The University of the State of New York

The State Education Department
State Review Officer
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No. 20-008

Application of a STUDENT WITH A DISABILITY, by his 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:
Shebitz, Berman & Delforte, PC, attorneys for petitioner, by Benjamin E. Cain, Esq. and Matthew J. Delforte, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, 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 her due process complaint notice with prejudice that sought special education services for her son for the 2019-20 school year from respondent (the district). The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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, according to the parent, it appears that the student was eligible for special education as a preschool student with a disability insofar as he had an IEP that the parties had agreed to in August 2016 (Amended Due Process Compl. Notice at p. 1). At the time of the impartial hearing in the present matter, the student had been parentally placed at Ohr Shraga Veretzsky, and the parent was seeking an IESP from the district (Amended Due Process Compl. Notice at p. 1).

A. Due Process Complaint Notice

By amended due process complaint notice dated October 8, 2019, the parent alleged that the district failed to convene a CSE and failed to develop an individualized education services program (IESP) for the student for the 2019-20 school year and asserted various procedural and substantive violations in support thereto (see generally Amended Due Process Compl. Notice).[2] As relief, the parent requested an independent educational evaluation (IEE) at a cost not to exceed $5,000, an appropriate IESP that included 12-month services and special education teacher support services (SETSS) (id. at pp. 2, 3, 4). The parent also requested that the district be required to fund the student's current SETSS provider at a rate of $150 per hour and provide "a related service authorization (RSA) to ensure that her child receives the mandated services as per the Pre-K IEP" (id.).

B. Impartial Hearing Officer Decision

A hearing to address the student's pendency placement was held on July 31, 2019 (Tr. pp. 1-8). At that time, the parent offered three exhibits into evidence, the July 2, 2019 due process complaint notice, a June 28, 2019 retainer agreement between the parent and an advocacy service and an August 30, 2016 preschool IEP, upon which the student's pendency program and placement was based (Tr. pp. 4-6; Parent Exs. A-C). The district did not object to the student's pendency services as outlined in the August 2016 IEP (Tr. p. -6). In an August 3, 2019 interim decision, the IHO found that the student's pendency placement consisted of five hours per week of 1:1 special education itinerant teacher (SEIT) services in Yiddish, and two 30-minute sessions per week of individual speech-language therapy in Yiddish (Aug. 3, 2019 Interim IHO Decision at p. 3).[3, 4]

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[1] When the IHO dismissed the parent's due process complaint notice with prejudice, the only evidence admitted into the hearing record had been offered during the pendency hearing and consisted of three parent exhibits (Tr. pp. 2, 4).

[2] The parent filed an original due process complaint notice dated July 2, 2019 (Parent Ex. A), and an impartial hearing was scheduled for September 23, 2019 (see Tr. p. 7). State regulations provide that the parent's amended due process complaint became part of the administrative record by operation of law (8 NYCRR 200.5[j][5][vi]; 279. 9[a]).

[3] The IHO's interim decision was not paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-6.

[4] Each date referenced in the IHO's interim decision on pendency is incorrect. In addition, the exhibit list has assigned the incorrect exhibit letter to two of the exhibits and lists an incorrect date for each of the three exhibits. The dates and content of the exhibits as described above are consistent with the hearing transcript and with the district's certification of the hearing record (see Tr. pp. 2, 4).

In an August 21, 2019 "corrected" interim decision, the IHO found that the student's pendency placement consisted of 12 hours per week of 1:1 SEIT services, five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual physical therapy (PT) (Aug. 21, 2019 Interim IHO Decision at p. 3).[5]

The parent's advocate and the district's representative appeared on December 5, 2019 to begin the impartial hearing (Tr. p. 11). The parent's advocate requested an adjournment on the record stating that the parent was not available (Tr. p. 12). The parent's advocate further stated that "[t]he [p]arent was contacted yesterday by our office. The office told me by phone that she was on her way today. It is now 11 o'clock. She still has not shown at the Impartial Hearing Office, so therefore, we would request an adjournment of today's case" (id.). The IHO denied the parent's advocate's request on the record (id.). The IHO then stated

> This child has been in front of me for years. This [p]arent rarely shows up to hearings. She gets pendency, and she disappears and doesn't want to proceed, and it's getting me very upset. I don't like the system, and I don't like the way the system treats these parents. I think she shows no respect for the system, no respect for me, no respect for her advocate, no respect for the DOE and she should be counseled about this.

(Tr. p. 12).

The IHO then stated that she was dismissing the parent's case "without prejudice" (Tr. p. 12). The parent's advocate then indicated that the parent would like to "withdraw the case without prejudice" (Tr. pp. 12-13). The IHO denied the parent's advocate's request and reiterated that she was dismissing the parent's due process complaint without prejudice (Tr. p. 13). The IHO concluded by stating

> And I'm going to write an order that you're not going to like. This parent has abused the system for years, and I'm tired of it. I know what the law says. I know my hands are tied, but I'm not happy with this parent, and she should know it. And she's actually hurting her son as well because if she cared about her son she would be here. This failure to attend an impartial hearing is educational neglect in my opinion, and she's lucky I don't refer the case to ACS.

(Tr. p. 13).

[5] The IHO's "corrected" interim decision on pendency has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-6. The "corrected" interim decision on pendency includes each of the date and exhibit label errors noted in the August 3, 2019 interim decision on pendency.

By decision dated December 6, 2019, the IHO dismissed the parent's due process complaint with prejudice (IHO Decision at p. 3).[6, 7] The IHO noted that the impartial hearing was initially scheduled for September 23, 2019, but the parent requested an adjournment (id. at p. 2). The IHO granted the parent's request and the impartial hearing was rescheduled for December 5, 2019. The IHO next indicated that "after receiving an extensive pendency order and waiting more than three months, the parent filed an amended request on October 11, 2019 [sic]" (id.).[8] Turning to the December 5, 2019 hearing date, the IHO noted that the parent's advocate initially stated that the parent was "on her way to the hearing" but had still not arrived after one hour had elapsed (id.). The IHO then stated that the advocate indicated that "the parent had somehow contacted him and said that she was supposedly having subway difficulties (she did not offer any evidence of this and there was no report of subway delays presented)," the parent did not attempt to contact the IHO directly to explain her absence, and her advocate requested an adjournment (id. at pp. 2-3).[9] The IHO denied the parent's advocate's request for an adjournment and wrote that she "initially agreed to dismiss without prejudice but upon further consideration and a review of prior years['] proceedings, it was determined that the parent has delayed her case for the last time" (id. at p. 3). Thus, the IHO dismissed the parent's July 2, 2019 due process complaint and October [8], 2019 amended due process complaint with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by dismissing the due process complaint notices with prejudice based upon the parent's failure to appear, especially where, as here, the IHO did so sua sponte, and without notice to the parties. According to the request for review, "[u]nbeknownst to [the parent's advocate], there had been a miscommunication between [his office's] personnel and [the parent] as to the precise date and time of the impartial due process hearing" (Req. for Rev. ¶12). The parent argues that the IHO failed to decide the parent's case on substantive grounds and failed to provide the parent with an opportunity to fully present evidence and question witnesses, thereby abusing her discretion in dismissing the parent's due process complaint notice and violating the parent's due process rights. In addition, the parent argues that the IHO erred in failing to consider the factors set forth in State regulation in denying the parent's

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

[7] In a footnote, the IHO recounted the parent's "pattern of behavior" of filing due process complaint notices, obtaining pendency services through the end of the respective school year, and then withdrawing her due process complaint (IHO Decision at p. 2, n.2). The IHO further opined that the pendency services obtained for the student were based on a 2016 preschool IEP and no longer appropriate now that the student was school age (id.). Additionally, the IHO stated that in any future pendency proceedings, "the parent would have the burden to establish that SEIT and SETSS are substantially similar" (id.).

[8] The IHO's decision and the request for review incorrectly state that the date of the amended due process complaint notice was October 11, 2019 (IHO Decision at pp. 2, 3; Req. for Rev. ¶10). The amended due process complaint notice was dated and filed by the parent on October 8, 2019 (Amended Due Process Compl. Notice at pp. 1, 5).

[9] The IHO's description in her decision of the parent's contact with her advocate during the hearing on December 5, 2019, and of the parent reporting experiencing subway delays is not consistent with the hearing record as submitted to the Office of State Review and as referenced herein (compare IHO Decision at p. 2; with Tr. p. 12).

request for an adjournment of the December 5, 2019 impartial hearing date. The parent further asserts that the IHO made unprofessional and grossly inappropriate statements about the parent and based her decision on due process complaints from prior school years, which were not at issue and outside the scope of the hearing record.

As relief, the parent seeks an order reversing, vacating, and annulling the IHO's decision; reinstating the parent's due process complaint notice; and remanding the matter for a due process hearing in front of a different IHO as [the IHO] may be biased against the parent. The parent submitted additional documentary evidence with the request for review for consideration on appeal (see generally Req. for Rev. Exs. A-G).[10]

The parties in this matter have sought a voluminous number of specific extensions of the decision timeline in order to resolve the matter amicably but have been unable to effectuate a voluntary settlement and withdrawal the matter within the final timeframe specified by the undersigned and, consequently the parties have been required to proceed to a litigated outcome and proceed to a final resolution of parent's appeal.

In its answer, the district responds to the parent's allegations and initially argues that the IHO acted within her discretion despite her failure to reach the substantive merits of the case. The district further argues that a decision on the merits is not necessary because the parent has received all of the requested services by operation of pendency. In the alternative, the district agrees that remand would be appropriate, should the SRO determine that a substantive hearing should be held. Next, the district asserts that no further relief is warranted because the student has received all of the requested relief by operation of pendency, and the district agrees to provide an IEE at a cost not to exceed $5,000.

In a reply to the district's answer, the parent asserts that the district misstated the services the student received pursuant to pendency and further argues that the student did not receive all of the requested services due to the COVID-19 pandemic. The parent contends that the student did not receive pendency services from March 16, 2020 through June 30, 2020.[11]

[10] The parent has submitted seven proposed exhibits with her request for review for consideration on appeal (Req. for Rev. Exs. A-G). However, none of the documents submitted by the parent constitute additional evidence. 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]). All but one of the documents offered by the parent were previously received as part of the certified hearing record. The parent's proposed exhibit D is a September 20, 2019 request for an adjournment by the parent sent via email to the IHO indicating that the advocate had communicated with the parent two weeks prior to the request for an extension of the timelines, and the IHO indicated that "[t]he adjournment [wa]s granted. Please send me new dates in Nov. and Dec." (Req. for Rev. Ex. D; see IHO Decision at p. 2). The IHO's written ruling on a request for an adjournment should have been included as part of the hearing record under State Regulations and, therefore, does not represent additional evidence presented for the first time on appeal.

[11] The district asserted a response to the parent's reply but the district's response does not comply with the practice regulations and as such, will not be considered.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[12] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[13] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

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[12] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[13] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Dismissal of the Due Process Complaint Notice with Prejudice

The parent alleges that the IHO erred by dismissing her due process complaint notice, based on the parent's failure to appear at the December 5, 2019 impartial hearing date without requesting an adjournment in advance or communicating with the IHO. Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

A dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). The parent argues in her request for review that she was never notified of the December 5, 2019 hearing date. The parent's advocate requested an adjournment that was denied by the IHO (Tr. p. 12). The district did not request dismissal of the parent's due process complaint notice. The district has the burden of proof to demonstrate that it offered the student equitable services in the first instance and the hearing record reflects that December 5, 2019 was the first appearance for the impartial hearing. As such, it is unclear why the IHO felt the parent's attendance, in addition to her advocate's attendance, was essential at this stage of the impartial hearing, and so essential that dismissal with prejudice was warranted. It is not clear why a lesser sanction was not sufficient, such as allowing the district to proceed with the presentation of its evidence in the absence of the parent (but with the presence of the parent's advocate), or dismissal without prejudice.

The evidence in the hearing record—or the lack thereof—undermines the IHO's conclusion that there was a sufficient basis to impose the most drastic sanction possible—outright dismissal of the parent's due process complaint notice with prejudice. This action by the IHO was particularly draconian even if the parent was aware of the hearing date and refused to attend. The hearing record reflects that the parent's advocate was present on December 5, 2019, and the district had yet to present its case in chief (Tr. pp. 10-13). Rather than query the district about its intentions to proceed, the IHO stated on the record her upset over the parent's failure to appear and dismissed the parent's due process complaint notice without prejudice in its entirety (Tr. pp. 12-13). The IHO's animus apparently grew overnight when she changed her mind without notice to the parties or opportunity to be heard and dismissed the parent's due process complaint notice with prejudice in her written decision on December 6, 2019 (IHO Decision at p. 3).

Apparently the IHO's concerns were drawn from prior proceedings involving the parent over which she presided. The IHO described her concerns as follows:

> The parent has followed a pattern of behavior for several years. The parent filed requests for impartial hearings for the 2017-2018 and 2018-2019 SYs. The parent received a pendency order for each of those years, one dated November 12, 2017 and one dated July 19, 2018 in which the delivery of extensive services were ordered. Neither of those two cases ever went forward. The pendency orders stayed in place for the entirety of those school years. For the 2018-2019 SY the parent did not show up for the hearing but instead withdrew her request on the date of the hearing which was scheduled at the end of the SY. The parent has never appeared at the scheduled impartial hearings and has never followed through with her requests to get a decision on the merits instead she has chosen to rely on the continuance of the pendency orders. At this time, the pendency orders which were both based upon a 2016 IEP and both provided SEIT services for a pre-school child are now inappropriate in any event since the child is now school age.

(IHO Decision at p. 2, n. 2)

Assuming for the sake of argument that the IHO's recollection of past proceedings was accurate, I would at least begin to understand the nature of her concerns, for no party should be allowed to engage in a pattern of behavior year in and year out of filing for a due process proceeding, seeking the desired services under pendency, then evading a merits hearing with the objective of prolonging the student's pendency placement at the expense of the public school system and its impartial hearing system.[14] If true, it would be a serious and costly abuse of the due process system.

However, there is no record basis at all to support the IHO's concerns and the fault for that lies with the IHO, who made no effort to develop the record with respect to the alleged abuses and failed to put the parties on notice or provide them with an opportunity to be heard with respect to her concerns. In fact, it is at least theoretically possible that none of the past events occurred as the IHO described, but the parent does not explicitly deny that she obtained pendency relief and then never moved forward with the merits phases of the hearings, which suggests that there may be more than one side to this story. Suffice it to say, contrary to the IHO's findings, there is only evidence of the parent's failure to attend the single December 2019 impartial hearing date without requesting an adjournment in advance or communicating with the IHO, which evidence falls short of a pattern of conduct or conduct so egregious warranting the maximum sanction of dismissal of

[14] I do not agree with that branch of the parent's argument that suggests that the parent's conduct during the impartial hearing process in prior year proceedings was an area that could not be subject to scrutiny by the IHO. An IHO has a responsibility to manage the hearing process efficiently and in so doing must employ reasonable measures to ensure that no party—whether a district or a parent—is abusing the impartial hearing process, and a pattern of commencing and then missing impartial hearings may be regarded as abusive. If an IHO suspects such a problem, a party's appearances, nonappearances, and requests for adjournments are, or at least should be, a matter of record that an IHO can examine if necessary to determine if a similar pattern of misconduct has or is likely to occur in the hearing over which the IHO is presiding. If an IHO has concerns, however, it is important to put the party on notice of the specific concerns and warn the party that continuing the pattern misconduct will not be tolerated.

the due process complaint notice with prejudice. Thus, the IHO erred by dismissing the parent's due process complaint on this ground.

B. Mootness

In its answer, the district asserts that the parent has received all of her requested relief by operation of 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]).

The district argues that the IHO ordered pendency services retroactively to the July 2, 2019 original due process complaint notice and that those services remained in place through June 30, 2020. In her reply, the parent asserts that while this matter was pending on appeal the student did not receive all of the services that the district was to provide in accordance with the student's stay put placement as directed by the IHO, with the onset of the COVID-19 pandemic being among the reasons for the lapse in services. The hearing record is not sufficient to address this issue. For example, the United States Department of Education (USDOE) indicated that

> If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The [USDOE] understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

(Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak [U.S. Department of Education, March 12, 2020] [emphasis added]). The guidance provided by the USDOE indicates that if the district was providing any educational services to general education students after its school buildings were closed, then it would also be obligated to provide special education instruction and related services to the student in this case (or provide compensatory education services if necessary). Merely asserting that the IHO had issued the pendency order is not sufficient—at least in these circumstances—to address the parent's defense that the district had stopped providing services in compliance with the IDEA's stay put requirement. The lack of evidence cuts against the district's argument that the case has become moot.

Even if the district was successful in its mootness argument and the district had provided some modicum of evidence showing that the parent had received all of the relief that she sought now that the 2019-20 school year actually has concluded, review of the hearing record supports application of one of the exceptions to the mootness doctrine.

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 regarding the CSE's programming and placement recommendations in future years. For its part, district does not assert that the CSE has had a change of opinion and now agrees that the student should be provided with the SETSS services in the IESP in the manner sought by the parent or extended school year services that the parent sought in her due process complaint notice. Furthermore, the district has not so much as asserted that it has provided an IESP for the 2020-21 school year, let alone provided one that the parent is satisfied with and,[15] instead, the evidence shows that there has been an ongoing dispute for approximately four years between the parties since the student was in preschool. It appears to me that the reason that the preschool IEP continues the student's then-current educational placement that is in effect as stay put in this matter is because there have been continued challenges, but never been a merits determination with regard to any other IEP or IESP since that IEP was produced and put into effect (see Parent Ex. C). Although I have no basis upon which to rely on the IHO's particular assertions on the record noting the parent's "pattern of behavior" (IHO Decision at p. 2, n. 2; Tr. pp. 12, 13), there must be some accuracy regarding the parent's history of repeated challenges to the district's recommendations or else the pendency placement would be some later IESP, IEP or final due process determination. It demonstrates that the likelihood that the district's conduct about which the parent complains—i.e., the CSE failing to recommend 12 month services, and SETSS—and the likelihood that the parent will continue to seek additional SETSS is not impermissibly speculative and, in this case, is "capable of repetition, yet evading review" (see Toth, 720 Fed. App'x at 51). A merits determination resolving these issues should be issued if the parties cannot reach an agreement through the CSE process regarding an appropriate IESP or IEP.

C. Remand

The parent alleges that the IHO violated her due process rights and in her request for relief states the IHO "may be biased" (Req. for Rev. ¶ 37). While a passing statement embedded in a wherefore clause is insufficient to raise a claim of bias, I find that the IHO's decision in this matter precluded both parties from presenting their respective cases in violation of due process (Tr. pp. at 10-13). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

[15] One of the most significant claims in the due process complaint is that the district had failed to convene the CSE to produce an IESP for the 2019-20 school year, but when asserting that the case was moot, it would not be particularly difficult to produce supporting evidence that tends to at least show that the claim would not repeat itself because CSE had convened and timely developed an IESP or IEP for the 2020-21 school year.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the appropriate remedy for the IHO denying the parties their due process rights to a full and complete impartial hearing is a remand to continue these proceedings. In light of the IHO's comments on the record and in her written decision, and out of an abundance of caution, the matter must be remanded to a different IHO for further proceedings.

Based on the foregoing, the IHO erred by dismissing the parent's due process complaint notice with prejudice. Accordingly, upon remand, an impartial hearing must proceed and the IHO assigned must determine whether the district offered the student equitable services in accordance with section 3602-c (Educ. Law § 3602-c).

VII. Conclusion

Having determined that the IHO erred by dismissing this case without a full hearing on the merits, the case is remanded to determine whether the district offered the student equitable services for the 2019-20 school year, and address the parent's remaining claims in her amended due process complaint notice to determine whether the parent is entitled to her requested relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dismissing the due process complaint notice with prejudice dated December 6, 2019 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to a new IHO for further proceedings in accordance with this decision to determine whether the district offered the student equitable services for the 2019-20 school year based upon the issues raised in the parent's due process complaint notice, and what relief, if any, the parent may be entitled to; and

IT IS FURTHER ORDERED that the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
October 14, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER