The University of the State of New York

The State Education Department
State Review Officer

No. 08-071

Application of the BOARD OF EDUCATION OF THE SPRINGVILLE-GRIFFITH INSTITUTE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hodgson Russ LLP, attorneys for petitioner, Jeffrey J. Weiss, Esq., of counsel

DECISION

Petitioner (the district) appeals from that portion of a decision of an impartial hearing officer which ordered an independent educational evaluation (IEE) for adapted physical education (PE) as a result of the educational program/services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2005-06 school year. The parent cross-appeals from that portion of the impartial hearing officer's decision which placed a time limit for obtaining an independent "functional vocational assessment" (FVA) at district expense, and ordered an independent evaluation of the student regarding adapted PE.[1] The appeal must be sustained in part. The cross-appeal must be dismissed.

With respect to a procedural issue that has arisen on appeal, I note that the parent has attached additional documentary evidence to her answer and cross-appeal that she contends was unavailable to her at the time of the impartial hearing, and the district has objected to the parent's submissions (Answer Exs. A-I). Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer'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 the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability,

[1] "Adapted physical education" means "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]).

Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, most of the additional documentary evidence submitted by the parent is cumulative with respect to the evidence already contained in the hearing record and the remaining two documents relate to a second impartial hearing held in response to a separate due process complaint notice filed by the parent.[2] Furthermore, none of the additional evidence is necessary to render a decision in this appeal. Therefore, I decline to consider it.

At the time the impartial hearing convened in February 2008, the student had been awarded all of the credits necessary for him to receive a New York State Regents diploma, with the exception of two credits for PE, and he was attending a community college (Tr. p. 424). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student began attending school in the district in 2002, and the student's prior educational history was discussed in Application of a Child with a Disability, Appeal No. 02-072 and need not be repeated here in detail (Parent Ex. C7). As relevant to the issues in this appeal, the hearing record indicates that the student has several diagnoses, including attention deficit hyperactivity disorder (ADHD), a mitral valve insufficiency, exercise induced asthma, and a heart murmur (Tr. p. 589; Parent Exs. I1 at p. 2; I2 at p. 1; I3 at pp. 1, 4). The parties have long agreed that the student's diagnoses, particularly his heart condition, have precluded his unrestricted participation in the district's regular PE classes (Dist. Ex. 11 at p. 2; Parent Exs. I1at pp. 1, 9; I2 at pp. 1, 3; I3 at pp. 1, 4; see also Parent Ex. F at p. 7). The student's individualized education programs (IEPs) for the 2002-03, 2003-04 and 2004-05 school years indicated that the student was "exempt" from PE (Parent Exs. I1 at p. 1; I2 at p. 1; I3 at p. 1). In a prior impartial hearing decision dated January 3, 2005, an impartial hearing officer noted that the district conceded that it had not provided the student with a free appropriate public education (FAPE) in his 2004-05 school year IEP and the impartial hearing officer ordered the district to provide the student with pendency services, reconvene and develop an appropriate IEP for the student (Parent Ex. F at pp. 14-15).[3]

The hearing record indicates that several CSE meetings were conducted in spring 2005, although the specific details regarding these meetings are not clear (Parent Ex. C11). A number of additional CSE meetings were scheduled thereafter and then cancelled or rescheduled for a variety of reasons (see, e.g., Dist. Exs. 23; 23a; 23b; 24; 24a; 24b; 24c; 24d; 24e; 24h; 25; 25a; 25b; 25d; 25f; 25g; 25h; 26, 26a, 26b, 26c; 26d; 26e, 26f; 26g; Parent Exs. C10; C11; C12; C13; C14; C18). In August 2005, the parent initiated a State administrative proceeding[4] with the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) alleging that the district had failed to timely conduct an annual review and develop an IEP for the student for the 2005-06 school year (Tr. p. 604; Dist. Ex. 28r at p. 2; Parent Ex. C4 at p. 4). VESID sustained the

[2] I note that after the impartial hearing in this case concluded, the parent also raised the same issues presented in this hearing record in a separate proceeding before another impartial hearing officer and sought the same relief with regard to the parties' dispute over the student's May 2006 IEP (Dist. Ex. 13); however, that proceeding was dismissed on the ground of res judicata (Application of a Student with a Disability, Appeal No. 08-076).

[3] Neither party appealed this January 2005 impartial hearing decision.

[4] See 8 NYCRR 200.5(*l*).

parent's complaint, instituted corrective action and directed the district to comply with State regulations and conduct the student's annual review by November 4, 2005 (Dist. Ex. 28r at p. 3; Parent Ex. C4 at p. 4). The district's compliance date by which they had to hold an annual review for the student was revised to December 13, 2005 (Dist. Ex. 28r at p. 3).

A CSE meeting for the student was convened on November 17, 2005, and over the course of approximately five hours, the parties attempted to develop the student's 2005-06 IEP (Tr. p. 159; Dist. Ex. 27e). Meeting attendees included the student, the student's mother and father, the parent's advocate, an additional parent member, the district's CSE chairperson, psychologist, two special education teachers, a regular education teacher, an occupational therapist, the high school principal and a recording secretary (Dist. Ex. 28e at p. 1). CSE meeting minutes for the November 2005 meeting indicated, among other things, that the parties agreed that an FVA of the student would be added to the student's IEP for 2005-06 (id. at p. 3). At the November 2005 CSE meeting, the district also raised the issue that the student needed credits for PE in order to receive a Regents diploma (id.). The parent disagreed with the district, indicating that the student was completely exempt from PE (id.). Several members of the CSE indicated that adapted PE should be recommended in the student's IEP (id.). The November 2005 CSE meeting minutes indicated that the discussion of the issue of PE was "very heated," the parent indicated her intent to litigate the issue, and the CSE "moved on to other items" (id.). After addressing other items for several hours, the parent's advocate indicated that the parent had a sick child at home and requested that the meeting be adjourned (id. at p. 4).

The district scheduled another CSE meeting for December 6, 2005 (Dist. Exs. 28; 28a; 28b). By letters dated November 7, 2005 and December 1, 2005, the parent indicated that she was unavailable to meet with the CSE on December 6, 2005 due to scheduling by an impartial hearing officer in another matter, and provided other dates in December 2005 and January 2006 that she was available (Tr. pp. 153-55; Dist. Exs. 26f; 28c; see Dist. Ex. 28d). By letter dated December 5, 2005, the district responded to the parent's letters and indicated that the parent had left the November 2005 CSE meeting early, the district was required to complete the corrective action ordered by VESID by December 13, 2005, the district had adjourned the November 2005 CSE meeting as a courtesy to the parent, and the VESID regional associate had directed the district to continue on the CSE meeting on December 6, 2005 stating that the district should have concluded the student's annual review at the November 2005 CSE meeting (Tr. pp. 168-69; Dist. Ex. 28e). The district convened the CSE meeting on December 6, 2005 (Dist. Ex. 28h). The December 6, 2005 CSE meeting attendees included an additional parent member, the district's CSE chairperson, psychologist, two special education teachers, a regular education teacher, an occupational therapist, the high school principal, and a recording secretary (id. at p. 1). The parent and the student were not in attendance (Tr. pp. 166, 659; Dist. Ex. 28h at p. 1). The December 6, 2005 CSE meeting minutes reflected that an "individual adaptive PE study proposal" had been obtained from the district's PE department, that it would be sent to the student's physician for approval and that it may require modification based upon input from the student's physician (Dist. Ex. 28h at p. 2). Among other things, the resultant IEP dated December 6, 2005 indicated that an FVA would be completed by June 2006, the student would not participate in regular PE program and that the student would participate in a specially designed or adapted PE program (Tr. p. 244; Dist. Ex. 11 at pp. 2, 4). On December 15, 2005, VESID determined that the district was in compliance with the corrective action plan for the student (Dist. Ex. 28r at p. 1).

The district scheduled an appointment for the FVA that was called for in the student's December 6, 2005 IEP; however, the parent cancelled the appointment and indicated that she would reschedule it (Dist. Exs. 8-10; Parent Ex. C5). With regard to the adapted PE recommended in the December 6, 2005 IEP, the district on December 22, 2005, attempted to seek input from a physician whom the district believed was the student's primary health care provider (Dist. Ex. 14; Parent Exs. C4 at p. 5; C13). On December 29, 2005, the physician responded by apologizing and indicating that he could not provide assistance to the district because the parent forbade him from exchanging information with the district regarding the student and informed him that the matter would be litigated by the parent (Dist. Ex. 15; Parent Ex. C7).

In January 2006, the district sought the parent's consent to discuss the proposed adapted PE program with the physician (Dist. Ex. 16). According to the district, district staff attempted to convince the student to meet with the adapted PE instructor, but the student politely refused (Tr. p. 340). The hearing record indicates that the student was not scheduled for and did not receive adapted PE for the remainder of the 2005-06 school year, during which time the district attempted to determine how to implement an adapted PE program for the student that did not include any physical activity (Tr. pp. 132-33, 340-41; Dist. Ex. 17). In the student's IEP dated May 19, 2006, the CSE again recommended that the student receive adapted PE for the 2006-07 school year (Dist. Ex. 13 at p. 2).

Although the hearing record does not clearly indicate when, the parent proposed that the student be awarded adapted PE credit for his participation in jazz band (Tr. pp. 527-28, 673-74, 676-79); however, the district ultimately rejected this proposal (Tr. p. 679; Parent Ex. C4 at p. 8). The district scheduled the student for "adapted PE" for one period at the end of each day in fall 2006 and the last two periods each day in spring 2007 in order to provide an opportunity for the student to earn sufficient PE credit by the time he concluded his senior year in June 2007 (Tr. pp. 343-45; Dist. Ex. 17; Parent Ex. H). The student did not attend the adapted PE class during the 2006-07 school year, and the parent provided the district with 133 notes requesting that the student be excused from school prior to his adapted PE classes because he had a job (Tr. p. 685; Dist. Exs. 21; 22). The district did not award the student any PE credit (Tr. pp. 450-51; Parent Exs. J5-J8). The student was not permitted to graduate in June 2007 and was not awarded a diploma because he lacked the necessary PE credits (Tr. pp. 450-51, 679; Parent Ex. C4 at pp. 9-10).

On June 14, 2007, the CSE developed an IEP for the student for the 2007-08 school year that recommended, among other things, adapted PE, and the district included an adapted PE class in the student's schedule; however, the student did not attend school in the district and attended a community college instead (Tr. p. 374; Dist. Ex. 17; Parent Ex. C4 at pp. 1, 10; IHO Ex. R at pp. 22-23). The parent notified the district that she disagreed with the CSE's recommendations in the student's 2007-08 IEP, she intended to unilaterally place the student in an appropriate school at district expense, and that she wanted the district to implement all of the educational programs and services in the student's 2007-08 IEP (Parent Ex. C4 at pp. 10-12; IHO Ex. R at pp. 22-29). The district indicated that it was willing to implement the 2007-08 IEP in the setting recommended by the CSE and denied the parent's request to implement the student's 2007-08 IEP at the community college (Parent Ex. C3; IHO Ex. R at pp. 22-29).

In a due process complaint notice dated November 20, 2007, the parent alleged numerous instances of wrongdoing by the district ranging from the 2004-05 through the 2007-08 school years, including, among other things, the failure to properly evaluate the student, failure to

implement the prior impartial hearing officer's unappealed 2005 order, providing false information about the student, holding CSE and multidisciplinary meetings regarding the student without the parent, creating the student's December 2005 IEP without the parent, failing to schedule the student for adapted PE during the 2005-06 school year or to provide appropriate adapted PE thereafter, and conducting unauthorized evaluations of the student (IHO Ex. A at pp. 1-10). The parent indicated that the 2007-08 placement offered by the district was inappropriate and that she had notified the district that she was unilaterally placing the student at public expense (id. at p. 10). The parent limited her request for relief to the 2005-06 school year (id. at p. 11), and among other things, sought a variety of admissions of wrongdoing by the district, and "day for day corrective action and/or compensatory educational services" regarding the FVA, adapted PE and counseling (id. at p. 14).

The district filed a motion to dismiss the parent's due process complaint notice on the bases that it was barred by the statute of limitations, the doctrine of mootness, and the doctrine of laches (IHO Ex. N). The parent opposed the motion, and the impartial hearing officer issued an interim determination that the parent's claims were timely, mootness did not apply insofar as the parent requested additional services, and that laches did not apply (IHO Exs. R; Z2 at pp. 3-6).[5] The impartial hearing was convened in February 2008 and concluded in May 2008. In a decision rendered on June 16, 2008, the impartial hearing officer noted the district's acknowledgement that it had mistakenly exempted the student from earning PE credits until fall 2005, but he determined that the district did not provide the parent with proper notice that the topic of adapted PE would be discussed at the November 2005 CSE meeting, the parent was excluded from participating in the adjustment of the student's 2005-06 IEP from describing the student as PE-exempt to requiring adapted PE, and the parent was improperly precluded from participating in the December 2005 IEP meeting (IHO Decision at pp. 11-14). The impartial hearing officer determined that these were procedural flaws that denied the student a FAPE (id. at p. 12).[6] The impartial hearing officer also determined that the district failed to conduct the student's FVA (id. at p. 15). The impartial hearing officer determined that the parties agreed that the FVA and adapted PE were important for the student, but had become deadlocked and were unable to agree on setting up and administering the FVA and an evaluation for adapted PE program (id.). Consequently, the impartial hearing officer ordered that the district pay, together with transportation costs, for an FVA to be conducted by an evaluator of the parent's choice, which conformed to the district's guidelines for an IEE (id. at p. 18). He also ordered that the district pay, together with transportation costs, for an IEE regarding adapted PE to be conducted by an evaluator of the parent's choice, which: (1) conformed to the district's guidelines for IEEs; (2) determined whether the student had completed an appropriate adapted PE program based on his jazz band or other activities; (3) determined the extent to which the student was entitled to credit for adapted PE; and (4) determined whether the

[5] With regard to the statute of limitations, the impartial hearing officer determined that the parent could assert that the district denied the student a FAPE for claims accruing between December 6, 2005 and June 30, 2006, (the interim decision appears to contain a typographical error with respect to the latter date), but he limited her ability to pursue claims arising prior to this period (Tr. p. 20; IHO Ex. Z2 at p. 5). With regard to mootness, he determined that the parent could proceed at the impartial hearing and identify the additional services sought and how they could be delivered (IHO Ex. Z2 at p. 5).

[6] The impartial hearing officer also made determinations regarding the student's occupational therapy and counseling services; however, the parties have not raised specific arguments with respect to these findings on appeal and I do not address them (IHO Decision at p. 17).

student had earned sufficient credits to fulfill the requirements for a Regents diploma (id. at p. 19). The impartial hearing officer ordered that the IEE's be completed within 120 days and directed the CSE to reconvene and implement a program consistent with the evaluator's adapted PE determinations (id.). The impartial hearing officer included provisions in his order that deemed the award of the IEEs waived by the parent and/or the student if they failed to have the IEEs conducted within 120 days or failed to reasonably cooperate with the evaluators (id. at pp. 19-20).

The district appeals, contending that it appropriately developed and offered an adapted PE program during the 2005-06 school year and thereafter. The district asserts that the student's failures to participate in adapted PE during 2005-06 and thereafter, earn credit for adapted PE, and graduate from high school in June 2007 were the result of the student's refusal to meet with the adapted PE teacher, and that the parent obstructed the district's provision of adapted PE by preventing input by a physician of the student and excusing the student from school every day prior to his scheduled adapted PE classes. The district argues that the impartial hearing officer should not have awarded the parent any relief with respect to the issue of adapted PE. The district also asserts that the impartial hearing officer lacked jurisdiction to order relief with respect to awarding academic credit for adapted PE or a determination of whether the student is entitled to a Regents diploma. The district seeks an order from a State Review Officer annulling the impartial hearing officer's order that it fund an independent adapted PE evaluation. The district does not appeal the impartial hearing officer's order that it fund an independent FVA.

In her answer, the parent denies the district's allegations and argues that the district never developed or offered an adapted PE program that was appropriate for the student and asserts that the district appropriately exempted the student entirely from PE until his junior year. The parent also alleges that the physician from whom the district sought input was not the student's physician. The parent also cross-appeals the order of the impartial hearing officer, contending that he erred by failing to annul the student's December 2005 IEP and failing to determine that the student continued to be exempt from PE requirements. Alternatively, the parent argues that the impartial hearing officer should have awarded the student credit for adapted PE due to his participation in jazz band and order that the graduation requirements be fulfilled. The parent also contends that the impartial hearing officer erred in limiting the time to 120 days within which to have an FVA conducted, arguing that it is not possible to obtain the evaluation in that time period. As relief, the parent seeks a determination that the student is exempt from PE and an order directing the district to award the student a Regents diploma. The parent requests one year (or until a Regents diploma is awarded) to secure an FVA. Alternatively, in the event that a State Review Officer determines that the student is not exempt from PE, the parent seeks a determination that the student's participation in jazz band constituted an appropriate adapted PE program and that he be awarded two credits for that activity and a Regents diploma. As a second alternative, in the event a State Review Officer determines that the student must participate in adapted PE, the parent requests that the district be ordered to recommend an appropriate program in an appropriate setting.

At the outset, the parties' jurisdictional arguments must be addressed. The Office of Special Education Programs of the United States Department of Education (OSEP) has explained that

> the establishment of standards for promotion and retention for all students, including students with disabilities, is a State and/or local function. Generally, the [Individuals with Disabilities Education Act (IDEA)] would not require that the IEP team make decisions

> regarding promotion or retention of a child with a disability. However, the IDEA does not prevent a State or local educational agency from assigning this decision-making responsibility to the IEP team

(Letter to Davis-Wellington, 40 IDELR 182 [OSEP 2003]; see Bd. of Educ. v. Ambach, 90 A.D.2d 227, 233-34 [3d Dep't 1982] aff'd, 60 N.Y.2d 758 [1983] [upholding State regulations regarding graduation requirements and holding that federal regulations implementing the Education of the Handicapped Act and the Education for All Handicapped Children Act of 1975 do not mandate the award of diplomas for students with a disability]). When developing a student's IEP, State regulations specify that a CSE, under certain prescribed circumstances, may excuse a student with a disability from the language other than English requirement and preserve the student's eligibility for a Regents diploma (see 8 NYCRR 100.5[b][2][ii][b]). However, absent from State regulations are any other comparable provisions setting forth a CSE's authority regarding other Regents or local diploma requirements, such as excusing a student from PE requirements altogether and similarly preserving the student's eligibility for a Regents diploma. With regard to PE, State regulations permit a CSE to determine "if a student is not participating in a regular physical education program, the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education," but these provisions do not address graduation requirements (8 NYCRR 200.4[d][2][viii][d]). Neither an impartial hearing officer, nor a State Review Officer may pass upon the academic standards required by the State of New York for graduation in a proceeding of this nature, which must be limited to the special education programs and services provided by the district (Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 96-67; Application of a Child with a Disability, Appeal No. 94-31). Furthermore, disputes over a district's decision to award or its failure to award academic course credit, are not properly raised or resolved at an impartial hearing filed under the IDEA. Impartial hearings filed under the IDEA are not the proper forum for such education disputes because such hearings are limited to issues concerning the identification, evaluation and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of a Child with a Disability, Appeal No. 03-070; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agencies' rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]).[7]

In this case, the parent seeks relief in her cross-appeal in the form of the student's complete excusal from the PE requirements or the award of academic credit for adapted PE, together with award of a Regents diploma (Answer at pp. 19-20). The parent cites to no legal authority to support her contention that an impartial hearing officer and/or State Review Officer have the authority to make such an award. For the reasons described above, the parent's requests are beyond the scope of relief that may be awarded by an impartial hearing officer or a State Review Officer (Application

[7] I note, however, that it is not beyond an impartial hearing officer's authority to hear evidence related to a district's decision to award or disallow credit or to issue a diploma insofar as it may be relevant to the identification, evaluation and the provision of special education programs and services to a student with a disability (see 8 NYCRR 200.5[j][1]).

of the Bd. of Educ., Appeal No. 05-037; see Application of a Child with a Disability, Appeal No. 03-070). Furthermore, I find that it was not permissible for the impartial hearing officer to authorize a third party, in this case an independent evaluator, to direct the district to award the student academic credit or a diploma in conformance with the results of an IEE (IHO Decision at pp. 19-20). Accordingly, I will annul that portion of the impartial hearing officer's decision.

With regard to the issue of whether the district offered or implemented an appropriate adapted PE program for the 2005-06 school year, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). 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., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). 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]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

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; Application of a Child with a Disability, Appeal No. 07-139). 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]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). 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., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). 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; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, I note that in seeking relief regarding the 2005-06 school year and the provision of adapted PE, the parent successfully opposed the district's motion to dismiss on the basis that she was seeking compensatory education for the alleged denial of services, and the impartial hearing

officer allowed the impartial hearing to proceed on the issue of whether additional services were warranted and, if they were, how they may be provided to the student (IHO Ex. Z2 at pp. 4-5). However, after his interim decision was issued and the hearing record was further developed, it became clear that the student stopped attending school in the district after the conclusion of the 2006-07 school year, the parent cannot confirm that the student has any interest in participating in a district evaluation or development of an appropriate adapted PE program, and it appears that the student has been unilaterally placed by the parent at a community college with the intention to seek reimbursement from the district (Tr. pp. 374, 707; Dist. Ex. 17; Parent Ex. C4 at p. 10). Under these circumstances, I find that the 2005-06 IEP has long since expired by its own terms, two superseding IEPs were developed that have also expired, the student is no longer attending the district's school, and therefore, no meaningful relief can be granted at this point with respect to the parent's 2005-06 claims, including the alleged improper implementation of the adapted PE program during the 2005-06 school year (Dist. Exs. 11; 13; Parent Ex. C4 at p. 10; IHO Exs. A; R at pp. 22-29). Accordingly, the case has been rendered moot, and the exception to the mootness doctrine does not apply. However, I also note that the district acknowledges its current responsibility insofar as the student continues to be eligible for and the district is willing to provide special education services, including adaptive PE services (Pet. ¶¶ 63-64). The hearing record supports the conclusion reached by the impartial hearing officer that that the parties reached an impasse regarding the evaluation of the student's needs, and there is nothing in the hearing record to suggest that this situation has changed (Tr. pp. 708-09; Dist. Exs. 14; 15; IHO Decision at p. 15). Accordingly, I will not disturb the impartial hearing officer's determination that the parent may obtain an IEE regarding adapted PE at public expense; however, I will direct that the purpose of the evaluation be limited to assessing the student's current special education needs, with particular consideration given to the extent to which he may safely participate in activities related to obtaining PE credit.

With regard to the parent's challenge to the impartial hearing officer's decision about length of time in which she may obtain an independent FVA at public expense, I find that four months is sufficient time to obtain that IEE and her arguments to the contrary are not persuasive, particularly in light of the fact that the district is required to reimburse her for the cost of transportation attributable to having the evaluation completed (IHO Decision at p. 18).

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated June 16, 2008, which directed an independent educational evaluator to determine the extent to which the student has earned academic credit for adapted PE and whether the student is entitled to a Regents diploma, is annulled.

Dated: **Albany, New York**
September 11, 2008

PAUL F. KELLY
STATE REVIEW OFFICER