The University of the State of New York

The State Education Department
State Review Officer
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No. 18-057

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 New York City Department of Education

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO), which determined that the parent's claims pertaining to her son's educational program and services as recommended by the respondent's (the district's) Committee on Special Education for the 2017-18 school year were moot. The appeal must be sustained and, for reasons explained more fully below, the matter is remanded back to the IHO for a determination on the merits.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the nature of this decision, a full recitation of the student's educational history is not necessary. Briefly, the student attended a charter school for the second half of the 2010-11 school year (kindergarten), as well as the 2011-12 and 2012-13 school years (first and second grades), and was initially found eligible for special education and, according to the parent, began receiving special education teacher support services during the 2011-12 school year (Tr. pp. 142-44; see Dist. Ex. 3 at pp. 24-26). Subsequently, the student's family relocated, and the student attended a

district public school for the 2013-14 and 2014-15 school years (second grade repeated and third grade) where, according to the parent, he received "some pull-outs, but not much" and, ultimately, a CSE recommended a special class for the student, which was not implemented (Tr. pp. 144-46; see Dist. Ex. 3 at pp. 10-13). The student has attended Lowell, a State-approved nonpublic school, since the 2015-16 school year (fourth grade) at district expense by way of a "Nickerson letter" (Tr. pp. 146-48, 151-53; Dist. Ex. 3 at pp. 5, 8).[1]

A CSE convened on August 1, 2016, to develop an IEP for the student for the 2016-17 school year (fifth grade) (see Parent Ex. E at pp. 1, 12). Having found the student eligible for special education as a student with a learning disability, the August 2016 CSE recommended that the student receive instruction in a 12:1+1 special class in a community school (id. at pp. 1, 7-8, 11-13). The CSE also recommended an FM unit for the student and related services of counseling, occupational therapy (OT), and speech-language therapy (id. at pp. 8, 12). The student attended Lowell during the 2016-17 school year at district expense (see Parent Ex. B; Dist. Ex. 3 at p. 5).

A CSE convened on May 11, 2017, to conduct the student's annual review and to develop an IEP to be implemented as of May 25, 2017 and for the 2017-18 school year (sixth grade) (see Dist. Ex. 1 at pp. 1, 21).[2] Finding that the student remained eligible for special education as a student with a learning disability, the May 2017 CSE recommended that the student attend a 12-month school year program in a 12:1+1 special class placement in .a specialized school, and receive related services of counseling, speech-language therapy, and OT, as well as assistive technology in the form of an FM unit (id. at pp. 1, 16-17, 21-22).[3]

The district sent the parent a prior written notice and a school location letter, both dated June 19, 2017, in which the district summarized the May 2017 CSE's recommendations and

[1] Although not described in the hearing record or in the IHO's decision, a "Nickerson letter" is a remedy for a systemic denial of a free appropriate public education (FAPE) that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision was intended to address those situations in which a student was not evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

[2] The record submitted to the Office of State Review included two additional versions of the May 2017 IEP and a copy of the May 2017 CSE meeting minutes, identified as District Exhibits 5, 6 and 7, respectively; however, these exhibits were not admitted into evidence during the impartial hearing (see Tr. pp. 1-206) and they are not referenced in the IHO Decision or exhibit list (see IHO Decision). Therefore, these exhibits will not be considered and all references to the May 2017 IEP will be to District Exhibit 1.

[3] The student's eligibility for special education programs as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

notified the parent of the particular public school site to which the distr..ict assigned the student to attend for the 2017-18 school year (Dist. Exs. 2; 4; see Dist. Ex. 3 at p. 2).[4]

A. Due Process Complaint Notice

By due process complaint notice, dated June 21, 2017, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year under both the IDEA and Section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (Parent Ex. A at pp. 1, 2). Specifically, the parent asserted that she was denied a meaningful opportunity to participate in the decision-making process concerning the creation of the student's May 2017 IEP when the district representative "ignored the recommendations of [the student's] current teachers, related service providers and Parent" (id. at p. 3). The parent also claimed that the CSE failed to conduct a classroom observation of the student prior to making the determination that the student's current program at Lowell "was too restrictive and no longer necessary" (id. at p. 2-3). Further, the parent alleged that the district representative "refused to recommend a non-public school" based on "the 'least restrictive environment requirement,'" despite "all [CSE] members present and personally familiar with [the student]" agreeing the student needed to be "in a specialized school, Lowell" and that "a change to a less restrictive setting would be detrimental to [the student]" (id. at p. 2). The parent contended that the district representative failed to articulate what factors the CSE used to make its determination (id.). Finally, the parent asserted that she did not receive prior written notice "that properly explain[ed] the CSE['s] actions and inactions" and did not receive a school location letter until June 21, making it impossible for her to tour the assigned public school site and, thereby, denying her the right to meaningfully participate "in the entire decision-making process, including placement" (id. at p. 3).

As relief, the parent requested that the IHO find that: the asserted violations deprived the student of a FAPE for the 2017-18 school year under both the IDEA and section 504; the asserted violations significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE and caused a deprivation of educational benefits; Lowell was an appropriate unilateral placement for the student; and equitable considerations weighed in favor of the parent's request for tuition reimbursement (Parent Ex. A at p. 3). The parent also requested that the district be required to: reimburse her for the cost of the student's tuition at Lowell for the 2017-18 school year; reconvene a CSE meeting and amend the student's IEP to reflect placement at Lowell, effective upon the date of the IHO's decision; and provide "appropriate bussing for [the student] to and from Lowell" (id. at pp. 3-4).

[4] E-mail correspondence dated June 20, 2017 indicated that the district had revised the student's school location assignment; however, the attachment to the e-mail consisted of a prior written notice and school location letter for a different student (Parent Ex. H at pp. 1-8). The parent notified the district of the apparent mistake on June 21, 2017 (id. at p. 1). According to the district's computerized special education tracking system, the district sent the parent an additional prior written notice on June 21, 2017 (see Dist. Ex. 3 at p. 2).

B. Subsequent Facts and Impartial Hearing Officer Decision

An impartial hearing convened on June 28, 2017 and concluded on December 8, 2017, after five days of proceedings (Tr. pp. 1-206).[5]

The student continued to attend Lowell at district expense during the 2017-18 school year by way of the issuance of an August 1, 2017 Nickerson letter (Tr. pp. 192-93; see Tr. pp. 22-23; Dist. Ex. 3 at p. 1).[6]

In a decision dated April 16, 2018, the IHO dismissed the parent's due process complaint notice on mootness grounds (IHO Decision at pp. 10-12). In so doing, the IHO determined that, because the student was attending Lowell pursuant to a district-issued Nickerson letter for the duration of the 2017-18 school year, the parent already received the relief she requested—that is, placement at Lowell—and there was no longer a live controversy (id. at pp. 10-11). In considering the parent's assertion that the matter fell under the "capable of repetition, yet evading review" exception to the mootness doctrine, the IHO observed that the May 2017 IEP recommended a different program than that recommended for the student for earlier school years (id. at p. 11). The IHO also noted that, although Nickerson letters were issued for three consecutive school years, the district funded the student's attendance at Lowell for the 2016-17 and 2017-18 school years because it could not implement the student's IEPs, whereas the district asserted that it could implement the May 2017 IEP at the public school site to which the district assigned the student to attend for the 2017-18 school year (id.). The IHO explained that "[t]he parent's claim . . . [wa]s grounded upon CSE action/inaction in connection with the 2017-2018 [school year] review" and that, should a similar IEP be created for the 2018-19 school year, the parent could avail herself of the impartial hearing process, including pendency (id.). Therefore, the IHO determined there was no reasonable expectation of there being a recurring action which would otherwise preclude a mootness finding (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding her claims moot. She contends that there was a live controversy at all stages of the proceeding as she has not received all of the relief requested, specifically asserting that the district did not amend the student's IEP to reflect placement at Lowell. Additionally, the parent asserts that the IHO erred in failing to apply an exception to the mootness doctrine, alleging that her claims related to the May 2017 IEP are capable of repletion yet evading review. The parent also appeals the IHO's failure to render

[5] The IHO originally assigned to this matter was removed on December 25, 2017, after completion of all testimony and the introduction of evidence (see Dec. 12, 2017 Letter to New York City Dep't of Educ. Impartial Hearing Office). The IHO who rendered the written decision in this matter was appointed on January 3, 2018, and, during a January 17, 2018 telephone conference, the IHO was informed by the parties that the evidentiary phase of the impartial hearing had concluded and that the parties wished to submit closing memoranda (IHO Decision at p. 2; see Jan. 17, 2018 Pre-Hr'g Conference Summ).

[6] According to the evidence in the hearing record, the district initially issued a Nickerson letter for the student's 2017-18 school year on June 22, 2017, which was "recreated" on August 1, 2017 (Tr. pp. 192-93; Dist. Ex. 3 at p. 1).

decisions based on claims contained within her due process complaint notice, including, among other things, alleged procedural and substantive errors with the May 2017 CSE and resultant IEP, the appropriateness of Lowell as a unilateral placement, and equitable considerations. The parent requests that the matter be remanded to the IHO for a determination on the merits.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Thereafter, the district argues that the parent's request for review should be dismissed for failure to comply with the regulations governing practice before the Office of State Review.

In a reply, the parent responds to the district's procedural allegations. The parent also asserts that the district's answer did not comply with the regulations and, as such, the district's answer should be stricken to the extent of such noncompliance.

V. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with the regulatory requirements governing practice before the Office of State Review (8 NYCRR 279.8[c][1]-[3]). Specifically, the district contends that, although the request for review lists issues, it does not set forth "the grounds for reversal or modification" or "identify 'the precise rulings, failures to rule, or refusals to rule presented for review.'" The district also contends that the request for review does not include citations to the hearing record.

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders 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" (id.).

State regulation also requires that a request for review shall set forth:

> (1) the specific relief sought 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 rulings, 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]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 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]).

The district correctly contends that the parent's request for review tersely lists the issues presented for review and does not detail the asserted grounds for reversal or include citations to the hearing record. However, as the scope of the appeal is primarily directed at the IHO's finding that the matter was moot and requests a remand for a determination on the merits, the lack of a detailed description of "the grounds for reversal or modification to be advanced" did not, in this instance, prevent the district from being able to formulate an answer to the issues raised on appeal and there is no indication that the district suffered any prejudice (see Application of a Student with a Disability; Appeal No. 18-053; Application of a Student with a Disability; Appeal No. 18-012; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015).

In a reply, the parent asserts that the district improperly included statements of fact and arguments in its answer to the request for review because facts and arguments should be addressed in a memorandum of law. Pursuant to regulation a memorandum of law must set forth: "(1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and (2) a statement of the party's arguments, including the party's contentions regarding the decision of the [IHO] and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal" (8 NYCRR 279.8[d]). While the regulations encourage parties to include a statement of facts and make legal arguments in their memoranda of law in accordance with standard legal practice, a party is not required to submit a memorandum of law. Accordingly, the inclusion of facts and legal argument in a request for review or an answer does not warrant the rejection of the pleading.

2. Additional Evidence

In her memorandum of law, the parent asserts that a CSE convened on May 9, 2018 to develop an IEP for the student, and that the recommendation contained in the May 2018 IEP establishes that the parent's claims relating to the 2017-18 school year are not moot.[7] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the

[7] While the memorandum of law references "attached post-hearing exhibit," no such exhibit was attached to the parent's submission to the Office of State Review. Accordingly, the parent was directed to submit the missing document and the parties were given an opportunity to state their positions regarding whether the IEP should be considered as additional evidence on appeal.

impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Here, the student's May 2018 IEP was not available at the time of the impartial hearing and is necessary in order to render a decision. That is, as discussed below, the Second Circuit has found that a later-developed IEP, which did not recommend a service requested by a parent in a due process complaint notice, is relevant to determining whether a claim is "capable of repetition, yet evading review" (Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]). Accordingly, the May 2018 IEP is accepted as additional evidence for that purpose.[8]

B. Mootness

Turning to the primary issue on appeal, a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth, 720 Fed. App'x at 51; 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. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; 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; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Furthermore, while the parent claims that the district's failure to admit that it did not offer the student a FAPE is "the crux of the case," a party's "unwillingness to admit liability is insufficient, standing alone, to make [a] case a live controversy," where the party has otherwise agreed to fully resolve the dispute (McCauley v. Trans Union, L.L.C., 402 F.3d 340, 341-42 [2d Cir. 2005]). 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]; see also Toth, 720 Fed. App'x at 51).

As determined by the IHO, the student attended Lowell at district expense pursuant to a Nickerson letter for the 2017-18 school year (IHO Decision at p. 10). The parent contends that the matter is still "live" because the IHO did not address her request that the CSE reconvene and amend the student's IEP to reflect placement at Lowell (see Parent Ex. A). While this claim may

[8] For purposes of convenience, the parent's designation of the document as a "post-hearing exhibit" (Post-Hr'g Ex.) will be used in this decision to refer to the May 2018 IEP.

have presented a live controversy at the time of the IHO's decision, which was issued prior to the conclusion of the 2017-18 school year, at this time, the 2017-18 school year has passed and any relief related to a change in placement for the 2017-18 school year would no longer afford any meaningful relief (see V.M., 954 F. Supp. 2d at 121 [finding that, after the conclusion of the school year to which a challenged IEP applied, the award of a new IEP would not offer meaningful relief]).

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). 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]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15; see also L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 102 [2d Cir. Jan. 19, 2017]). 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; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]).

In this proceeding, the parent asserted, among other things, that the May 2017 CSE did not "recommend a non-public school" based on "the 'least restrictive environment requirement,'" despite "all [CSE] members present and personally familiar with [the student]" agreeing the student needed to be "in a specialized school, Lowell," and that changing the student's placement "to a less restrictive setting would be detrimental to [the student] given his emotional fragility and academic deficits" (Parent Ex. A at p. 2).

The district recommended a 12:1+1 special class in a community school for the 2016-17 school year (Parent Ex. E at pp. 7-8, 11) and a 12:1+1 special class in a specialized school for the 2017-18 school year (Dist. Ex. 1 at pp. 16, 20).[9] Accordingly, there is some indication that the

[9] Additionally, according to the evidence in the hearing record, in January 2015, a CSE recommended a 12:1 special class for the student (see Tr. p. 145-46; Dist. Ex. 3 at p. 10).

parent's claim may have repeated itself in the past in that these CSEs recommended either district community or specialized schools for the student. More significantly, a review of the May 2018 IEP shows that the CSE recommended that the student be placed in a 12:1+1 special class in a district community school (Post-Hr'g Ex. at pp. 13, 18), thus showing that the district's conduct about which the parent complains—i.e., the CSE recommending that the student be placed at a district school, rather than the nonpublic school program—is not speculative, and is "capable of repetition, yet evading review" (see Toth, 720 Fed. App'x at 51; see also Application of a Student with a Disability, Appeal No. 17-103). While the IHO correctly noted that the "challenged IEP recommended a different program than previously" (IHO Decision at p. 12), the changes did not pertain to the parent's allegations as articulated in her due process complaint notice. Likewise, the IHO's observation relating to the district's implementation of the student's IEPs—i.e., the district defended its ability to implement the student's May 2017, whereas the district could not implement the student's program for the 2015-16 and 2016-17 school years at district public schools—does not resolve the parent's complaint in the present matter.[10]

Although it is not clear what relief may be afforded the parent if it is determined that the March 2016 IEP should have recommended placement in a nonpublic school—as the student attended Lowell at district expense during the 2017-18 school year and IEPs are to be reviewed at least annually and revised to reflect the student's progress and anticipated needs (20 U.S.C. §1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f])—the parent's claims related to the district's recommendation should not have been dismissed as moot.

Having found that the IHO erred in finding the matter moot, I considered reaching the merits of the parent's claims; however, the parent specifically requested that the matter be remanded to an IHO and the parent should be extended the benefit of the impartial hearing process as envisioned by the IDEA and State law. Accordingly, this matter is remanded for the IHO to render a determination on the merits (see 8 NYCRR 279.10[c]). As the IHO who presided over the impartial hearing did not and will not be rendering a decision in this matter, it is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parent's claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, to simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

VI. Conclusion

Based on the above, the IHO's dismissal of the case as moot was in error and the matter must be remanded for a determination on the merits of the parent's claims.

[10] Moreover, while a decision in this matter will not affect the district's obligation to pay the student's tuition for the 2017-18 school year, it could affect the student's pendency placement going forward. While the IHO who presided over the impartial hearing indicated that she intended to order the student's placement at Lowell as the student's stay-put placement for the pendency of the proceedings, the parties did not receive an order from that IHO (Tr. pp. 14-15, 28-29; see IHO Decision at p. 2). Accordingly, contrary to the district's contention, it is not clear that the student's pendency placement was resolved during the course of the impartial hearing.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 16, 2018 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for a determination on the merits of the parent's claims in accordance with this decision; and

IT IS FURTHER ORDERED that, in the event the IHO who issued the April 16, 2018 decision is not available, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
June 28, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER