The University of the State of New York

The State Education Department
State Review Officer
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No. 21-002

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:
The Law Office of Andrew Weisfeld, PLLC, attorneys for petitioner, by Andrew Weisfeld, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, 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 determined that the parent's claims that respondent (the district) failed to offer appropriate special education programming to her son for the 2019-20 school year were moot and that the student was not eligible for pendency services during summer 2019. The district cross-appeals from that portion of the IHO's decision which found that the parent's claims were moot. The appeal must be sustained, the cross-appeal must be sustained, and the matter remanded to the IHO for additional findings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student received "special instruction" and related services through the Early Intervention program and during the 2017-18 school year attended "a full time special education preschool" in a 12:1+2 classroom where he also received occupational therapy (OT), physical therapy (PT), and speech-language therapy services through the Committee on Preschool Special Education (CPSE) (Parent Exs. F at p. 2; Q at pp. 2-3).

In July 2018, a private neuropsychological evaluation of the student was conducted (see Parent Ex. F). The evaluator administered two standardized assessments to measure the student's cognitive skills; due to "significant variability" between the index scores on the first measure a full scale IQ was not calculated, while the second measure of nonverbal intelligence yielded a full-scale IQ of 114, which the evaluator concluded, given the student's "significant language deficits," "was likely the best estimate of his overall intelligence" (id. at p. 5). Following administration of language, academic, sensory, fine motor, social interaction and behavior assessments, the evaluator concluded that the student's overall performance, with the exception of academic achievement which was generally advanced, was "extremely variable," and his social perception skills were delayed (id. at pp. 4, 6-11). After offering diagnoses of a mixed receptive expressive language disorder and an autism spectrum disorder (ASD), the evaluator opined that a traditional classroom setting was "an inappropriate place for [the student] to learn" as "[h]e require[d] [] intensive, individualized support in a twelve month, full time special education environment" (id. at pp. 11-12). Next, the evaluator recommended a class size of no more than twelve students with two teachers and other children of a similar intellectual capacity (id. at p. 12). The evaluator also recommended daily speech-language therapy, three sessions of OT per week with two of those sessions provided in the sensory gym, and a bi-weekly social skills group (id.). Further, the evaluator recommended that the student receive four hours per week of individual therapy to improve his "adaptive and social behavior," to be provided after school and not as part of his academic program (id. at p. 14). The evaluator also indicated that the student should receive counseling in school twice per week to work on social skills (id.). As the evaluator determined that the student was "extremely impulsive and perseverative," a functional behavioral assessment (FBA) was recommended "in order to help teachers and staff learn which cues are triggers for his impulsive behavior" (id. at p. 13).[1] Updated PT and OT evaluations as well as "follow-up evaluations" to assess changes in cognitive skills and behavior were also recommended (id. at p. 14).

In August 2018, the parent requested independent evaluations of the student based upon the results of the neuropsychological evaluation, which were subsequently ordered by an IHO in a proceeding involving the 2018-19 school year (see Parent Ex. Q at p. 3). During the majority of the 2018-19 school year, the student attended preschool in an 8:1:2 special class at the Gillen Brewer School (Gillen Brewer), a State-approved nonpublic school, and received the related services of speech-language therapy, OT, and counseling (Parent Exs. E at pp. 5-6; G at p. 1; Q at p. 3).

On November 20, 2018, a speech-language pathologist conducted an independent speech-language evaluation of the student (see Parent Ex. G). The speech-language pathologist administered language, articulation, phonological awareness, and pre-literacy assessments to the student (id. at pp. 3-10). She concluded that the student's performance on measures of receptive and expressive language was "well below" his chronological age and that he exhibited pragmatic language deficits in the areas of topic maintenance and attention (id. at pp. 10-11). The student's speech was intelligible approximately 89.5 percent of the time, and he exhibited adequate phonological awareness and pre-literacy skills (id.). The speech-language pathologist recommended that the student receive three 60-minute sessions of individual speech-language

[1] A behavior plan was also recommended (Parent Ex. F at p. 13).

therapy per week and one 60-minute session per week of speech-language therapy in a group of two (id. at p. 11).

Over three dates in November and December 2018, a board certified behavior analyst (BCBA) conducted an applied behavior analysis (ABA) skills assessment of the student (see Parent Ex. I). After completing a document review, administering an ABA-based test of the student's verbal behavior and observing him at home and school, the BCBA recommended that the student "stay enrolled" at Gillen Brewer as it was a program that provided a language-rich therapeutic program with a low student-to-teacher ratio, a collaborative approach to intervention across all environments with ongoing program oversight by a team of trained and experienced practitioners, ongoing parent training, and regular meetings with the parents and school staff (id. at pp. 11-12).[2] The BCBA concluded that the student remaining in his program at Gillen Brewer was "essential" so that he could "continue to receive full-time therapeutic, language-based intervention" (id. at p. 12).

On December 13, 2018 a physical therapist conducted a PT evaluation of the student (see Dist. Ex. 3). The evaluation indicated that the student demonstrated delays in his gross motor skills (id. at p. 9). The evaluator recommended that the student receive two 30-minute sessions of PT per week (id. at p. 10).

Over six dates in November and December 2018, a BCBA conducted an FBA and developed a behavior intervention plan (BIP) (see Parent Ex. J). According to the BCBA, the results of the FBA indicated that the student "present[ed] with a number of behavioral challenges" but that Gillen Brewer staff had "incorporated a comprehensive set of effective strategies" (id. at p. 19). The FBA/BIP report provided a number of strategies to be used at school, and in addition, recommended that the family receive coaching "on how to manage [the student's] behavioral challenges and that there be continuation and generalization of strategies from the school-based setting to the home" (id.). It was also noted that "nearly all of the behavioral difficulties observed at school tend[ed] to occur at a higher rate in the home setting" (id.). The BCBA opined that the student's parents "must" receive training and recommended two hours per week of BCBA parent training (id.).[3]

On March 10, 2019, the parent provided signed consent for the district to conduct evaluations of the student although she indicated that a neuropsychological exam, PT evaluation, and speech-language, assistive technology, OT and psychoeducational testing had been performed and were "unnecessary at this time" (Dist. Ex. 4).

On April 10, 2019, the IHO who presided over the due process proceeding pertaining to the 2018-19 school year issued a decision (see Parent Ex. Q). The IHO found that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year and that Gillen Brewer was an appropriate placement for the student (id. at pp. 4, 7-8). The IHO

[2] Specifically, regarding parent training, the BCBA recommended that the parent receive two hours per week of training by a BCBA, and that the BCBA meet with school staff once per month to exchange information about the student's "skill acquisition and generalization" (Parent Ex. I at p. 12).

[3] It was again recommended that the BCBA meet with the school once per month (Parent Ex. J at p. 19).

ordered the district to fund the student's placement at Gillen Brewer for the 2018-19 school year, reimburse the parent for all tuition already paid, and reimburse the parent for the cost of the private neuropsychological evaluation (id. at p. 10). Additionally, the IHO awarded compensatory education in the form of 184 hours of speech-language therapy, 40 hours of OT, 80 hours of social skills instruction, 160 hours of ABA services for the student and the parent, and also ordered that the CSE reconvene no later than April 25, 2019 (id.).

The Committee on Special Education (CSE) convened a "Turning 5" meeting on May 9, 2019 and determined that the student was eligible for special education and related services as a student with a speech or language impairment (Parent Ex. E at pp. 1, 6, 27; Dist. Ex. 7). The May 2019 IEP indicated that although the student had received a diagnosis of ASD, "it appear[ed] that his speech deficits impact[ed] his school functioning most and [wa]s best representative of his need for support" (id. at p. 9). The CSE determined that the student required numerous management needs but did not require positive behavioral interventions or a BIP (id. at pp. 12-14). Beginning in September 2019, the CSE recommended that the student receive 10 periods per week of integrated co-teaching (ICT) services in math and 15 periods per week of ICT services for English language arts (ELA) (id. at p. 20). For related services, the CSE recommended one 30-minute session of group counseling per week, one 30-minute session of individual OT per week in a separate location, one 30-minute session of individual OT per week in the classroom, one 30-minute session of group PT per week, two 30-minute sessions of individual speech-language therapy per week, and one 30-minute session of group speech-language therapy per week (id. at pp. 20-21).

According to the attendance report from Gillen Brewer, the student attended school for 17 days in July 2019 and 12 days in August 2019, and therefore was not absent on any school days during summer 2019 (Parent Ex. P).

In a letter dated August 21, 2019, the parent notified the district of her intent to unilaterally place the student at Gillen Brewer and seek "public funding and prospective payment" for the 2019-20 school year (Parent Ex. K at pp. 1-2). The parent indicated that she did not agree with the May 2019 CSE's recommendations as the IEP would not allow the student to make meaningful progress and the CSE failed to recommend an appropriate classroom placement and related services (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated September 12, 2019, the parent asserted that the district procedurally and substantively denied the student a FAPE for the 2019-20 school year (Parent Ex. A at pp. 1-2). The parent contended that the program recommended by the May 9, 2019 CSE was not appropriate and that the student "cannot make meaningful educational progress under the CSE's flawed and inappropriate program" (id. at p. 2).

The parent contended that the CSE failed to appropriately classify the student as the CSE classified the student as a student with a speech-language impairment despite his ASD diagnosis (Parent Ex. A at p. 8). The parent argued that given the incorrect classification, the CSE could not develop an appropriate program designed to meet the student's unique needs as a student with ASD (id.) Further, the parent asserted that she was denied her right to meaningfully participate in the

decision making process and development of the student's educational program, as the May 2019 CSE failed to appropriately address her concern that the student required a more intensive program in order to progress (id.).

The parent argued that the May 2019 IEP did not contain appropriate present levels of performance for the student as they failed to describe "how the Student's disability affects involvement and progress in the general education curriculum," seldom referenced the student's disability, and did not address "how the disability manifests and/or impacts the Student" (Parent Ex. A at p. 10). The parent further argued that the present levels of performance failed to "provide an appropriate and detailed description of the Student's needs and abilities in all areas" and did establish an "adequate baseline through which progress could be measured" (id.).

The parent contended that the CSE failed to appropriately address the student's behavioral needs as it failed to recommend a behavioral methodology, appropriate counseling services, and appropriate supports to address the student's social deficits (Parent Ex. A at p. 9). Further, the parent contended that the CSE indicated that the student did not require behavior supports or a behavioral intervention plan (BIP) despite the independent evaluator's recommendation and indications that the student "required numerous behavior supports and strategies" (id.). Moreover, the parent contended that the recommended annual goals failed to "address the Student's interfering behavior" such as low frustration tolerance (id.).

The parent asserted that the CSE failed to recommend an appropriate placement for the student, as an ICT "classroom" was too large of a classroom setting for the student and there was clear evidence that the student was unable to progress in an ICT setting in the past but required 1:1 attention, support and instruction (Parent Ex. A at p. 9). The parent argued that the student continued "to require the small and supportive therapeutic environment that Gillen Brewer provides with students who possess similar cognitive profiles to [the student] and without behavior concerns" (id.). Moreover, the parent contended that the assigned public school would not have been able to meet the student's needs as the school "presented safety and emotional concerns due to lack of supervision and tremendous auditory and visual stimulation" (id. at 10).

The parent asserted that the CSE failed to recommend the appropriate levels of related services as the recommended amount could not meet the student's needs (Parent Ex. A at p. 8). Specifically, the parent contended that the CSE failed to recommend the appropriate amount of speech-language, OT, and parent counseling and training (id. at pp. 8-9). Also, the parent asserted that the CSE failed to recommend an appropriate behavioral methodology to address the student's learning needs or any home-based services (id. at p. 9).

Further, the parent asserted that equitable considerations favor her as she secured an IEE for the CSE to understand the student's needs and abilities, cooperated with the May 2019 CSE, toured the proposed assigned school and provided a 10-day notice of unilateral placement letter to the district (Parent Ex. A at p. 10).

For relief, the parent requested an immediate pendency "hearing and order that Gillen Brewer be deemed the student's pendency placement beginning on September 5, 2019" (Parent Ex. A at p. 11). The parent also requested a finding that the student was denied a FAPE for the 2019-20 school year and an order that the CSE reconvene to review the results of the independent

evaluations and develop an IEP with, at a minimum, the following recommendations: an autism classification; comprehensive present levels of performance that accurately reflected the student's needs and abilities; specific, meaningful and measurable annual goals in all areas of needs; home-based parent counseling and training for at least two hours per week through a licensed psychologist, BCBA or provider with extensive ABA training; two sessions of individual counseling services per week; OT services in accordance with the parent's IEE; speech-language services in accordance with the speech-language IEE; at least two sessions of social skills instruction per week in a group of no more than three students; and placement in a classroom with no more than 12 students who do not present disruptive behaviors and possess at least average cognitive abilities (id.). The parent requested that the district be ordered to prospectively fund all of the tuition costs for Gillen Brewer for the 2019-20 school year (id.). Lastly, the parent requested door-to-door transportation with air conditioning to and from school and attorney's fees (id. at p. 12).

B. Impartial Hearing Officer Decision

On October 21, 2019, the parties proceeded to an impartial hearing on the issue of pendency services (see Tr. pp. 1-40). The IHO issued an interim order on pendency on November 6, 2019 (IHO Interim Decision at p. 12).[4] In the interim decision, the IHO found that the prior April 10, 2019 IHO decision was not appealed and that it was "undisputable" that the student was attending the private school at the time the parent invoked her right to pendency in the due process complaint notice (id. at pp. 5, 10). The IHO held that the issue of whether the prior decision authorized a 10-month or 12-month program is "irrelevant to what constitutes pendency because 'pendency' will be retroactive only to the date that the Parent filed the [due process complaint notice]" (id. at p. 10). The IHO ordered the district to reimburse the parent or directly pay the cost of the student's continued placement at Gillen Brewer, retroactive to September 12, 2019, pursuant to the April 10, 2019 IHO decision (id. at pp. 10-11). Further, the IHO ordered that the student "shall receive compensatory services in the amount of and in the nature of, those services the student did not receive since the filing of the [due process complaint notice] on September 12, 2019 to the present" (id. at p. 12).

The parties then proceeded with an additional four days of hearings (see Tr. pp. 41-426). By decision dated November 20, 2020, the IHO found that the parent was not entitled to pendency services during the summer of 2019 (IHO Decision at pp. 7-8, 31-32). Specifically, the IHO held that the parent did not request reimbursement for services during the summer of 2019 as the due process complaint specifically requested pendency services beginning September 5, 2019 (id. at p. 17). Moreover, the IHO indicated that the due process complaint did not "assert that the student attended the private school during the summer of 2019" and that the parent's 10-day letter notified the district on August 21, 2019 of her intent to place the student at the private school in 10 business days (id.). The IHO indicated that this information "supports a finding that the student was not attending the private school during the summer of 2019" and that it comported "with the Parent's request for pendency to begin on September 5, 2019" (id. at pp. 17-18).

[4] The IHO's interim pendency decision was not paginated (see generally IHO Interim Decision). For ease of reference, citations to the IHO's decision will reflect pages numbered "1" through "13" with the cover page identified as page "1."

Additionally, the IHO found that "fundamental fairness and equitable considerations require that the Parent properly notify the [district] of the issues that are disputed and the relief sought to address those issues from the Parent's perspective" (IHO Decision at p. 18). The IHO held that a parent must give fair notice and that "the failure to notify [the district] of a request for a 12-month school year as opposed to a 10-month school [year] is a substantial and material defect in the notice requirement" (id.). The IHO determined that the parent did not serve proper notice of her request for payment of summer 2019 services, the parent's pleadings support a finding that the student's 2019-20 school year at the private school did not begin until September 5, 2019, and that "these findings preclude an award of payment for services during the summer of 2019" (id. at p. 19). The IHO did modify the pendency order to indicate that the parent "shall receive the payment and services requested to the date she requested in her [due process compliant notice], September 5, 2019" (id. at p. 20).

Turning to the parent's request for compensatory education services based on the district's "failure to incorporate the service mandates order" in the prior IHO's decision of April 10, 2019, the IHO found that "this is not a situation warranting compensatory services, but instead, an issue regarding the enforcement of an order issued by" the prior IHO (IHO Decision at p. 20). The IHO found that although he lacked enforcement authority, the student was entitled to the services awarded in the prior IHO decision and that if the district was not honoring the order, the parent's remedy was to file a State administrative complaint or file in federal district court to ensure compliance (id. at pp. 20-21).

Next, the IHO found that the November 2019 pendency order "effectively render[ed] the case on the merits moot" (IHO Decision at p. 22). The IHO noted that the parent objected to a finding of mootness, and her argument that a decision on the merits was necessary to establish the student's future rights was without merit because "mere speculation as to what may happen in the future is not a proper concern in this matter" (id.). The IHO held that:

> The 'Order on Pendency' entitles the Parents to payment of the student's tuition and related services, from the date the [due process complaint notice] was filed, September 12, 2019, to the date of this order, and equitable considerations have extended that entitle[ment] to September 5, 2019, as requested in the Parent's [due process complaint notice], which covers the entirety of the student's 10-month 2019-20 school year at his current private school
>
> (id. at p. 23).

The IHO noted that the 2019-20 school year had expired and that the parent received all of the relief she sought under pendency (IHO Decision at p. 23). The IHO found that "regardless of the merits of a decision concerning whether" the district offered the student a FAPE for the 2019-20 school year, "no further meaningful relief may be granted to the Parent because she will receive all of the modified relief sought" (id.). Further, the IHO held that there was no longer any live controversy relating to the parties' dispute and even if it was found that the district did not offer the student a FAPE for the 2019-20 school year, "it would have no actual effect on the parties because the 2019-20 school year expired on June 26, 2020" (id. at p. 25). Next, the IHO declined to adopt the reasoning set forth in New York City Dep't of Educ. v. V.S., 2011 WL 3273922 [E.D.N.Y. 2011], because the "rationale regarding future pendency may be read so broadly to

apply to virtually any and all IDEA proceedings," that "we must be concerned with adjudicating rights unnecessarily" and that such determinations are better left until the proceedings under which the right arises are commenced and the issue of the student's pendency placement is actually in dispute (id. at pp. 26-28). Also, the IHO found that the finding in V.S. "raises a concern that the decision has the effect of removing the much needed discretion of administrative hearing officers to focus on both fairly and efficiently resolving disputes while retaining the discretion of how best to allocate their adjudicative resources to address ever growing dockets" (id. at p. 29). Finally, the IHO found that there was no barrier to an IHO deciding pendency in a future matter even without a decision rendered on the merits in a previous controversy between the parties (id.).

The IHO found that the exceptions to mootness did not apply as the matter "is not assuredly capable of repetition and in either case would not evade review" (IHO Decision at p. 29). The IHO ordered the district to honor the November 6, 2019 pendency order and either reimburse the parent or pay directly the costs of the student's 10-month 2019-20 school year tuition from September 5, 2019 through June 26, 2020 (id. at p. 31). Further, the IHO ordered the district to conduct evaluations of the student in all areas of suspected disabilities not evaluated in the last two years for the 2021-22 school year and ordered that the CSE shall reconvene to produce a new IEP for the student's 2021-22 school year considering all of the student's available evaluations and related information (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent's request for review is a list of seventeen numbered paragraphs objecting to the IHO's conduct and finding, with each paragraph consisting of no more than a sentence or two.[5]

Regarding the IHO's conduct, the parent asserts that the IHO "inappropriately adjudicated the matter despite the potential and possibility of bias," that the IHO failed to allow the matter to be heard in a timely manner, and that the IHO should not have allowed the district to proceed on a subsequent date when the district was not prepared to proceed on its allotted date. The parent argues that the IHO failed to admit her exhibits into the hearing record when they were authenticated and relevant. The parent contends that the IHO inappropriately raised arguments in his decision that the district failed to raise during the hearing or in its closing brief, and further, that the IHO made arguments for the district that the district explicitly indicated "were not part of the District's position in this matter."

Next, the parent contends that the IHO erred in his determination that a decision on the merits was unnecessary, the matter no longer contained a "live controversy," and that the November 6, 2019 pendency order rendered the Parent's requested relief "moot." The parent argues that a decision on the merits of the parent's claim is necessary to determine the student's future pendency program.

Further, the parent asserts that the IHO erred "in his determination the Parent's pleadings did not include a request for tuition during the summer of 2019." Also, the parent contends that

[5] The request for review had an attached Memorandum of Law, which contained significantly more detail regarding the parent's claims (see Parent Mem. of Law).

the IHO erred by not "conducting a full and thorough Burlington-Carter analysis" and that the IHO's determination on the equities was incorrect. The parent argues that the IHO was incorrect that the student did not attend Gillen Brewer during the summer of 2019 and should have ordered funding for the school prior to September 12, 2019. The parent asserts that the IHO erred by stating that the parties had agreed that all relief, other than tuition during the summer of 2019, was covered through pendency. Moreover, the IHO erred by failing "to appropriately order compensatory services as a form of equitable relief for the [district's] failure to implement the prior order."

For relief, the parent requests that the SRO render a determination on the merits based on the record, which includes the parent's proposed exhibits, by finding that the district failed to offer the student a FAPE for the 2019-20 school year. The parent seeks all requested relief specified in her post-hearing brief. In the alternative, the parent requests that the SRO remand the case to a different IHO, in order for the new IHO to render a decision on the merits and order the parent's requested relief. Finally, the parent contends that any potential cross-appeal filed by the district be denied as the district waived its right to contest the IHO's pendency order, when it failed to appeal the November 6, 2019 IHO Interim Decision.

In an answer with cross appeal, the district argues that the request for review should be dismissed for failure to comply with State regulations as there are no citations to the record or any applicable case law. Also, the district contends that the request for review "forces the SRO to construct the arguments" for the parent and that the memorandum of law cannot supplant the request for review. Further, the district argues that the parent's allegation that the IHO was biased is without merit. The district contends that the IHO conducted a fair and impartial hearing permitting both parties a full and fair opportunity to be heard and then issued "a thorough and well-reasoned decision that is supported by the record and relevant law." Also, the district contends that the parent's general disagreement with the IHO's decision is not a basis for a finding of "actual or apparent bias by the IHO."

The district asserts that the IHO properly held that the parent is not entitled to tuition reimbursement for the summer of 2019. The district contends that the IHO correctly found that the parent did not request reimbursement for the summer of 2019, as the due process complaint notice requests pendency as of September 5, 2019 and the 10-day notice was dated August 21, 2019. Moreover, the 10-day notice failed to notify the district of a request for tuition for a 12-month school year. As such, the parent failed to give adequate notice to the district that she was placing the student at Gillen Brewer for the summer of 2019 and was seeking tuition reimbursement for that summer. The district requests that the IHO's determination be upheld and parent's claims dismissed.

Additionally, the district asserts that the parent did not, on the record, disagree with the IHO when he indicated that the pendency order rendered the case moot and would not cover tuition for the summer of 2019 and, as such, the allegation should be disregarded. Further, the district contends that the parent's allegations regarding an agreement between the parties, and that the IHO made arguments for the district in his decision that the district did not itself raise and stated were not part of its position, should be dismissed because these allegations were "vague and imprecise."

The district argues that the IHO properly denied the parent's claim for compensatory education as the IHO correctly found that he did not have jurisdiction over the request since the parent was seeking enforcement of a prior IHO decision. The district asserts that it is well settled that neither IHOs or SROs have the authority to enforce a prior decision, and the parent's allegations are without merit.

The district cross-appeals the IHO's finding that the issue of a denial of FAPE was rendered moot. The district contends that the parent is not entitled to tuition relief for the summer of 2019 because it offered the student a FAPE for the 2019-20 school year as of September 2019. The district argues that the May 9, 2019 CSE was duly constituted, properly classified the student with a speech-language impairment, reviewed sufficient evaluative information and made an appropriate classroom recommendation of an ICT setting with appropriate related services. Further, the district contends that the management needs section of the IEP reflected strategies to help the student be successful and the goals were aligned with the present levels of performance in the IEP. The district argues that the student did not present with any behaviors that would have impacted him in the educational setting and that an FBA and BIP were not necessary. The district contends that the IEP recommendations were tailored to meet the student's unique needs and would enable him to make progress in light of his circumstances in the least restrictive environment.

Moreover, the district asserts that as the summer months prior to kindergarten are governed by the CPSE, and the summer of 2019 was the summer before the student began kindergarten, the recommendations for that period would have been set forth in his CPSE IEP. The district contends that the parent did not argue in the due process complaint notice that the CSE improperly recommended a 10-month program instead of a 12-month program. The district argues that any claim for the summer of 2019 should have been raised in the 2018-19 case brought by the parent and is therefore, now barred by res judicata. In the alternative, the district argues that if the record is insufficient to render a decision on tuition for the summer of 2019, the case should be remanded to an IHO to make a determination.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

Initially, it is noted that the district argues that the parent's request for review should be dismissed for failure to comply with the practice regulations that require citations to the record and applicable case law (Ans. with Cross-Appeal at p. 4).

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8 [c][4]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this instance, the district is correct that the parent's request for review did not cite to the record on appeal or any applicable case law. However, the parent's seventeen statements clearly presented the issues for review, even if they lacked a full explanation, and therefore, in the exercise of my discretion, I decline to dismiss the request for review for failing to comply with the practice regulations of Part 279.[6] Additionally, it does not appear that any alleged defect in the pleading materially prejudiced the district in its ability to answer the allegations in the request for review. To the contrary, the district formulated a responsive answer to the allegations that directly addresses the issues identified by the parent in the request for review. Therefore, I decline to dismiss the request for review on this basis.

2. IHO Bias and Conduct of Impartial Hearing

The parent contends that the IHO inappropriately adjudicated this case "despite the potential and possibility of bias" and that the IHO failed to allow the matter to be heard in a timely manner (Req. for Rev. at ¶¶ 1; 2).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is

[6] It is noted that the parent's memorandum of law filed in conjunction with the request for review contained more detail regarding the claims being raised by the parent in the request for review (see Parent Mem. of Law). However, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6 [a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.

involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). In this instance, the record does not support the parent's allegation that the IHO was biased. The parent failed to point to any instance in the record to support the allegation. Further, the hearing record demonstrates that the parent requested the IHO recuse himself "based on a possible conflict due to a complaint being filed" (Tr. p. 47). In response, the IHO stated that he did not know the nature of the complaint as he never received it, but was aware that a complaint had been filed against him, and that he did not see a conflict based on a complaint being filed (id.). Further, the IHO noted that "they specifically ask us not to recuse ourselves where possible because of the crisis" and, as such, denied the parent's request that he recuse himself (Tr. pp. 47-48). I find that the IHO's refusal to recuse himself does not support a finding of bias in this instance.

Turning next to the claim that the IHO failed to allow the matter to be heard in a timely manner, the record demonstrates that at the first hearing held on October 21, 2019, the district asked if it could "enter evidence and do openings today and then continue for when our witnesses can appear in person" because the district's two witnesses, who were able to testify via telephone that day, were not able to be there in person (Tr. pp. 16-17). The parent's attorney objected to continuing the case and requested that the district be precluded from "their witnesses appearing and scheduling further dates" (id.). The IHO questioned the parent's attorney regarding whether he would be able to present his case that day (Tr. p. 18). The parent's attorney indicated that the parent would be able to testify, but that he would require an additional day for two additional witnesses to testify (Tr. p. 19). The parties then had an off-the-record discussion (id.). When the parties returned, the IHO summarized the off-the record discussion and requested the parties summarize their positions (Tr. pp. 19-24). The IHO then granted the district's request for a continuance over the parent's objection, finding that the argument of prejudice against the parent was not sufficient (Tr. p. 27). The IHO noted that if the parent had been ready to proceed that day, he would have allowed the case to go forward and it would have been resolved in its entirety on the merits (id.). In this instance, the IHO's refusal to grant the parent's request to preclude the district's witnesses does not demonstrate bias. The IHO provided a reasonable explanation for his decision and fully allowed the parties to state their arguments on the issue.

A full review of the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. Moreover, to the extent that the parents disagree with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

B. Pendency

Turning next to the IHO's finding regarding the parent's entitlement to pendency during the summer of 2019, the IHO found that the parent did not provide notice of the request for pendency during the summer of 2019 and that the student did not attend Gillen Brewer during the summer of 2019 (IHO Decision at pp. 17-19). The parent contends that the IHO erred in these findings as the student attended Gillen Brewer during the summer of 2019 and that the parent is entitled to pendency for these months.[7] The district counters that the IHO properly denied the request for pendency during the summer of 2019. Further, the district argued that the summer of 2019 was controlled by the CPSE and any claim for pendency should have been raised in the proceeding concerning the parent's claims for the 2018-19 school year.

Initially, I must note that the IHO erred by finding that the student did not attend Gillen Brewer for the summer of 2019. The evidence in the hearing record demonstrates that the student attended Gillen Brewer during that summer (see Parent Ex. P). There is no evidence to the contrary to support the IHO's finding that the student did not attend Gillen Brewer during that summer. The IHO bases his decision on his interpretation of the pleadings, rather than addressing the evidence that was actually in the hearing record.

Here, the district is correct that the CPSE was responsible for the recommendations for the summer of 2019 (Educ. Law § 4410[1][i]). However, it is impossible to determine what the recommendations of the CPSE were for the 2018-19 school year because the student's CPSE IEP is not in the record and the hearing record is unclear as to whether a 12-month program was recommended by the CPSE.[8] Further, the April 2019 IHO decision which resolved the parent's claims for the 2018-19 school year does not indicate whether the student was entitled to a 12-month program and the decision was rendered prior to the summer of 2019. There is also no evidence in the hearing regarding whether the CPSE met following the publication of the April 2019 IHO decision to recommend a summer program for the student.[9] As such, the issue must be remanded to clarify the record.

Upon remand, the parties should present evidence regarding the CPSE recommendations for the summer of 2019. The district should be prepared to demonstrate why the student was not recommended for 12-month services by the CPSE if a 12-month program was not recommended, and the parent will be entitled to present evidence as to why the student required these services.[10]

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[7] The parent contends in the request for review that the district should be barred from cross-appealing pendency (Req. for Rev. at p. 4). It is noted that the district's cross-appeal did not pertain to pendency, but the fact that the IHO found the merits of the case were moot (Ans. with Cross-Appeal at pp. 7-10).

[8] The parent's attorney asserted that the September 4, 2018 IEP recommended a 12-month program, but the IHO declined to allow the IEP into the record to verify this claim (see Tr. pp. 21-22, 42, 63, 69).

[9] There is no record regarding the CPSE and the summer of 2019; however, the district's witness testified that the CSE did not recommend a summer program for the 2019 school year because the CSE's IEP did not go into effect until September 2019 and that the CSE would reconvene to determine if a 12-month program was necessary at the next meeting (Tr. pp. 215-16).

[10] Further, the district will be able to raise its claim that the summer of 2019 is barred by res judicata.

The IHO's determination that the parent is not entitled to tuition reimbursement for the summer of 2019 under pendency is hereby reversed, and the case is remanded for further development of the hearing record on that issue.

C. Mootness

The IHO found that because the parent received all the requested relief for the 2019-20 school year under pendency, it effectively rendered the case moot on the merits. Both the parent and the district argue that the IHO erred by finding that the case was rendered moot.

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]).

Here, the parent did not receive all of the relief that she requested during the impartial hearing. Although the parent did not request reimbursement for the summer of 2019 under pendency in the due process complaint notice, she very clearly made the request several times during the impartial hearing and in her closing brief (Tr. pp. 20-22; 28; Parent Ex. Z at p. 26).[11] Further, the IHO erred in finding that there was an agreement as to pendency because the record does not support this result. Nevertheless, even if the parent had received all of the relief that she sought, at this juncture, now that the 2019-20 school year has concluded, a review of the hearing record supports the application of the exception to the mootness doctrine.[12]

Turning to the "capable of repetition, yet evading review" exception to mootness, because the challenged action was in its duration too short to be fully litigated prior to cessation or expiration of the school year, the first element of the exception is satisfied as it often is in IDEA cases. Furthermore, there is also a substantial likelihood that the parties will be involved in the same dispute again. Notably, the hearing record indicated that the parent did not agree to the recommendations made by the CSE for the 2020-21 school year stating "[t]hat is clearly for another case" (Tr. p. 335).[13] Accordingly, the likelihood that the district's conduct about which the parent complains and the likelihood that the parent will continue to seek district funding of the student's tuition is not speculative, and is "capable of repetition, yet evading review" (see Toth, 720 Fed. App'x at 51).

D. Remand

The district asserts that the student was offered a FAPE for the 2019-20 school year, while the parent argues that the district did not offer a FAPE. State regulations set forth the procedures

[11] The district did not object during the hearing that the parent could not now raise the summer of 2019 (Tr. pp. 20-22). Further, it did not make this argument in its closing brief (see Dist. Ex. 9).

[12] The IHO's decisions have been reversed numerous times due to a growing number of improper mootness determinations (see, e.g., Application of a Student with a Disability, Appeal No. 21-001 [erroneously finding that the parent had withdrawn her due process complaint notice]; Application of a Student with a Disability, Appeal No. 20-195 [issuing an erroneous sua sponte pendency determination to find a parent's tuition reimbursement claim moot]; Application of a Student with a Disability, Appeal No. 20-068 [finding the parents' live tuition reimbursement controversy moot]).

[13] Details as to what the parent's disagreement was with the 2020-21 IEP were not fleshed out in the hearing record.

for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO dismissed the case without ruling on any of the parent's FAPE claims on the merits. Accordingly, I find that the matter must be remanded to continue the administrative proceedings on the merits and further develop a hearing record. It is noted that the record lacked several proposed exhibits by the parties that could be relevant to whether the student was offered a FAPE. The parties are reminded that they should work together to develop a complete hearing record. Further, the IHO is reminded to ensure clarity as to what exhibits and testimony are properly included in the hearing record.[14]

VII. Conclusion

Having determined that the IHO erred by finding that the parent is not entitled to tuition reimbursement for the summer of 2019 and in finding the matter moot, the case is remanded to the IHO to determine whether the district offered the student a FAPE for the 2019-20 school year, and thereafter, if necessary, whether Gillen Brewer was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

[14] On January 29, 2021, the Office of State Review sent a letter to the parties requesting clarification of the hearing record (see Jan. 29, 2021 letter). The district responded to the letter (see Feb. 4, 2021 letter). In addition to the record issues identified in the January 29, 2021 letter, the parent's affidavit testimony was never properly admitted into the hearing record (see Tr. pp. 390-405; 414) even though the parent was made available for cross-examination which was a prerequisite for her affidavit testimony (Tr. pp. 414-15, 418-21).

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 20, 2020 is vacated; and

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

Dated: **Albany, New York**
February 25, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER