned. This is illustrated by the allegations made in the parent's amended due process complaint notice which relate to the physical characteristics of the assigned public school (Dist. Ex. 3 at p. 2; Pet. at ¶ 19), as well as the concerns expressed as a basis of appeal in her petition, which relate to the characteristics of the other students in the proposed class (Pet. at ¶¶ 84-88). Such contentions, however, do not provide a basis for relief.

While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]); see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 887-89 [D. Ariz. Mar. 21, 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). A denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement.

[13] Although this testimony was not known to the parent at the time she was required to accept or reject the offered program and placement and can be considered "retrospective" in nature (see R.E., 694 F.3d at 185-88, 192-94), I do not accept it here as proof of the services or the type of class that the student would have received. Rather, this testimony is accepted solely as proof of the type of classes and services available within the district that a CSE (including the May 2012 CSE) could have reasonably considered.

Along these lines, the Second Circuit Court of Appeals has held that where an IEP is rejected by a parent before a district has had an opportunity to implement it,[14] the sufficiency of a district's offered program must be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents." (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id. at 87, quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at 9). Citing to R.E., the Court held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

In light of the above, I am unable to find that to extent that the parent's claims relate to issues regarding the assigned school and not the student's IEP itself, they provide an appropriate basis for relief. However, even if such claims did provide an appropriate basis for relief, I would be unable to find, for the reasons discussed below, that such claims are supported by the record.

1. Size of Public School

Again, the parent raises concerns with respect to the size of the public school to which the student was assigned, and in particular, with respect to the number of students at the school (Tr. pp. 115-17). In this regard, the parent expressed a concern at the hearing that if there were too many students in a school (which she indicated would happen if there were 150 or more students at the school [Tr. pp. 116-17]), the student would be able to "slip out" and go to places where she should not be (Tr. pp. 115-17).[15] However, while the student's counselor at Reece indicated that the increased school population in the district public school might offer greater opportunities for elopement from the classroom and subsequent victimization, the record reflects that the counselor

[14] As noted above, the record indicates that the parent did not attempt to enroll the student at the assigned school, and instead requested an impartial hearing on June 18, 2012, prior to the start of the 12-month school year (Dist. Ex. 1).

[15] The record indicates that approximately 168 students attended the school that the student was assigned to (Tr. pp. 61, 74). As an aside, there is no evidence in the record that being in a school with approximately 168 students would, by itself, result in the inability of the student to receive an educational benefit, and in that sense these claims are speculative (see generally N.K., 961 F. Supp. 2d at 591-92). However, for purposes of this section I will address the parent's claims as they have been pled.

had no familiarity with the recommended public school site and, admittedly, based her opinion on her impression that district specialized schools were generally in a large building (Tr. pp. 82, 84, 92-93).[16] In contrast, the testimony from the special education teacher in the proposed classroom at the recommended school site indicated that the student would be continuously supervised and there was "at no point from the time [the students] arrive here at school 'til the time they leave to go home where they are not with either myself and/or [the classroom paraprofessional]" (Tr. pp. 62, 67; Dist. Ex. 5 at p. 5). Further, while the record reflects that the assigned school shares a building with a general education middle school, the record indicates that students do not interact nor do they come into contact with each other during the day (Tr. pp.74-75). Accordingly, there is nothing in the record from which I can conclude that the student would not have received educational benefits at the recommended public school solely because of its size as the parent suggests.

2. Grouping in the Proposed Class

The parent also asserts that the student would not have been appropriately grouped at the assigned school, noting that the teacher of the proposed classroom reported that all of the students in his class were classified as having an emotional disturbance (Tr. p. 157). Furthermore, the parent expressed concerns regarding the classmates the student would have if she had attended the CSE-recommended program, explaining that she felt the district program was for "children with more cognitive issues" as well as "behavioral issues" (Tr. pp. 17, 112-13).

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii],[iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]).

In this case, while the teacher of the proposed classroom testified that although all of his students had "IEP classifications of emotional disturbance…they all across the board have learning disabilities" (Tr. p. 157). The teacher added that each of his students required "socially appropriate role models" and all were dependent upon "peer approval for their own self-esteem," which parallels the parent's description of her daughter's needs (Tr. p. 157; Dist. Ex. 3 at pp. 2-3).

[16] I note that the parent testified that she visited the assigned school on two separate occasions, once after the CSE meeting in May 2012 and then again in September 2012 (Tr. p. 111-112). While the parent had an opportunity to observe the proposed classroom, there were only two students present (id.). However, she indicated that she did encounter a number of other students in the hallways and main office with "behavior issues" (id.).

Furthermore, the teacher of the proposed classroom provided detailed testimony about his program, addressing many of the parent's concerns (Tr. pp. 63-69, 156). When questioned with regard to the severity of behavioral problems of the students in his class, the teacher explained that the behavior was not anything outside of that which is typical for the age group (Tr. p. 159). Thus, while I can appreciate that a loving parent would not want her child to be in a classroom where there are students with behavioral problems, the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates" and even "private school is no guarantee of non-disruptive peers" (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]).

Finally, testimony of the teacher of the proposed classroom indicated that the students in his class were academically functioning in the upper range of third grade to the lower range of sixth grade level (Tr. p. 68). A review of the record indicates that the student's math and reading levels were at the higher end of the fifth grade level, thereby placing her within the range of the other students' functionality (Dist. Ex. 5; Tr. p. 71; 8 NYCRR 200.6[h][7]). In light of the foregoing, I find that the hearing record supports the conclusion that the student would have been appropriately grouped in the proposed class had she attended the recommended public school site.

VII. Conclusion

Upon due consideration of the evidence in the hearing record, I find that the IHO's findings should be upheld.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2014

HOWARD BEYER
STATE REVIEW OFFICER