The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 10-066

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer, which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student attended the Rebecca School, where he has continuously attended school since September 2007 (Parent Ex. A at p. 1; see Tr. p. 267; Dist. Ex. 3 at p. 3).[1] The Commissioner of Education has not approved the Rebecca School as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; Tr. pp. 136-37).

[1] The student received occupational therapy (OT), physical therapy (PT), speech-language therapy, and counseling as related services while attending the Rebecca School during the 2009-10 school year (Tr. pp. 141-42). In addition, the student received a weekly home-based program that included speech-language therapy and special education itinerant teacher services (Tr. pp. 6, 8-14; see Tr. pp. 178-204, 209-30).

On May 22, 2009, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 3 at p. 1; see Tr. pp. 33-34, 106-07). The following individuals attended the May 2009 CSE meeting: a district special education teacher (who also acted as the district representative), a district school psychologist, the student's then-current special education teacher from the Rebecca School (via telephone), a social worker from the Rebecca School, an additional parent member, the parents' educational advocate, and both of the student's parents (Dist. Ex. 3 at p. 2; see Tr. pp. 33-35, 106-07). Prior to the May 2009 CSE meeting, the district received a 15-page "Multidisciplinary Progress Report Update" from the Rebecca School, dated May 1, 2009, which described the student's then-current program; his "[f]unctional [e]motional [d]evelopmental [c]apacities;" his educational instruction in the areas of mathematics, English language arts, and social studies; and his related services, including OT, PT, speech-language therapy, counseling, music therapy, and art therapy (Tr. pp. 35-36; Dist. Ex. 4 at pp. 1-7). In addition, the district conducted a classroom observation of the student at the Rebecca School (Tr. pp. 36-37).

To develop the student's IEP, the CSE reviewed and discussed the classroom observation, as well as the student's present levels of academic performance, social/emotional performance, and health and physical development (Dist. Ex. 7; see Dist. Ex. 3 at pp. 3-5).[2] The CSE also reviewed and discussed the recommended related services and annual goals (Dist. Ex. 7; see Dist. Ex. 3 at pp. 1-2, 6-12, 15). To create the student's annual goals, the CSE relied upon the "school report," "teacher input," and "parental involvement" (Dist. Ex. 7).[3] The CSE modified the student's related services by adding "push-in individual counseling" as suggested by the Rebecca School social worker (id.). In response to the parents' request for home-based services for the student, the CSE "suggested outside agencies" (id.).

Based upon the information provided, the CSE found the student eligible for special education programs and services as a student with a speech or language impairment (Dist. Ex. 3 at p. 1).[4] The CSE recommended a 12-month program and placement in a 6:1+1 special class in a specialized school with the following related services: five 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual PT; one 30-minute session per week of PT in a 2:1 setting; four 30-minute sessions per week of individual speech-language therapy;

[2] According to the CSE meeting minutes, the CSE explicitly asked the parents "if [there was] anything to add to IEP p[age] 3," which described the student's present levels of academic performance and learning characteristics (Dist. Ex. 7). The meeting minutes recorded "'we agree'" as the response to that question (id.).

[3] According to the CSE meeting minutes, when the CSE explicitly asked the parents "if [there was] anything to add to academic goals," the following was recorded as the response: "'I trust [the student's then-current special education teacher]—my goals are long term, I don't know that I can annualize them'" (Dist. Ex. 7). The meeting minutes also noted that the student's father stated: "'We want him to play w[ith] other kids[,] [h]ave less tantrums[,] [and be] [a]ble to express himself'" (id.).

[4] The student's father testified at the impartial hearing that he agreed with the CSE's determination of the student's classification of disability as speech or language impairment (Tr. pp. 136-37). He further testified that the Rebecca School social worker and the parents' educational advocate attending the May 2009 CSE meeting also agreed with the student's classification of disability (Tr. p. 137).

one 30-minute session per week of speech-language therapy in a 2:1 setting; and one 30-minute session per week of individual counseling (id. at pp. 1-2, 15). [5, 6]

On June 15, 2009, the parents received a Final Notice of Recommendation (FNR), dated June 12, 2009, which identified and offered a specific site location for the student's 2009-10 school year (Tr. pp. 112, 144-45; Dist. Ex. 2). By letter dated June 22, 2009, the parents advised the district that the student would be attending the Rebecca School for the 2009-10 school year (Tr. pp. 143-44, 146-47, 153; see Parent Ex. B2 at pp. 1-2).[7, 8] On or about June 26, 2009, the student's father visited the site location identified in the FNR accompanied by the Rebecca School social worker who attended the May 2009 CSE meeting (Tr. pp. 146-47, 292).

By due process complaint notice, dated July 1, 2009, the parents alleged that the CSE's recommended special education programs, related services, placement, and site location identified in the FNR did not offer the student a free appropriate public education (FAPE) for the 2009-10 school year (Parent Ex. A at pp. 1-5; see Dist. Exs. 1-3). As relief, the parents requested, among other things, reimbursement for the costs of the student's tuition at the Rebecca School for the 2009-10 school year (Parent Ex. A at pp. 4-5). In addition, the parents requested a pendency determination finding that the Rebecca School constituted the student's pendency placement for the duration of the administrative or judicial proceedings in this matter (id. at p. 4).

The first day of the impartial hearing in this matter occurred on November 3, 2009, when the parties conducted a pendency hearing (Tr. p. 3). At that time, the parties agreed that a recently rendered and, to date, unappealed impartial hearing officer's decision, dated September 15, 2009, regarding the 2008-09 school year established the Rebecca School as the student's pendency placement (Tr. pp. 4-6). At the conclusion of testimony and after an off-the-record discussion, the impartial hearing officer stated that the impartial hearing would be adjourned until January 5 and 12, 2010, and she then asked if the "parties consent[ed] to an extension of the compliance date in

[5] At the impartial hearing, the student's father neither admitted nor denied whether he agreed with the CSE's recommended related services (Tr. pp. 138-40). Rather, he explained that he "sort of disagreed" with the recommended services because he thought the CSE recommended additional related services in order to "exclude the home services" (Tr. pp. 139-40).

[6] The student's father testified at the impartial hearing that he agreed with the CSE's recommended placement in a 6:1+1 special class in a specialized school (Tr. pp. 108-09). In addition, the student's father testified that the Rebecca School attendees and the parents' educational advocate also agreed with the CSE's recommended placement in a 6:1+1 special class in a specialized school (Tr. pp. 137-38).

[7] Neither party submitted the June 22, 2009 letter into evidence at the impartial hearing (see Tr. pp. 1-329; Dist. Exs. 1-4; 6-8; 8A-10; Parent Exs. A-B; A1-B2).

[8] On February 22, 2010, the impartial hearing officer identified the enrollment contract for the 2009-10 school year for the Rebecca School as "Parent Exhibit B1" (Tr. pp. 98, 101-02). However, in the list of exhibits entered into the hearing record, the same exhibit was identified as "Parent Exhibit B2;" thus, to avoid confusion, the 2009-10 school year enrollment contract for the Rebecca School will be referred to throughout this decision as "Parent Exhibit B2."

this matter" (Tr. pp. 16-17). Both the parents' attorney and the district's attorney agreed to the impartial hearing officer's request (Tr. pp. 17-18).[9]

On January 5, 2010, the parties reconvened to continue the impartial hearing (Tr. p. 20). The impartial hearing concluded on May 18, 2010, after five days of hearings (Tr. p. 238).

By decision dated June 21, 2010, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2009-10 school year because the specific site location identified and offered in the FNR did not constitute a special class in a specialized school as required by the student's IEP, and the recommended placement was not available to the student as of July 1, 2009 (IHO Decision at p. 8). The impartial hearing officer noted that the site location was "located in a larger public school building in which all students [did] not have IEP[s]" (id.). She also concluded that the parents sustained their burden to establish the appropriateness of the Rebecca School and that equitable considerations did not preclude an award of tuition reimbursement; thus, the impartial hearing officer ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2009-10 school year and for the costs of the home-based services program upon proper proof of payment (id. at p. 9).

On appeal, the district contends that notwithstanding the pendency decision in this case and the expiration of the 2009-10 school year, the present matter is not moot and that a State Review Officer should render a determination on the merits of this case for the following reasons: the parents request for attorneys' fees in their July 1, 2009 due process complaint notice remains a "live" issue in the case; whether the district offered the student a FAPE for the 2009-10 school year would affect the student's future pendency rights; and rendering the instant matter moot would inequitably allow parents to obtain the relief they seek in tuition reimbursement cases through unjustifiably delaying and prolonging the impartial hearings by seeking repeated requests for extensions. The district also contends that the present matter is not moot because it falls within the well-known exceptions to the mootness doctrine.

In addition, the district asserts that contrary to the impartial hearing officer's decision, the district offered the student a FAPE for the 2009-10 school year, and thus, the district should be entitled to recoup pendency payments made during this proceeding. The district alleges that the impartial hearing officer erred in finding that the parents sustained their burden to establish the appropriateness of the Rebecca School and in finding that equitable considerations did not preclude an award of tuition reimbursement. As relief, the district requests an order annulling the impartial hearing officer's decision in its entirety. The district also seeks a finding that the impartial hearing

[9] On December 2, 2009, the impartial hearing officer rendered an Interim Order on Pendency, which was later amended and reissued on April 8, 2010 (IHO Interim Order on Pendency at pp. 1, 3; see IHO Amended Interim Order on Pendency at pp. 1, 3; Tr. pp. 102-06). The impartial hearing officer found that the Rebecca School and the student's home-based services constituted the student's pendency placement, and further, that the pendency placement "arose as of the date of the filing of the impartial hearing request, namely, July 1, 2009" (IHO Interim Order on Pendency at p. 2). As neither party has appealed the impartial hearing officer's Interim Order or Amended Interim Order on Pendency to a State Review Officer, the impartial hearing officer's decision on pendency is final and binding upon the parties (34 C.F.R. § 300.514; 8 NYCRR 200.5[k]).

officer engaged in misconduct by allowing a particular witness to testify and that the district is entitled to recoup pendency payments made during this proceeding.

In their answer, the parents seek to uphold the impartial hearing officer's decision and assert the following as affirmative defenses: the district's appeal is moot; the district is not entitled to recoup pendency payments made during this proceeding; the district's appeal does not fall within the exceptions to the mootness doctrine; the district's claims are barred because the district failed to appeal the pendency decisions rendered in this matter; the impartial hearing officer did not engage in misconduct; and the district was responsible for the delays in the impartial hearing. In a reply, the district argued that the parents' affirmative defenses were without merit.

Turning to the district's appeal and as discussed below, I am not persuaded by the district's arguments that the present matter is not moot or that a State Review Officer should adjudicate the underlying merits of whether the district offered the student a FAPE for the 2009-10 school year.[10] It is well settled that 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]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; 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). In addition, a case becomes moot when the parties lack a legally cognizable interest in the outcome (Murphy v. Hunt, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (Christopher P. v. Marcus, 915 F.2d 794, 802 [2d Cir. 1990]). 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). Thus, consistent with the mootness doctrine, State Review Officers have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). However, a claim

[10] In a recently decided matter, Application of a Student with a Disability, Appeal No. 10-064, the district asserted the same arguments as argued in the present appeal, and a State Review Officer, at that time, deemed the arguments unpersuasive or without merit.

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 and is severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; 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).

Initially, the district contends that the present matter is not moot because the parents' request for attorneys' fees remains a "live" issue in the case. However, I note that the Individuals with Disabilities Education Act (IDEA) does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; see also B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009]; Application of the Bd. of Educ., Appeal No. 09-081). Moreover, the district acknowledges in its own petition that the Supreme Court's ruling in Lewis v. Continental Bank Corporation, 494 U.S. 472 (1990), precludes the assertion of this rationale as the sole basis for evading the mootness doctrine (see Lewis v. Continental Bank Corp., 494 U.S. 472, 479-80 [1990]). Therefore, the district's argument is without merit and must be dismissed.

Next, the district argues that the instant matter is not moot and is distinguishable from Lewis because the district also seeks to recoup payments made pursuant to pendency and an adjudication on the merits of the underlying FAPE claim would affect the student's future pendency rights. The district's arguments, however, are without merit.

First, the district is well aware that the current prevailing caselaw prohibits the district from recoupment of payments made pursuant to pendency (see New York City Dept. of Educ. v. S.S., et al, 2010 WL 983719, at *1-14 [S.D.N.Y. Mar. 17, 2010]; see also M.M. v. New York City Dept. of Educ., 2010 WL 2985477 [S.D.N.Y. July 27, 2010]). In S.S., the court determined that the district—the New York City Department of Education—was not entitled to recoup payments made pursuant to pendency "even if the parent's FAPE-based tuition claim has already been found to fail

on the merits" (S.S., 2010 WL at *11)(emphasis in original). Thus, regardless of whether the district offered the student a FAPE for the 2009-10 school year, no meaningful relief can be granted to the district because the funds paid during pendency are not subject to recoupment. Therefore, the district's argument is without merit and must be dismissed.

Regarding the district's assertion that adjudication on the merits of whether the district offered the student a FAPE for the 2009-10 school year will affect the parties with respect to the student's future pendency rights, I decline to render a finding on this issue solely based upon the allegations in the district's petition, which fails to contain any legal basis or legal authority in support of this argument. Therefore, the district's argument must be dismissed.

Turning next to the district's argument that rendering the instant matter moot would inequitably allow parents to obtain the relief they seek in tuition reimbursement cases through unjustifiably delaying and prolonging the impartial hearings by seeking repeated requests for extensions, I find that the hearing record fails to support the district's contention.

In this case, the first day of the impartial hearing—November 3, 2009—occurred four months after the date of the parents' due process complaint notice—July 1, 2009—and neither the hearing record nor the district's petition contains any evidence as to the reason for the four-month delay (see Tr. pp. 1-329; Dist. Exs. 1-4; 6-8; 8A-10; Parent Exs. A-B; A1-B2). In addition, the hearing record does not contain evidence that a pre-hearing conference, a resolution session, or mediation occurred in this matter—or, alternatively, that the impartial hearing officer granted extensions in this matter—which would serve to extend the timelines within which to commence the impartial hearing (8 NYCRR 200.5[j][3][iii][b][1]-[4], 200.5[j][5][i]). The district is reminded that both State statute and regulations require that upon receipt of a due process complaint notice, the board of education "shall arrange for an impartial due process hearing to be conducted," and shall appoint an impartial hearing officer to conduct the hearing in accordance with the rotational selection process mandated by State statute and regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], 200.2[e][1], 200.5[j][3][i]-[ii]). In addition, State regulations delineate the timelines and procedures governing the commencement of the "hearing or pre-hearing conference" (8 NYCRR 200.5[j][3][iii]).

It is further noted that at the conclusion of the first date of the impartial hearing on November 3, 2009, and after an off-the-record discussion, the impartial hearing officer stated that the proceeding would be adjourned for two months until January 5 and 12, 2010 (Tr. p. 17). Both the parents' attorney and the district's attorney consented to an extension of the compliance date at that time (id.). Thus, for approximately six months—which constitutes the same amount of time it took to complete the impartial hearing—the district's own actions directly contributed to the overall length of the impartial hearing in this case.

With respect to the length of the impartial hearing between January and May 2010, both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). In this case, the repeated extensions to the compliance date resulted in an impartial hearing that was unnecessarily lengthy,

especially in light of the fact that all of the witnesses' total testimony was completed within slightly more than eight hours of time (Tr. pp. 1, 18, 20, 95, 97, 170, 172, 205207,281, 283, 328).[11] Thus, I remind and caution the impartial hearing officer and both parties in this matter that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]).[12] In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

> "(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Therefore, I must conclude that both the district and the parents contributed to the length of the impartial hearing in this matter, and thus, the district's argument is without merit and must be dismissed.

Next, I note that in this case, there is no longer any live controversy relating to the parties' dispute over the placement or program offered by the district for the 2009-10 school year. I find that even if I were to make a determination that the district did not offer the student a FAPE for the 2009-10 school year, in this instance, it would have no actual effect on the parties because the 2009-10 school year expired on June 30, 2010, and the student remains entitled to his pendency placement at the Rebecca School, including the student's home-based services program by virtue of pendency (see Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). Accordingly, the district's claims for the 2009-10 school year need not be further addressed here. A State Review Officer is not

[11] A review of the transcripts in this matter indicates that over the six days required to complete the impartial hearing in this matter, the length of time the parties convened for testimony on the record ranged between approximately 25 minutes to, at most, approximately 2 hours and 15 minutes (see Tr. pp. 1-329).

[12] In this case, the parties conducted off-the-record discussions prior to some of the requested extensions and the impartial hearing officer failed to document the reasons for the extensions in the hearing record, which precludes a meaningful review of whether the extensions were granted consistent with regulatory constraints (see Tr. pp. 1-329; Dist. Exs. 1-4; 6-8; 8A-10; Parent Exs. A-B; A1-B2).

required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

Finally, I am not persuaded by the district's argument that the exception to the mootness doctrine applies to this case. Although the district contends that this case is capable of repetition, yet evading review, there is no evidence in the hearing record or an offer of additional evidence to support this contention. I note that the crux of the parents' case focused primarily upon the inappropriateness of the CSE's recommended site location identified in the FNR and that the recommended site location was not a specialized school. The hearing record indicates that the student's father credibly testified that he would accept an appropriate public school placement if offered by the district, noting that his other son—who also has an IEP—currently attended a public school placement (Tr. pp. 132-34). Without more, I decline to find that the district has shown that the exception to the mootness doctrine applies to this case solely based upon the allegations in the parties' pleadings. Additionally, as discussed in detail above, the district contributed to the delay of the impartial hearing, which further does not support the district's argument that the exception to the mootness doctrine applies (see Torres v. State, 15 A.D.3d 742 [3d Dep't 2005]). Accordingly, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; 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).

Based upon the foregoing, the district's case is dismissed as moot. I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 1, 2010

FRANK MUÑOZ
STATE REVIEW OFFICER