The University of the State of New York

The State Education Department
State Review Officer
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No. 20-068

Application of a STUDENT WITH A DISABILITY, by his 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:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed the parents' claims as moot. The district joins in the parents' assertion that the IHO erred in dismissing the matter as moot, and cross-appeals from the IHO's finding that it failed to offer the student an appropriate educational program for the 2018-19 school year. The appeal and cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the nature of the appeal, a full recitation of the student's educational history is unnecessary at this time.

Briefly, the student attended the International Academy of Hope (iHope), a nonpublic school, for the 2017-18 school year (see generally Parent Exs. I; J; Dist. Ex. 8).[1]

The CSE convened on March 7, 2018 to develop the student's IEP for the 2018-19 school year (Dist. Ex. 1 at pp. 20, 23). Finding the student was eligible for special education as a student with multiple disabilities, the CSE recommended a 12-month program in a 12:1+(3:1) special class placement together with four 40-minute sessions of individual occupational therapy (OT) per week, five 40-minute sessions of individual physical therapy (PT) per week, five 40-minute sessions of individual speech-language therapy per week, and three 40-minute sessions of individual vision education services per week (id. at pp. 20-21, 23). The CSE also recommended full time 1:1 paraprofessional services for health and transportation (id. at p. 20). In addition, the CSE recommended one 60-minute session per month of parent counseling and training (id.).

On May 3, 2018 the parents signed an enrollment contract for the student to attend the International Institute for the Brain (iBrain) for the 2018-19 school year (Parent Ex. E at p. 6). In a letter dated May 4, 2018 to the district, the parents requested a reconvene of the CSE to discuss the student's IEPs for the 2017-18 and 2018-19 school years (Parent Ex. M at p. 1).[2] The parents relayed their concerns about the conduct of the March 2018 CSE meeting, asserted that they disagreed with the March 7, 2018 IEP, and made several, specific requests regarding the reconvene meeting (id. at pp. 1-2).

In a letter dated June 21, 2018, the parents reiterated their requests regarding a CSE reconvene meeting, and notified the district that they were unilaterally enrolling the student at iBrain for the 2018-19 school year and intended to seek public funding for that placement (Parent Ex. N).[3]

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2018, the parents asserted that the student was denied a FAPE for the 2018-19 school year and generally contended that the district committed "several substantive and procedural errors under the IDEA and state law while developing the IEP" dated March 7, 2018 (Parent Ex. A at p. 2). The parents argued that the

[1] The 2017-18 school year was the subject of another impartial hearing which concluded in an IHO finding that the student was denied a free appropriate public education (FAPE) by the district; however, a copy of that decision was not accepted into the record (Tr. pp. 8-10; see also Parent. Mem. of Law at p. 13).

[2] In the May 2018 letter, the parents asserted that an IHO decision resulting from an impartial hearing concerning the 2017-18 school year directed the district to reconvene a CSE to address the student's 2017-18 school year IEP (Parent Ex. M at p. 1).

[3] The student attended iBrain for the 2018-19 school year (see Parent Ex. E). iBrain created an IEP for the student for the 2018-19 school year on February 11, 2019 and recommended a 6:1:1 special class placement with five 60-minute sessions of individual PT per week, four 60-minute sessions of individual OT per week, three 60-minute sessions of individual vision education services per week, two 60-minute sessions of individual hearing education services per week, and five 60-minute sessions of individual speech-language therapy per week (Parent Ex. D at pp. 1, 49). The iBrain IEP also reflected recommendations that the student receive 12-month services and the services of a full-time 1:1 paraprofessional (id. at p. 50).

district impeded the student's right to a FAPE and significantly impeded their opportunity to participate in the decision-making process (id.). Further, the parents requested an order of pendency that directed the district to "prospectively pay for the student's [f]ull [t]uition at iBrain" (id. at pp. 1-2).

Specifically, the parents asserted that the CSE was not properly composed, as the district did not comply with their request for a full committee meeting and failed to hold the meeting at a mutually agreeable time (Parent Ex A at p. 2). The parents argued that the district failed to develop an appropriate IEP as the CSE only "feigned interest in the independent evaluations and reports" they provided (id.). Also, the parents alleged that the district failed to consider their May 4, 2018 request to reconvene at a meeting (id.).

Next, the parents argued that the proposed March 2018 IEP would "expose [the student] to substantial regression due to the significant and unsubstantiated reduction in the related services mandates and student-to-teacher ratio of the recommended class size" (Parent Ex. A at p. 2). Additionally, the parents asserted that the IEP was "not the product of any individualized assessment of all" of the student's needs and would "not confer any meaningful educational benefit for" the 2018-19 school year (id.).

Further, the parents contended that the March 2018 IEP was inappropriate, as it did not properly classify the student as having a traumatic brain injury (TBI) and inadequately described the student's present levels of performance, as well as management needs (Parent Ex. A at pp. 2-3). Moreover, they alleged that the IEP annual goals were immeasurable (id. at p. 3). Regarding the CSE's recommendations, the parents asserted that the district failed to offer the student "an appropriate school program and placement that meets [the student's] highly intensive management needs," which required "a high degree of individualized attention and intervention" (id.). The parents contended that the district's recommended program was not in the least restrictive environment (LRE) (id.). They argued that the recommended class ratio of 12:1+(3:1) was insufficient to address the student's needs and too large "to ensure the constant 1:1 support and monitoring" the student required (id.). The parents also asserted that the district's recommended program did not offer the student an extended school day, which they opined was necessary to implement the student's related services (id.) For relief, the parents requested direct payment to iBrain for the costs of the student's program and placement for the 2018-19 school year, including the cost of transportation and a 1:1 travel aide as well as a reconvene of the student's annual review CSE meeting (id.).

B. Procedural History Subsequent to Due Process Complaint Notice

The parties proceeded to an impartial hearing and after two hearing dates an IHO (IHO 1) rendered an order on pendency (see Tr. pp. 1-60; see also Parent Ex. B). In the October 3, 2018 interim order, IHO 1 held that the student was entitled to pendency at iBrain because the student's program at iBrain for the 2018-19 school year was substantially similar to his 2017-18 program at iHope (Parent Ex. B at p. 3). The district appealed IHO 1's order on pendency and the order on pendency was overturned by an SRO in a decision dated December 31, 2018 (Application of the Dep't of Educ., Appeal No. 18-127). In that decision, an SRO held that, although substantial similarity was the correct standard to apply, the programs at iBrain and iHope were not substantially similar (id.). More specifically, the decision noted the lack of

vision services at iBrain resulted in a change of placement; however, the decision also noted that in the event iBrain began providing the student with vision services, the issue of pendency could be revisited (id.). According to that decision, the student's then-current placement for the purposes of pendency was the placement offered by iHope for the 2017-18 school year.[4]

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on the merits of the claims raised in the due process complaint notice on July 24, 2019 in front of a different IHO (herein "the IHO") and the hearing concluded after three hearing dates on December 11, 2019 (Tr. pp. 61-228).[5] In a decision dated March 15, 2020, the IHO found that the October 2018 pendency order rendered the case moot (IHO Decision at pp. 15-16).[6] The IHO indicated that the October 2018 pendency order granted the parents' request for pendency and although the SRO's decision modified the pendency decision, it did not change the relief awarded to the parents (id. at p. 4).[7] The IHO held that due to the IHO's October 2018 order on pendency, the matter was "effectively moot, because the Parent is entitled to, and must receive, all of the money that she was awarded under" the pendency order (id. at p. 5). Specifically, the IHO determined that the pendency order granted the parent "all of the relief she sought at the impartial hearing," in that "regardless of the merits of a decision concerning whether the [district] offered the student a FAPE for the 2018-2019 school year, no further meaningful relief may be granted to the Parent because she is entitled to all of the relief sought pursuant to 'pendency,' and thus, the Parent's case has now been rendered moot" (id.). The IHO also noted that the district was unable to recoup the pendency payment, even if it was to win on the merits (id. at pp. 5-6). The IHO held that there was "no longer any live controversy relating to the parties' dispute over the placement or program offered by the [district] for the 2018-2019 school year" because a determination that the district did not

[4] The parents appealed the decision in Application of the Department of Education, Appeal No. 18-127 to district court. Recently, the Second Circuit rendered a decision which now is controlling authority regarding the application of the substantial similarity test used by IHO 1 and the prior SRO (see Ventura de Paulino v. New York City Dep't of Educ., 2020 WL 2516650 [2d Cir. May 18, 2020]). In the decision, the Second Circuit held that parents are not entitled to pendency after they unilaterally place their child in a new school regardless of whether the programs are substantially similar (id. at *3, *12). Specifically, the court held that the parents cannot determine a child's pendency placement and should parents unilaterally move their child from the agreed pendency placement, they do so at their own financial risk (id. at *11).

[5] The December 11, 2019 hearing date was set for the parents to present their case; however, following the opening statement made by the parents' attorney, the IHO rendered a decision on the record and ended the hearing without the parents calling any witnesses (Tr. pp. 219-230). The IHO appears to have mistakenly believed that the decision in Application of the Department of Education, Appeal No. 18-127, did not overturn the IHO's October 2018 order on pendency, as he believed the decision only "issued a modification regarding vision services" (Tr. pp. 224-25). However, as noted above the October 2018 order on pendency was reversed (Application of the Dep't of Educ., Appeal No. 18-127); the matter is now pending in district court.

[6] The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO's decision will reflect pages numbered "1" through "18," with the cover page identified as page "1."

[7] The IHO noted that the parents appealed Application of the Dep't of Educ., Appeal No. 18-127 to the district court of the Southern District of New York; however, the IHO indicated that neither the Second Circuit nor the district court had rescinded the IHO or SRO decisions (IHO Decision at p. 5).

offer the student a FAPE for that school year "would have no actual effect on the parties because the 2018-2019 school year expired" (id. at p. 10). Finally, the IHO determined that the matter was not capable of repetition and would not evade review (id. at pp. 13-14).[8]

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred by finding the matter moot. The parents argue that the IHO erred because the student has not received pendency funding for the 2018-19 school year and the IHO's reliance on the October 2018 pendency order was misplaced as that order was reversed by Application of the Department of Education, Appeal No. 18-127. Additionally, the parents contend that they have not received any of the relief requested through pendency and as such, a determination on the underlying FAPE claims "is even more emergent." The parents further assert that, even if, the issue of pendency was resolved, "a determination on the appropriateness of [the student's] educational placement at iBRAIN will affect his pendency placement going forward." Moreover, they allege that "the IHO erred because the IHO had a statutory responsibility to render a decision" based on the evidence in the hearing record.

The parents contend that the district committed multiple procedural violations that constituted a denial of FAPE. Specifically, the parents assert that the district "failed to issue proper meeting notices and prior written notices, failed to include mandated members of the [CSE], and denied the Parents meaningful participation in the IEP process." In regards to substantive violations, the parents argue that the district failed to: recommend an appropriate program and placement, identify the student's highly intensive management needs, recommend related services of appropriate duration and frequency, and appropriately classify the student as a student with a TBI. Additionally, the parents contend that the district "engaged in predetermination in developing [the student's] IEP and recommending a program and placement." The parents also assert that the IHO erred by not addressing these issues and argue that these failures warrant a finding of a denial of FAPE for the 2018-19 school year.

Turning to the unilateral placement, the parents argue that the IHO erred by not finding that iBrain was appropriate and request that the SRO render a finding that iBrain was an appropriate placement for the student for the 2018-19 school year. The parents acknowledge that they were unable to present evidence regarding the appropriateness of iBrain; however, contend that there is sufficient information in the hearing record to make a finding. Additionally, the parents assert that the IHO erred by not making a finding regarding equitable considerations and request that an SRO render a decision on this issue. The parents contend that equitable considerations favor reimbursement.[9]

The district, in its answer with cross appeal, denies the parents' allegations; however, the district agrees with the parents that the IHO erred by dismissing the due process complaint notice

[8] The IHO also ordered the district to "immediately re-evaluate the student in all areas of his suspected disabilities not evaluated within the last two years" and ordered the district upon completion of the evaluations to reconvene and produce a new IEP for the 2020-21 school year (IHO Decision at p. 16).

[9] Again, the parents acknowledge that they were unable to present evidence on the issue of equitable considerations but assert that there is sufficient evidence in the hearing record to render a decision.

as moot. Initially, the district notes that the IHO erred in finding that the SRO only modified the pendency order and contends that the SRO actually reversed the pendency order. As such, the district contends that the IHO based his dismissal of the hearing on an incorrect understanding of the procedural history and that the dispute remains live and active.

Further, the district contends that it offered the student a FAPE for the 2018-19 school year. The district asserts that the parents failed to properly raise the following issues in the due process complaint notice: that the district failed to issue proper meeting notices and prior written notices, failed to timely conduct the student's annual review, ignored an IHO decision, and failed to recommend assistive technology and an individualized healthcare plan.[10] Since these issues were not raised in the due process complaint notice and the district did not agree to expand the issues, it asserts that these issues cannot be reviewed on appeal.

Moreover, the district argues that issues not raised in the request for review but raised in the due process complaint notice are now abandoned. Specifically, the district asserts that the parents have abandoned their claims that: the March 7, 2018 CSE was not held at a mutually agreed upon time, the CSE failed to comply with the parents' request for a "full committee" review, the CSE failed to consider independent evaluations and reports provided by the student's teachers and service providers, the March 2018 IEP failed to adequately describe the student's present levels of performance, and the IEP contained immeasurable goals.[11]

With respect to the merits of the parents' claims, the district contends that its decision to classify the student as having multiple disabilities better captures the nature of the student's needs and that disagreement over the classification category does not amount to a deprivation of FAPE. The district argues that the special class recommendation of 12:1:(3+1) was appropriate for the student and that the parents' requested 6:1:1 class ratio "overlooks that [the student's] needs stem from the fact that [the student] has severe multiple disabilities, has needs for programming in the areas of habilitation and treatment, needs a staff/student ratio of at least one staff person to three students, and requires services from additional staff that are teachers, supplementary school personnel and related services providers." The district asserts that the 12:1:(3+1) special class placement plus the recommended related services is the type of program designed to address the student's unique needs. As to the recommended related services, the district contends that the duration and frequency were sufficient to allow the student to receive educational benefits because the student does not have the stamina for 60-minute sessions of related services.

The district asserts that its decision not to reconvene a CSE meeting subsequent to the parents' request did not deprive the student of a FAPE. The district alleges that the parents failed to present "any testamentary or documentary proof that [the parents] submitted any new documentation that would reflect a change in [the student's] needs and abilities" that would

[10] The district points to both the request for review and the parents' memorandum of law for these four issues.

[11] The district also contends that although the parents assert that the district failed to identify the student's highly intensive management needs, that "they have not pointed to any management need that was overlooked" and therefore, "these bald allegations are insufficient to raise an issue for review."

warrant a reconvene after the March 2018 CSE meeting. The district argues that the parents' ability to participate in the development of the student's IEP was not impeded by the failure of the CSE to reconvene.

Turning to the issues of the appropriateness of iBrain and equitable considerations, the district contends that should the SRO find it necessary to address these issues, that they should be remanded to the IHO. The district asserts that the parents never completed presenting witnesses and it was not provided with an opportunity to cross-examine the witnesses on these issues. The district requests that the IHO's dismissal of the due process complaint notice on mootness grounds be overturned, the parents' appeal be denied, and the cross-appeal be sustained.

The parents served an answer to the district's cross appeal. The parents repeat the general allegations raised in the request for review asserting that the IHO erred in his finding regarding mootness, that the district did not offer the student a FAPE for the 2018-19 school year, that iBrain was an appropriate placement, and that equitable considerations favor the parents. In addition, the parents address the district's arguments regarding the scope of the hearing and the scope of review. With respect to the scope of the hearing, the parents object to the district's allegation that the due process complaint notice did not contain certain procedural issues pointing to an allegation that the district "committed 'several substantive and procedural errors under the IDEA and state law while developing the 3/7/18 IEP and subsequent placement recommendations.'" The parents also assert that the district opened the door to the issues of assistive technology and nursing services. Regarding the scope of review, the parents assert that the request for review included an allegation regarding the composition of the CSE.[12]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive

[12] To the extent that the parties have submitted letter briefs that are not contemplated by State regulation, such briefs have not been considered on appeal (see 8 NYCRR 279.6[a]).

content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[13]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Mootness

Both parties appeal from the IHO's determination that the matter is moot due to the parents receiving all of their requested relief through the October 2018 order on pendency.

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

[13] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[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"]).

The IHO based his mootness determination on an interim order on pendency dated October 2018, in which IHO 1 determined that the student's pendency for the 2018-19 school year was at iBrain (IHO Decision at p. 4). The IHO mistakenly believed that an SRO did not overturn the October 2018 order on pendency (id.; see Application of the Dep't of Educ., Appeal No. 18-127). However, as pointed out by both parties, the IHO based the mootness finding on an incorrect interpretation of the previous SRO's decision (Req. for Rev. ¶¶12-13; Answer with Cross ¶11). The hearing transcript demonstrates that following an off-the-record discussion, the IHO believed that the SRO decision had not altered the pendency order (Tr. pp. 224-25). Upon reading the decision regarding the appeal of the October 2018 order on pendency, it is clear that the SRO overturned the October 2018 order (Application of the Dep't. of Educ., Appeal No. 18-127). In that decision, the SRO found that the student's placement for the purposes of pendency was the 2017-18 iHope placement. In addition, while the SRO applied the same test of substantial similarity as IHO 1 had applied, the SRO found that the program provided at iBrain was not substantially similar to the program provided at iHope due to the lack of vision education services at iBrain (id.). The SRO then overturned IHO 1's decision directing pendency at iBrain, but permitted the parents to request to revisit the question of pendency by presenting evidence as to when vision education services were made available at iBrain (id.). There is no indication in the hearing record that the parents requested an IHO revisit the question of pendency. Accordingly, based on the prior SRO decision in this matter, pendency for the student for the duration of this proceeding was at iHope and the IHO's discussion of the parents receiving relief through pendency was entirely incorrect and the IHO erred in finding the matter was moot.

Additionally, to the extent that the parents have sought an appeal in district court of the SRO decision that reversed the October 2018 order on pendency, the parties have not notified this tribunal of a decision in that matter and since the SRO's decision, the Second Circuit has issued a decision finding that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 2020 WL 2516650, at *9-*11).

Additionally, even if the IHO had not erred in his findings regarding the October 2018 order on pendency, courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency, finding that the case should be heard because of the applicable exception to the mootness doctrine when (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again (New York City Dep't of Educ. v. S.A., 2012 WL

6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012]). Thus, even if the parents had obtained all of their requested relief through pendency, this appears to be the type of matter in which a court would not favor dismissal because of the exception to the mootness doctrine.

Based on all of these facts, it is clear that there is still a live controversy in this matter. The parents have not received and likely will not receive the funding they are seeking for the student's placement at iBrain for the 2018-19 school year through pendency in this matter and therefore, a finding on the merits is paramount.

B. Remand

I have considered reaching the merits of the parents' claims; however, that is unrealistic in light of the IHO's decision to cut off the presentation of evidence and cross-examination by the parents on the issue of whether iBrain was an appropriate placement for the 2018-19 school year and whether equitable considerations favor reimbursement.

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]).

In this matter a remand is necessary for development of the hearing record as to whether the district offered the student a FAPE for the 2018-19 school year, whether iBrain was an appropriate unilateral placement for the 2018-19 school year, and whether equitable considerations favor reimbursement.

After the parents have been given the opportunity to present their witnesses, it is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parents' 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]).[14]

[14] It is clear from the district's answer with cross-appeal and the parents' answer to the cross-appeal that there is a dispute as to the scope of the impartial hearing, i.e. what issues have been properly raised by the parents in the due process complaint notice or to which the door was opened by the district in presenting its case. Therefore, upon remand, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of identifying agreed upon facts between the parties and narrowing the issues that remain outstanding (8 NYCRR 200.5[j][3][xi]).

VII. Conclusion

In light of the above, the IHO erred in finding that IHO 1's October 2018 interim pendency order granted the parents the relief they were seeking, and in dismissing the matter as moot, given that IHO 1's pendency decision was overturned by an SRO in Application of the Dep't of Educ., Appeal No. 18-127. The issues raised in the due process complaint notice are not moot. The matter is remanded to the IHO to identify the issues in dispute between the parties, to permit the parents to complete the presentation of their case, to further develop the hearing record if deemed necessary, and to make determinations as to whether the district offered the student a FAPE for the 2018-19 school year, whether the unilateral placement at iBrain was appropriate for that school year, and whether equitable considerations favor tuition reimbursement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 15, 2020 is reversed as it dismissed the case as moot; and

IT IS FURTHER ORDERED that this matter is remanded to the IHO to determine whether the district offered the student a FAPE for the 2018-19 school year; and if not, whether the unilateral placement at iBrain for the 2018-19 school year was appropriate, and whether equitable considerations favor tuition reimbursement;

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

Dated: **Albany, New York**
June 17, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER