The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-077

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

Cuddy Law Firm, PC, attorneys for respondent, Jason H. Sterne, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a portion of the decision of an impartial hearing officer (IHO) which determined that the educational programs recommended by its Committee on Special Education for respondent's (the parent's) daughter for the 2012-13 and 2013-14 school years were not appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Although the only issue raised on appeal relates to the relief rewarded by the IHO, a brief recitation of the facts leading up to this dispute is pertinent to the issue presented. At the start of the 2012-13 school year the student was attending the Andrus Children's Center (Andrus), a State-approved nonpublic day school, recommended by the district for the student's 2012-13 school year and which she had attended for several years prior (Tr. pp. 46, 275, 281-83, 369-70).[1] The student was reported as displaying significant behavioral difficulties, including aggressive behaviors

[1] The principal of Andrus described the school as a day school for students with emotional disturbances or other health impairments (Tr. p. 45).

towards other students, and has received diagnoses of an attention deficit-hyperactivity disorder (ADHD), a mood disorder, asthma, and Ehlers-Danlos syndrome (Parent Exs. D at pp. 1, 2; E at p. 1; O at pp. 1, 5, 6, 8). According to the student's doctor, due to Ehlers-Danlos syndrome the student has hypermobile joints which makes them susceptible to dislocation (Parent Ex. F).

At a CSE meeting in June 2012, the parent expressed dissatisfaction with Andrus and the CSE deferred the matter to the CBST to locate another State-approved nonpublic day school; however, the CBST referred the student back to Andrus (Tr. pp. 282-83; Parent Ex. D at pp. 7, 10).[2] The CSE reconvened in October 2012, while the student was attending Andrus, and again recommended placement in a State-approved nonpublic day school and deferred the matter to the CBST to locate another school for the student (Tr. pp. 282-85, 377-78; Dist. Ex. 9 at pp. 7-8, 10-11).

The student received a diagnosis of a pervasive developmental disorder, not otherwise specified, in a report of an evaluation conducted September 27, 2012, which was confirmed by a neuropsychological evaluation conducted January 8, 2013 (Parent Exs. L at p. 7; M at p. 2). The January 2013 neuropsychological evaluation report also indicated that the student's behaviors had not improved over the years and that the student "frequently runs away from class" or "will get up and walk away" in the middle of class (Parent Ex. L at p. 1).

The parent removed the student from Andrus in January 2013 (Tr. pp. 383-84). The CSE reconvened in February 2013, determined the student to be eligible for special education and related services as a student with autism, recommended placement in a State-approved nonpublic day school, and again deferred the selection of a specific school to the CBST (Parent Ex. C at pp. 1, 7, 9-11).[3] As the CBST went through the process of finding a school, the district provided the student with home instruction beginning in April 2013 (Tr. pp. 75, 288, 311-12, 387).[4] The CSE reconvened on April 15, 2013 to review the student's program and recommended integrated co-teaching (ICT) services in a general education classroom for all classes, with related services including counseling and occupational therapy (OT) (Dist. Ex. 13 at pp. 7, 10).[5] The April 2013 CSE considered placing the student in a State-approved nonpublic day school but rejected it,

[2] While the hearing record includes a copy of the June 2012 IEP, which recommended placement in a State-approved nonpublic day school and deferred to the CBST, neither party included a copy of the July 2012 IEP, which according to testimony recommended the student's continued placement at Andrus (Tr. pp. 282-83; Parent Ex. D at pp. 8, 10).

[3] Prior to the February 2013 CSE meeting the student had been classified as a student with an emotional disturbance (Dist. Ex. 9 at p. 1; Parent Ex. D at p. 1).

[4] Although not entirely clear from the hearing record for how long the student received home instruction services, she was no longer receiving them by the time of the impartial hearing (Tr. p. 146).

[5] ICT services are defined in State regulation as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom providing ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a guidance document which further describes ICT services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

explaining that would "not take into account her higher cognitive potential and the opportunity to be with her general education peers" (id. at p. 11).[6]

The student was never placed according to the recommendation in the April 2013 IEP (Tr. pp. 396-97). Instead, on September 10, 2013, the district sent the parent a "comparable service plan" recommending that the student attend a 12:1+1 special class in a community school with related services including counseling and OT (Parent Ex. P at pp. 1-2). The district also identified the particular public school site to which the district assigned the student for the 2013-14 school year and notified the parent that the student could begin receiving services at the school on September 12, 2013 (id. at p. 4). The parent initially did not send the student to the assigned public school due to safety concerns over the lack of a 1:1 paraprofessional, which the district later agreed to provide beginning in November 2013 (Tr. pp. 404-05). However, as of January 30, 2014, the student had attended the recommended public school site for only two and one-half days in November 2013 and two days in January 2014 (Tr. pp. 406-08, 421-22, 461).

The CSE reconvened on January 15, 2014 and recommend placement in the Woodward Children's Center (Woodward), a State-approved nonpublic day school (Parent Ex. W at pp. 7-8, 12-13). During the CSE meeting, the parent indicated that she did not think Woodward was an appropriate placement for the student and that she would not accept placement at Woodward (id. at p. 13; Tr. p. 336).[7]

A. Due Process Complaint Notice

By amended due process complaint notice dated September 19, 2013, the parent requested an impartial hearing, asserting various grounds on which she alleged the district had failed to provide the student with a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (Parent Ex. Q at pp. 8-14). As relief, the parent requested, among other things, that the IHO (1) annul the student's IEP and the September 2013 comparable service plan, (2) direct the district to evaluate the student and to conduct a functional behavioral assessment (FBA) and an assistive technology evaluation, (3) direct the CSE to reconvene to develop a new IEP for the student that included adapted physical education services and recommend an appropriate placement, or to work with the CBST to identify "an appropriate non-public school placement" that could address the student's needs relating to safety, (4) award the student compensatory services, (5) direct the district to provide the student with extended school year services, (6) direct the district to provide the student with ten hours per week of special education services using an applied behavior analysis ABA model, and (7) direct the district to provide parent counseling and training (id. at pp. 14-16).

[6] The parent testified that she was prevented from completing the intake process at one of the schools to which the student was referred by the CBST because the student was no longer recommended for placement in a State-approved nonpublic school (Tr. pp. 394-95, 441-42).

[7] While some of the preceding history postdates the filing of the parent's due process complaint notice, it is presented to provide context for the parties' dispute.

B. Impartial Hearing Officer Decision

An impartial hearing was convened on December 4, 2013 and concluded on January 30, 2014 after three hearing dates (Tr. pp. 7-466).[8] In a decision dated April 24, 2014, the IHO determined that the district did not offer the student a FAPE for the 2012-13 and 2013-14 school years (IHO Decision at pp. 6-7).[9] The IHO also opined as to what would constitute an appropriate placement for the student, finding that the student's placement should be at a secure facility that prevented elopement, provided instruction using an ABA model in a therapeutic setting, and offered social skills training (id. at p. 8). As relief the IHO ordered that (1) the student be referred to the CBST, which was directed to "consider all options for the [s]tudent's placement including 'non-approved' non-public schools"[10] (2) the student's IEP be amended to include ten hours of ABA services per week at the student's home, parent training and counseling, and adapted physical education, and to incorporate recommendations made by privately-retained evaluators, (3) an FBA be conducted and a behavioral intervention plan (BIP) developed after a school was found for the student, and (4) the district provide the student with 230 hours of academic tutoring, 12 thirty-minute sessions of counseling, and 12 thirty-minute sessions of OT as compensatory education, to be used by the end of the 2015-16 school year (id. at pp. 9-10).

IV. Appeal for State-Level Review

The district appeals from so much of the IHO's order as directed the district to consider "non-approved" nonpublic schools in finding a placement for the student. The district asserts that the parent's request for the district to consider placement in a "non-approved" nonpublic school is outside the scope of the impartial hearing as it was not raised in the parent's due process complaint notice. In addition, the district argues that placement in a "non-approved" school is outside the continuum of services and that neither the IHO nor an SRO have jurisdiction to compel the district to place the student in a nonpublic school that has not been approved by the Commissioner of Education.

The parent answers, arguing that because an IHO has the authority to award prospective payment for tuition costs at a "non-approved" nonpublic school, the IHO also has the authority to direct the district to consider placement in a "non-approved" nonpublic school.

---

[8] As of the last hearing date the student was not attending school or receiving home instruction (Tr. pp. 175-76, 461-62).

[9] The hearing record indicates that the IHO granted the parent's requests for extensions of the timelines for the impartial hearing on five occasions (IHO Ex. 1). Considering that the student was not attending school at the time of the impartial hearing, it would have been a better course of action to complete the hearing in as prompt a manner as possible (see 8 NYCRR 200.5[j][5][ii][a]).

[10] The IHO used the acronym "SBST" in place of the acronym "CBST" throughout his decision (IHO Decision at pp. 4, 7, 9). As the hearing record makes repeated references to the term "central based support team" and the acronym "CBST," and the hearing record does not use the acronym "SBST," I will treat the IHO's use of the acronym "SBST" as referencing the central based support team (see, e.g., Tr. pp. 103-04, 200-01).

V. Applicable Standards and Discussion

The district expressly limits its appeal to the IHO's order directing the district to consider all options for the student's placement, including placing the student in a "non-approved" nonpublic school (Pet. ¶¶ 9, 25).[11] With regard to the district's assertion that the IHO's order was outside the scope of the impartial hearing, the IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the 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]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 2014 WL 2748756, at *1-*2 [2nd Cir. June 18, 2014]). In addition, a due process complaint notice must provide "a proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. §1415[b][7][A][ii][IV]; 34 CFR 300.508[b][6]; 8 NYCRR 200.5[i][1][v]). In this instance, the parent requested that the IHO order the CSE to reconvene to recommend an appropriate placement or to work with the CBST to identify "an appropriate non-public school placement" (Parent Ex. Q at p. 15). Additionally, in a conversation on the record between the attorneys for the parent and the district, the parent's attorney explained the parent's requested relief as including assistance from the district in locating an appropriate placement for the student as well as the possibility of "approving a non-approved private school" (Tr. pp. 12-14). While the parent did not specifically request that the district consider placing the student in a "non-approved" nonpublic school, the due process complaint notice may reasonably be read to include the relief granted by the IHO (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014] ["the waiver rule is not to be mechanically applied"]).

Turning to the district's argument that neither the IHO nor an SRO have the authority to compel the district to place the student in a nonpublic school that has not been approved by the Commissioner of Education, under certain circumstances an IHO may direct a district to place a student in an appropriate school that has not been approved by the Commissioner.[12] Upon review, however, under the circumstances presented in this matter, the specific relief awarded by the IHO—directing the CBST to consider non-approved nonpublic school placements—was

---

[11] As the district appeals only the IHO's direction that the district consider "non-approved" nonpublic schools, the IHO's remaining determinations are not raised on appeal and have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[12] The remedial authority of administrative hearing officers in fashioning equitable relief is broad. In Forest Grove, the Supreme Court reaffirmed its holding in Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) that hearing officers and courts have authority to "grant such relief as the court determines appropriate" (20 U.S.C. § 1415[i][2][C][iii]; see Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 237 [2009]; see also Frank G., 459 F.3d at 368-69). The equitable relief awarded in Burlington was not expressly provided in the statute at the time the case was decided. The Supreme Court further explained that if a district failed to provide a FAPE and the parent's unilateral placement was appropriate for the student, with respect to relief, the hearing officer must "consider all relevant factors . . . in determining whether reimbursement for some or all of the cost of the child's private education is warranted" (Forest Grove, 557 U.S. at 247; see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 415-16 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]).

improper. Prospective injunctive relief, in the form of an order directing a district to pay for a student's tuition at a nonpublic school, is an available form of equitable relief "where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate" (Burlington, 471 U.S. at 369-70; Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422 [S.D.N.Y. 2011]). However, in this instance, the parent has not identified any specific prospective injunctive relief for the student (Tr. p. 462), instead requesting that the district be required to identify an appropriate placement for the student (Parent Ex. Q at p. 15).

The Supreme Court has noted that the IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in nonpublic schools by the educational agency receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]). A state educational agency must ensure that each student placed in a private facility by a public agency be provided special education and related services in conformity with an IEP, at no cost to the parents, and that meets the state's educational standards, and must also ensure that each such student is provided with all of the rights of a student who is served by a public agency (34 CFR 300.2[c][1]; 300.146). The IDEA also requires that special education and related services meet the standards of the state educational agency for a student to receive a FAPE (20 U.S.C. §1401[9][B]; 34 CFR 300.17[b]).[13]

Considering the State's obligations involving students placed in private facilities by public agencies, it is not surprising that in providing special education to students with disabilities, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).[14]

State regulations include a number of rules governing nonpublic schools which are approved by the Commissioner to provide special education to students with disabilities (8 NYCRR 200.7[a], [b]). For example, State regulations require approved private schools to maintain the confidentiality of student's records and provide parental access to such records in a manner comparable to the requirement for public schools, to develop a policy on school conduct

[13] State law defines "Special education" as "specially designed instruction which includes special services or programs . . . provided at no cost to the parents to meet the unique needs of a child with a disability" (Educ. Law § 4401[1]; see 8 NYCRR 200.1[ww]). In addition, while in-State and out-of-State "non-residential schools which have been approved by the commissioner" are included as part of the State's definition of special services or programs, nonpublic schools that have not been approved by the commissioner are not included (Educ. Law § 4401[2][e], [f]).

[14] New York limits the circumstances under which a district may contract with an approved nonpublic school to provide special services or programs to a student with a disability in order to meet its obligations to provide the student with a FAPE (see Educ. Law §§ 4401[2][e]-[h]; 4402[2][a], [b][1], [2]).

and discipline consistent with State regulations, to provide a school day of comparable length to the public school day, to provide instruction for a minimum of 180 days per school year, to comply with State law regarding student attendance, and to conform to all local and State fire and safety regulations (8 NYCRR 200.7[b][2]-[5], [7]).[15]

In contrast to a district placement, a parent's unilateral placement may be found appropriate even if it does not meet the standards of the state educational agency (34 CFR 300.148[c]). In Carter, the Supreme Court found that the requirements set forth in the definition of a FAPE do not apply to a unilateral placement (Carter, 510 U.S. at 13-14). The Court reasoned that certain requirements included in the definition of a FAPE could never be met in a unilateral placement and would render the parent's right to unilateral placement meaningless (id. at 13). Those incompatible requirements included that special education be provided "under public supervision and direction" and in conformity with an IEP designed by "a representative of the local educational agency" (id.). Following this logic, the Supreme Court held that a unilateral placement does not have to meet the standards of the state educational agency and does not have to be approved by the State (id. at 14).

In this instance, the parent asserts that the Supreme Court's decision in Carter overturned the Second Circuit's holding in Antkowiak and authorizes the IHO to direct the district to consider "non-approved" nonpublic schools in recommending an appropriate placement. However, the parent overlooks the key difference between a district's recommended placement and a parent's unilateral placement, as a parent's unilateral placement is not subject to the same standards as a district placement (34 CFR 300.148[c]; Carter, 510 U.S. at 13-14). Thus, while a parent may seek reimbursement or direct funding for a unilateral placement that is not approved by the Commissioner of Education and an administrative hearing officer may order a district to place a student in an appropriate but unapproved nonpublic school, the Second Circuit's holding in Antkowiak still applies to district placements and it is outside the authority of an IHO or an SRO to direct a district to consider placement of a student in a school that has not been approved by the Commissioner of Education and regarding which there has been no finding that the school constitutes an appropriate placement for the student (Antkowiak, 838 F.2d at 640-41; Application of a Child with a Disability, Appeal No. 01-036).[16] Neither the IHO nor the parent has provided a basis in this instance for the extension of caselaw regarding unilateral placements to those made by public agencies, which Carter acknowledged are subject to the requirements of the IDEA (510 U.S. at 13-14).

---

[15] In addition, while federal regulations allow a public agency to place a student in a nonpublic school that does not employ "highly qualified special education teachers," State regulations require approved private schools to provide special education instruction and services by appropriately certified or licensed individuals (compare 34 CFR 300.146, with 8 NYCRR 200.7[b][6]).

[16] In Tucker v. Bay Shore Union Free School District, the Second Circuit expanded its holding in Antkowiak, stating "that a placement in an unapproved school, whether by school officials or through unilateral action by parents, cannot be considered 'proper under the Act' because it would violate the Act's requirement that placements 'meet the standards of the State educational agency'" (873 F.2d 563, 568 [2nd Cir. 1989]). While the Supreme Court in Carter abrogated the holdings of Antkowiak and Tucker regarding unilateral placements, the Supreme Court did not address placements made by a public agency (Carter, 510 U.S. at 12, 14).

I sympathize with the parent's frustration, as the student's unique difficulties make identifying an appropriate program a challenge.[17] However, the State has developed a process that must be followed by districts in locating an appropriate placement, and the district has not yet exhausted the process of locating a State-approved nonpublic school to address the student's needs.[18] Although the hearing record indicates that the CBST sent applications to at least eight State-approved nonpublic schools, the hearing record does not establish that the CBST exhausted all approved placements that might be appropriate to address the student's needs (Tr. pp. 104-05, 116). In addition, the IHO did not make a specific finding regarding the appropriateness of Woodward, to which the student was accepted (IHO Decision at p. 8; Tr. p. 413). It is also unclear why the IHO would direct the district to place the student in an nonapproved private school when the hearing record also indicates that there are other State-approved nonpublic schools the district contacted regarding the student but for which the intake process was not even completed (Tr. pp. 104-05, 135, 289-90, 394-95, 417-19, 441; Parent Ex. Q at p. 6). In the event that the district cannot find an appropriate program within the State to meet the student's needs, State law expressly directs the district to notify the Commissioner of Education (Educ. Law § 4402[2][b][3]). While a district is not authorized to place a student in a school that has not been approved by the Commissioner of Education, in the event that no approved schools are available to address a student's needs, the Commissioner may approve an interim placement ("Placements of Students with Disabilities in Approved Out-of-State Residential Schools and Emergency Interim Placements," Office of Special Educ. Mem. [Mar. 2012], available at http://www.p12.nysed.gov/specialed/ publications/OutofStatePlacement-final.pdf ["School districts do not have authority in law to place students with disabilities in nonapproved schools"]; see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1180 [S.D.N.Y. 1992] [indicating that in the event there are no appropriate State-approved nonpublic schools, a court may direct the State to expand the list of approved schools or provide conditional approval for an appropriate placement]; cf. L. v. North Haven Bd. of Educ., 624 F. Supp. 2d 163, 184 [D. Conn. 2009] [upholding an IHO's order that a district consider a State-approved private school and noting that the IHO had directed the district "to proceed as it would have in the absence of the parents' challenge" to the recommended program]).

Notwithstanding the above, in certain limited circumstances an award directing a district to prospectively place a student in an appropriate but unapproved school may be proper (Connors v. Mills, 34 F. Supp. 2d 795, 802-06 [N.D.N.Y. 1998]). In Connors, the court reasoned that immediate prospective funding is available when the parent and district agree that the district could not provide the student with a FAPE, that placement in a specific unapproved private school was appropriate, and the parent evidences an inability to front the cost of the student's tuition at the private school (Connors, 34 F. Supp. 2d at 805-06). Thus while the IHO's order directing the

[17] While the student has tested in the average range of intellectual functioning, she has also been identified as requiring a secure facility due to the combination of her elopement behaviors and physical limitations (Parent Exs. E at p. 1; O at p. 2).

[18] Normally, deficiencies in a student's educational program or its implementation does not, in and of itself, demonstrate that the student cannot be provided with an appropriate education within the public school system (see Suffield Bd. of Educ. v. L.Y., 2014 WL 104967, at *12 [D. Conn. Jan. 7, 2014]). However, in this instance the district is not arguing that it can appropriately address the student's needs in a district placement, but is arguing only that it does not have the authority to place the student in a school that has not been approved by the Commissioner (Pet. ¶ 9).

district to consider placing the student in an unapproved school was not an appropriate delegation of the IHO's authority to award appropriate relief, in the event that the district does not identify an appropriate placement for the student the parent is not left without options. The parent may select an appropriate unapproved school and initiate a due process complaint proceeding requesting prospective equitable relief from an administrative hearing officer; however, in such a proceeding the parent would be responsible to establish with specific objective evidence before the IHO that such a unilateral placement, chosen by the parent without the consent of district officials, is an appropriate placement under the IDEA.

VI. Conclusion

Although prospective payment is available in limited circumstances, under the facts presented in this matter, the IHO's direction that the district consider placing the student in a school that has not been approved by the Commissioner of Education was beyond the scope of his authority and must be overturned (Carter, 510 U.S. at 13-14; Antkowiak, 838 F.2d at 640-41; Connors, 34 F. Supp. 2d at 805-06).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 24, 2014 is modified, by reversing the portion directing the district to consider placement of the student in "non-approved" nonpublic schools.

Dated: **Albany, New York**
June 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER