



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-099

**Application of the [REDACTED]  
[REDACTED] 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, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending McCarton (Tr. pp. 51, 54-56). The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

### **Background and Due Process Complaint Notice**

The student's educational history was described in a prior decision and need not be repeated here in detail (Application of the Bd. of Educ., 09-114). Upon review and consideration of the hearing record developed in this proceeding and as discussed more fully below, this decision need not include a further description of the student's educational history because the

issues in controversy are no longer live and no meaningful relief can be granted, thereby rendering the instant appeal moot.

Briefly, as relevant to the parties' instant dispute, the Committee on Special Education (CSE) convened on April 20, 2010 to develop an individualized education program (IEP) for the student's upcoming 2010-11 school year (Dist. Exs. 3; 4).<sup>1</sup> The CSE recommended that the student attend a 6:1+1 special class in a special school with related services and adapted physical education (*id.*). The parents disagreed with the CSE's recommendations and consequently filed a due process complaint notice dated December 22, 2010, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year due to numerous procedural and substantive errors that were detailed in the complaint (Dist. Ex. 1). For relief, the parents requested that the district pay for the student's tuition and transportation to McCarton for the 2010-11 school year as part of a 12-month program (*id.* at p. 6). The parents also stated that "in the interim, and until there has been a final order" they "invoke[d] [the student's] pendency entitlements" pursuant to a September 2, 2008 "final and not appealable" decision by another impartial hearing officer (*id.* at p. 2; *see* Parent Ex. B). The parents stated that the student's pendency entitlements included tuition and costs at McCarton as part of a 12-month school year (Dist. Ex. 1 at p. 2).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on January 26, 2011 to determine the student's pendency (stay put) placement (Tr. pp. 1-15). In an interim decision dated February 7, 2011, the impartial hearing officer determined that the special education program and services provided in the prior unappealed September 2, 2008 impartial hearing officer decision constituted the student's pendency placement (Interim IHO Decision at p. 2). Accordingly, the impartial hearing officer ordered that the student remain at McCarton at the district's expense from the date of the parents' due process complaint notice until the "conclusion of the hearing" (*id.*). At the impartial hearing, neither party disputed that the student's pendency placement arose from the September 2, 2008 impartial hearing officer's decision (Tr. pp. 4-5, 9).

The impartial hearing reconvened on March 9, 2011, and concluded on May 18, 2011, after five days of proceedings (Tr. pp. 16-862). By decision dated July 14, 2011, the impartial hearing officer rendered a decision on the merits of the case and found, among other things, that the district failed to offer the student a FAPE for the 2010-11 school year because of defects regarding the development of the student's IEP and because the district did not prove that the particular classroom to which the district assigned the student was appropriate for the student (IHO Decision at pp. 12-15). Specifically, regarding the development of the student's IEP, the impartial hearing officer found that the parents and McCarton staff disagreed with the district's decision to place the student in a 6:1+1 special class setting, and that the district's decision to offer the student a 6:1+1 special class was made without evaluative data to support that determination, which denied the student a FAPE, impeded the parents' opportunity to participate

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<sup>1</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (*see* 8 NYCRR 200.5[j][3][xii][c]).

in the decision-making process and caused a deprivation of educational benefits (*id.* at pp. 12-14).<sup>2</sup> The impartial hearing officer also found that the parents met their burden of establishing that McCarton was appropriate for the student, stating that the parents offered "substantial evidence" to meet their burden regarding the appropriateness of the school and that the evidence demonstrated clearly that the student was progressing academically and emotionally (*id.* at p. 16).

The impartial hearing officer further determined that the parents had cooperated with the CSE and that they timely notified the district that they were rejecting the proposed placement (IHO Decision at p. 17). She also found that the parents were willing to have their son attend an appropriate public school (*id.*). The impartial hearing officer determined, therefore, that the equitable considerations favored the parents and ordered the district to reimburse them for tuition at McCarton for the 2010-11 school year, as well as the cost of transportation (*id.*).

### **Appeal for State-Level Review**

This appeal by the district ensued. The district alleges, among other things, the impartial hearing officer's decision should be overturned because the impartial hearing officer erred in finding that the recommended program offered to the student was not appropriate as it was based upon sufficient evaluative data, was substantially similar to the student's program at McCarton, and contained adequate provision for the student's transition back to public school.<sup>3</sup> Further, the district alleges that the equities did not favor an award of reimbursement because, among other things, the parents had no intention of sending the student to a public school. In a footnote, the district alleges that the matter is not moot because it has a legally cognizable interest in adjudication of the merits as a decision in the district's favor would change the student's pendency placement from McCarton to a public school on a going-forward basis, thereby relieving the district of the obligation to fund McCarton's tuition pendency placement during the next impartial hearing.

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<sup>2</sup> The impartial hearing officer's decision notes that the April 2010 IEP was not appropriate and that the student was thereby denied a FAPE (IHO Decision at p. 14). Although not necessary to reach a determination in this case, I note that the impartial hearing officer did not articulate the legal standard under which she determined that the particular classroom to which the district assigned the student also constituted a denial of a FAPE. I remind the impartial hearing officer that the IDEA requires the district to provide special education services by implementing them in conformity with the student's IEP (20 U.S.C. § 1401[9]; 8 NYCRR 200.4[e][7]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010] [explaining that school districts do not have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements]) and that with regard to the implementation of a student's IEP, a denial of FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at McCarton prior to the time that the district became obligated to implement the student's IEP in this case.

<sup>3</sup> The district does not appeal the finding by the impartial hearing officer that McCarton was appropriate for the student.

In their answer, the parents deny many of the substantive allegations of the district and assert that the impartial hearing officer properly determined that the district failed to offer the student a FAPE,<sup>4</sup> that McCarton was appropriate for the student, and that the equities favor an award of reimbursement to the parents. Specifically, the parents deny the district's assertion that the case is not moot. The parents request that the impartial hearing officer's decision and award be affirmed on appeal.

## **Applicable Standards and Discussion**

### **Special Transportation**

As an initial matter, I will address the parents' request for transportation raised in their due process complaint notice and awarded by the impartial hearing officer (Dist. Ex. 1 at p. 6; IHO Decision at p. 17). In their due process complaint notice, the parents did not allege what special education transportation services the student required or why he required them (see Dist. Ex. 1). A review of the hearing record does not reveal that the impartial hearing officer held a prehearing conference to clarify issues pertinent to this matter, including issues related to transportation.<sup>5</sup> It also reveals that neither the parties nor the impartial hearing officer developed the hearing record regarding the student's transportation needs and why he required transportation.<sup>6</sup> At the impartial hearing, the student's father testified that he did not know whether the parents were seeking reimbursement for transportation costs as part of their due process complaint notice (Tr. at pp. 817-18). The parents' counsel then informed the student's father that the parents were seeking such reimbursement, to which the father simply replied "okay" (Tr. p. 818). On appeal, the district does not articulate whether it is otherwise obligated to provide transportation to the student,<sup>7</sup> and the parents do not deny that this matter is moot, which matter includes a request for the reimbursement of transportation as set forth in their due process complaint notice, nor do they raise any issue with regard to transportation costs (see Pet.; Answer n. 8). Where, as here, the complaining party was unclear that the issue of transportation was being litigated, that the impartial hearing officer did not address the claim, and such failure

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<sup>4</sup> The parents allege that there are additional claims upon which the impartial hearing officer could have found FAPE deprivations; however, the parents do not cross-appeal the any portion of the decision of the impartial hearing officer (see Pet. ¶¶ 3-4, 35).

<sup>5</sup> State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]).

<sup>6</sup> I remind the impartial hearing officer of her responsibility to develop an adequate hearing record containing information that is relevant to the matters at issue while appropriately limiting testimony and documentary evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]-[e]).

<sup>7</sup> I note that the special education teacher from the district who participated in the development of the student's April 2010 IEP testified at the impartial hearing that special education transportation does not have to be on an IEP, that it is "assumed" to be appropriate for 6:1+1 students, and that it only needs to be indicated on the IEP if the student needs something "very specialized like an air conditioned bus" or "something very, very, very specific," which the student in this matter did not need (Tr. pp. 252-53, 317-18). However, State regulations require that an IEP indicate the recommended special education program and services, which includes special transportation provided to meet the unique needs of students with disabilities (8 NYCRR 200.1[ww], 200.5[d][2][v]; see also 34 C.F.R. §§ 300.34[a], 300.320[a][4]). I caution the district to comply with applicable governing regulations.

to address the claim has not been appealed by an aggrieved party, it appears that the parties have elected not to pursue the issue and I decline to address the matter further as it is not properly before me.

### **Mootness**

As stated previously, the impartial hearing officer determined that the special education program and services provided in the September 2, 2008 impartial hearing officer decision constituted the student's pendency placement and ordered that the student remain at McCarton at the district's expense from the date of the parents' December 22, 2010 due process complaint notice until the "conclusion of the hearing" (Interim IHO Decision at p. 2). I note that the student's special education program and services for the 2008-09 school year was the subject of another impartial hearing that occurred subsequent to the issuance of the September 2, 2008 impartial hearing officer decision and that the parents were entitled to reimbursement for tuition costs at McCarton during that proceeding (see Application of the Dep't of Educ., Appeal No. 09-114). that the parties thereafter sought judicial review of the matter in U.S. District Court (R.E. v. New York City Dep't of Educ., 2011 WL 924895 [S.D.N.Y. Mar. 15, 2011]). The District Court decision has been appealed and the matter remains pending in the Second Circuit (R.E. v. New York City Dep't of Educ., Docket No. 11-1266 [2d Cir. April 2011]; see Answer n.1). Accordingly, the student has been entitled to receive services at McCarton a public expense pursuant to pendency at all times relevant to the instant proceeding due to ongoing litigation during the time period of July 1, 2010 through December 22, 2010 when the parents' due process complaint notice in the instant proceeding was filed.

Accordingly, the parents have already received or are entitled to receive the tuition reimbursement relief they were seeking at the impartial hearing in this matter under pendency, and the 2010-11 school year at issue has expired, which raises the question of whether the instant appeal has been rendered moot by the passage of time. As stated above, the district asserts that the instant appeal is not moot (Pet. n.8; citing New York City Dep't of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011) and Pawling Cent. Sch. Dist. v. New York State Educ. Dept., 3 A.D.3d 821 [3d Dep't 2004]). However, upon careful consideration of the evidence in the hearing record, I find that regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2010-11 school year, no further meaningful relief may be granted to the parents because they have received or are entitled to receive the tuition relief sought by virtue of pendency during the 2010-11 school year, and thus, the district's appeal has been rendered moot. In addition, careful consideration of the District Court's recent decision rendered in V.S., 2011 WL 3273922, as discussed further below, does not compel a different result.

As other State Review Officers have long held in administrative reviews of impartial hearing officer decisions, 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 397 F.3d 77 at 84; 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, an exception provides that 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). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the parties' dispute over the placement or program offered by the district for the 2010-11 school year. Here, even if a determination on the merits demonstrated that the district did offer the student a FAPE for the 2010-11 school year, in this instance, it would have no actual effect on the parties because the 2010-11 school year expired on June 30, 2011, and the student remained entitled to his pendency placement at McCarton funded by the district through the conclusion of the administrative due process. Accordingly, the district's claims for the 2010-11 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a

Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

With regard to the District Court's decision in V.S. (2011 WL 3273922), the court held that in Application of the Dep't of Educ., Appeal No. 10-041, the State Review Officer correctly determined that the parents' request for funding for the school year that was the subject of that appeal was no longer at issue where the student was educated at public expense at a private school chosen by the parents for the duration of the school year pursuant to a pendency order (V.S., 2011 WL 3273922, at \*9). Noting that a decision in favor of the district in that matter would not affect its obligation to pay the costs of the student's private school tuition, the Court nevertheless determined that the district sought redress regarding the collateral issue of the student's ongoing pendency placement for future proceedings and that had a decision been rendered by a State Review Officer on the merits, it would have affected the student's placement (id.). After careful consideration and for several reasons described below, I respectfully decline to adopt the reasoning as set forth in V.S.<sup>8</sup>

First, a decision rendered in favor of the district in this proceeding would not alter the student's pendency placement at McCarton as the decision in V.S. can be read to suggest.<sup>9</sup> The parties' dispute in a collateral proceeding remains pending in the Second Circuit and the student is entitled to remain in his stay put placement regardless of a determination rendered in this forum. To hold otherwise would be to permit the district to alter the "status quo" in a manner that the pendency provision was designed by Congress to prevent (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see also Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 [3d Cir. 1996]).

Second, the sole reason that the District Court held that Application of the Dep't of Educ., Appeal No. 10-041, was not moot was because the parties required resolution of the merits of their dispute to establish the student's pendency placement in future proceedings (V.S., 2011 WL 3273922, at \*10);<sup>10</sup> however, this rationale regarding future pendency may be read so broadly as to apply to virtually any and all Individuals with Disabilities Education Act (IDEA) proceedings

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<sup>8</sup> Although State Review Officers endeavor to adhere as closely as possible to the legal guidance provided by the courts, in rare instances, where conflicting authorities regarding statutory interpretation are present, such authority may not be binding upon a State Review Officer (see Application of the Bd. of Educ., Appeal No. 05-074 [holding that a student need not have previously received special education services from a public agency to be eligible for reimbursement when the District Court had previously ruled to the contrary]).

<sup>9</sup> The district's argument that a state-level decision in its favor would alter the student's pendency placement appears to be underlie the district's reasoning that the case is not moot. The district's statement is incorrect. A decision by a State Review Officer in favor of a district does not alter the district's obligation to provide a student with his or her pendency placement—only a state level decision in favor of the parents modifies a student's pendency placement (Mackey v. Bd of Educ. For Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004]; see 34 C.F.R. § 300.518[d]).

<sup>10</sup> Although infrequent, it is not unheard of for a student to remain in a pendency placement for years, even after administrative and court decisions have been issued multiple times (see, e.g., B.J.S. v. State Educ. Dep't/Univ. of State of New York, 2011 WL 3651051, \*1 [W.D.N.Y. Aug. 18, 2011] [acknowledging that the student remained in a 2003-04 pendency placement despite numerous subsequent adjudications regarding the student's educational placement]).

involving the educational placement or services to be provided to a student, and other courts in New York have not adopted this broad approach (see Bd. of Educ. v. O'Shea, 353 F.Supp.2d 449, 457 [S.D.N.Y. 2005] [determining the matter was moot and declining to resolve the merits of the parties' dispute when the pendency provision provided an independent basis for doing so]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 [2d Cir. 2002] [ruling that the pendency provision formed a basis for awarding relief without addressing the merits of the parties' dispute]; Bd. of Educ. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002] [rejecting the district's argument that a dispute must be resolved on the merits rather than on the basis of the pendency provision]; Patskin, 583 F. Supp. 2d at 428-29 [holding that the matter was moot where the school year at issue had passed, and stating that the relevant controversy was whether the IEP that the student was provided with was an appropriate placement and that there was no reasonable expectation that the student would be subjected to that particular IEP again]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 273, 278-80 [E.D.N.Y. Aug. 25, 2010] [dismissing the case as moot and noting that the parents were receiving full compensation for their private school expenditures and that the proceeding was brought to obtain legal fees]; J.N., 2008 WL 4501940, at \*3-\*4 [upholding a State Review Officer's determination that the case was moot]; Bd. of Educ. v. Steven L., 89 F.3d 464, 468-69 [7th Cir 1996] [holding that it was not necessary to determine which party would prevail on the merits when the stay put provision controlled for the duration of the dispute and the proposed public school IEP was no longer applicable to the student]; see generally New York City Dep't of Educ. v. S.S., 2010 WL 983719 [S.D.N.Y. Mar. 17, 2010].<sup>11</sup> Additionally, the Ninth Circuit has explicitly rejected this rationale, holding that the stay put provision cannot be relied upon as the basis for a live controversy when the issue of liability on the substantive issues has been rendered moot (Marcus I. v. Dep't of Educ., 2011 WL 1979502, at \*1 [9th Cir. May 23, 2011] [explaining that stay put provision 20 U.S.C. § 1415[j] is designed to allow a student to remain in an educational institution pending litigation, but does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]).<sup>12</sup>

Third, I am concerned with adjudicating rights unnecessarily, particularly when it will not affect the claims that a party alleged at the outset of the due process proceeding and especially under a statutory scheme like the IDEA, which envisions that parents and districts will continue to convene on at least an annual basis to review a student's current IEP or educational placement, share their concerns with one another, and cooperatively and affirmatively engage in efforts to develop a new appropriate plan designed to offer the student a FAPE in the public schools (see 20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). This process usually works best when it is as free as possible from acrimonious relationships that often develop after continued litigation.<sup>13</sup>

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<sup>11</sup> I also disagree with the interpretation that the District Court in M.N. v. New York City Dep't of Educ. (700 F. Supp. 2d 356 [S.D.N.Y. Mar. 25, 2010]) ruled that the State Review Officer erred in dismissing the case on mootness grounds (V.S., 2011 WL 3273922, at \*10). The Court in M.N. only acknowledged the State Review Officer issued the decision on mootness grounds and did not further comment.

<sup>12</sup> I also note what appears to be a discrepancy between the views of the Marcus I Court and the decision in Pawling, (3 A.D.3d 821) regarding future pendency placements.

<sup>13</sup> Moreover, this is also not a case in which particularly new or novel issues have been presented on the merits.

Fourth, I believe that the automatic nature of the pendency provision set forth in the IDEA (see Zvi D., 694 F.2d at 906; Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker, 78 F.3d at 864), and if necessary, the speed with which parties may obtain State-level pendency placement reviews on an interlocutory basis under New York's regulatory scheme (see 8 NYCRR 279.10[d]) strongly diminishes the need to establish future pendency placements for future school years; such determinations are better left until the proceedings under which the right arises are commenced and the issue of the student's pendency placement is actually in dispute.

Lastly, while I appreciate the Court's comment that a decision on the merits in V.S. would be useful (2011 WL 3273922, at \*10), I am also concerned that the decision has the effect of removing the much needed discretion of administrative hearing officers to focus on both fairly and efficiently resolving disputes while retaining the discretion of how best to allocate their adjudicative resources to address ever growing dockets.<sup>14</sup> For the forgoing reasons, I decline to find that the parent's claim for tuition reimbursement for the 2010-11 school year continues to be a live controversy.

### **Exception to Mootness**

With respect to the mootness exception, neither party argues that the exception to the mootness doctrine applies in this case. Moreover, the hearing record fails to contain evidence or an offer of additional evidence to support this contention. While it may be theoretically possible that the parties will be involved in a dispute over the same issues that were the subject of this action for the 2010-11 school year in the future, such speculation does not rise to the level of a reasonable expectation or a demonstrated probability of recurrence sufficient to satisfy the requirements necessary for the exception to apply. Accordingly, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; 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).

### **Commencement of Due Process**

I also note that the circumstances in this case are in part due to the district's conduct in waiting until the parent filed a due process complaint for the 2010-11 school year. Here, the parents unilaterally placed the student in McCarton and, as the impartial hearing officer noted, timely informed the district that they were rejecting the district's recommended services and intended to place the student in McCarton at public expense, thereby placing FAPE in issue

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Both State Review Officers and courts have previously provided frequent guidance regarding the types of claims raised in this case.

<sup>14</sup> For example, the Second Circuit has determined that an exhaustive analysis by the impartial hearing officer is not mandated in every administrative proceeding and that in appropriate circumstances summary disposition procedures may be employed (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

(Parent Ex. F). Although it was permissible to wait for the parents to file a complaint, at any point after the parents notified the district, the district was entitled to commence due process and defend its IEP for the 2010-11 school year (see Yates v. Charles County Bd. of Educ., 212 F.Supp.2d 470, 472, [D.Md. 2002]; Questions and Answers on Procedural Safeguards and Due Process Procedures For Parents and Children with Disabilities, 52 IDELR 266 [OSERS 2009]). Had the district done so, it is far more likely that full administrative review by both an impartial hearing officer and State Review Officer would be complete and timely available for conducting the student's annual review for the following school year. However this did not occur and the matter of the parents' tuition reimbursement claims for 2010-11 school year became stale due to the district's pendency obligations, and the time for conducting the student's annual review and developing a new IEP based on the student's experiences during the 2010-11 school year elapsed more than five months ago (see Parent Ex. D at p. 2).

### **Conclusion**

In light of my determination herein, I find that it is unnecessary to address the parties' remaining contentions.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 17, 2011**

  
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**JUSTYN P. BATES  
STATE REVIEW OFFICER**