The University of the State of New York

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

No. 19-102

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tamara Roff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Amy Fellenbaum, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their due process complaint notice. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

The student was attending 12th grade at a State-supported nonpublic school during the 2018-19 school year and was reportedly "on track for her Regents Diploma" and "to graduate in June 2019" upon the completion of "all [of] her classes" (Parent Ex. B at pp. 1, 12-13). As reported in an IEP dated March 1, 2019, the student achieved the following Regents examination scores: Biology, 80; English, 66; Global, 80; Integrated Algebra, 65; and U.S. History, 84 (id. at p. 1). The March 2019 IEP also reflected the following grades the student had achieved based upon a 2017-18 transcript from the State-supported nonpublic school: English 11, 95; Environmental Science, 89; Personal Finance, 84; physical education, 95; and U.S. History and Government, 90 (id.). In addition, the IEP reflected that the student received a "Pass" in both "Independent Living 11" and "Pop culture through the decades" (id.).

According to the March 2019 IEP, the student—eligible for special education and related services as a student with an orthopedic impairment—had "met several of her transitional goals," which included the use of a debit card (Parent Ex. B at p. 2).[1] At that time, the student indicated her interest in "pursing a career in law, special education law or special education advocacy" and that "her goal [was] to go to [a] four year college and get her Bachelors" degree (id.). In addition, the student indicated that she was "taking [an] economics class and [an] independent skills class to work on her resume and [was] looking at career and college options for herself" (id.). As reported in the IEP, the student did "not want to put herself in a situation where it [was] hard for her, therefore she [was] hoping that she c[ould] get in to [sic] a program close to home where she ha[d] support services"; as reflected in the March 2019 IEP, the nonpublic school the student attended "indicated that OPWDD w[ould] meet with parents" (id.).[2] According to the IEP, the "[p]arent and school ha[d] been unable to meet for [a] transition meeting," but at that time, it was "determined that the school w[ould] coordinate and set up a meeting [with] the parents to discuss services that [the student] c[ould] access post[-]graduation" (id.).

The March 2019 IEP included measurable postsecondary goals and a coordinated set of transition activities (see Parent Ex. B at pp. 4, 10-11). With respect to the postsecondary goals, the March 2019 IEP reflected that the student planned to "attend a four year college to pursue [a] career in special education advocacy/law" and that after college, the student's goal was to "be competitively employed in the law field" (id. at p. 4). The student also had a goal to "live independently" after high school (id.). In order to achieve these goals, the March 2019 IEP reflected the following as the student's transition needs: the student would "develop her independent living skills and self[-]advocacy skills"; the student would "also work on her time management and organizational skills"; and the student would "utilize her independent living course to lea[rn] pre-employment skills regarding money management, travel training and adult services such as ACCES-VR, OPWDD and SSI" (id.).[3] Additionally, the March 2019 IEP noted that the student needed to complete the "necessary coursework required for graduation with a Regents high school diploma" as another transition need (id.).

With regard to the coordinated set of transition activities, the March 2019 IEP identified activities required to facilitate the student's movement from school to post-school life in the areas of instruction, related services, community experiences, development of employment and other post-school adult living objectives, acquisition of daily living skills, and a functional vocational assessment (see Parent Ex. B at pp. 10-11). The March 2019 IEP also identified the school district or agency responsible for each service or activity listed within the IEP (id.).

[1] The student's eligibility for special education programs and related services as a student with an orthopedic impairment is not in dispute (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

[2] Although not explained in the hearing record, "OPWDD" typically refers to the New York State Office for People with Developmental Disabilities (see generally https://www.opwdd.ny.gov).

[3] Although not explained in the hearing record, "ACCES-VR" typically refers to the New York State Education Department Office of Adult Career and Continuing Education Services-Vocational Rehabilitation (see http://www.acces.nysed.gov/vr/). Similarly, "SSI" typically refers to Supplemental Security Income (https://www.ssa.gov/ssi/).

A. Due Process Complaint Notice

By due process complaint notice dated June 7, 2019, the parents alleged that the district failed to conduct "appropriate, necessary, and sufficient evaluation[s]" (Parent Ex. A at p. 1). In addition, the parents contended that the district failed to provide an "appropriate transition plan," failed to properly address the student's "vision needs," and failed to provide the student with a free appropriate public education (FAPE) (id.). The parents also alleged that the district failed to provide "adequate prior written notice," failed to ensure the parents' "appropriate participation" during the "educational planning process," and based its "decisions" on "policy" rather than on the student's needs (id.).

Next, the parents indicated that, "[d]espite repeated requests" since "spring of 2017," the district failed to conduct a "functional vision assessment" to determine the student's needs and "to determine appropriate accommodations, training, and services" (Parent Ex. A at p. 2). As a result of the alleged failure to conduct this assessment, the parents further alleged that the student had not been provided with an "appropriate transition plan and services to ensure [a] successful transition to adulthood and postsecondary school" (id.). In addition, the parents alleged, "upon information and belief," the student was not provided with the "appropriate equipment and training necessary for transition" due to the "lack of an appropriate functional vision assessment and related assistive technology evaluation" (id.). As a final point, the parents alleged that the district failed to provide the student with "mandated vision therapy services for the past two years" (id.).[4]

As relief for the alleged violations, the parents requested a "[c]ontinuation of [the student's] last agreed upon IEP dated March 1, 2019" until the functional vision assessment, a "related" assistive technology evaluation," and "any recommended training" were completed at the student's then-current State-supported nonpublic school (Parent Ex. A at p. 2). In addition, the parents requested a declaratory finding that the district failed to offer the student a FAPE (id.).

B. Facts Post-Dating the Due Process Complaint Notice

On June 20, 2019, the student graduated from the State-supported nonpublic school (see Tr. p. 20; Dist. Ex. 5 at p. 1).

C. Impartial Hearing

On June 24, 2019, the parties met for an impartial hearing, and presented evidence with respect to the student's pendency (stay-put) placement and services (see Tr. pp. 1-16; Parent Exs. A-C). The parents' attorney explained the basis for student's pendency placement and services as set forth in a combination of both the March 2019 IEP—as the student's "last agreed upon IEP"—

[4] The parents did not specify in the due process complaint notice which school years their allegations pertained to or for which school years the district allegedly failed to offer the student a FAPE (see generally Parent Ex. A). Evidence in the hearing record does reveal, however, that the parents had previously filed a due process complaint notice, as well as an amended due process complaint notice dated March 8, 2017, which alleged that the district had failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (see Parent Ex. C at pp. 3, 12). That same evidence reflected that the parents had also alleged that the district, in a previous impartial hearing, failed to offer the student a FAPE for the 2014-15 school year (id. at pp. 3-4).

and a portion of an unappealed IHO decision, dated August 8, 2017 (August 2017 IHO decision), which awarded services to the student on a 52-week basis (Tr. pp. 1, 3-6; see generally Parent Exs. B-C).[5] According to the parents' attorney, the August 2017 IHO decision required the district to develop an IEP that was "compliant" with that decision, which the parent's attorney stated resulted in the March 2019 IEP (see Tr. p. 6). The parents' attorney clarified, however, that the only detail missing from the March 2019 IEP was the finding in the August 2017 IHO decision that the special education program must be delivered to the student on a 52-week basis (see Tr. pp. 6-7, 8-11). In addition, the parents' attorney stated that the student "would graduate unless [they] assert[ed] pendency provisions with the IDEA," and thus, requested "pendency so that there could be a stay" of the student's graduation (Tr. pp. 6-7).

At the first impartial hearing date, the parents' attorney also clarified that the functional vision assessment had been completed, but the parents had not received a report from the evaluation (Tr. pp. 11-12). When asked whether an assistive technology evaluation had similarly been conducted, the parents' attorney delineated that the assistive technology evaluation would "be a result of the functional vision assessment" and any "recommendations" made within the corresponding evaluation report for an assistive technology evaluation (Tr. p. 12). In addition, and according to the parents' attorney, "any recommended training" would then necessarily arise from any assistive technology evaluation that was recommended in the functional vision assessment report (Tr. pp. 11-13). Notwithstanding this information, the IHO reminded the parties that the evaluations—described by the parents' counsel as the "final resolution" sought by the parents—would not be made part of the pendency decision, which both parties acknowledged (Tr. pp. 13-15).

In an interim decision dated June 24, 2019, the IHO ordered the district to provide the following as the student's pendency placement and services: continued "funding for the student's special education program" as reflected in the last agreed-upon IEP, dated March 2019, and for the provision of such services to the student on a 52-week basis (as per the August 2017 IHO decision) (Interim IHO Decision at p. 3; see generally Parent Exs. B-C).

On August 8, 2019, the parties resumed the impartial hearing (see Tr. p. 17). On that date, the district moved to dismiss the parents' due process complaint notice based on the fact that the student graduated on June 20, 2019 (Tr. pp. 17, 19-20; see generally Dist. Ex. 5). The district's representative stated that "ample case law [] support[ed] the District's position that the child [was] no longer eligible to receive FAPE upon the graduation, and that pendency which flow[ed] from the guarantee of FAPE, [was] rendered moot" (Tr. p. 20). As a result, the district representative argued that the "case should be dismissed" (id.).

The IHO provided the parents' attorney with an opportunity to respond to the district's motion to dismiss at the August 8, 2019 impartial hearing (see Tr. pp. 17, 20-25). The parents'

[5] According to the August 2017 IHO decision, the IHO found that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (see Parent Ex. A at pp. 3, 12). As relief, the IHO ordered the district to provide the following as compensatory educational services: 600 hours of special education services to be "held in a bank and used by student based on available time until used up," "40 hours of physical therapy," "20 hours of occupational therapy," and "90 hours of vision therapy" (id. at p. 12). The IHO also ordered a CSE to meet "to effectuate this placement or IEP with these services and accommodations asap" (id.).

attorney initially requested an opportunity to research the legal authority relied on by the district (see Tr. pp. 20-21). Briefly, however, the parents' attorney asserted that the issues briefed in the motion to dismiss required "litigation," noting that "factual issues surrounding this [s]tudent's graduation and surrounding the [s]tudent's pendency program" existed (Tr. p. 21). With respect to the district's assertion that the parents' case was moot, the parents' attorney acknowledged that the district had conducted a "vision evaluation" of the student, but she also acknowledged that the parents had not yet received a copy of the resulting evaluation report (Tr. p. 23). The parents' attorney also expressed concern that a dismissal of the case or a mootness finding would extinguish the student's pendency order and the student would no longer be entitled to the remaining evaluations requested—namely, an assistive technology evaluation and any "training needed" (Tr. p. 23).[6]

After hearing from the parents' attorney on this issue, the IHO stated her intention to provide the parents' attorney with an opportunity to respond in writing to the district's motion to dismiss by August 23, 2019, and the IHO scheduled another impartial hearing date for September 5, 2019 to provide the parties with a decision on the motion to dismiss (see Tr. pp. 23-29).

In the district's motion papers—and as briefly explained at the impartial hearing—the district contended that the student's graduation terminated her eligibility to receive special education programs and related services and "negated [its] obligation thereafter to offer the student a [FAPE]" (Dist. Ex. 5 at p. 1). The district similarly argued that the student was no longer entitled to the protections of the pendency provisions as a result of her graduation and the termination of eligibility under the IDEA (id. at pp. 1-2). Therefore, under the facts of the present case, the district argued that the student's right to pendency services ordered by the IHO "should end on 6/30/19 when the student became ineligible after graduating with a Regents degree" (id. at p. 2). The district also noted, however, that under a different set of facts—namely, when "the parents [were] challenging the graduation itself"—a student remained entitled to receive pendency services (id.). Next, the district argued that "[a]ssuming arguendo" that the parents were "challenging the graduation," then the remedy available to the student would be similar to a student who aged-out of eligibility under the IDEA, apparently referring to compensatory education (id. at pp. 2-3). According to the district's motion papers, the parents had not requested compensatory educational services; however, the district further noted that if the parents "tr[ied] to suggest that the evaluations should be considered comp[ensatory] ed[ucational]" services, then the IHO "would need to find a gross violation of the IDEA during the student's period of eligibility" (id.). The district also noted that "'it [was] a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services'" (id. at p. 3).

Notwithstanding the preceding arguments, the district then argued that the first question to resolve was whether the parents' case was moot (see Dist. Ex. 5 at p. 3). In support of this assertion, the district indicated that the vision evaluation requested by the parents as relief had been

[6] According to the parents' attorney, the district stopped providing the student's pendency services and had not issued related services authorizations (RSAs) to obtain those services, and she requested that the IHO remind the district of its continuing obligations under pendency until such time as the IHO issued a determination regarding the motion to dismiss (see Tr. pp. 24-25). The IHO agreed with the parents' attorney and reminded the district that the "pendency order [was] continuing" and therefore, the district must fulfill its obligations ordered via the interim decision on pendency, dated June 24, 2019 (Tr. p. 25).

completed, and the "pendency order allow[ed] for any needed assessments" (id.). Therefore, if the "assistive technology evaluation" had similarly been completed, then "this case may be moot" (id.). In summary, the district requested that the IHO dismiss the parents' due process complaint notice as moot since the student graduated and the parents were not challenging the graduation (id.).

In their written response to the district's motion to dismiss, the parents requested that the IHO deny the motion because the student was "entitled to [a] continuation of her current services during the 'pendency' of the current litigation" (Parent Ex. D at p. 1). The parents noted that the instant proceeding involved "matters of fact as well as law"—and pointed specifically to the following raised in the due process complaint notice: the district failed to offer the student a FAPE; the district "failed to conduct appropriate, necessary, and sufficient evaluations"; the district failed to "provide an appropriate transition plan"; the district failed to "properly address [the student's] vision needs"; the district failed to "provide adequate prior written notice"; the district failed to "ensure the appropriate participation of the parent throughout the educational planning process"; the district failed to "base decisions on [the student's] needs, rather than policy"; and the district failed to "implement/provide recommended vision therapy" (id.). The parents asserted that because "graduation constitute[d] a change in placement," the district was "preclude[d] . . . from removing a [student] with a disability from their last agreed upon placement" (id. [internal citations omitted]).

Next, the parents addressed the district's argument in favor of dismissing the due process complaint notice because the student's graduation "terminated the District's duty to provide [the student] with a FAPE" (Parent Ex. D at p. 2). Here, the parents contended that because the due process complaint notice was filed prior to the district's "attempts to graduate [the student]," the the student's "graduation [was] stayed" (id. [emphasis added]). The parents noted that the district failed to cite to any legal support or any relevant arguments to support its position (id.). The parents also sought to distinguish the facts of the present case with the caselaw the district cited to support its argument that the student was no longer entitled to pendency (id. [internal citations omitted]). The parents assert that in contrast to the district's authority regarding violations that happened after the school year in which the student had graduated, the district failed to "conduct the evaluations for years after they were requested, [but] prior to [the student's] graduation" (id. [emphasis in original]). As a final point, the parents noted "upon information and belief, there [was] no dispute that these evaluations [and resultant training] [were] appropriate and necessary to have completed [the student's] transition plan, and therefore, exit summary" (id.).

Next, the parents turned to the district's assertion that "a student['s] loss of pendency entitlement due to aging out [was] analogous to the District's graduation of [the student]" (Parent Ex. D at pp. 2-3). The parents argued that the district's attempt to apply this standard to the student in this case was "baseless," because the student had not aged-out; and instead, the student's graduation in this case, and under well settled precedent, constituted a change in placement that "trigger[ed] the stay put provision of the IDEA" (id. at p. 2). In addition, the parents asserted that although the district admitted that a student may continue to receive pendency when "parents challenge the student's graduation," the parents' did not agree with the district's position that a challenge to graduation constituted the "only circumstance where a due process complaint c[ould] 'stay' a placement" and found fault with the caselaw cited by the district in support of its position (id. at p. 3). Moreover, the parents asserted that the district "assume[d], erroneously, that [the student's] parents [were] not disputing her graduation" and that the "team agreed" the student

required "vision and assistive technology assessments prior to her graduation" (id.). The parents then contended that the district's decision to "graduate [the student] without these assessments, after" the parents filed the due process complaint notice, "certainly now create[d] a challenge to [the student's] graduation" (id. [emphasis in original]). The parents also noted that the district could have resolved the entire matter but "no resolution meeting was even offered" (id.).

Next, the parents challenged the district's argument that the student was not entitled to an award of compensatory educational services because the district's failure to offer a FAPE did not constitute a "'gross violation'" (Parent Ex. D at p. 3). The parents argued that, contrary to the district's position, the gross violation standard did not apply in this case because the student had not yet aged-out of the IDEA protections (id.). However, even if the gross violation standard applied, the parents asserted that an impartial hearing was needed to determine whether the district committed a gross violation, and furthermore, that the need for such impartial hearing triggered the "pendency provisions of the IDEA, and [were] not cause for dismissing the case" (id.).

As a final point, the parents argued that although the district completed the vision evaluation of the student and the "Order on Pendency order[ed] the District to conduct the assistive technology assessments," the district's assertion that these facts rendered the student's case as moot must fail (Parent Ex. D at p. 4). In support of their argument, the parents contended that the pendency order was "not a final order and therefore, [was] not active once a case [was] dismissed" (id.). Additionally, the parents argued that the vision assessment report had not yet been provided to the parents, the district had not completed the assistive technology evaluation, and the district's argument "ignore[d] the requested remedy of training required on any recommended devices" (id.). The parents further argued that in asserting that the case was moot, the district "admit[ted] that the pendency order would allow for the 'needed assessments,'" thereby admitting that the "assessments [were] 'needed,' yet continue[d] to drag its feet in completing them" (id.).

In closing, the parents requested that the IHO deny the district's motion to dismiss, noting that a dismissal would "reward the District's inequitable actions of delaying needed and agreed upon evaluations, only to then graduate [the student] and claim it's too late to complete them" (Parent Ex. D at p. 4).

D. Impartial Hearing Officer Decision

On September 5, 2019, the parties returned to the impartial hearing, which concluded on that day (see Tr. pp. 31-42). In a decision also dated September 5, 2019—and explained to the parties at the impartial hearing—the IHO granted the district's motion to dismiss the parents' due process complaint notice (compare Tr. pp. 31-42, with IHO Ex. I at pp. 1-4). After briefly reciting the procedural background of the case in the decision, the IHO addressed the issues raised in the district's motion to dismiss (see IHO Ex. I at pp. 1-2). Upon review of the legal authority presented in support of each party's contentions, the IHO rejected the parents' assertions that the filing of the due process complaint notice prior to the student's graduation acted to "'stay'" the student's graduation and "allow[ed] [the student] FAPE entitlements post-graduation" (id. at p. 2). While acknowledging that a student's graduation may, under particular facts and circumstances, preclude a district from effectuating a change in the student's placement through graduation, the IHO found that such was not the case presented in this matter (id. at pp. 2-3). The IHO based this conclusion on the following findings: the student, when compared to the students in the caselaw presented by

the parents' attorney, was "on target" both "academically and emotionally"; the parents had not challenged the student's graduation; contrary to the parents' contention, the filing of a due process complaint notice prior to a student's graduation did not automatically constitute a challenge to the student's graduation; and finally, the parents' due process complaint notice arose as a result of the district's alleged failure to conduct a "functional vision evaluation" of the student and to provide an "appropriate transition plan" to the student (id.). Consequently, the IHO determined that the student graduated with a Regents diploma and was no longer eligible to receive a FAPE and dismissed the parents' due process complaint notice (id. at p. 3).

IV. Appeal for State-Level Review

The parents appeal, arguing overall that the IHO erred in granting the district's motion to dismiss the due process complaint notice. As relief, the parents seek to reverse the IHO's decision dismissing the due process complaint notice and to find that the pendency provisions of the IDEA apply to the case and continue to entitle the student to receive the pendency placement and services set forth in the IHO's interim decision, dated June 24, 2019. In addition, the parents seek to remand the case back to the IHO for further consideration on the merits.

In an answer, the district responds to the parents' allegations, generally argues to uphold the IHO's decision in its entirety, and encloses additional documents for consideration. Overall, the district seeks to dismiss the parents' appeal or, if necessary, remand the matter for further proceedings.

In a reply, the parents respond to the "defenses" raised in the district's answer. Specifically, the parents argue that, contrary to the district's representations, the four documents attached to the answer were not entered into the hearing record as evidence at the impartial hearing. In addition, the parents object to the consideration of all four documents on appeal.

V. Discussion

A. Preliminary Matters—Additional Evidence

Consistent with State regulations, the district submitted a certified copy of the hearing record to the Office of State Review (see 8 NYCRR 279.9). Upon receipt and a preliminary review of the hearing record submitted, the Office of State Review discovered discrepancies, and by letter dated October 24, 2019, requested clarification from the district as to those discrepancies described in the letter.[7,8] One of the discrepancies highlighted for clarification involved four documents—

[7] The Office of State Review transmitted the October 24, 2019 letter to the district via facsimile and regular mail on October 24, 2019; however, because the Office of State Review did not receive any confirmation from the district of its receipt, the October 24, 2019 letter was retransmitted to the district via facsimile on October 25, 2019. On October 25, 2019, the Office of State Review received a telephone call from the district to confirm it received the letter.

[8] The IHO in this case did not attach an exhibit list to the decision in this case (see generally IHO Decision). The IHO is reminded that State regulation requires the IHO to "attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]).

identified and submitted with the certified hearing record as district exhibits 1, 2, 3, and 4—received by the Office of State Review. In particular, the Office of State Review asked the district to clarify whether, in fact, district exhibits 1, 2, 3, and 4 had been entered into evidence at the impartial hearing because, although the district submitted these four documents as part of the certified hearing record, a review of the exhibit list attached to the district exhibits reflected that these four documents had only been marked for "ID" (i.e., identification only) by the IHO. It was also noted in the letter to the district that clarification was needed with respect to these four documents because it appeared that the IHO, in the decision, cited to at least one of the four documents in question (see IHO Decision at p. 2, citing to "([District] Exhibit 3)" [referring to the student's "official transcript"]).

Prior to receiving clarification of the hearing record, the district filed its answer—dated October 24, 2019 and received on October 25, 2019—with the Office of State Review, affirmatively asserting that all four documents (i.e., district exhibits 1, 2, 3, and 4) had been entered into the hearing record as evidence even though the IHO marked the same four documents for identification only (see Answer ¶ 5; Answer Exs. 1-4). Alternatively, the district contends in the answer that if the SRO concludes that the four enclosed documents were not fully entered into the hearing record, then the SRO should consider the documents because they were "relevant to the issues presented herein" and otherwise "'were or should have been included as part of the hearing record . . . and, therefore, do not represent additional evidence presented for the first time on appeal'" (Answer ¶ 5).[9] On November 1, 2019, the Office of State Review received an amended certification of the hearing record from the district, which clarified the discrepancies noted in the October 24, 2019 letter. According to the amended certification—and contrary to at least some of the information represented in its answer—the district affirmatively asserted that the IHO did not enter district exhibits 1, 2, 3, and 4 into the hearing record as evidence.

Relying upon the amended certification of the hearing record and an independent review of the hearing record, it is initially determined that district exhibits 1, 2, 3, and 4 were not fully entered into the hearing record as evidence at the impartial hearing. Consequently, the district's first argument that the documents had already been made part of the hearing record at the impartial hearing is without merit and must be dismissed.

The district's alternative argument—that the SRO accept and consider these four documents as "relevant to the issues presented herein" and because they comprise "documents that 'were or should have been included as part of the hearing record . . . and, therefore, do not represent additional evidence presented for the first time on appeal'"—obliquely references State regulation (by pointing to a decision in another State-level appeal) as a basis for this argument (Answer ¶ 5). The State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "the due process complaint notice and any response to the [due process] complaint,"

[9] Although the October 24, 2019 letter from the Office of State Review was directed to the attention of the same attorney who executed the district's answer and the answer addresses some of the concerns raised in the letter, seeking clarification about these specific district exhibits the district's answer did not mention the letter or otherwise indicate that the attorney's representations about the district's exhibits set forth in the answer were in response to that letter (see Answer ¶ 5). It does not appear that as of October 24, 2019, when the attorney for the district executed and served the answer, she was in possession of the October 24, 2019 letter from the Office of State Review, which was resent on October 25, 2019 due to the lack of a fax confirmation.

"all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order," and "any other documentation as may be otherwise required by this section" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a]-[c], [e]-[f]). However, other than making this reference to State regulation, the district asserts no further argument regarding why these four documents submitted with its answer fall within one or more of the regulatory categories in order to be considered part of the hearing record (see Answer ¶ 5).

The parents, in response, object to the admission and consideration of district exhibits 1, 2, 3, and 4 (see generally Reply). First, the parents contend that district exhibits 1, 2, 3, and 4 do not fall within the regulatory categories cited above with respect to what comprises the hearing record. Second, the parents contend that the district's argument to enter the documents into evidence ignores the fact that, at the impartial hearing, the parents' attorney objected to the district entering the four documents into evidence because the district failed to disclose the documents in a timely manner consistent with the five-day business rule.[10] Additionally, the parents assert that the district attempts to submit these documents for consideration on appeal in order to support its argument that the district offered the student a FAPE and allowed her to graduate, which, according to the parents, requires additional fact-finding and litigation, and, without remanding for this purpose, deprives them of due process.[11] Finally, the parents argue that because the district failed to enter exhibits 1, 2, 3, and 4 into evidence at the impartial hearing, the documents constitute additional evidence to be considered for the first time on appeal. The parents contend that an SRO should not consider the four documents on this basis because all were available at the time of the impartial hearing and could have been offered at that time, and furthermore, the documents are not now necessary in order to render a decision.

Turning first to whether district exhibits 1, 2, 3, and 4 may be considered as additional evidence on appeal, the parents correctly note that, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the 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. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]). However, notwithstanding the parents' objection that district exhibits were all available at the time of the impartial hearing, while SROs have considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing, this factor is not necessarily dispositive in every case (Application of a Student with a

[10] The parents' attorney submitted an affidavit with the reply, attesting to what she described as off-the-record discussions held at the impartial hearing on August 8, 2019 concerning the district's failure to disclose the documents in a timely manner (i.e., the five-day business rule) and her objection to entering said documents into the hearing record at that time as a result of the district's failure to comply with this requirement (see generally Reply Aff.). The district's representative at the impartial hearing was not the attorney who now represents the district on appeal, therefore, it is not surprising that the district's attorney may have been unaware of the off-the-record discussions held at the August 8, 2019 impartial hearing date or the objection raised by the parents' attorney (compare Answer at pp. 1, 12, with Reply Aff. ¶¶ 6-8).

[11] This argument is more fully addressed below in the context of the motion to dismiss and relief.

Disability, Appeal No. 08-030). This factor serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination, and to prevent the party submitting the additional evidence from "sandbagging" that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where it appears that the parents' objection to the submission of district exhibits 1, 2, 3, and 4 at the impartial hearing was based solely upon the failure to disclose the documents consistent with the five-day disclosure rule (see Reply Aff. ¶¶ 6-7).[12] In addition, this factor is also of less weight in this instance because it appears that the IHO's decision to not enter district exhibits 1, 2, 3, and 4 into evidence on August 8, 2019 was solely upon the basis of the parents' objection and not pursuant to State regulation, which provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). Instead, the IHO—as noted previously—cited to district exhibit 3 in the decision, indicating at a minimum that the IHO considered the document as relevant evidence in reaching her final decision (see IHO Decision at p. 2).

Finally, the additional documentary evidence—specifically, district exhibit 3—is now necessary in order to render a decision on the issues as appealed by the parents. Furthermore, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Therefore, while all of the district exhibits were available at the time of the impartial hearing, the need to render a decision on these issues and the preference for doing so based upon reliable information outweighs the concerns noted above and as argued by the parents; thus, to achieve this purpose, only district exhibit 3 will be considered, and I decline to exercise my discretion to accept or consider those documents identified as district exhibits 1, 2, and 4 as these exhibits are not now necessary to render a decision on the issues appealed in this matter.

[12] State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). As the parents' attorney duly notes in her affidavit accompanying the reply, she exercised her right to object to the introduction of the district's evidence at the impartial hearing on the basis of untimely disclosure, and therefore, was afforded due process at that time.

B. Motion to Dismiss

On this point, the parents contend that the IHO erred in finding that the filing of the due process complaint notice prior to graduation did not automatically constitute a challenge to the student's graduation. Relatedly, the parents argue that the student was entitled to continue to receive special education services pursuant to pendency as a result of the IHO issuing the interim decision until the resolution of the underlying dispute in the due process complaint notice, and thus, no further challenge to the student's graduation was required. In addition, the parents assert that the IHO erred in failing to determine whether the student's graduation constituted a change in placement and by dismissing the due process complaint notice without conducting the necessary fact finding. Next, the parents assert that the IHO failed to consider the student's "unmet transitional services" in concluding that the student met the "academic requirements for graduation" and that the district's failure to comply with the "transitional recommendations" resulted in a failure to offer the student a FAPE and was a bar to the student's graduation.

In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). According to State regulations describing diploma requirements, a student first entering grade nine in September 2001 and thereafter shall meet the commencement-level New York State learning standards by successfully completing 22 units of credit and five New York State assessments (8 NYCRR 100.5[b][7][iv]).

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA; however, they should be used with caution and they 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, 69 [2d Cir. 2000]).

Here, the evidence in the hearing record reflects that, consistent with this standard, both parties had a meaningful opportunity to present evidence both orally at the impartial hearing and via written briefs, and the parents, as the non-moving party, had the opportunity to identify any genuine issues of material fact (see generally Tr. pp. 17-29; Parent Ex. D; Dist. Ex. 5). Although a review of the IHO's decision reveals that the IHO did not specifically reference or appear to analyze the district's motion to dismiss in the context of this standard, the IHO nonetheless considered all of the parties' arguments and reached the conclusion that the student's graduation "with a *Regular High school Diploma (*Regents Diploma)" meant that the student was "no longer eligible to receive a FAPE" and granted the district's motion to dismiss (IHO Ex. I at pp. 2-3). A review of the student's transcript, which was relied upon by the IHO in her decision, reflects that, consistent with State regulation, the student—who entered ninth grade in the 2014-15 school

year—successfully completed 23.5 units of credit and passed five New York State assessments (Regents examinations) to earn a Regents diploma and graduate (see Dist. Ex. 3 at p. 1).[13]

Ultimately, while an independent review of the evidence in the hearing record—including the parties' submissions to the IHO prior to issuing the decision—and the parents' arguments now submitted on appeal, supports a finding that the IHO properly concluded that the student graduated on June 20, 2019 and also properly concluded that she was no longer eligible to receive a FAPE as a result of her graduation on June 20, 2019, the IHO's decision granting the district's motion to dismiss the parents' due process complaint notice must, nevertheless, be reversed. In this matter, reversal is warranted because the parties' arguments to the IHO, and the IHO's decision itself, mistakenly focused on the legal significance of the student's graduation and whether it affected the student's eligibility to receive a FAPE after graduation, as opposed to addressing whether the student's graduation had any legal significance with respect to the district's obligation to offer the student a FAPE during the school years prior to her graduation and, considering the allegations contained in the parents' due process complaint notice (compare Parent Ex. A at pp. 1-2, with IHO Ex. I at pp. 2-3, and Parent Ex. D, and Dist. Ex. 5). While it was certainly worth noting that the student was no longer eligible to receive a FAPE after graduation, the parties and the IHO should have addressed the legal significance of the student's graduation in the context of the allegations in the due process complaint notice as the student's graduation on June 20, 2019 did not alter the district's obligations to offer the student a FAPE prior to graduation. Instead, the student's graduation may constitute a factor to be weighed in any relief awarded if the district had failed to offer the student a FAPE in the school years prior to graduation (see T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1092 [10th Cir. 2001] [finding a student's graduation makes a proceeding under

[13] While SROs, at times, waded into the vicinity of confirming whether a student has met the State requirements to obtain either a Regents or local diploma—as in this instance—generally, the issuance of a diploma has historically been the province of the Commissioner of Education to consider the award of course credit and the related issuance or revocation of a diploma as a result (see, e.g., Appeal of K.D., 52 Ed Dept Rep, Decision No. 16,460), and generally, outside of instances where a student's graduation is a determinative factor as to the student's continuing eligibility for special education, an impartial hearing is not the proper forum for disputes involving a district's decision to award or its failure to award academic course credit because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR. 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 10-124; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]). Further, graduation credits and requirements generally fall under the purview of the district's discretionary authority, again subject to the review of the Commissioner (see Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] [finding that "[a]fter a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]). Here, the parents' due process complaint notice cannot be reasonably read to include a challenge to the student's continuing eligibility based upon her graduation (see generally Parent Ex. A). In addition, the IHO correctly found that the grounds argued in the parents' opposition to the district's motion to dismiss did not constitute challenges to the student's graduation (see IHO Ex. I at pp. 2-3).

the IDEA moot only where the student does not contest graduation and is seeking only prospective—rather than compensatory—relief]). Therefore, these errors in analysis support the parents' overall contention on appeal that the IHO erred in granting the district's motion to dismiss the due process complaint notice and that the IHO's decision must be reversed.

C. Requested Relief

In dismissing the parents' due process complaint notice by virtue of the district's motion, the IHO did not address any of the substantive or procedural issues raised by the parents in the due process complaint notice, or relatedly, whether the district failed to offer the student a FAPE prior to the student's graduation (compare IHO Ex. I, with Parent Ex. A). Consequently, having concluded that the IHO erred in granting the district's motion to dismiss, the next inquiry focuses on what relief, if any, may inure to the student based upon what must now be more accurately characterized at this juncture as the unaddressed issues in the parents' due process complaint notice. Generally, when an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

The parents argue that the appropriate remedy is to remand the matter for further administrative proceedings and to conduct the necessary fact-finding in order to determine whether the student actually graduated. In its answer, the district acknowledges that if an SRO determines further fact-finding was required, then it has no objection to remanding the matter.

Initially, it must be noted that, contrary to the parents' contentions and as already discussed above, no further fact-finding is required to determine whether the student actually graduated (see Dist. Ex. 3). Therefore, absent this issue, the only remaining basis to remand the matter would be to determine whether the student is entitled to any relief emanating from the unaddressed issues in the parents' due process complaint notice. In determining whether to remand the matter on this basis, a review of the evidence in the hearing record and the additional documentary evidence submitted with the district's answer (i.e., district exhibit 3) led the undersigned to a determination that it was necessary to seek further additional evidence from the district pursuant to 8 NYCRR 279.10(b). This was due, in part, to the fact that both parties continue to place significant weight on the legal ramifications of the student's graduation with regard to what relief may be awarded (see generally Req. for Rev.; Answer; Reply). The parents were afforded an opportunity to respond to any evidence requested by the SRO and proffered by the district.

Pursuant to this SRO's request, the district thereafter submitted a copy of the functional vision assessment of the student completed during the impartial hearing (see generally SRO Ex. 2); information about what, if any, pendency services the student had received and continued to receive (see SRO Ex. 1 at p. 1-2); and information about what, if any, compensatory educational services the student had received or continued to receive as a result of the award granted in the

August 2017 IHO decision (id. at p. 1).[14] Finally, the district also submitted information about the student's current educational services (see SRO Ex. 1 at p. 2).

As for the functional vision assessment submitted to the SRO—which the parents requested as relief in the due process complaint notice and which was completed on June 17, 2019—the resulting evaluation report was dated June 21, 2019 (see SRO Ex. 2 at p. 1).[15] The evaluator, based upon the assessment results, recommended the following "School Accommodations" for the student: preferential classroom seating and placement in the "[f]ront and center of the classroom"; additional time to "reduce visual fatigue"; the use of "portable reading devices for near and distance classroom tasks as needed"; "[l]arge print" materials; the use of a scribe; "[a]ssignments read" to the student; with regard to "Quality of Print/Picture," the evaluator recommended "[h]igh contrast and free of visual clutter"; and finally, with respect to the "Need for Braille or Pre-Braille," the evaluator noted that Braille was "not an accessible medium for the student due to limited hand movements" (id. at pp. 4-5).[16] In addition, the evaluator recommended testing accommodations for the student that included "extended time, separate location, large print, use of portable reading devices, scribe, tests read, breaks as needed, [and] preferential seating" (id. at p. 5).

While the parents do not object to the SRO including the functional vision assessment report into the hearing record to support the district's contention that the evaluation was completed, the parents do object to the SRO's consideration of the evaluation as representative of the student's needs (see SRO Ex. 3 at p. 1). As a basis for their objection, the parents contend that the report "contains numerous errors, as well as omissions of relevant information discussed between the evaluator, [the student], [the student's] paraprofessional, and [the student's] teacher" (id.). In addition, and similar to the information contained within the district's letter, the parents also provided the SRO with information about what, if any, pendency services the student had received and continued to receive (see SRO Ex. 3 at p. 1-2); information about what, if any, compensatory educational services the student had received or continued to receive as a result of the award

[14] For clarity, the district's November 13, 2019 letter to the Office of State Review sent in response to the SRO's request for additional evidence, dated November 7, 2019, will be referred to in citations as "SRO Ex. 1," and the June 2019 functional vision assessment provided with the district's letter will be referred to in citations as "SRO Ex. 2." Similarly, the parents' November 19, 2019 letter to the Office of State Review sent in response to the SRO's request for additional evidence, dated November 7, 2019, will be referred to in citations as "SRO Ex. 3."

[15] Given the date of the assessment report, it is unclear why the parents had not been provided with a copy of the report during the impartial hearing held in this matter, which concluded on September 5, 2019 (compare SRO Ex. 2 at p. 1, with Tr. p. 31).

[16] Based on the evaluation report, the student "tr[ied] reading visually with large print and a CCTV" and had "access to Learning Ally, Bookshare, Read 2 Go, and Bard on a portable reading device" (SRO Ex. 2 at p. 3).

granted in the August 2017 IHO decision; and information concerning the student's current educational services (id. at p. 2).[17]

Other than generally expressing that the report contained errors and omissions, however, the parents do not identify any specific information in the June 2019 functional vision assessment report as being an error or explain what relevant information has been omitted (see generally SRO Ex. 3). Notwithstanding the parents' objection with regard to using the evaluation report as a source to identify the "student's needs," the June 2019 functional vision assessment report is useful with regard to potential relief in this matter because, at the impartial hearing, the parents' attorney had explained that the assistive technology evaluation—which was part of the parents' requested relief—would only result from the functional vision assessment recommending an assistive technology evaluation (Tr. p. 12). At the impartial hearing, the parents' attorney also explained that "any recommended training"—as part of the parents' requested relief—would thereafter arise from any recommendations made within the assistive technology evaluation for that training (Tr. pp. 11-13). Thus, based upon the fact that the June 2019 functional vision evaluation report did

[17] Based on the information provided by the district and the parents, both parties agree that the student has not yet availed herself—due, in part, to difficulties locating providers to suit the student's schedule—of the compensatory educational services awarded per the August 2017 IHO decision, which included 600 hours of special education teacher support services or SETSS, 40 hours of physical therapy, and 90 hours of vision therapy (compare SRO Ex. 1 at p. 1, with SRO Ex. 3 at p. 2). The district did indicate, however, that the compensatory educational services awarded to the student had no "end date" and were "available to the student at any time" (SRO Ex. 1 at p. 1). With respect to the pendency services arising from the IHO's interim order in the instant proceeding, the district indicated that it "authorized [the pendency services] to continue while this litigation [was] pending" and the pendency services were made available to the student in July 2019 (SRO Ex. 1 at p. 2). According to the parents, the IHO's interim order on pendency entitled the student to receive both school-based and home-based services (see SRO 3 at p. 1). The parents alleged that the district's "Implementation Unit" sought clarification from them with respect to "what services" the parents were seeking pursuant to the IHO's interim order; and in response, the parents advised that they sought to continue both the student's "school-based and home-based related services" (id.). As a result, the "Implementation Unit" indicated that "Related Services Authorizations [RSAs] would be issued for home-based services" but that an "amended pendency order would be required for the school-based related services" (id.). According to the parents, they received this information from the "Implementation Unit" on August 15, 2019 and "therefore, [were] unable to seek an amendment to that order as the case was dismissed by the IHO shortly thereafter" (id. at pp. 1-2). The parents noted, however, that the student has received five 60-minute sessions per week of physical therapy and four 60-minute sessions per week of speech-language therapy through pendency, but has not received either vision therapy or occupational therapy due to difficulties locating providers and the district's failure to implement these services (id. at p. 2). To be clear, while sympathetic to the difficulties expressed by the parents in locating providers to implement both the compensatory educational services awarded to the student in the August 2017 IHO decision and the pendency services ordered in this case, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that a parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, such parent may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or 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).

not include a recommendation to conduct an assistive technology evaluation of the student, or for that matter, for "any recommended training," it appears that the parents have already received all of the relief requested in the due process complaint notice, which, as described more fully below, is now subject to dismissal under the mootness doctrine.

D. Mootness

On this point, the parents contend that, contrary to the district's arguments in its motion to dismiss, their claims are not moot just because the district completed the functional vision assessment of the student and note specifically that the IHO's pendency order "provide[d] for any additional assessments"—namely, the "assistive technology evaluation and any associated training."[18]

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.,

[18] Here, neither the evidence in the hearing record nor the plain reading of the IHO's interim order on pendency supports the parents' interpretation suggesting that the pendency order allowed for additional evaluations of the student (see generally Interim IHO Decision; Tr. pp. 1-42; Parent Exs. A-D; Dist. Exs. 3; 5). The IHO specifically stated at the impartial hearing that the pendency order would not address the issue of evaluations, and the parents' attorney agreed with the IHO (see Tr. pp. 8-13). In addition, generally, the stay-put provision does not apply beyond expiration of the student's eligibility for special education due to age (see Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654 [7th Cir., 1996]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 385-90 [N.D.N.Y. 2001]). However, courts have found that a student should remain in a stay-put placement in instances where one of the purposes of the pending proceedings is to challenge the factor which terminated the student's eligibility, i.e., to challenge the age limit on special education (see A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] [finding that stay put applied for a student with a disability who challenged state-imposed age limits on IDEA eligibility, even though the student exceeded that age limit while the proceedings were pending]) or to challenge whether the disabled student met the requirements for graduation (see R.Y. v. Hawaii, 2010 WL 558552, at *6-*7 [D. Haw. Feb. 17, 2010] [noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2010 WL 557058, at *2-*4 [S.D. Ind. Feb. 10, 2010]; Cronin v. E. Ramapo Cent. Sch. Dist., 689 F. Supp. 197, [S.D.N.Y. 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]). Absent an agreement between the parties otherwise, the student's entitlement to pendency services expired upon her graduation on June 20, 2019 (prior to the IHO's interim order, dated June 24, 2019) because the parents have not challenged the student's graduation; however, in this instance, it appears that the parties have agreed to the student's continued receipt of pendency services (see SRO Ex. 1 at p. 1), and the district is required to implement those services consistent with that agreement.

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"]). 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).[19] In this matter, a review of the parents' due process complaint notice cannot be reasonably read to include a claim for compensatory educational services as relief, and the student graduated on June 20, 2019 and is no longer statutorily eligible for special education programs or related services.

Notwithstanding that the due process complaint notice did not include a request for compensatory education, considering that the student is no longer eligible for special education services due to graduation, the Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has committed a gross violation of the IDEA, which resulted in the "denial of, or exclusion from, educational services for a substantial period of time" (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French, 476 Fed. App'x at 471; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994], citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]).

The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education

[19] In addition, 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). Given the student's graduation, this exception to the mootness doctrine is inapplicable.

awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 18-081; Application of the Bd. of Educ., Appeal No. 17-081; Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159).

In summary, even if the district failed to offer the student a FAPE based upon the allegations in the parents' due process complaint notice and that those failures constituted a gross violation of the IDEA, the student ultimately received educational benefits and graduated, thereby achieving one of the major goals and milestones that the IDEA is intended to support—that place being graduation (see Reid, 401 F.3d at 518). In other words, no compensatory education is required since the deficiencies were already mitigated in a substantial way (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

VI. Conclusion

Based on the above, although the IHO erred in dismissing the parents' due process complaint notice based solely on the student's graduation, after review of the relief requested in the due process complaint notice, with particular consideration of the completion of the requested evaluations and the absence of a claim for compensatory education, there is no relief available with respect to the allegations contained in the parents' due process complaint notice. Accordingly, the parents' challenge to the IHO's dismissal of the due process complaint notice must be dismissed as

the parents' claims are moot.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
December 9, 2019

STEVEN KROLAK
STATE REVIEW OFFICER