The University of the State of New York

The State Education Department
State Review Officer
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No. 20-092

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

The Law Offices of Steven L. Goldstein, attorneys for respondents, by Steven L. Goldstein, 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 district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondents (the parents) for their son's tuition costs at the Imagine Academy for Autism (Imagine), including transportation, for the 2019-20 school year. The appeal must be sustained and the matter remanded to the IHO for further administrative proceedings.

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

A full recitation of the student's educational history is not possible due to the state of the hearing record in this matter.[1] By way of brief background, the parents indicated that, at the time

[1] During the proceedings, the IHO did not receive any testimony or documents into evidence. Accordingly, all facts recited herein are derived from allegations contained in the parents' due process complaint notice dated September 11, 2019 (see Due Process Compl. Notice) or from evidence the parties submitted with their request for review and answer, respectively (see Req. for Rev. Exs. 1-2; Answer Exs. A-I). As to the evidence submitted by the parties on appeal, the district offers: a September 3, 2019 IHO decision relating to the student's 2018-19 school year (Req. for Rev. Ex. 1) and an April 3, 2019 IEP (Req. for Rev. Ex. 2), and the parents offer: an April 2011 IHO decision relating to the student's 2010-11 school year (Answer Ex. A), a May 30, 2014 IHO decision

of the due process complaint notice, the student was 17 years old and had received diagnoses of, among other things, Down syndrome and autism (Due Process Compl. Notice at p. 3). According to the parents, the student demonstrated limitations in and difficulties with attention, behavior, social interactions, sensory processing and integration, communication, and academic skills (id. at pp. 4-5). Additionally, the student presented with "numerous deficiencies in regards to his activities of daily living skills, some of which [we]re health related" (id. at p. 5).

The CSE convened on April 3, 2019 to formulate the student's IEP for the 2019-20 school year (see generally Req. for Rev. Ex. 2). Upon finding that the student was eligible for special education as a student with autism, the April 2019 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a district specialized school for the 2019-20 school year, along with related services and assistive technology (id. at pp. 1, 7, 19-20, 23).[2] The parents disagreed with the recommendations contained in the April 2019 IEP and enrolled the student at Imagine for the 2019-20 school year (Due Process Compl. Notice at pp. 4, 6, 7).[3, 4]

On September 3, 2019, an IHO issued a decision relating to the student's 2018-19 school year (Req. for Rev. Ex. 1). The IHO in that matter found that the district failed to offer the student a FAPE for the 2018-19 school year and, as relief, ordered the district to reimburse the parents for the costs of the student's tuition at Imagine for that school year (id.). That decision was not appealed.

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relating to the student's 2013-14 school year (Answer Ex. B), the parents' September 11, 2019 due process complaint notice that was already part of the hearing record by operation of State regulation (Answer Ex. C; see 8 NYCRR 279.9[a]), documents from Imagine (Answer Exs. D; G), as well as correspondence between counsel for the parties and/or the IHO regarding the present proceedings (Answer Exs. E; F; H; I). 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. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, given the IHO's decision to curtail the impartial hearing, the parties did not have an opportunity to offer documentary evidence at the time of the hearing and the documents submitted with the request for review and the answer are considered only to the extent necessary to understand the context of the parties' current dispute. Although they have been considered to a limited extent for background purposes herein, as I do not reach the merits of the parents' claims, the parties should, if they so choose, offer these documents into evidence upon remand to be sure that they are made part of the hearing record before the IHO.

[2] The student's eligibility for special education as a student with autism is not in dispute (see Due Process Compl. Notice at p. 4; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The Commissioner of Education has not approved Imagine as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[4] According to the parents, the district "recommended a 6:1+1 [specialized school] program for [the student] for the 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years" but that the student had attended Imagine for each of those school years (Due Process Compl. Notice at p. 3 n.1).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 11, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year (see generally Due Process Compl. Notice).

The parents raised numerous concerns about the April 2019 CSE recommendations, including the CSE's refusal to recommend one-to-one instruction throughout the school day and failure to recommend certain methodologies such as "the Applied Behavior Analysis ('ABA') model, a Developmental Individual-difference Relationship ('DIR') based model, and the TEACCH model throughout the school day" (Due Process Compl. Notice at pp. 3, 4, 15). The parents alleged that they were informed that the district would only consider a public-school placement for the student and, as a result, the CSE again recommended placement at the 6:1+1 specialized school program that it had recommended in prior years (id. at p. 4). Further, the parents alleged the April 2019 CSE and resultant IEP were deficient for several reasons, including that the IEP: did not contain an adequate statement of how the student's educational performance and ability to progress in the general education curriculum were impacted by his disability; did not contain annual goals to address the student's educational needs; did not contain goals for parent counseling and training; included annual goals that were broad and vague, and lacked objectively measurable criteria; included short-term objectives that lacked adequate objectively measurable criteria and failed to contain sufficiently descriptive target dates for completion; did not contain adequate information regarding the student's medical conditions and their effect on his learning; did not adequately address the student's sensory needs; and did not include appropriate and adequately individualized post-secondary planning and goals (id. at pp. 8-13). The parents also contended that the district failed to conduct a functional behavioral assessment (FBA) of the student or develop an adequate behavioral intervention plan (BIP) (id. at pp. 10-11). The parents further alleged that they were denied the right to meaningfully participate in the development of the IEP and that the CSE recommendations were predetermined prior to meeting (id. at pp. 13, 16). Finally, the parents alleged that the district's denial of a FAPE for the 2019-20 school year resulted "in his unilateral placement at Imagine" (id. at p. 18).

Furthermore, the parents argued that they did not have a burden to prove the appropriateness of Imagine or that equitable considerations weighed in favor of their requested relief, as the circumstances represented a change in placement rather than a unilateral placement (Due Process Compl. Notice at pp. 16-17). Finally, they contended that Imagine was an appropriate placement for the student as it addressed his educational needs and allowed him to make meaningful progress (id.). As relief, the parents requested the costs of the student's tuition at Imagine, along with transportation, for the 2019-20 school year, as well as compensatory education for any services denied during 2019-20 school year (id. at pp. 20-21).

B. Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing and addressed the issue of the student's pendency (stay-put) placement on October 2, 2019 (Tr. pp. 1-8). On October 2, 2019, the IHO issued an interim decision regarding the student's pendency placement (see Interim IHO Decision). The IHO held that the "baseline" of the student's pendency placement derived from the September 2019 IHO decision relating to the student's 2018-19 school year, which, according to the IHO, the

district acknowledged it would not be appealing (id. at p. 12). Specifically, the IHO held that the pendency placement consistent of "placement at and payment for Imagine . . . inclusive of transportation" (id.). In addition to determining the student's pendency program and placement, the IHO found that the district's refusal to implement pendency in the absence of an IHO order was in and of itself a denial of a FAPE to the student (id. at pp. 9-10).

On April 20, 2020, the parties participated in a second and final day of proceedings (Tr. pp. 9-27). As previously stated, there was no documentary evidence admitted into the hearing record and no testimony taken on either day (see Tr. pp. 1-27). In a final decision, dated April 20, 2020, the IHO indicated that the student's tuition at Imagine would be funded pursuant to pendency "at a minimum, until the end of the appeal window," which the IHO calculated would fall roughly one month prior to the end of the 2019-20 school year (IHO Decision at p. 2). The IHO went on to recognize the practical difficulties and real concerns accompanying the ability of both public and nonpublic schools to deliver education to students during the COVID-19 pandemic but found the circumstances did not affect the district's responsibility to fund the student's tuition, opining that the district would be entitled to documentation that the student received "distance/remote instruction" during the school closure (id. at pp. 3-5).[5] Based on the foregoing, the IHO found that "no substantive showing by the district at this point in the school year could serve to vitiate its responsibility to fund the non-public placement for all but a de minimis portion of the school year" (id. at p. 5 [emphasis in original]). As for that de minimis period of time, the IHO noted that, if the student was required to move to a district program at that point, the district program would "still be affected by the C[OVID] lockdown" (id. at p. 6).

In addition to finding that the district was responsible for funding the student's tuition for most of the school year pursuant to pendency, the IHO also opined that the parents had no burden to prove that Imagine was an appropriate unilateral placement, reasoning that the student had not been unilaterally placed by the parents but instead was attending Imagine pursuant to the IHO decision relating to the 2018-19 school year and pursuant to pendency (IHO Decision at pp. 5-6). The IHO indicated that the unappealed IHO decision relating to the 2018-19 school year amounted to "a placement agreement between the parties" and that, therefore, "the student was entitled to ongoing placement at Imagine" (id. at p. 6). As relief, the IHO ordered the district to fund the student's placement at Imagine through the end of the 2019-20 school year (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parties' familiarity with the issues for review on appeal in the district's request for review, the parents' answer, and the district's reply is presumed and will not be recited here in detail. The central issue on appeal is whether the IHO erred in determining that a substantive hearing on the merits was not required based upon the fact that the parents received most of their requested relief under pendency and because the student's attendance at Imagine did not constitute a unilateral placement, the appropriateness of which the parents were required to prove. The district argues that the IHO's decision should be vacated and remanded for a full hearing on the merits.

[5] According to the IHO, the impact of the COVID-19 pandemic and the closure of schools resulted in a breakdown of the parties' settlement negotiations (see IHO Decision at p. 3).

In their answer, the parents respond to the district's allegations with admissions and denials and argue that the IHO's decision should be upheld in its entirety. The parents further argue that the district failed to present a case at the hearing held on April 20, 2020, and therefore, waived any right to exercise its due process rights to a hearing. Additionally, the parents contend that the student's placement at Imagine was not a unilateral placement, and accordingly, the district bore the burden of proof and persuasion on all issues. Finally, the parents seek reimbursement for Imagine tuition for the 2019-20 school year.[6]

In a reply, the district asserts that it did not concede that it denied the student of a FAPE, and therefore, the IHO's preclusion of a full hearing constitutes a due process violation.

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 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

[6] The parent also argues that the district failed to respond in writing to the parents' due process complaint notice and, therefore abandoned the opportunity to defend its offer of a FAPE. Contrary to the parents' argument, a response to a due process complaint notice is "qualitatively different than a federal or state court pleading" and does not require affirmative defenses or specific denials of the allegations contained in the due process complaint (see R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *5-*6 [S.D.N.Y. Sept. 16, 2011]). Furthermore, a response by the district is only required "[i]f the school district has not sent a prior written notice" which has essentially the same information as a school district's due process response (8 NYCRR 200.5[a]; see 34 CFR 300.508[e]). Here, while it is not in the hearing record, the parents alleged that the district provided them with a prior written notice regarding the April 2019 CSE recommendations, albeit an inadequate one (Due Process Compl. Notice at pp. 3, 6-7, 20). While I do not find that the district's failure to respond to the parents' due process complaint notice amounts to an abandonment of any defenses at this juncture, upon remand, the parents may wish to pursue their claim that the district committed a procedural violation by providing them with an inadequate prior written notice.

[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]).[7]

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

On appeal, the district asserts that the IHO erred in finding the matter moot based on the operation of pendency for a majority of the 2019-20 school year. The district also argues that, in any event, the matter falls within an exception to the mootness doctrine in that the matter is "capable of repetition, yet evading review." Further, the district argues that the IHO erred by finding that the parents did not have a burden to prove the appropriateness of the student's unilateral placement at Imagine for the 2019-20 school year.

Here, the IHO primarily rested his decision that a substantive hearing was not required on the basis that the district was required to fund the student's placement pursuant to pendency. While the IHO did not explicitly state the legal grounds for his dismissal, his determination that no (or little) further relief could be gained if the impartial hearing were to proceed amounts to a finding that the parents' claims 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,

[7] 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).

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"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]). However, generally, 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 (see, e.g., New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012]).

Here, the IHO erred in finding that the district's obligation to fund most of the student's tuition was close enough and in essentially rounding up to require the district to fund the entirety of the tuition before the school year had come to a close without examining the merits. Moreover, according to the April 2019 IEP, the student was entitled to services on a 12-month basis (Req. for Rev. Ex. 2 at pp. 20, 25) and the parents' due process complaint notice was not filed until

September 11, 2019 (Due Process Compl. Notice at p. 1), leaving all of July and August, and a portion of September not covered by pendency. While the IHO pointed to the fact that the IHO decision pertaining to the student's 2018-19 school year was issued on September 3, 2019 and that, therefore, the student's tuition up until that date would have been covered by pendency relating to that proceeding (see IHO Decision at pp. 1, 6), there is no evidence in the hearing record that this was the case. However, even if the parents have received all of the relief that they sought at this juncture now that the 2019-20 school year actually has concluded, review of the limited record supports application of the exception to the mootness doctrine.

Turning to the "capable of repetition, yet evading review" exception to mootness, to compound the relative short duration of the school year compared to the long litigation process, the IHO shortened the school year even further by disregarding at least a month of the school year as de minimis (see IHO Decision at p. 5). Further, there is a high likelihood that the parties will be involved in the same dispute regarding the CSE's program and placement recommendations in future years. According to the parents, the CSE has recommended that the student attend a 6:1+1 special class in a district specialized school and the parents have disagreed with such recommendation every year since the 2012-13 school year (Due Process Compl. Notice at p. 3 n.1). The student is 19 years of age and has not graduated high school, and is entitled to a FAPE until the age of 21.[8] Further, similar to the April 2019 IEP, the April 2020 CSE's placement recommendation includes a 6:1+1 special class in a district specialized school (Req. for Rev. Ex. 2 at p. 23; SRO Ex. I at p. 32).[9] This demonstrates that the likelihood that the district's conduct about which the parents complain—i.e., the CSE recommending that the student be placed at a district school, rather than the nonpublic school program—and the likelihood that the parent will continue to seek district funding of the students' tuition is not speculative, and is "capable of repetition, yet evading review" (see Toth, 720 Fed. App'x at 51).

B. Legal Standard

Having found that this matter is not moot, it is also necessary to determine if there was another legal theory that would justify the IHO's decision to halt the impartial hearing. The IHO described in his decision, as well as during the impartial hearing, his view that the student's

[8] A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition (Educ. Law § 3202[1]).

[9] After a preliminary review of the district's request for review in this matter, it was determined that additional evidence was potentially relevant and necessary for a full review of the district's arguments. Thus, in a letter to both parties dated June 12, 2020, the undersigned, pursuant to 8 NYCRR 279.10(b), directed the district to submit a copy of the student's IEP for the 2020-21 school year as relevant to the district's argument on appeal that the case was not moot and fit within an exception to the mootness doctrine. The parties were offered an opportunity to state their positions or objections in their answer and/or reply. Neither party opposed the consideration of the additional documentary evidence; in its reply, the district responds as if the parents object to the consideration of the April 2020 IEP but review of the parents' answer reveals that the parents object to the consideration of the April 2019 IEP submitted with the district's request for review, not the April 2020 IEP (see Answer ¶ 31; Reply ¶ 12 ; see also Req. for Rev. Ex. 2). For purposes of this decision, to the extent referenced, the additional evidence shall be cited as SRO Exhibit "I" (the April 3, 2020 IEP for the 2020-21 school year) and SRO Exhibit "II" (a prior written notice dated June 8, 2020).

enrollment at Imagine had not been a unilateral placement since the September 2019 unappealed IHO decision represented an agreement between the parties under State law that Imagine was the student's placement (see Tr. pp. 20-21; IHO Decision at p. 6). Before turning to the district's challenge to the IHO's legal theory, I note that, while the IHO cited his view of the nature of the student's placement at Imagine as grounds for not receiving evidence pertaining to the appropriateness of Imagine, this theory does not explain the IHO's rationale for precluding the district from presenting evidence regarding its provision of a FAPE to the student (see Tr. p. 21). Accordingly, even if the IHO applied a correct legal standard, the matter would still need to be remanded to give the district an opportunity to present evidence regarding its offer of a FAPE to the student for the 2019-20 school year.

First, the standards applicable to identifying a student's pendency placement shall be reviewed. During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X, 2008 WL 4890440, at *20; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v.

Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). If a private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute (see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; S.S., 2010 WL 983719, at *1, *6, *8-*9; Ambach, 612 F. Supp. at 233-34). The Second Circuit has repeatedly emphasized that the stay-put placement becomes effective "once a party has filed an administrative due process complaint" (Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 659 [2d Cir. 2020]).

At the outset, there is no dispute amongst the parties that the district has been required to fund the student's placement at Imagine since the filing of the parents' due process complaint notice as a result of its obligation to provide the student with his pendency placement. However, contrary to the parents' and IHO's theory that the unappealed IHO decision amounted to an agreement between the parties that Imagine constituted the student's placement for purposes other than pendency, it has been held that a student's pendency placement and the appropriateness of a student's placement are separate concepts (O'Shea, 353 F. Supp. 2d at 459 [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; Student X, 2008 WL 4890440, at *20; see Mackey, 386 F.3d at 162 [a claim for tuition reimbursement under pendency is evaluated separately from a claim for tuition reimbursement pursuant to the inadequacy of an IEP]). Further, each school year is analyzed separately, and the parent must place FAPE at issue (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable in a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F .Supp. 2d 346, 366 [S.D.N.Y. 2009]).

Here, the September 2019 IHO decision resulting from the 2018-19 proceedings outlined a remedy that was specific to the 2018-19 school year (see Req. for Rev. Ex. 1). The district did not agree to placement at or refer the student to Imagine for the 2019-20 school year (see Req. for Rev. Ex. 2). Instead, the April 2019 CSE recommended a 6:1+1 special class in a district specialized school (Req. for Rev. Ex. 2 at p. 23). The student's placement at Imagine for the 2019-20 was made after the parents determined that they disagreed with the recommendations in the April 2019 IEP (Due Process Compl. Notice at p. 18). Further, in their due process complaint notice, the parents stated that they "ha[d] paid at least a portion of [the student's] tuition to Imagine and [we]re obligated to pay the remainder, in full, for the 2019-2020 school year, regardless of the outcome of this matter" (id.). The parents' choice to remove the student to Imagine was "at their own financial risk" (Carter, 510 U.S. at 15; see also Burlington, 471 U.S. at 373-74).

The parents were not automatically entitled to continue the student's placement at Imagine in the absence of the pending proceeding to trigger the student's stay-put entitlement (see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay-put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] ["a stay-put placement is effective from the date a student requests an administrative due process hearing"]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). The parent's ultimate remedy is set forth in the IDEA and consists of reimbursement for private school tuition upon a showing that the unilateral placement was appropriate for the student for the school year for which the student was denied a FAPE (see Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370-71; see also 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). The statutory scheme requires the CSE to conduct a review of the student's special education programming at least annually, develop an IEP, and then offer special education services in every year in the least restrictive environment, and there is no case law or statute that allows an administrative hearing officer to completely abandon that statutory scheme simply because the student was granted tuition reimbursement previously due to a denial of a FAPE.

Thus, the IHO erred in finding that a change in the student's then-current placement for purposes of pendency constituted unconditioned assent by the district to fund that placement on a going forward basis (see Application of the Dep't of Educ., Appeal No. 20-080 [holding that an IHO erred by failing to apply the elements of the Burlington/Carter analysis and, instead, substituting a pendency standard]; Application of the Dep't of Educ., Appeal No. 13-230 [same]). To hold otherwise would obviate the parents' notice requirements (20 U.S.C. § 1412[a][10][C][iii][III][bb]), eliminate the financial risk of a unilateral placement (see Burlington, 471 U.S. at 374) and undermine the regulatory provisions allowing districts to correct IDEA violations before the commencement of an impartial hearing (e.g., 34 CFR 300.510[a] [setting forth the requirements for the resolution meeting]; 8 NYCRR 200.5[j][2][i] [same]; 8 NYCRR 200.5[h] [outlining provisions relating to mediation]).

Based on the foregoing, the IHO erred by holding that a Burlington/Carter analysis did not apply to the parent's unilateral placement of the student at Imagine for 2019-20 school year. Accordingly, upon remand, an impartial hearing must proceed and the IHO must apply the analysis under the Burlington/Carter framework to evaluate whether the district offered the student a FAPE for the 2019-20 school year, whether the parents' unilateral placement of the student at Imagine was appropriate, and whether equitable considerations weigh in favor of an award of tuition reimbursement.

C. Remand

The IHO's decision in this matter barred the parties, and more specifically, the district from the presentation of evidence and testimony (Tr. pp. at 1-27). 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]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation 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 impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Here, the IHO denied the district any opportunity to present a case when he determined there was no need to conduct a substantive hearing on the merits (see Tr. pp. 17-18). The district's counsel objected to such ruling stating that, even if the district didn't put on a case regarding its offer of a FAPE to the student, the parents would still have a burden to prove the appropriateness of the unilateral placement (Tr. pp. 18-19).[10] In response, the IHO referenced his position that the parents did not carry a burden, which as discussed above, was error (Tr. pp. 20-22).

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]). Here, the appropriate remedy for the IHO's denying the district its due process rights to a full and complete impartial hearing under a Burlington/Carter analysis is a remand to continue these proceedings.

[10] While the IHO interpreted the district's statements as reflecting that the district did not intend to defend its offer of a FAPE to the student (see IHO Decision at p. 5), at no point did the district explicitly state that it did not intend to present evidence or concede that it failed to offer the student a FAPE on the record (see Tr. pp. 1-27).

VII. Conclusion

Having determined that the IHO erred in dismissing this case without a full hearing on the merits, the case is remanded to determine whether the district offered the student a FAPE for the 2019-20 school year, and thereafter, if necessary, whether Imagine was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' request for relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 20, 2020 is vacated; and

IT IS ORDERED that that the matter be remanded to the same IHO who issued the April 20, 2020 decision to determine whether the district offered the student a FAPE for the 2019-20 school year based upon the issues raised in the parents' due process complaint notice, and what relief, if any, the parents may be entitled to;

IT IS FURTHER ORDERED that, if the IHO who issued the April 20, 2020 decision is not available to conduct a proceeding, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
July 30, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER