The University of the State of New York

The State Education Department
State Review Officer
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No. 19-132

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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 dismissed the relief sought in the parent's due process complaint notice as moot. Respondent (the district) also cross-appeals from the determination that the matter was moot. The appeal and the cross-appeal must be sustained in part and the matter is remanded back to an 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 8200.5[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

The student has been the subject of prior administrative appeals of interim decisions rendered by an IHO (IHO 1) regarding the student's pendency placement after the district's offer of a public school placement and the parent's unilateral placement of the student at the International Institute for the Brain (iBrain) for the 2018-19 school year (see Application of the Dep't of Educ.,

Appeal No. 19-019; Application of a Student with a Disability, Appeal No. 18-116).[1] This State-level appeal relates to final decision issued by a second IHO (IHO 2) on the issue of the district's offer of a free appropriate public education (FAPE) in the same proceeding.

The student in this matter has previously received diagnoses including an acquired brain injury, cerebral palsy, seizure disorder, scoliosis, cortical visual impairment, chronic lung disease, and global developmental delays (Parent Ex. C at p. 14; Dist. Ex. 15 at p. 1). He is nonverbal and communicates via a variety of communication switches using his hands and head as well as various eye gaze communication systems (Parent Ex. C at pp. 1, 4). The student is also non-ambulatory, fully dependent in all domains of mobility, receives nutrition, hydration, and medication via g-tube, and requires assistance with all activities of daily living (id. at pp. 1, 14-15).

For the 2017-18 school year, the student was unilaterally placed at the International Academy of Hope (iHope), a nonpublic school (Parent Exs. B; D). The district's provision of a FAPE to the student for the 2017-18 school year was the subject of a prior impartial hearing, which resulted in an IHO decision dated January 12, 2018 that found that: based on the district's concession, the district failed to offer the student a FAPE for the 2017-18 school year; iHope was an appropriate unilateral placement for the student; and equitable considerations weighed in favor of the parent's request for relief (Parent Ex. B at pp. 4-8). The IHO in that matter ordered the district to fund the costs of the student's attendance at iHope, along with the costs of related services (id. at p. 9). The IHO also ordered that the CSE convene to draft an appropriate IEP for the student for the 2018-19 school year consistent with his decision and to change the student's eligibility classification to traumatic brain injury (id.).

In preparation for educational planning for the 2018-19 school year, the district scheduled and re-scheduled a CSE meeting for March 21, March 7 (for 1:00 p.m. and then changed to 10:00 a.m.), April 9, April 27, and May 11, 2018 (Dist. Exs. 3-10; see also Dist. Ex. 14 at pp. 2-11).[2] The hearing record includes evidence of various correspondence between the parent and the district, the district's computerized Special Education Student Information System (SESIS) log

[1] During the pendency portion of the impartial hearing, IHO 1 admitted parent's exhibits H (SRO decision in Application of the Dep't of Educ., Appeal No. 19-019) and I (an affidavit with a 103-page attachment) (see Tr. pp. 65-66, 101-02). Those exhibits are still part of the overall hearing record but were not included in the hearing record filed with the Office of State Review as part of the instant appeal. As the exhibits were filed with the Office of State Review in the two prior interim appeals in the same matter, they were available to the undersigned, and a copy of each has been placed into this hearing record. To further complicate matters, IHO 2 allowed the parent to reuse letters "H" and "I" to identify new exhibits during the substantive portion of the impartial hearing (see Tr. pp. 210-11, 216, 221), resulting in two different "H" and "I" exhibits in the same hearing record. Upon remand, the IHO should remedy the duplication of exhibit identifiers, so that there are not two exhibits H and two exhibits I.

[2] The hearing record also includes notices scheduling meetings for February 14 and February 15, 2018 (Dist. Exs. 3-4; see Dist. Ex. 14 at pp. 11-12). It appears that a CSE meeting may have occurred on February 15, 2018 in order to revise the student's IEP, but the hearing record does not include an IEP dated February 15, 2018 and the hearing record is not developed on this point (see Dist. Ex. 14 at p. 11). In any event, the district's prior written notices dated April 17 and April 26, 2018, reference that the annual review CSE meeting was initially scheduled for March 21, 2018 based on a notice dated February 12, 2018 (Dist. Exs. 9 at p. 1; 10 at p. 1).

relating to the student, as well as prior written notices from the district, regarding the attempts to schedule a CSE meeting (see Parent Exs. N; O; Dist. Exs. 9; 10; 14 at pp. 2-11).[3]

The CSE convened on May 11, 2018 as planned to develop an IEP that would become effective July 5, 2018 for the 2018-19 school year (Dist. Ex. 1 at pp. 1, 9-10, 13). The meeting was scheduled to begin at 9:00 a.m. (see Dist. Ex. 10 at p. 1). According to a SESIS log entry, on May 11, 2018 at 10:17 a.m., the district telephoned the parent at two different phone numbers and left voicemails with both requesting the parent's presence at the CSE meeting and requesting that the parent return the call (Dist. Ex. 14 at p. 2). In attendance at the CSE meeting was a special education teacher, a school psychologist who also served as the district representative, and via telephone a district physician (Dist. Ex. 2). Neither the parent nor the staff from iHope attended (see Dist. Ex. 2). According to the IEP, the CSE relied upon progress reports from iHope dated March 26, 2018, a September 2017 social history update, and a December 2017 classroom observation (Dist. Ex. 1 at p. 1; see Dist. Exs. 23; 24).[4]

Having found that the student was eligible for special education as a student with a traumatic brain injury, the CSE recommended a 12-month district program in a 12:1+(3:1) special class in a specialized school with related services to include five 30-minute sessions per week of individual occupational therapy (OT), five 30-minute sessions per week of individual physical therapy (PT), four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and one 60-minute session per month of parent counseling and training (Dist. Ex. 1 at pp. 1, 9-11). Additionally, the May 2018 CSE recommended individual, full time school nurse services, as well transportation services and accommodations consisting of adult supervision (nurse), a lift bus, air conditioning, limited travel time (less than 90 minutes), walking aids, and a regular size wheelchair (id. at pp. 10, 12). To address the student's management needs, the CSE recommended a small classroom with minimal distractions, multisensory/multimodal instructional teaching strategies, dimmed lighting and noise reduction, direct/explicit instruction, simplified directions, repetition, additional response time, verbal praise, reinforcers, breaks, and 1:1 support and supervision (id. at p. 3). The May 2018 IEP also included multiple goals with accompanying short-term objectives and a post-secondary transition plan (id. at pp. 4-9, 11).

[3] The hearing record includes several duplicative exhibits (compare Parent Exs. H, N, P, with Dist. Exs. 17, 19, 20). For purposes of this decision, the parent exhibit is cited in instances where multiple identical or similar copies of an exhibit were entered into evidence. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[4] The only progress reports from iHope that are included in the hearing record are dated October 13, 2017 and January 12, 2018 (see Parent Exs. G; H); the hearing record does not include a progress report from iHope dated March 26, 2018. However, a review of the IEP's present levels of performance sections (academic, social, and physical) shows that the student's strengths and deficits were taken from the iHope reports (compare Parent Exs. G; H, with Dist. Ex. 1 at pp. 1-3; see also Ex. 14 at p. 6 [email from iHope reflecting provision of second quarter progress report]).

On June 7, 2018 the parent signed an enrollment contract with iBrain for the student's attendance for the 2018-19 school year (Parent Ex. J).

The district sent the parent a prior written notice, dated June 20, 2018, summarizing the program recommended by the May 2018 CSE, as well as other options considered but deemed not appropriate (Dist. Ex. 11). On the same date, the district sent the parent a school location letter identifying the particular public-school site to which the district assigned the student to attend for the 2018-19 school year (Dist. Ex. 12).

On June 21, 2018, the parent, through her attorneys, provided the district with a 10-day notice letter indicating her intent to unilaterally place the student at iBrain for the 2018-19 school year and to seek public funding for the placement (Parent Ex. P at p. 1). The parent stated that the district had not offered the student an appropriate program or placement to address the student's educational needs and that the district had not convened a proper annual review with the parentally requested members (id.).[5]

A. Due Process Complaint Notice

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A). Initially, the parent requested an interim order on pendency that the district fund the student's placement at iBrain for the 2018-19 school year based on an unappealed January 2018 IHO decision granting the parent tuition reimbursement for iHope for the 2017-18 school year (id. at pp. 1-2; see Parent Ex. B).

Turning to "disputed issues," the parent asserted that the district failed to offer the student a FAPE for the 2018-19 school year when the May 11, 2018 CSE refused to schedule and hold a CSE meeting at a time that was mutually agreeable to the parent and conducted the CSE meeting without the attendance of mandated members, including the parent (Parent Ex. A at p. 2). With respect to the resultant IEP, the parent asserted that it was not the product of any individualized assessment of all the student's needs, was not reflective of the student's individual needs, and inadequately described the student's present levels of performance and management needs (id.). The parent also asserted that the annual goals contained in the IEP were unmeasurable (id.). Further, the parent asserted that the recommendation for a 12:1+(3+1) special class placement in a district specialized school was inappropriate to meet the student's highly intensive management needs, was not in the student's least restrictive environment (LRE), represented a student-to-teacher ratio that was too large, and did not offer the 1:1 direct instruction, support, and monitoring the student required (id. at pp. 2-3). The parent further alleged that the May 2018 CSE's recommendations represented a "significant and unsubstantiated reduction in the related services mandates and the student-to-teacher ratio of the recommended class size" (id. at p. 2). The parent also asserted that CSE failed to recommend an extended school day, which was required in order to implement the recommended related services (id. at p. 3).

[5] In a letter dated August 2, 2018, the district responded to the parent's June 21, 2018 letter, indicating that the CSE had convened on May 11, 2018 and stated that CSE "deem[ed] the recommendations and school location appropriate to meet [the student's] educational needs" (Dist. Ex. 21).

For relief, the parent requested that the district be required to fund the costs of the student's tuition at iBrain and transportation, which included a 1:1 travel aide, for the 2018-19 extended school year (Parent Ex. A at p. 3). The parent also requested that the CSE be required to reconvene (id.).

B. Impartial Hearing Officer Interim Decisions and State-Level Administrative Review Decisions

The parties proceeded to an impartial hearing on August 24, 2018 (see Tr. pp. 1-27). In an interim decision dated September 4, 2018, IHO 1 noted that the district agreed with the parent that the student's pendency placement was established by an unappealed IHO decision and consisted of placement at iHope with related services (IHO Ex. I at pp. 2-3). IHO 1 then found that "the reasons why [the student] c[ould] no longer attend iHope [were] fundamental to a determination of pendency where pendency l[ay] in a parental placement," and must be addressed before reaching the parent's argument that the student's placement at iBrain was substantially similar to iHope and, therefore, constituted a continuation of the student's pendency placement (id. at pp. 3-4).

Following the first hearing day and issuance of the interim decision, the parties proceeded to a second day of hearing on October 26, 2018 (Tr. pp. 28-34). On November 16, 2018, an SRO issued a decision with respect to the parent's appeal of IHO 1 's September 4, 2018 interim decision (Application of a Student with a Disability, Appeal No. 18-116). The SRO remanded the matter to an IHO in order to "reach a determination of whether there is substantial similarity between the student's former educational placement at iHope and his current educational placement at iBrain" (id.). The SRO instructed the IHO to direct the district to fund the student's pendency placement at iBrain if there were no significant differences between the two programs (id.). The SRO further directed that, if iBrain was unable to implement all of the student's programming at the start of the school year but was able to do so at some later date, the IHO should determine the date on which the programs became substantially similar and order funding from that point forward (id.).

Following the October 26, 2018 hearing date, IHO 1 issued a second interim order on pendency on November 22, 2018, largely reiterating his determination that iHope was the student's pendency placement pursuant to the unappealed IHO decision in the proceeding regarding the 2017-18 school year and declining to address the issue of substantial similarity because the "fundamental issue of why the student was removed by the parent from [iHope] was not answered by the parent, which [wa]s the parent's burden" (IHO Ex. IV at pp. 2, 4-5).[6]

Subsequently, the parent filed a complaint in district court seeking a temporary restraining order and preliminary injunction reversing IHO 1's November 22, 2018 interim order on pendency; the parent also sought a ruling that iBrain was the student's pendency placement and requested that IHO 1 be removed from the matter (IHO Ex. V at p. 1).[7] The district court determined that "[a]s

[6] It appears that, at the time he issued the November 22, 2018 interim decision the IHO was not aware that an SRO had issued a decision regarding the appeal of the September 4, 2018 decision (see Tr. p. 38; IHO Ex. IV).

[7] The parent did not challenge the SRO's decision in Application of a Student with a Disability, Appeal No. 18-116, in district court.

explained by the SRO, the evidentiary record must be supplemented to address whether [iBrain's] educational program for the 2018-19 school year is substantially similar to [iHope]'s educational program for the 2017-18 school year" (id. at pp. 20-21). The district court vacated IHO 1 's November 22, 2018 interim order on pendency and ordered that the case be remanded to IHO 1 for "purposes of supplementing the evidentiary record as to (1) whether [the student] [wa]s receiving vision services at [iBrain], and (2) the similarity between the parent counseling and training services and assistive technology services [the student] [was] receiv[ing] [at iBrain] with the services he received at [iHope]" (id. at p. 21). The district court further ordered that IHO 1 determine whether the two programs were substantially similar (id. at pp. 20-21).

As a result of the district court's decision, the parties continued with the impartial hearing on January 10, 2019 and concluded the pendency portion of the hearing on January 17, 2019 (Tr. pp. 35-209).[8] IHO 1 issued a third interim decision on pendency on January 23, 2019 (Jan. 2019 Interim IHO Decision at p. 6). IHO 1 found that iHope and iBrain were substantially similar with respect to "parent counseling and training, assistive technology, and hearing education services" (id.). IHO 1 found that the affidavit and testimony of the special education director at iBrain regarding those services "credibly documents the substantial similarity of the services and the fact they have been implemented" at iBrain (id.). IHO 1 ordered that pendency "shall be effective as of the date of the request for hearing, July 10, 2018 and shall continue until this matter is resolved" (id.). At some point thereafter, IHO 1 recused himself and, on January 24, 2019, IHO 2 was appointed (IHO 2 Decision at p. 1).[9]

On April 5, 2019, an SRO issued a decision with respect to the district's appeal of the IHO's January 23, 2019 interim decision (Application of the Dep't of Educ., Appeal No. 19-019). The SRO noted that, although IHO 1found that iHope and iBrain were substantially similar, the January 2019 interim decision did not explicitly identify the date upon which the programs became substantially similar (id.). Therefore, the SRO identified the "only issue in contention" as "whether pendency at iBrain should be from, the date of the due process complaint notice on July 9, 2018 as directed by IHO 1, or as of when the student began receiving vision education services on September 14, 2018" (id.). Based on the hearing record, the SRO concluded "that vision services were an important component of the student's program at iHope," and that "there [wa]s insufficient information included in the hearing record that iBrain provided supports to offset the failure to provide vision education services" (id.). Therefore, the SRO found "that the lack of vision education services affected the student's learning experience in a significant way such that the program was not substantially similar to the program provided at iHope until September 14, 2018, when the student first began receiving vision education services" (id.).

[8] On January 3, 2019, the parent filed a motion, requesting that IHO 1 recuse himself (Mot. for Recusal); however, it does not appear that the IHO ruled upon that motion as of the January 10 and January 17, 2019 hearing dates.

[9] IHO 2's decision was not paginated (see generally IHO Decision). For ease of references and, consistent with the method adopted by the parties, citations to the IHO decision will reflect pages numbered "1" through "12," omitting the cover page and the page identifying the names and titles of persons who appeared at the impartial hearing.

C. Impartial Hearing Officer Decision

On May 22, 2019, the parties continued with the impartial hearing, which concluded on June 20, 2019, after the second hearing date regarding the merits of the parent's claims (the sixth hearing overall) (Tr. pp. 210-359). In a decision dated November 11, 2019, IHO 2 determined that, "regardless of the merits of a decision concerning whether the [district] offered the student a FAPE for the extended 2018-2019 school year," the parent had received all the relief that was sought "for the extended 2018-2019 school year" through pendency (IHO Decision at pp. 2, 4-5). In particular, the IHO found that the parent had received all the relief "as per the Order of Pendency issued by IHO [1] date January 23, 2019," which was retroactive to the date the parent filed her due process complaint notice on July 9, 2018 (id. at pp. 4-5). Therefore, the IHO determined that the matter had been rendered moot and dismissed the parent's due process complaint notice (IHO Decision at pp. 2-3, 10).[10]

IV. Appeal for State-Level Review

The parent appeals, asserting that IHO 2 erred by finding that the parent received all of the relief sought for the 2018-19 school year through pendency and dismissing the due process complaint notice based on the doctrine of mootness. The parent asserts that the district has failed to fully fund the student's pendency at iBrain during the 2018-19 school year. Further the parent argues that the IHO erred in raising the issue of mootness sua sponte. The parent also alleges that the matter is not moot because a determination on the appropriateness of the student's placement at iBrain would affect his pendency in future proceedings.

The parent also appeals IHO 2's lack of determinations on the issues of the district's offer of a FAPE, the appropriateness of the unilateral placement, and whether equitable considerations weighed in favor of an award of the costs of the student's tuition at iBrain and transportation (including a 1:1 aide) for the 2018-19 extended school year.

For relief, the parent requests that an SRO find that: the district denied the student a FAPE, iBrain was and appropriate unilateral placement for the student, and equitable considerations support a full award of the costs of the student's tuition and related services for the 2018-19 school year.[11]

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[10] The IHO also examined applicability of mootness in instances where a merits determination may define the student's pendency placement in future proceedings and applicability of an expectation to mootness (capable of repetition but evading review) but found that there considerations did not warrant a different result (IHO Decision at pp. 5-10).

[11] The parent also submits additional evidence with the request for review related to the district's payment of a portion of the student's tuition at iBrain for the 2018-19 school year. As the evidence is unnecessary in order to render a decision in this matter, the parent's request that it be considered is denied (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]).

In its answer, the district generally responds to the parent's allegations with denials.[12] In its cross-appeal, the district also asserts that IHO 2 erred in finding the matter moot.[13] The district also asserts that iBrain was not an appropriate unilateral placement for the student for the 2018-19 school year and that equitable considerations do not weigh in favor of the parent's request for an award of tuition and transportation costs. The district requests that an SRO dismiss the parent's appeal with prejudice, sustain its cross-appeal, and find that iBrain was not an appropriate unilateral placement and equitable factors do not weigh in favor of the parent's request for relief.[14]

V. Discussion

Both parties are in agreement that IHO 2 erred in determining that the issues raised in the due process complaint notice were moot. 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 v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; 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"]). However, in most instances, a claim for compensatory education will not be

[12] The district further asserts that the SRO should not consider any allegations contained in the parent's memorandum of law that were not also in the request for review.

[13] Although the district agrees with the parent that IHO 2 erred in finding the matter moot, the district does not specifically state the reasons for its position (see Answer & Cross-Appeal at ¶ 23); however, the district does submit additional evidence related to one of the grounds raised by the parent in the form of an affirmation (i.e., remittance of payment). As with the parent's additional evidence, the district's request that the submitted document is also denied as it is unnecessary in order to render a decision in this matter (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., 932 F. Supp. 2d at 488-89).

[14] The parent served a "Reply to Respondent's Verified Answer and Cross-Appeal" (reply) on the district on January 16, 2020. According to State regulations, each pleading, together with proof of service, must be filed with the Office of State Review within two days after service of the pleading is complete (8 NYCRR 279.4[e]; 279.5[c]; 279.6[b]). Documents that do not comply with the provisions of sections 279.4, 279.5, and 279.6 may be rejected at the sole discretion of the SRO (8 NYCRR 279.8[a]). In this case, the postage mark on the envelope indicates the reply was mailed to the Office of State Review on January 28, 2020, 12 days after service was complete; it was received on January 20, 2020. The parent's reply was, therefore, filed late, and the reply, along with any defenses raised therein, is rejected (8 NYCRR 279.8[a]).

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).

IHO 2 based his mootness determination on the fact that the parent had "received under 'pendency' all of the relief she sought at the impartial hearing and that the extended 2018-2019 school year at issue ha[d] expired" (IHO Decision at p. 3). However, the second State-level administrative decision regarding the student's pendency placement specifically found that iBrain did not become substantially similar to the program at iHope until September 14, 2018, meaning that the district was not obligated to fund iBrain as the student's pendency placement from the beginning of the school year (on July 9, 2018) through September 14, 2018 (Application of the Dep't of Educ., Appeal No. 19-019; see Parent Ex. W at p. 2). Therefore, IHO 2 erred in finding that the matter was moot because the parent has not received all of the relief she sought through pendency.[15]

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]).

I have considered reaching the merits of the parent's claims, particularly in light of the length of time that this matter has been pending thus far (i.e., since the parent's July 9, 2018 due process complaint notice); however, there is no indication that the student has or will be harmed by virtue of continuing the proceedings in this instance so that an IHO may have an opportunity to review the merits of the parent's claims prior to review by an SRO in the manner envisioned by the IDEA and State law (see 20 U.S.C. § 1415[f][3][E][i]; [g]; Educ. Law § 4404[1]-[2]).[16] Accordingly, this matter is remanded for the IHO to render a determination on the merits (see 8 NYCRR 279.10[c]). It is left to the sound discretion of the IHO on remand to determine whether

[15] Having found that IHO 2 erred on this ground, it is unnecessary to review the parent's contention that the matter was not moot because a decision on the district's offer of a FAPE and the appropriateness of the unilateral placement at iBrain for the 2018-19 school year could establish a new current educational placement for pendency purposes (see Parent Mem. of Law at pp. 8-10).

[16] That is, the outcome of this matter essentially relates to an outstanding portion of the student's tuition costs for the 2018-19 school year and there is no indication that the parent or student will suffer adverse consequence due to the delay in payment (cf. Cohen v. New York City Dep't of Educ., 2018 WL 6528241, at *1-*2 [S.D.N.Y. Dec. 12, 2018] [in the context of reviewing a parent's standing to sue, finding no evidence that the private school had requested payment from the parents for tuition or threated to expel the student]). In particular, the contract for the student's attendance at iBrain for the 2018-19 school year explicitly provides that, if the parent "file[s] a complaint against the local school district for funding [of the student's tuition], the tuition payment obligations outlined [in the contract] will be suspended until a final determination/decision is issued by an administrative judge or appellate court" (Parent Ex. J at p. 2).

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, 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 erred in dismissing the parent's due process complaint notice as moot and the matter must be remanded for a determination on the merits of the parent's claims.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS 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 November 11, 2019 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**
February 13, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER