The University of the State of New York

The State Education Department
State Review Officer
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No. 20-142

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group Ltd., attorneys for petitioners, by Karl J. Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed the parents' due process complaint notice as moot and based on the parent's failure to appear at the hearing. Respondent (the district) joins in the parents' assertion that the IHO erred in dismissing the matter as moot, and cross-appeals from the IHO's failure to make a finding that it offered the student a free appropriate public education (FAPE) for the 2019-20 school year. The appeal and cross-appeal must be sustained in part 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

Due to the nature of the appeal, a full recitation of the student's educational history is unnecessary at this time. Briefly, the CSE convened on June 12, 2019 to develop the student's IEP for the 2019-20 school year (Dist. Ex. 1 at pp. 21, 24). 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 three 40-minute sessions of individual

occupational therapy (OT) per week, four 40-minute sessions of individual physical therapy (PT) per week, four 40-minute sessions of individual speech-language therapy per week, two 40-minute sessions of individual vision education services per week, and two "period[s]" per week of adapted physical education (id. at pp. 21-22). The CSE also recommended a full-time 1:1 paraprofessional for transportation and a full-time group paraprofessional for health and daily living skills (id. at p. 21). The CSE further recommended assistive technology consisting of a Tobii eye gaze device with "Snap+Core" and "Look 2 Learn" software (id.). In addition, the CSE recommended one 60-minute session per month of parent counseling and training (id.).

On June 21, 2019, the student's mother signed an enrollment contract for the student to attend the International Institute for the Brain (iBrain) for the 2019-20 school year (Parent Ex. D at pp. 1, 7).[1] In a letter dated June 21, 2019, the parents asserted that the district had failed to offer the student a program or placement that could appropriately address her needs, and notified the district that they were unilaterally enrolling the student at iBrain for the 2019-20 school year and intended to seek public funding for that placement (Parent Ex. K).[2]

A. Due Process Complaint Notice

By due process complaint notice dated July 8, 2019, the parents asserted that the student was denied a FAPE for the 2019-20 school year and generally contended that the district committed "many substantive and procedural errors under the IDEA and state law while developing the [June 2019] IEP" (Parent Ex. A at p. 2). The parents argued that the 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). Next, the parents argued that the proposed June 2019 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" (id.). 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 2019-20 school year (id.).

Further, the parents contended that the June 2019 IEP was inappropriate, as it did not properly classify the student as having a traumatic brain injury and failed to reflect the student's individual needs (Parent Ex. A at p. 2). Regarding the CSE's recommendations, the parents

[1] On July 8, 2019, the student's mother signed a school transportation service agreement for the 2019-20 school year (Parent Ex. E at pp. 1, 5).

[2] The student attended iBrain for the 2019-20 school year (see Parent Ex. D). iBrain created an IEP for the student for the 2019-20 school year on June 1, 2019 and recommended a 6:1:1 special class placement with five 60-minute sessions of individual PT per week, five 60-minute sessions of individual OT per week, three 60-minute sessions of individual vision education services per week, and five 60-minute sessions of individual speech-language therapy per week (Dist. Ex. 15 at pp. 1, 40). 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 pp. 40, 41).

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 (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. at p. 3). The parents also asserted that the district's recommended program did not offer the student an extended school day, which they opined was necessary for the student to make meaningful progress (id.). For relief, the parents requested direct payment to iBrain for the costs of the student's program and placement for the 2019-20 school year, including the cost of transportation and a 1:1 paraprofessional as well as a reconvene of the student's annual review CSE meeting (id.).

B. Impartial Hearing Officer Decision

An interim order on pendency was issued on September 10, 2019 "on consent of the parties" after waiver of a hearing on pendency (Interim IHO Decision at p. 2).[3] In an "order on consent," the IHO indicated that the student's pendency program consisted of "the educational program provided at iBRAIN, and the costs of being transported to and from iBRAIN, in accordance with" an unappealed IHO decision dated July 16, 2019 (id. at p. 3).

On October 25, 2019, the parties proceeded to an impartial hearing which included documentary and testimonial evidence received over three nonconsecutive dates (Tr. pp. 1-262). The June 17, 2020 hearing date concluded while a district witness was testifying (Tr. p. 259). Prior to concluding the hearing date, the IHO reiterated that the parties would reconvene to continue the witness' cross-examination on July 10, 2020 (Tr. pp. 259, 260). The district and the IHO appeared by telephone on July 10, 2020 for the next hearing date; however, neither the parents' attorney nor the parents appeared (Tr. pp. 263-69). The IHO noted on the record that the parent had not requested an adjournment and given that the school year had concluded and by operation of pendency, the parents had received all of their requested relief, he was inclined to dismiss the parents' claims "as moot by pendency and for the Parent's failure to appear today" (Tr. pp. 265-66). Thereafter, the district made a motion for the IHO to find that the parents had abandoned their claims based on their nonappearance and failure to communicate with the IHO (Tr. p. 267). The IHO granted the district's motion on the record noting the lack of opposition (Tr. pp. 267-68).

By decision dated July 17, 2020, the IHO determined that the parents' claims had been rendered moot by operation of pendency and also granted the district's motion to dismiss the parents' claims for their failure to appear at the July 10, 2020 hearing (IHO Decision at pp. 14, 15).[4] The IHO further ordered the district to reevaluate the student in all areas of suspected disability that had not been evaluated "within the last two years" and upon completion reconvene a CSE to "produce a new IEP" for the 2020-21 school year (id. at p. 15). Lastly, the IHO determined that any other relief sought by the parents and not addressed by the IHO's decision was

[3] The IHO's interim order on pendency has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-4.

[4] The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-17.

"found to be either resolved by the parties, withdrawn by the Parent, outside the scope of the IHO's authority or unsupported by the record" (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the issues for review on appeal in the parents' request for review, the district's answer, and the parents' reply is presumed and will not be recited here in detail. The issues on appeal are whether the IHO erred by dismissing the parents' claims on the grounds of mootness and failure to appear for the July 10, 2020 hearing date. The parents assert that the IHO erred by dismissing their due process complaint notice as moot. The parents argue that the IHO raised mootness sua sponte and failed to address dismissal with the parties. The parents also contend that the district has failed to fully fund the student's pendency program. The parents further allege that the IHO failed to issue a decision on the merits. The parents next contend that the IHO erred by dismissing the parents' due process complaint notice based on their failure to appear for one hearing date and request that the IHO's determinations be reversed. As relief, the parents request a finding of a denial of a FAPE for the 2019-20 school year and direct funding of the cost of the student's attendance and transportation at iBrain.

In an answer, the district cross-appeals the IHO's determination that the parents' claims were moot and the IHO's failure to determine that the student had been offered a FAPE for the 2019-20 school year. The district also argues that the SRO does not have jurisdiction over the parents' claims relating to pendency as the parents have appealed the IHO's decision to district court. For relief, the district requests a finding that the student was offered a FAPE for the 2019-20 school year or in the alternative, a remand to an IHO for a full hearing on the merits.

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 [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]).[5]

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. Preliminary Matters - Additional Evidence

Both parties have submitted a proposed exhibit with their respective pleadings as additional evidence for consideration on appeal (Req. for Rev. Ex. M; Answer Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the 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]).

Given the procedural posture of this matter and the issues presented for review, the evidence offered by the parties are necessary to the extent cited herein in order to review the parties' allegations about the conduct of the impartial hearing and whether the IHO properly dismissed the parents' claims. Accordingly, I will accept the documents as additional evidence to the extent necessary to render a decision in this matter.

[5] 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).

B. Dismissal of the Due Process Complaint Notice

Next, the parents allege that the IHO erred by dismissing their due process complaint notice, based on the parents' failure to appear at the July 10, 2020 impartial hearing date. Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

As noted above, the parents did not appear for a July 10, 2020 hearing (Tr. pp. 263-69). In an attempt to explain what happened, the parents submitted an email thread with the request for review (Req. for Rev. Ex. M). By email dated May 29, 2020, the IHO's office indicated that the next available date to continue the impartial hearing was July 10, 2020 (id. at pp. 1-2). By email dated June 1, 2020, the district replied that its witness was not available during the summer (id. at p. 1). In a June 1, 2020 response to the district's email, the parents replied that the district's inability to present its witness for a continuation of cross-examination on July 10, 2020 should result in the IHO making a finding against the district on its burden to demonstrate that it offered the student a FAPE (id.). Following this email exchange—to which the IHO never responded—the parties convened on June 17, 2020 for the third impartial hearing date (Tr. pp. 216-62). The IHO stated on the record that the next hearing date was scheduled for July 10, 2020 (Tr. p. 259). The district indicated that its witness—who was in the middle of cross-examination—was not available on July 10, 2020 (id.). The IHO instructed the parties to work out any issues with the next impartial hearing date between themselves and concluded by stating "we'll talk again July 10" (Tr. pp. 259, 260).

Due to the COVID-19 pandemic, the IHO, the court reporter, the parties, their counsel and the witnesses appeared by teleconference on the second impartial hearing date on May 26, 2020 with the same procedure occurring on the third impartial hearing date on June 17, 2020 (Tr. pp. 146, 152, 216, 219). The district, the IHO, and the court reporter appeared by teleconference on July 10, 2020 (Tr. pp. 263, 265). The IHO opened the proceeding by stating that as of March 12, 2020 all impartial hearings were conducted via teleconference due to the pandemic (Tr. p. 265). Despite the parents and their counsel having appeared for all prior hearing dates, there was no discussion of or effort made to contact the parents or their counsel on the record (Tr. pp. 265-68).

In the request for review, the parents' attorney asserts that he intended to (1) communicate with the IHO since he did not respond to the email exchange on June 1, 2020 and (2) seek an adjournment due to a conflict with a medical appointment (Req. for Rev. ¶20). Without explanation, the parents' attorney next contends that he "unintentionally failed to seek the adjournment and, having failed to calendar the hearing because of their original intention to seek

the adjournment, Petitioners' counsel and Petitioners inadvertently failed to appear on July 10, 2020" (id.).

I find the parents' attorney's argument lacking, particularly in light of the vigor with which he sought to have the district's case dismissed when the district requested an adjournment due to witness availability. Nevertheless, as the hearings were being conducted via telephone, it is unclear why the IHO did not attempt to call the parents' attorney on the date of the hearing. In contemplating the district's motion to dismiss, the IHO even indicated that he believed the parents should have "a reasonable time. . . to argue a reasonable excuse for the default that they have a meritorious claim of defense, and that the Department of Education is not prejudiced" (Tr. p. 267). However, instead of granting the parents' the opportunity to present such an argument, the IHO granted the district's motion as "unopposed" (Tr. pp. 267-68). It appears that the IHO also gave less consideration to the district's motion to dismiss the matter due to the parents' nonappearance because he intended to dismiss this matter as being moot (Tr. pp. 266, 267; see IHO Decision at pp. 4-13). However, as discussed below, the IHO's determination as to mootness was incorrect. Additionally, while the IHO appears to have intended for the parents to have time to make an application to argue a reasonable excuse for the default, after the IHO issued a final decision, the parents' recourse was to appeal from the IHO's decision (see Educ. Law 4404[1], [2]). Unfortunately, this means that the reviewing authority does not have input from the IHO as to whether the IHO would have found the parents' reason for not appearing at the July 10, 2020 hearing as a sufficient basis for continuing the hearing.

Accordingly, an outright dismissal of this matter, without attempting to get some input from the parents or parents' counsel, was improper. A dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). However, the parents' failure to appear for a scheduled impartial hearing date for which the parent was aware ahead of time and whether the parents' excuse for the nonappearance is reasonable is something that falls withing the broad discretion granted to an IHO in how the impartial hearing is conducted. For this reason, this matter is remanded so that the IHO can address the parents' reason for not appearing on the July 10, 2020 hearing date in the first instance, as well as whether the parents' nonappearance justifies such an extreme remedy as an outright dismissal of the parents' due process complaint notice.[6]

C. 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 September 2019 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.

[6] The IHO should take note that on at least one occasion an SRO has determined that "a parent's failure to attend a single impartial hearing date without requesting an adjournment or communicating with the IHO, d[id] not constitute either a pattern of conduct or conduct so egregious warranting the maximum sanction of dismissal of the due process complaint notice with prejudice" (see Application of a Student with a Disability, Appeal No. 20-137). Albeit, in that matter, the parent's advocate was present for the hearing and requested an adjournment (id.).

v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). 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]).

The IHO found that the parents' right to pendency was funded retroactively to the July 8, 2019 due process complaint notice and that the 2019-20 school year had concluded as of the July 10, 2020 hearing date on which the parents failed to appear (IHO Decision at pp. 4-5, 14-15; see Tr. p. 266). According to the parents, at the time the request for review was filed, the district had funded approximately 80 percent of the cost of the student's placement at iBrain for the 2019-20 school year (Req. for Rev. n.4); however, according to the district the matter of pendency is currently being litigated in the United States District Court for the Southern District of New York (Answer with Cross-Appeal ¶7). Thus it does not appear that the parents have received all of their requested relief through pendency. Nevertheless, even if the parents have received all of the relief that they sought at this juncture now that the 2019-20 school year has concluded, review of the hearing record supports application of the exception to the mootness doctrine.

Turning to the "capable of repetition, yet evading review" exception to mootness, 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. In support of this exception, the district has included the parents' July 6, 2020 due process complaint notice challenging the CSE's recommendations for the 2020-21 school year as additional evidence annexed to its answer (Answer Ex. 1). While the specific content of the parents' July 6, 2020 due process complaint notice is not relevant to the merits of the parents' complaint regarding the 2019-20 school year, it demonstrates that some of the parents' allegations regarding the 2019-20 school year—such as placement of the student in a nonpublic school, the amount of support the student needed in the classroom, and the frequency and duration of the student's related services—carried forward as disputed issues from the 2019-20 school year to the 2020-21 school year (compare Parent Ex. A, with Answer with Cross-Appeal Ex. 1). Accordingly, the likelihood that the district's conduct about which the parents complain and the likelihood that the parents will continue to seek district funding of the student's tuition is not speculative, and is "capable of repetition, yet evading review" (see Toth, 720 Fed. App'x at 51).

D. Remand

The IHO's decision in this matter precluded the district from concluding its case in chief and barred the parents from confronting the district's remaining witness and presenting testimony (Tr. pp. at 265-68). 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]).

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 decision to dismiss the proceeding based on mootness and the parents' nonappearance at one hearing date is a remand to continue the proceedings at the point they were interrupted. On the July 10, 2020 hearing date, the district was directed to present a witness for cross-examination (Tr. pp. 259, 260). The district had not yet rested its case in chief, and it is not clear from the hearing record if the district had another witness to call (see Req. for Rev. Ex. M at p. 1). The parents' attorney had indicated that the parents intended to present direct testimony by affidavit from three witnesses (Tr. p. 260). A series of communications took place between the parties leading up to the July 10, 2020 hearing date (Req. for Rev. Ex. M). On the July 10, 2020 hearing date, the district appeared by its counsel; however, it was unclear from the hearing record if the district was prepared to proceed with the cross-examination of its witness (Tr. pp. 264-68). The hearing should resume from this point with the district prepared to complete its case in chief and the parents' prepared to present an argument to the IHO as to the reason for their nonappearance at the July 10, 2020 hearing date and the presentation of their witnesses.

VII. Conclusion

Having determined that the IHO erred by dismissing this matter, the case is remanded to the IHO to review the parents' reason for not appearing at the July 10, 2020 hearing and to determine whether the district offered the student a FAPE for the 2019-20 school year, and thereafter, if necessary, whether iBrain was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' request for relief.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision dated July 17, 2020 is vacated; and

IT IS ORDERED that the matter is remanded to the same IHO who issued the July 17, 2020 decision to resume the hearing; and

IT IS FURTHER ORDERED that, if the IHO who issued the July 17, 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**
October 8, 2020

STEVEN KROLAK
STATE REVIEW OFFICER