The University of the State of New York

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

No. 17-033

Application of a STUDENT WITH A DISABILITY, by his parent for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Massapequa Union Free School District

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, Tara E. Kahn, 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 a decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parent's due process complaint notice. The appeal must be dismissed.[1]

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.

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

§§ 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 all times relevant to this proceeding, the student was receiving related services and attending a preschool program at a nonpublic school (the NPS) pursuant to a stipulation of

settlement resolving an earlier due process complaint notice (Dist. Ex. C at pp. 1, 3).[2]

On February 2, 2016, the Committee on Preschool Special Education (CPSE) convened for an initial eligibility meeting based on concerns regarding the student's motor skills (Dist. Ex. F.A at p. 1). The February 2016 CPSE found the student eligible for special education as a preschool student with a disability and recommended that the student receive three weekly 30-minute sessions of individual occupational therapy (OT) and three weekly 30-minute sessions of individual physical therapy (PT) (id. at pp. 1, 8).[3] The CPSE did not recommend speech-language therapy or any academic support for the student at this time (see id.).

According to meeting minutes, on May 17, 2016, a CPSE convened for a "Program/Annual Review" (Dist. Ex. A at p. 5).[4, 5] The May 2016 CPSE discussed 12-month school year services and agreed to provide the student with twice weekly OT and PT during the summer (id.). On June 27, 2016, the parent agreed to amend the student's IEP to include a recommendation for three sessions of speech-language therapy per week from June 27, 2016 through September 5, 2016 (id.).

By due process complaint notice dated August 4, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (Dist. Ex. D.B at pp. 1, 3). Specifically, the parent alleged that the CPSE recommended an insufficient level of related services for the summer portion of the 12-month school year (id. at p. 3). The parent also contended that she requested a school based program so the student could receive his preschool education and related service from the same program (id.). Lastly, the parent alleged that the May 2016 IEP failed to provide the student with sufficient speech-language therapy (id.). As a remedy, the parent requested an order directing the district to provide the student with a full-day preschool program, where the student could also receive his related services, in addition to four sessions per week of speech-language therapy (id. at p. 15). Furthermore, the parent requested an order directing the district to provide the student with seven sessions of compensatory PT and seven sessions of compensatory OT (id.).

On September 14, 2016, the parent signed a stipulation of settlement and release in which the district agreed to provide the student with a center-based 18:1+2 integrated program at the NPS, five days per week from 8:30 a.m. to 1:30 p.m., along with the related services recommended in the student's IEP, for the period of September 19, 2016 through June 23, 2017 (Ex. C at p. 3).

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[2] The parent appeals from a decision by the IHO that was rendered based on the parties' submissions. No hearing dates had been held and no exhibits had been admitted. For that reason, citations are to the documents as lettered in the district's letter dated April 25, 2017, transmitting the hearing record to the Office of State Review (Dist. Exs. A-T), and in the district's letter dated May 10, 2017 amending the hearing record to include additional documentation (Additional Dist. Exs. A-D). While the district's letter references lower case letters, the exhibits themselves have cover pages with capital letters. Capital letters are used in this decision. Citations to exhibits attached to one of these documents are as identified in the letter, with the exhibit letter appended thereto (e.g., Dist. Ex. D.C).

[3] The student's eligibility for special education as a preschool student with a disability is not in dispute (8 NYCRR 200.1[mm]).

[4] A copy of the June 27, 2016 IEP was included with the parent's August 4, 2016 due process complaint notice (Dist. Ex. A at pp. 5-16).

[5] It is unclear from the record on appeal whether or not an IEP was generated as a result of the May 2016 CPSE meeting.

The parent further waived her right to an impartial hearing and to commence any action or proceeding with respect to the student's IEP, special education program, and related services relative to the student's 2016-17 school year (id. at p. 4).

According the parent's December 7, 2016 due process complaint notice and the district's December 15, 2016 response thereto, the CPSE convened on December 7, 2016 at the parent's request (Dist. Exs. A at p. 3; B at p. 1). At that meeting, the parent requested that the CPSE add academic goals to the student's IEP and include the placement the student was attending pursuant to the stipulation on the IEP as the student's recommended placement (id.). The CPSE declined to do so because the CPSE did not find that the student's academic needs necessitated placement in a center-based preschool and the September 2016 stipulation of settlement and release did not require it (Dist. Exs A at pp. 3-4; B at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated December 7, 2016, the parent asserted that the district should have amended the student's IEP at the December 2016 CPSE meeting to reflect the placement the student was attending at the NPS and include academic annual goals (Dist. Ex. A at pp. 3-4). The parent further asserted that the district was inappropriately "using" the previously-disputed June 2016 IEP (see id. at p. 3). She alleged that "the district [wa]s creating unnecessary obstacles instead of creating a properly crafted IEP that [wa]s in compliance with the [C]ommissioner's regulations and the IDEA" (id. at p. 4).

As relief, the parent requested that the district be required to create an IEP reflecting the student's current placement and including annual goals addressing academic skills (Dist. Ex. A at p. 17). The parent also requested monetary damages "for harassment, retaliation, intimidation, violation of rights and knowingly being non-compliant with IDEA and the regulations of the commissioner" (id.).

B. Facts Post-Dating the Due Process Complaint Notice and IHO Decisions

A prehearing conference was held on January 4, 2017, during which the IHO set forth a schedule for the district to submit a motion to dismiss the parent's due process complaint notice and for the parent to respond (Dist. Ex. T).

On January 12, 2017, the parent requested "an immediate pendency hearing" (Dist. Ex. G at p. 1). The parent asserted that, although the student was attending the NPS and receiving related services and door-to-door transportation, she was unsure of which IEP was being implemented and needed a pendency hearing because the district never created an IEP reflecting the student's placement at the NPS (id.).[6]

On January 13, 2017, the district moved to dismiss the parent's complaint (Dist. Ex. D). The district alleged that the parent had entered into a stipulation and, consequently, waived her right to commence an impartial hearing (id. at pp. 1-4). The district further contended that the parent's request for monetary damages should be dismissed as monetary damages are not an

[6] The district responded to the parent's request for a pendency hearing in a January 20, 2016 Memorandum of Law, arguing that the student's pendency should be the February 2016 IEP as it was the last agreed upon IEP (Dist. Ex. F).

available remedy under the IDEA (id. at pp. 4-5). Lastly, the district argued that federal and State law prohibited an award of attorneys' fees for the parent's lay advocate (id. at pp. 6-7).

In an email dated January 18, 2017, the parent requested that the IHO deny the district's motion to dismiss (Dist. Ex. 2.e at p. 1). The parent contended that the district breached the September 2016 stipulation of settlement agreement (id.). The parent also maintained that the student's current placement, as well as academic goals, should be delineated on his IEP (id.).

On January 27, 2017, the district submitted a reply to the parent's response to its motion to dismiss, in which it reiterated its request to dismiss the parent's due process complaint notice (Dist. Ex. H). The district also argued that the parent's claims that the district breached the settlement agreement were outside the scope of her December 2016 due process complaint notice and, in any event, the district did not breach the stipulation (id. at pp. 1-2, 7-8). The district also argued that the parent failed to comply with the stipulation because she failed to provide the required 10-day notice prior to bringing an action or proceeding (id. at pp. 4-5). Additionally, the district asserted that the IHO lacked the authority to enforce a settlement agreement (id. at pp. 3-4). Furthermore, the district contended that the parent's due process complaint notice was an improper attempt to amend the parties' settlement agreement (id. at p. 6-7, 8-10).

In a February 9, 2017 email, the IHO advised the parties that pendency was not an issue at this point, given that pendency had not been raised during the proceedings, and the parties already agreed the student would attend the NPS for the duration of the 2016-17 school year (Dist. Ex. 2.n at p. 1).[7]

By interim decision dated February 9, 2017, the IHO dismissed the parent's due process complaint notice in part (Dist. Ex. L at p. 4).[8] More specifically, the IHO found that the parties entered into a stipulation of settlement and release with respect to the parent's claims surrounding the 2016-17 school year, and she concurred with the district that "the Parent [wa]s barred from reopening the issues that were known and resolved by way of that Stipulation" (id. at p. 3). However, the IHO noted that preclusion did not apply to claims that could not have been raised in the prior proceeding (id.). Under the circumstances, while the IHO noted that the district placed the student at the NPS pursuant to the stipulation, she further found that the district did not develop an IEP to reflect the placement or create annual goals with respect to academics (id.). Accordingly, the IHO determined that the parent's claims related to placement and academic goals could proceed (id. at p. 4). However, the IHO rejected the parent's request for monetary damages, noting that the IDEA barred an award of monetary relief and did not permit reimbursement for the cost of the parent's advocate (id. at pp. 3-4).

In a letter to the parties dated February 17, 2017, the IHO scheduled a hearing date for March 2, 2017 (Additional Dist. Ex. B at pp. 6-7). She further advised the parties that the impartial hearing had a "very, very limited scope," and that she only planned to entertain the parent's request

[7] The initial IHO assigned to the matter recused himself on January 28, 2017 (Dist. Ex. J). The parent had requested that the matter be assigned to an IHO who had been assigned to an earlier due process complaint notice regarding the same student; however, the IHO declined appointment (Dist. Ex. L at p. 2; see Dist. Ex. I). A second IHO was appointed on February 2, 2017, conducted a pre-hearing conference, and recused herself on February 3, 2017 (Dist. Exs. K; R). A third IHO was appointed on February 3, 2017 (Dist. Ex. L at p. 1).

[8] District Exhibits "L" and "P" are both copies of the IHO's February 9, 2017 interim decision.

for the CPSE to reconvene in order to develop academic goals for the student and amend the IEP to reflect the student's current program (id.).

In a letter to the parent dated February 28, 2017, the district scheduled a CPSE meeting to take place on March 7, 2017 (Additional Dist. Ex. A at p. 3).

In a letter dated March 1, 2017, the IHO advised the parties that, in light of the scheduled March 7, 2017 CPSE meeting, at which time the CPSE planned to amend the IEP to state that the student was placed in an 18:1+2 center based program at the NPS and include academic goals, the impartial hearing would not proceed on March 2, 2017 (Dist. Ex. O at p. 1). The IHO further directed the parent to attend the upcoming CPSE meeting and advised the district to hold the meeting in her absence should she not attend (id.). Additionally, the IHO indicated she would reconsider the district's motion to dismiss after she was provided with a copy of the March 2017 IEP (id. at p. 2).

On March 22, 2017, the CPSE convened and amended the IEP to reflect the student's placement in an 18:2+2 integrated class in an approved preschool special education program and included annual goals related to the student's academic needs (Additional Dist. Ex. D at pp. 5, 10-11, 15, 17). According to the CSE meeting minutes, the parent agreed with the changes made to the student's IEP (id. at p. 5).

In a decision dated March 30, 2017, the IHO dismissed the parent's due process complaint notice in its entirety (IHO Decision at p. 2). The IHO determined that the March 2017 IEP, which reflected the student's current placement and included academic goals, met the conditions of the IHO's March 1, 2017 order and resolved the parent's remaining claims for relief (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in dismissing her due process complaint notice. Specifically, the parent asserts that she had "standing" to bring the impartial hearing based on language in the stipulation of settlement and based on the district's violation of the stipulation of settlement. The parent also argues that the IHO erred by not awarding additional relief to remedy the district's placement of the student in a class with an alleged inappropriate student-to-teacher ratio and without academic annual goals. With respect to the March 2017 IEP, the parent asserts that the IHO erred by dismissing the parent's due process complaint notice after the CPSE created an IEP because the March 2017 IEP did not reflect the student-to-teacher ratio agreed upon in the stipulation of settlement and the district placed the student in a class where he was not grouped with students with similar functioning needs. As to the impartial hearing process, the parent alleges that the IHO violated her due process rights by dismissing her due process complaint notice without holding any days of

hearing.[9] Finally, the parent argues that the IHO erred in failing to properly address the issue of pendency.

As a remedy, the parent requests that the matter be remanded to a new IHO for a ruling on pendency. The parent also requests an award of "compensatory special education instruction hours and any and all relief which the new IHO deems appropriate based upon the inappropriate placement and the deficient IEP which lacked appropriate educational goals for over 6 months."

In an answer, the district generally denies the parent's allegations and requests that the IHO's decisions be upheld in its entirety. In addition, the district argues that the parent's submissions on appeal failed to comply with the form requirements set forth in Part 279 of the practice requirements. Further, the district asserts that the parent is improperly attempting to raise issues on appeal that she did not raise below, such as the parent's claim that the district placed the student in an improper placement with an improper student to teacher ratio.

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 or CPSE 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

[9] As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible and an effective mechanism for resolving certain proceedings under the IDEA, but they should be used with caution and are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68-69 [2d Cir. 2000]). In the present case, as described below, the IHO made effective use of the summary dismissal procedure for the parent's claims and did not err or otherwise violate the parent's right to due process by declining to hold days of hearing.

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).

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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]). 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).

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]).

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).

VI. Discussion

A. Preliminary Matters

1. Form Requirements for Pleadings

The district requests dismissal of the parent's appeal for failure to comply with the practice requirements as set forth in State regulations. More specifically, the district argues that the "notice of petition" and "petition" and were defective for the following reasons: (1) the parent did not endorse the petition with the required information; (2) the parent did not verify the petition; (3) the notice with petition failed to contain the requisite language set forth in 8 NYCRR 279.3; (4) the parent filed a "notice with petition" and "petition" rather than a "notice of request for review" and "request for review," in accordance with the amended State regulations; (5) the parent did not sign the notice with petition; and (6) the parent failed to clearly identify the findings, conclusions and orders to which she took exception.[10] The district alleges that "[the parent's] failures in this matter amount to more than easily corrected procedural errors or mere technicalities."

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). State regulation further provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in pertinent part, that a request for review set forth:

> (1) the specific relief in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise ruling, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). Moreover, all pleadings and papers submitted to an SRO must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney (8 NYCRR 279.7[a]). Additionally, all pleadings shall be verified (8 NYCRR 279.7[b]).

[10] While the undersigned previously indicated to the parent that the "petition" would be deemed a "request for review" to conform with the current practice regulations, for purposes of this decision, the parent's submission shall continue to be referred to as a "petition" in order to avoid confusion given the procedural arguments interposed by the district.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], aff'd C.E. v Chappaqua Cent. Sch. Dist., 2017 WL 2569701 [2d Cir. June 14, 2017], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Initially, while the district asserts the parent did not sign the notice with petition or verify the petition, the notice with petition filed with the Office of State Review was signed by the parent and the parent filed an affidavit of verification of the petition with the Office of State Review. Additionally, although the petition did not include the parent's mailing address and telephone number, as required by State regulation (8 NYCRR 279.7[a]), the district has not alleged that the parent's failure in this respect impeded its ability to respond to the petition.[11] The district's objection to the "notice with petition" and "petition" on the grounds that the amended practice regulations instead call for a "notice of request for review" and "request for review" are similarly without merit as there is no indication that the mislabeling of the documents impaired the district's ability to respond to the parent's allegations contained therein.[12]

Next, while the notice with petition failed to contain the requisite language set forth in 8 NYCRR 279.3, the notice did contain the language required by State regulation in effect prior to January 1, 2017. Changes to the notice that became effective on January 1, 2017 reflected the change in the name of the document used to initiate the appeal from a petition to a request for review, the change in the time allowed for service of an answer from 10 days to 5 business days, and a notice that extensions of the time to answer may be granted upon proper application (8 NYCRR 279.3). In this instance, the district requested and was granted an extension of time to serve an answer and the district served its answer within its extended time frame. Accordingly, although an improper notice might impair a party's ability to timely respond to a request for review under some circumstances, here, the district timely submitted an answer and the parent's mistake was a harmless error.

With respect to the district's allegation that the parent failed to clearly identify the findings, conclusions, and orders to which she took exception, subsequent to receiving the petition, rather than rejecting the parent's submission and requiring her to refile it on such grounds, in a letter dated May 11, 2017, the undersigned listed the issues presented on appeal, assigned a corresponding numbering scheme, and provided the parties an opportunity to object.[13] In its answer, the district alleges that my letter did not render the petition sufficient and that the parent did not raise the first three numbered issues in her petition. The district further asserts that I restated issues when the

[11] The petition included additional documents, including the March 2017 IEP, which had the parent's full address and telephone number on it.

[12] Moreover, as noted above, shortly after the Office of State Review received the parent's petition, the undersigned notified the parent, among other things, that the "petition" would be treated as a "request for review" consistent with the current practice regulations.

[13] The district objected in a letter dated May 18, 2017.

lack of clarity should have constituted grounds for dismissal, which the district argues prejudiced its ability to respond to the alleged issues on appeal.

State regulation provides that an SRO has discretion to require a party to clarify a pleading or submit further briefing upon request (8 NYCRR 279.6[d]). In the May 2017 letter, the undersigned invited such clarification by requesting any objection to the listed issues. Additionally, notwithstanding the district's objection to the first three issues outlined in the May 2017 letter, a review of the petition shows that the parent included these allegations in her submission (see Pet. at pp. 1-2). The district appears to primarily object to the use of language in the May 2017 letter that "the IHO erred by not finding . . . ." The district asserts that the IHO made no finding on such points and, therefore, there was nothing for the parent to appeal. On the contrary, however, State regulations provide that an appeal to an SRO involves the review of a decision of an IHO (see 8 NYCRR 279.1[a] [providing for "[r]eview by an SRO of a determination made by an [IHO] . . . ."]) and, further, specifically contemplate that a petitioner may appeal an IHO's failure or refusal to make a finding (8 NYCRR 279.4[a]). The district also misinterprets the inclusion of an issue in the May 2017 letter as a determination regarding whether or not the parent properly preserved the issue for review on appeal by raising it during the proceedings before the IHO. As discussed below, this is not the case. Finally, contrary to the district's allegations that it suffered prejudice as a result of the May 2017 letter, the district provides no basis for this assertion except to allege that the district was required to respond to issues "raised by the SRO on appeal, as well as every allegation in the Petition." As already noted, the issues were the same, so no additional response to the listed issues was necessary and, in fact, the district was advised that it could refer to the numbered issues in the May 2017 letter, if convenient, but that it need only needed to either concur in a statement of facts with the parent or provide an answer to the parent's petition, consistent with State regulation (8 NYCRR 279.5).

Based on the foregoing, while the district correctly submits that the parent failed to comply with all of the form requirements for pleadings as set forth in State regulation, I decline to dismiss the parent's petition on these grounds, given that the district was not prevented from responding to the allegations raised in the petition or prevented from answering in a timely manner and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

2. Scope of Review

On appeal, the parent argues that the IHO erred by not awarding additional relief to remedy the district's placement of the student in a class with an alleged inappropriate student-to-teacher ratio. The district asserts that the parent did not raise the issue of the appropriateness of the ratio of the student's classroom at the NPS as an issue to be resolved at the impartial hearing and, therefore, may not raise this issue for the first time on appeal.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [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]). Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issue, and did not include this issue in her

due process complaint notice (see Dist. Ex. A), I decline to review this issue for the first time on appeal (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).[14, 15]

B. Pendency

The parent alleges that the IHO erred in failing to address pendency and requests that the matter be remanded for a determination by the IHO. The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F.

[14] Even if properly raised, the parent's claim that the recommendation for placement in an 18:2+2 integrated class violated the IDEA's LRE provisions and was overly restrictive would nevertheless fail. The parent misconstrues the analysis of the restrictiveness or LRE aspects of the student's educational placement. In circumstances such as those in the present case, LRE is not defined by the particular student-to-adult staff ratio present in a placement because it presents no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]). The level of access to nondisabled peers in the regular education environment, however, is of little moment in this case insofar as neither party has asserted that the student should be educated in an educational setting other than an integrated class. Thus, the parents' contention that placement in an 18:2+2 integrated class was more restrictive relative to an 18:1+2 integrated class must be dismissed.

[15] The parent's argument that the district placed the student in a class where he is not grouped with students with similar functioning needs is also raised for the first time on appeal and is outside the scope of the proceeding (see Dist. Ex. A). Alternatively, such claim would pertain to implementation of the stipulation of settlement, which as described below is beyond the jurisdiction of this proceeding, or would be related to the implementation of the March 2017 IEP that postdated the due process complaint notice and, therefore, is not within the scope of the present proceeding.

Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, quoting Zvi D., 694 F.2d at 906). Although not defined by the IDEA, the phrase "then-current educational placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]).

As a preliminary matter, to the extent that the IHO determined that she did not have to rule on pendency because it was not raised in the due process complaint, such a determination was in error (see IHO Decision at p. 4). A student's right to pendency automatically arises as of the filing of the due process complaint notice and, therefore, is one particular issue that generally is not contained in a due process complaint. Additionally, considering the focus on maintaining the status-quo during the proceeding and the time sensitive nature of a pendency determination, an IHO may and should promptly address a parent's pendency claims (see Murphy, 297 F.3d at 199-200; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112 [3d Cir. 2014]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]).

Turning to the merits, on appeal, the parent alleges that the IHO erred by not addressing pendency but does not specify her position as to what constitutes the student's pendency placement. The parent's submissions to the IHO regarding pendency indicated that the parent took issue with the lack of an IEP—reflecting the placement agreed upon in the stipulation of settlement—upon which the parent could rely as a statement of the student's pendency placement (Dist. Ex. G at p. 1). Although the district previously asserted that the program and services provided at the NPS did not constitute the student's pendency placement (Dist. Ex. F at pp. 4-6), the district has changed its position on appeal and asserts that the IHO correctly found that pendency was not at issue because "the parties entered into a Stipulation, which set forth the agreed upon placement for the Student and . . . that same was agreed to between the parties and would not change . . . ." (District Mem. of Law at p. 19).

The parent's position as stated to the IHO (Dist. Ex. G at p. 1) mirrors the crux of her claim articulated in the due process complaint notice; to wit, that the CPSE failed to develop an IEP to reflect the student's placement at the NPS (Dist. Ex. A at pp. 3-4). However, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE or CPSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). Further, while an IEP is one source

for identifying the student's then-current educational placement, the stay-put placement may, instead, be the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; in this instance, the integrated preschool class with related services.

Specifically, the hearing record reflects that the student attended the integrated class at the NPS for the 2016-17 school year pursuant to the September 2016 stipulation of settlement, including at the time that the parent filed the December 2016 due process complaint notice (Dist. Exs. A; C). A settlement agreement between the parties may be sufficient to establish a student's pendency placement depending on various factors (see L.L. v. New York City Dep't of Educ., 2016 WL 4535037, at *7-*8 [S.D.N.Y. Aug. 30, 2016] [discussing factors relevant to a determination whether a settlement agreement establishes a pendency placement]). Further, the parties' apparent accord regarding the student's attendance at the placement articulated in the stipulation of settlement during these proceedings is supportive of a finding that the agreement constitutes the student's stay-put placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3).

Under the circumstances, the parties do not appear to disagree as to the student's pendency placement. On appeal, the parent expresses concern that the particular nonpublic school the student attended during the 2016-17 school year may be closing; however, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

In addition to its inclusion in the September 2016 stipulation of settlement, the district subsequently memorialized the operative placement attended by the student at the time of the due process complaint notice on the student's May 2017 IEP and the same placement has continued uninterrupted. To remove the program and services the district agreed to provide and the student is currently receiving, would destroy the purpose of the pendency provision: maintaining a stable and consistent educational environment for the student (M.G., 982 F. Supp. 2d at 247-48). Based on the foregoing, the parent's request that the matter be remanded to an IHO for a determination on pendency is denied as unnecessary.

C. Settlement Agreement

The parent claims that the student was attending a classroom with an 18:2+2 ratio, although the settlement agreement provided for placement in an 18:1+2 ratio. The parent further contends that the IHO erred by finding that the parent could not pursue certain claims relating to the 2016-17 school year as a function of the terms of the settlement agreement.[16]

To the extent that the parent seeks enforcement of or argues that the district breached the September 2016 settlement agreement, Federal and State law and regulations do not confer jurisdiction to review or enforce settlement agreements on IHOs or SROs, whose jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]; see Application of the

[16] The parent frames this issue in her petition by reference to the legal doctrine of standing.

Bd. of Educ., Appeal No. 07-043; but see Application of the Bd. of Educ., Appeal No. 04-068). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that a due process proceeding is "not the proper vehicle to enforce the settlement agreement" (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009]; see A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005]; see also Honeoye Cent. Sch. Dist. v. S.V., 2011 WL 280989, at *3-*5 [W.D.N.Y. Jan. 26, 2011]). In the event that the parent wishes to pursue further action, she may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also, A.R., 407 F.3d at 76, 78 n.13).

Additionally, the IHO held that the parent was barred from reopening issues that were addressed in the September 2016 settlement agreement; however, the IHO also found that the parent's requests for the CPSE to update the student's IEP to identify the student's current placement and develop annual goals were not waived by the settlement agreement (Dist. Ex. L at pp. 3-4). While, the district asserts that, pursuant to the September 2016 settlement agreement, the parent waived her right to file another complaint with respect to the 2016-17 school year, the district did not cross-appeal from the IHO's determination and that determination is final and binding on the parties (34 CFR 300.51[a]; 8 NYCRR 200.5[j][5][v]). However, as discussed further below, the IHO was correct in dismissing the parent's remaining claims related to identifying the student's placement and academic goals on the IEP as being moot.

D. Mootness

Lastly, to the extent that the parent's claims do not relate to the enforcement or allegations of the district's breach of the stipulation of settlement, the parent's claims must be dismissed as moot.

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]; Toth v. New York City Dep't of Educ., 2017 WL 78483, at *9 [E.D.N.Y. Jan. 9, 2017]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X, 2008 WL 4890440, at *12; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; but see Toth, 2017 WL 78483, at *10 [finding the matter moot where the student had been receiving at-home therapy pursuant to resolution agreements, which was "the very compensatory education that [the parent] sought"]). Additionally, 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, 484 U.S. at 318-23; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038).

In this case, there is no longer a live controversy relating to the parties' dispute regarding the district's IEP for the student for the 2016-17 school year. As described above, in her due process complaint notice, the parent requested that the district be required to create an IEP reflecting the student's current placement and including annual goals addressing academic skills (Dist. Ex. A at p. 17). The CPSE already convened in March 2017 and developed an IEP for the student which included the amendments sought by the parent in the due process complaint notice; specifically, the March 2017 CPSE recommended that the student attend an 18:2+2 integrated class placement in an approved preschool special education program and receive related services of OT, PT, and speech-language therapy (Additional Dist. Ex. D at pp. 5, 15, 17). Moreover, the CPSE should have already convened to revise the student's program and develop a new IEP for the student for the 2017-18 school year, as the summary of the March 2017 IEP indicated an implementation date for the recommended program and services of March 24, 2017 through June 23, 2017 (id. at p. 5). Assuming for the sake of argument that the IHO had determined that the district had denied the student a FAPE for the 2016-17 school year, in this instance, such a failure would have no real effect on the parties since the school year expired and the parent did not seek any relief other than an amendment of the 2016-17 IEP.

On appeal, although the parent requests additional relief in the form of compensatory special education based upon the alleged inappropriate placement and lack of educational goals for over six months, a review of the parent's due process complaint notice shows that this relief was not requested (Dist. Ex. A at p. 17). At the time the parent filed the December 7, 2016 due process complaint notice, the student had been attending the NPS pursuant to the stipulation for approximately three months (see Dist. Ex. C), and the parent was able to identify her concerns with the placement and the lack of educational goals (Dist. Ex. A at pp. 3-4). However, the parent did not request compensatory educational services and only requested amendments to the student's IEP and monetary damages (id. at p. 17). With regard to the parent's request for relief, pursuant to the IDEA, the 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] [emphasis added]; see M.R., 2011 WL 6307563, at *12-*13 [upholding SRO's decision denying an award of compensatory education services based upon the parents' failure to raise such claim for relief in the due process complaint notice]; see also J.M. v. Kingston City Sch. Dist., 2015 WL 7432374, at *15-*16 [N.D.N.Y. Nov. 23, 2015] [dismissing "late-blossoming claim for compensatory education" due to parents' failure to raise such a claim for relief in the due process complaint notice]). Some federal district courts have found the parents' failure to raise a request for compensatory education in their due process complaint notice was, alone, sufficient for dismissing a belatedly asserted request for compensatory education services (see Toth, 2017 WL 78483, at *12-*13; J.M., 2015 WL 7432374, at *15-*16; M.R., 2011 WL 6307563, at *12-*13). Moreover, when the district's motion to dismiss aimed, in part, at the lack of relief requested by the parent within the jurisdiction of the IHO (see Dist. Ex. D at pp. 4-7), the parent could have but chose not to argue in her response that an award of compensatory education was warranted (see Toth, 2017 WL 78483, at *8, *12-*13).

As a final note, the "capable of repetition, yet evading review" 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]). 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). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). 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). 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]). 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). The case at issue does not fall within an exception to the mootness doctrine. It is not reasonable to expect that the parent will challenge another IEP, particularly here, where future IEPs will likely be developed for the student by a CSE rather than a CPSE and, therefore, would set forth a non-preschool specific recommendation.

Based on the foregoing, there is no further relief to grant in this matter as the district has met all of the parent's demands. Accordingly, the parent's claims related to the 2016-17 school year have been rendered moot (V.M., 954 F. Supp. 2d at 119-21; F.O., 899 F. Supp. 2d at 255).

VII. Conclusion

Based on the above, the parent's claims are dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 26, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER