The University of the State of New York

The State Education Department
State Review Officer
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No. 21-001

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

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

Judy Nathan, Interim Acting General Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed without prejudice her due process complaint notice that sought reimbursement for her daughter's tuition costs at the Manhattan Star Academy (MSA) for the 2019-20 school year from respondent (the district). The appeal must be sustained.

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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of the appeal.[1] Briefly, at the

[1] When the IHO "terminate[d] the matter without prejudice," no evidence had been admitted into the hearing record (IHO Decision at p. 1; see Tr. pp. 1-15). As such, the district provided the following to the Office of State Review as

time of the impartial hearing in the present matter, the student was eligible for special education as a student with multiple disabilities and attended MSA (Admin. Hr'g Ex. 1 at pp. 1, 2).[2]

A. Due Process Complaint Notice

By due process complaint notice dated September 11, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and failed to allow the parent the opportunity to meaningfully participate in the development of the student's IEP for the 2019-20 school year and asserted various procedural and substantive violations relating thereto (see generally Admin. Hr'g Ex. 1). The parent asserted that the April 2019 CSE's failure to recommend a sufficiently supportive special class, adequate 1:1 support, applied behavior analysis (ABA) and PROMPT therapies, adequate annual goals and behavioral supports denied the student a FAPE (id. at pp. 4, 5).[3] The parent contended that she was unable to schedule a visit to the particular public school to which the district assigned the student to attend prior to the start of the 12-month school year (id. at p. 5). The parent alleged that she visited the school site in August 2019 and found that it would not have been appropriate to meet the student's needs (id.). The parent asserted that the assigned public school site was not safe and secure given the student's history of elopement, that the student would be overstimulated by the size of the lunch room and distracted by the small, cramped space where occupational therapy and physical therapy were provided (id. at p. 6). The parent also alleged that the school did not use ABA, there was no Board Certified Behavior Analyst (BCBA) on staff, the school's speech therapist was unfamiliar with the student's communication device, and that the school could not provide an adequate level of assistive technology (id.). As relief, the parent requested findings that the student was denied a FAPE, that the parent's opportunity to participate in the decision-making process was significantly impeded, and that the district caused a deprivation of educational benefits (id. at p. 7). The parent also requested direct funding and reimbursement of the costs of the student's attendance at MSA for the 2019-20 school year (id.). The parent further requested that the district provide appropriate bus transportation for the 2019-20 school year (id.). Additionally, the parent requested that the district conduct a functional behavioral assessment (FBA) and if appropriate, develop a behavioral intervention plan (BIP) (id.). The parent also requested that the district be required to fund the

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the administrative record on appeal: the parent's due process complaint notice, the IHO's written decision, the parties' pendency agreement, the parent's "[w]ithdrawal [l]etter and [a]djournment" and a transcript of the proceeding held. For clarity, the parent's due process complaint notice will be cited to as "Admin. Hr'g Ex. 1." In addition, the parent attached a document to the request for review and requests that it be considered as additional evidence. However, this document should have been included with the hearing record and shall be considered on appeal to the extent discussed below. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]).

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

[3] "PROMPT" is an acronym for "prompts for restructuring oral muscular phonetic targets," which is a method of speech-language instruction using "a tactile-kinesthetic approach that uses touch cues to a patient's articulators . . . to manually guide them through a targeted word, phrase or sentence" (Admin. Hr'g Ex. 1 at p. 2 n.1).

student's after school speech-language therapy by a PROMPT trained or certified speech-language pathologist of the parent's choosing at an enhanced rate for the 12-month, 2019-20 school year (id.). Lastly, the parent requested compensatory relief "in an amount and of a type" that the IHO finds to be just and proper (id.).

B. Impartial Hearing Officer Decision

The parent's attorney, an interpreter, two representatives for the district and the IHO convened for a hearing on October 20, 2020 (Tr. pp. 1-15).[4] IHO De Leon was assigned and stated that he would not proceed with the hearing without the parent present (Tr. p. 3).[5] The IHO next discussed that the parties had entered into an agreement on pendency based on an unappealed IHO decision (Tr. p. 4; see Interim Order on Pendency at p. 2). Turning to the parent's claims, the IHO stated that the student's pendency services "render[ed] the [p]arent's claims for tuition reimbursement, transportation moot" (Tr. pp. 5, 6-7). The IHO further indicated that the district had "no objection to conducting an FBA" and as a result the only issue pending for a hearing was the parent's request for after school PROMPT speech-language therapy (Tr. pp. 5, 6, 7).[6] The IHO then stated that since the district asserted that the student was offered a FAPE for the 2019-20 school year, the matter would be scheduled for another hearing date on the limited issue of whether

[4] According to case extension orders submitted with the hearing record, extensions of the date by which the IHO's decision was due were requested by the parties on November 25, 2019, December 25, 2019, January 24, 2020, February 23, 2020, March 24, 2020, and April 23, 2020. These six orders were electronically signed by the IHO on April 27, 2020. The hearing record reflects that the parties requested extensions on May 23, 2020 and on June 22, 2020. These two case extension orders were electronically signed by IHO De Leon on June 7, 2020, which indicated that the June order was signed before it was requested. Extension requests for July through September reflect that the parties requested extensions on July 22, 2020, August 21, 2020 and September 20, 2020. These three case extension orders were electronically signed by IHO De Leon on August 21, 2020, again reflecting that the September extension order was signed before it was requested. The final two case extension orders indicate that the parties requested extensions on October 20, 2020 and November 19, 2020. The final two orders were electronically signed by the IHO on October 27, 2020. The reason specified for each of the case extension orders was "[e]xtensive [t]estimony/[i]ssues" when no testimony had been taken at all, no exhibits were entered into evidence, and there were approximately four to six fact issues upon which to render findings with respect to the IEP.

[5] Due to the COVID-19 pandemic, all of the hearing participants appeared via telephone conference. There is no indication in the hearing record whether any attempts were made to contact the parent, given that an interpreter was participating.

[6] Although the IHO stated that compensatory services can be awarded for a failure to implement pendency, he later stated that, if the student was entitled to receive PROMPT speech-language therapy pursuant to pendency and if the district failed to provide services it had agreed to provide or was otherwise mandated to provide, the parent was not entitled to compensatory services and should seek enforcement in another venue (Tr. pp. 5, 6). Notwithstanding the IHO's contradictory statements, if the student was entitled to PROMPT speech-language therapy under pendency, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

or not the student was "entitled to PROMPT services" because the parent would receive tuition reimbursement and transportation pursuant to pendency (Tr. pp. 6-7).

By email dated November 20, 2020, the parent's attorney advised the IHO that the student had been receiving PROMPT speech-language therapy at MSA for the 2019-20 school year and therefore was withdrawing the parent's claim for after school PROMPT speech-language therapy (Req. for Rev. Attachment at p. 2).[7] In an email dated November 22, 2020, the IHO's office responded by stating that "[s]ince [the] [p]arent is withdrawing this matter then there is no need to appear tomorrow for a hearing" (id. at p. 1). In a decision dated November 24, 2020, the IHO reported that the parent's attorney had requested to withdraw the matter without prejudice and "[a]ccordingly, [he] terminate[d] the matter without prejudice (IHO Decision).

By email dated November 30, 2020, the parent's attorney informed the IHO's office that "there was a mistake in issuing the order of termination" (Req. for Rev. Attachment at p. 1). The parent's attorney further stated that she did not intend to withdraw the parent's entire complaint and that the IHO's order failed to include an award of tuition reimbursement "for the period of time between the start of the school year, and the date the due process complaint was filed" and failed to memorialize the district's agreement to conduct an FBA (id.). In closing, the parent's attorney requested that the IHO issue a corrected decision (id.). The hearing record does not indicate whether the IHO responded.

IV. Appeal for State-Level Review

The parent appeals and argues that IHO De Leon erred by terminating the underlying matter. The parent alleges that she intended to withdraw a single claim and proceed with presenting evidence and witnesses in support of the parent's request for tuition reimbursement that was not addressed by the parties' pendency agreement. Specifically, the parent argues that tuition for the 12-month portion of the 2019-20 school year "remains a live issue" as does funding for the first week of the ten-month school year "prior to the filing of the impartial hearing request on September 12, 2019" (Req. for Rev. at p. 3).[8] As relief, the parent requests that the matter be remanded "to an IHO for determination on the merits of the [p]arent's claim for tuition associated" with the student's attendance at MSA for the 2019-20 school year not covered by pendency (id.).

In an answer, the district joins the parent's request for the matter to be remanded to an IHO for a hearing on the merits. The district agrees that IHO De Leon erred by determining that the parent withdrew her due process complaint notice. The district further argues that the parent's claim for tuition reimbursement not covered by pendency and the district's claim that it offered the student a FAPE for the 2019-20 school year have not been addressed. As such, the district requests that the IHO's termination be reversed and the matter remanded to an IHO for a hearing on the merits.

[7] The request for review indicates that the email was dated November 23, 2020, however the email was dated November 20, 2020 (compare Req. for Rev. at p. 2; with Req. for Rev. Attachment at p. 2).

[8] The parent's due process complaint notice was dated September 11, 2019 (compare Admin. Hr'g Ex. 1 at p. 1, with Req. for Rev. at p. 3).

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]).[9]

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).

[9] 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).

VI. Discussion

A. Mootness

IHO De Leon did not address pendency in his written decision, however he stated on the record during the impartial hearing that pendency had effectively rendered the parent's claim for tuition reimbursement and transportation moot (Tr. pp. 5, 7). Both parties assert that the IHO erred by determining that the parent withdrew her due process complaint notice and that the IHO failed to address claims that are not moot due to the parent receiving part of her requested relief through pendency.

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [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]).

According to the parent, the student's attendance at MSA for its summer session and the first week of the 10-month school year were not part of the parties' pendency agreement. Thus, contrary to IHO De Leon's statements during the impartial hearing, the case is not moot as the parent has not received all of her requested relief through pendency. Nevertheless, even if the parent had received all of the relief that she 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.[10]

Turning to the "capable of repetition, yet evading review" exception to mootness, because the challenged action was in its duration too short to be fully litigated prior to cessation or expiration of the school year, the first element of the exception is satisfied as it often is in IDEA cases. Furthermore, there is also a substantial likelihood that the parties will be involved in the same dispute again. For its part, the district does not assert that the CSE has had a change of opinion and now agrees that the student's IEP should include use of the PROMPT technique and ABA, or that the CSE recommended a 6:1+1 special class with a 1:1 paraprofessional, similar to the parent's IEP claims for the 2019-20 school year. Accordingly, the likelihood that the district's conduct about which the parent complains and the likelihood that the parent 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).

B. Remand

Turning to their next request, the parties agree that the IHO erred by finding the parent had withdrawn her due process complaint notice. The district asserts that the student was offered a FAPE for the 2019-20 school year and the parent argues that she did not receive all of her requested relief through pendency. 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

[10] The IHO's cases have been reversed numerous times due to a growing number of improper mootness determinations (see, e.g., Application of a Student with a Disability, Appeal No. 20-195 [issuing an erroneous sua sponte pendency determination to find a parent's tuition reimbursement claim moot]; Application of a Student with a Disability, Appeal No. 20-068 [finding the parents' live tuition reimbursement controversy moot]).

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]).[11] 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, IHO De Leon dismissed the case without ruling on any of the parent's claims on the merits of the case that were contained in the parents' due process complaint notice.[12] Accordingly, I find that the matter must be remanded to continue the administrative proceedings and develop a hearing record. The hearing record reflects that the district intended to defend its recommendations for the 2019-20 school year (Tr. p. 6). The hearing record also indicates that the parent intended to present documentary evidence and call witnesses (Req. for Rev. Attachment at p. 2). The hearing should resume from this point with the district prepared to present its case in chief.

VII. Conclusion

Having determined that the IHO erred by finding that the parent had withdrawn her due process complaint notice, the case is remanded to IHO De Leon to determine whether the district offered the student a FAPE for the 2019-20 school year, and thereafter, if necessary, whether MSA

[11] During the impartial hearing, the IHO stated that "the parties should not assume that they can get an entire day" to present their case and that "[t]hose days are gone" (Tr. p. 11), referencing the now well-documented problem in the district of "an unprecedented volume of special education due process complaints [that] is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15). While the IHO's description of the challenges that the district's administrative due process system faces may be accurate, the IHO's disregard of State regulations (both with respect to extensions to the timelines, discussed above, and to the parties' right to present their cases) and over-reliance on the mootness doctrine to prematurely dispose of live controversies (or those that fall under one or more of the exceptions) are not acceptable solutions for addressing this frustrating state of affairs because it simply deflects the IHO's responsibility to the parties elsewhere and compounds the problems faced by the system. Specifically as to the length of the impartial hearing, the IHO correctly points to use of testimony by affidavit as a means to avoid a lengthy hearing (Tr. p. 13); however, even though State regulation allows this method of receiving testimonial evidence (8 NYCRR 200.5[j][3][xii][f]), there is nothing in the regulation providing that, if used, a party's access to up to one day to present its case is in any way modified. The IHO represented to the parties that he does not work alone and that he handles more cases than other IHOs because he has the infrastructure to do so (Tr. p. 12) but dismissing cases with live disputes is not handling them.

[12] As noted above, the parent only withdrew an aspect of the relief sought, specifically, her request for district funding of after-school speech-language therapy services by a PROMPT trained or certified speech-language pathologist of the parent's choosing.

was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parent's request for relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 24, 2020 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to IHO De Leon to resume the impartial hearing and issue a determination of the parent's claims in her due process complaint notice.

Dated: **Albany, New York**
January 26, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER