The University of the State of New York

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

No. 22-005

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 Elisa Hyman, P.C., attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 the parent's claims regarding the 2019-20 school year with prejudice as moot and ordered the district to both review the student's need for assistive technology and arrange for the provision of the same. The appeal must be dismissed.

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

It is noted that this appeal concerns a student, who has been the subject of several prior impartial hearings (see generally Parent Exs. B; C; Aug. 5, 2019 Interim IHO Decision; July 18, 2020 Interim IHO Decision).[1] Details relating to such previous impartial hearings are set forth herein only to the extent that the underlying pendency decision and the decision being appealed

[1] Although not pertinent to the time period at issue in this appeal, the record contains references to the student's educational program having previously been at issue in IHO case numbers: 162210, 170014, and 174239 (see generally Parent Exs. B at p. 2, C at p. 2; Aug. 5, 2019 Interim IHO Decision at pp. 1-2) IHO case number 195507 also involved the student, but commenced subsequent to the case at issue, based upon a July 1, 2020 due process complaint notice filed by the parent (July 18, 2020 Interim IHO Decision).

cite to the same for support (IHO Decision at pp. 3). However, given the limited scope of this appeal, the parties' familiarity with the student's educational facts and the detailed procedural history of the case is presumed and will not be recited here in full.

Briefly, the student's educational history includes diagnoses of autism spectrum disorder and a speech-language disorder (Parent Exs. I at p. 12; DD ¶ 40; GG at pp. 1-3, 17).[2] During the period relevant to this appeal, the student's eligibility for special education was not in dispute. The student was deemed to have deficits that were multifaceted in nature and spanned across all areas of speech and language, which particularly impacted his ability to initiate spontaneous requests and comments regarding visual stimuli and his immediate environment, as well as to engage in meaningful conversation (Parent Ex. EE ¶¶ 13-14).[3] The student had the tendency to "stare and smile" at the speaker when a directive was given or when asked a question (Parent Ex. FF ¶¶ 23, 26).[4] The student struggled with sensory processing and self-regulation skills, which affected his ability to focus, attend, and engage in activities of daily living (Parent Ex. EE ¶ 16). The student also demonstrated that he had difficulty with his visual motor and perceptual skills as well as with grasping and fine motor skills, which affected his ability to complete academic tasks efficiently, compared to other peers his age (id. ¶ 16). The student also had deficits in motor planning and postural endurance combined with muscle weakness, which made it a challenge to navigate his environment safely (id. ¶ 20). Additionally, the student was easily distracted, making it difficult to obtain and maintain his attention (id. ¶¶ 26, 27). Lastly, the student engaged in a high rate of self-stimulatory behaviors (Parent Exs. I at p. 12; J at p. 13; DD ¶ 43; FF ¶ 21).

Prior to the time period germane to this appeal, the student had received early intervention services, which at the age of three transitioned into services recommended by a Committee of Preschool Special Education (CPSE) (Parent Ex. GG at p. 2). The student's 2014 IEP recommended placement within an 8:1+2 special class, extended school year services, and related services including speech therapy and occupational therapy (OT) (id.).[5] In March 2016, in preparation for the student transitioning to school-age programming, the CSE recommended special education services in a specialized public school (id.). The parent rejected the placement on the basis that the student had been making limited progress with communication, cognitive, and social development; and because assistive technology and speech-language testing had not been conducted prior to the district's recommendation having been made (id. at pp. 2, 4). Therefore, according to the student's mother, at some point during the 2016-17 school year, the student

[2] Some of the affidavit evidence prepared as exhibits for this proceeding were not paginated, therefore, where pagination was missing, paragraph numbers have been referenced, when possible.

[3] Although the district did not object to the affidavit of the coordinator of admissions at MSA being admitted as evidence, it is noted that the affidavit is not signed or notarized (Parent Ex. EE at pp. 7-8).

[4] The district also did not object to the affidavit of the student's teacher being admitted as evidence, which is not signed or notarized and relied on the information contained therein in its answer (see Answer ¶¶ 5-6; Parent Ex. FF at pp. 12-13). Further, the affidavit appears to erroneously provide information relating to another student, which could be the result of a typographical error or the result of reusing prior work product (Parent Ex. FF ¶ 28).

[5] No IEPs were submitted into the impartial hearing record, therefore background regarding the student's prior educational programming was provided by way of second-hand information contained in alternative evidentiary documents that had been submitted into the record.

enrolled at Manhattan Star Academy (MSA), a private special education school for students with global developmental delays, where he received multiple related services (Parent Exs. A ¶¶ 23-25; D ¶¶ 23-25; E at p. 2; EE ¶¶ 6, 11; GG at p. 2).[6]

A March 15, 2017 private assistive technology assessment obtained by the parent determined that the student was an excellent candidate for assistive technology, namely "a range of light to high technological based communication and academic interventions" to develop his communication and academic skills (Tr. pp. 93; Parent Ex. GG at pp. 1, 7, 18). The evaluator recommended that the student be provided with two different assistive technology devices, namely a 9.7-inch iPad Pro to serve as an augmentative and alternative communication (AAC) support for communication and a 12.9-inch iPad Pro for education (id. at pp. 10). It was also recommended that the student be provided with assistive technology support services, accessories for the recommended devices including noise cancelling headphones, and multiple software applications (id. at pp. 8-15).

According to the student's parent, the district provided the student with two assistive technology devices sometime after the March 2017 assistive technology evaluation that subsequently became inoperable (Tr. pp. 88-89, 92-93). Therefore, MSA loaned the student an assistive technology device that contained the software necessary for the student to communicate (Tr. pp. 89, 91). The student also utilized an iPad belonging to his sibling (Tr. pp. 89, 91). The district did not provide the student with replacement assistive technology devices (Tr. pp. 88-90).

As relevant to the student's pendency placement in this proceeding, in an unappealed April 10, 2018 impartial hearing decision, IHO Carter found that the district failed to create an updated IEP and failed to offer the student a placement for the 2017-18 school year which constituted a denial of a FAPE (Parent Ex. B at p. 3). IHO Carter found that the district failed to rebut the appropriateness of the student's placement at MSA and ordered the student's placement to consist of a 12-month program at MSA in an 8:1+2 (or substantially similar program); a 1:1 in-school paraprofessional; special transportation for a short ride in an air-conditioned vehicle with an individual transportation paraprofessional; assistive technology supports and services; and related services consisting of four 30-minute sessions of individual speech-language therapy per week; three 30-minute sessions of individual OT per week; and two 30-minute sessions of individual physical therapy (PT) per week (id. at pp. 3-4). The IHO also ordered the district to fund a home-based applied behavior analysis (ABA) program of 15 hours per week, and two hours of ABA training by a board-certified behavioral analyst (BCBA) (id.). As early as May 2018, the student began to receive 15 hours of 1:1 ABA services in his home by way of an independent provider (Parent Exs. I at p. 12; J at p. 12; DD at pp. 1-2, 4, 21).

Similarly, relevant to the student's pendency placement in this proceeding, on July 31, 2018, IHO Briglio issued an interim decision regarding pendency in the parties' proceeding related to the 2018-19 school year which relied upon IHO Carter's aforementioned April 10, 2018 decision

[6] The record contains documentation corroborating the student's attendance at MSA as early as 2017, however documentation from MSA only confirms enrollment during the 2019-20 school year and does not verify the exact date when the student began attending MSA (Parent Exs. F at pp. 1-4, G at p. 1, FF ¶ 9; GG at pp. 1-2; see generally Parent Exs. K-V, BB-CC).

and thus he directed the district to fund the student's program at MSA and services for the 2018-19 school year (Parent Ex. C at pp. 2, 4).

According to the parent, the CSE convened on or about January 22, 2019 (Parent Exs. A ¶ 7; D ¶ 58).[7]

In a letter dated June 14, 2019, the parent provided the district with ten days' notice that the student would continue to attend MSA for the 2019-20 school year based upon the January 2019 IEP being "fraught with substantive and procedural errors" which denied the student a FAPE (Parent Ex. D ¶¶ 1, 3, 59). Specifically, the parent's letter alleged in part that the district "failed to timely, thoroughly, and appropriately evaluate" the student, "failed to develop a substantively and procedurally valid IEP," "failed to provide timely and appropriate placements," "failed to employ appropriate evaluation, IEP development, and placement procedures," and "violated the [p]arent(s)' procedural rights under the IDEA which resulted in their exclusion from the special education process"(id. ¶ 5).

The student continued attending MSA for the 2019-20 extended school year, received related services, and participated in a home-based ABA program that provided 15 hours of 1:1 services per week (Parent Exs. F at p. 1-3; J at p. 1; DD ¶ 21; FF ¶ 12, GG at p. 2). The student ceased attending MSA in-person after March 12, 2020 due to the COVID-19 pandemic (Parent Exs. EE ¶¶ 31-32; FF ¶ 33). Therefore, beginning on March 23, 2020, the student began a remote learning program with MSA which provided the student with live educational instruction, group instruction, related services, therapies, and pre-recorded instruction (Parent Exs. EE ¶¶ 32-34, 36; FF ¶¶ 33, 35). ABA services were also provided to the student virtually for a period, but this was limited in duration due to the COVID-19 pandemic and circumstances within the home (Tr. pp. 71, 80-81). In-person services provided by a home-based BCBA again commenced towards the end of May 2020 (Tr. pp. 71, 81). According to MSA's coordinator of admissions the student was receiving "related services at the same mandate, frequency and duration" as when he attended classes in-person (Parent Ex. EE ¶ 35). The student's teacher also indicated that the student's therapists provided 30-minute live sessions according to the student's schedule (Tr. p. 67; Parent Ex. FF ¶¶ 8). From March 2020 until the end of the school year, the student was also provided with 30 minutes of live synchronous learning per week (15 minutes of math and 15 minutes of English language arts) and daily asynchronous learning for each class (Tr. pp. 66-68). During periods of asynchronous learning, the student was provided videos, websites, and worksheets to complete, but it was the student's parent's responsibility to provide one-to-one prompting and to make sure that the student was paying attention (Tr. pp. 68, 72).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2019, the parent requested an impartial hearing, asserting a multitude of claims which were both procedural and substantive in nature, by arguing that during the 2019-20 school year the district violated the United States Constitution; federal laws including 42 U. S. C § 1983 (section 1983), the IDEA, the Americans with Disabilities Act (ADA), and section 504 of the Rehabilitation Act of 1973 (section 504); the New York State

[7] The student's January 2019 IEP, which was contested during the impartial hearing, was not submitted into the record.

Constitution; New York State laws including Article 89 of the New York Education Law; as well as New York State regulations and guidelines (see Parent Ex. A ¶¶ 1-2, 61-62, 72-75, 84).[8]

Specifically with regard to the alleged denial of FAPE under IDEA, the parent's due process complaint notice included allegations that the district's evaluations, CSE meetings, IEPs, procedures, programs, and placements substantively and procedurally failed, which resulted in a significant deprivation of educational benefits (Parent Ex. A ¶¶ 61-62). The parent asserted that she desired a program for the student that had sufficient individualized support and ABA therapy, but that the student's January 2019 IEP did not provide for the same (id. ¶ 62). The parent argued that the district failed to offer the student a timely and appropriate placement (id. ¶¶ 5, 61-62, 70). Additionally, the parent alluded that the district had a practice of failing to implement IHO decisions and pendency agreements (id. ¶¶ 4, 80).

With respect to pendency, the parent requested a placement that mirrored what had been previously ordered in the unappealed April 10, 2018 decision by IHO Carter (Parent Ex. A ¶¶ 82-84). Specifically, the parent requested a pendency order which continued the student's placement at MSA in an 8:1+2 class or substantially similar class, an extended school year, a full-time 1:1 in-school paraprofessional, four 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, 15 hours per week of home-based ABA services, two hours of ABA training per month by a BCBA, assistive technology, special education transportation consisting of a short bus ride in an air-conditioned vehicle, and a full-time 1:1 transportation paraprofessional (id. ¶¶ 83-84).

The parent argued that final resolution of this matter should consist of findings that the district denied the student a FAPE for the 2019-20 school year, that MSA was an appropriate placement based upon the student's progress, and provide continued funding for the student's attendance at such school (Parent Ex. A ¶¶ 25, 30, 42, 51-52, 58, 69, 84). The parent requested related services including home-based ABA and an 8:1+2 student to teacher ratio in a special education classroom (id. ¶ 84). With regard to the parent's request for transportation, the parent stated that she desired for the student to spend a limited amount of time traveling, but if this could not be achieved, a car service to transport the student to and from school and home was being requested (id.). Additionally, transportation or transportation costs were requested for travel to and from programs and services (id.). The parent also requested compensatory services to make up for the district's failure to provide a FAPE during the 2019-20 school year, and for any time periods during the administrative proceedings in which the student did not receive services due to the district failing to comply with pendency or interim orders (id.). The parent asserted that any afterschool or home-based services should be authorized at "enhanced rates" to ensure that the student could secure appropriate providers (id.).

The parent asserted that if the district was unable to secure a licensed behavior analyst (LBA) to provide services to the student, the district alternatively must fund 1:1 instruction with

[8] The parent's due process complaint notice contains significant background information and allegations associated with years prior to the one at issue (see Parent Ex. A ¶¶ 4-59). As this appeal relates solely to issues associated with the 2019-20 school year, such claims raised in the due process complaint notice related to previous years will not be fully set forth herein.

behavioral support until such time that the district was able to locate an LBA (Parent. Ex. A. ¶ 84.). The parent requested that the district bear any other costs related to the relief sought and indicated that if she was to incur any other debts or extend any funds with respect to the student's education for the 2019-20 school year, the debts should be satisfied or reimbursed (id.). The parent also requested any additional relief deemed appropriate by the impartial hearing officer, but that was not known to the parent when the hearing was requested, on the ground that independent evaluations may recommend greater or different services than what was originally requested (id.). Lastly, the parent requested that the district fund her attorneys' fees (id.).

B. Impartial Hearing Officer Decision

In response to the parent's July 1, 2019 due process complaint notice, IHO Briglio was appointed again to hear the 2019-20 school year proceeding and he convened an impartial hearing with the parties on August 5, 2019 to address the student's pendency placement (Tr. p. 3). A decision and order on pendency was issued on the same day (Tr. p. 3; see generally Aug. 5, 2019 Interim IHO Decision pp.1-2, 5). The pendency decision ordered that the prior unappealed impartial hearing decision dated April 10, 2018 and the un-appealed July 31, 2018 pendency decision, constituted the student's pendency placement (Aug. 5, 2019 Interim IHO Decision at pp. 2-4). [9]

Accordingly, for pendency the IHO ordered the district to immediately fund the student's tuition at MSA with a 1:1 paraprofessional, assistive technology, related services, special transportation, and 15 hours per week of ABA in the student's home (Aug. 5, 2019 Interim IHO Decision at p. 4). The IHO held that funding was to commence the date in which the parent requested the hearing, July 1, 2019, which was also the start of the 2019-20 extended school year and continue until the matter was completed or agreed to by the parties (id.). The IHO noted that another matter involving the 2018-19 school year remained pending, so the district was not to fund any duplicate pendency services (id.). Additionally, the funding ordered was to be provided upon proof of provision of services and attendance (id.).

On August 13, 2019, the IHO denied consolidation of this proceeding with the then pending 2018-19 proceeding (Aug. 13, 2019 Interim IHO Decision at pp. 2-3). Similarly, on July 18, 2020,

[9] While not directly at issue in this matter, to the extent the IHO, in part, based his pendency decision on the prior unappealed pendency decision dated July 21, 2019, such reasoning was in error. As has recently been explained in other State-level review proceedings, a pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding because, in order to represent an agreement between the parties, the unappealed decision upon which pendency may be based must be a decision on the merits, including a determination of the appropriateness of the unilateral placement (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2], Ventura de Paulino, 959 F.3d at 536; Schutz, 290 F.3d at 484-85 [explaining that "a final administrative decision by a state review board, agreeing with a parent's decision about their child's placement, constitutes a 'placement' within the meaning of the pendent placement provision of the IDEA"]; Letter to Hampden, 49 IDELR 197), see also Application of a Student with a Disability, No. 20-165; Application of a Student with a Disability, No. 20-096). Accordingly, the IHO should have limited the basis for pendency to the placement and program found in the unappealed April 10, 2018 IHO Decision rather than expand it to encompass the unappealed July 31, 2018 pendency order and "the actual program and services [the student] was receiving at the time of the [due process complaint notice] in this matter, July 1, 2019" (Aug. 5, 2019 Interim IHO Decision at p. 4). While the distinction is academic in this case, the practice of relying on interim decisions to establish pendency has proven problematic in many proceedings.

the IHO denied consolidation with the then pending 2020-21 proceeding that was filed after this matter commenced (July 18, 2020 Interim IHO Decision at pp. 2-3).

The parties appeared for nine additional hearing dates during which they discussed the status of the case, including the possibility of settlement (see Tr. pp. 7-99). However, efforts at settlement were ultimately unsuccessful, and the hearing proceeded on the merits, with the district representing that it would not be presenting any evidence or witnesses to contest the claims made by the parent regarding the 2019-20 school year (Tr. pp. 47, 54, 58). On the final day of the impartial hearing in June 2020, while the student was attending MSA, the parent's counsel began explaining to the IHO that a new problem had arisen with the student's assistive technology devices "over the course of the last several weeks, even before COVID" and that the parent wanted an order for new devices based upon previous orders and the need documented in the March 2017 assistive technology assessment (Tr. pp. 84-86). The hearing concluded on June 13, 2020, and the parent submitted a closing brief in October 2020 (Tr. pp. 93-98; IHO Ex. II).

Approximately 14 months later, the IHO issued a final decision on December 10, 2021, which found that the district conceded it failed to provide the student a FAPE for the 2019-20 extended school year (IHO Decision at pp. 1, 4-5). The IHO also decided that the student "benefitted from the program and services he received while at MSA and in the home ABA program and that the program and services were designed to meet the student's special education needs" (IHO Decision at p. 3).

In the final decision, the IHO again acknowledged that pendency in this matter was previously determined by both the un-appealed April 10, 2018 impartial hearing decision and the continued receipt of such program and services pursuant to the July 31, 2018 pendency decision, which in effect continued the program that was provided during the 2018-19 school year into the 2019-20 school year (IHO Decision at p. 3). The IHO also noted that a pendency agreement had been reached in the case pertaining to the 2020-21 school year, which required the district to continue funding the student's program at MSA and to provide the related services that had been requested and granted in this case for the 2019-20 school year (id. at p. 4). Accordingly, the IHO decided that because the 2019-20 school year was complete and "all of the relief requested by the parent was or should have been funded through pendency" the matter was moot (id. at pp. 3-4). The IHO asserted that because a "requisite dispute in special education case must persist throughout the litigation… pendency retaining student in parent's chosen placement moots parent's IDEA claim" (id. at p. 4). Therefore, the IHO dismissed the parent's due process complaint notice with prejudice "upon full provision and payment for pendency services ordered herein" (id. at p. 5).

With respect to relief, the IHO only specifically addressed the parent's request for assistive technology, as the remaining claims were dismissed (IHO Decision at p. 5). The IHO explicitly ordered the district to review with the parent and her counsel the assistive technology that the student needed according to an evaluation and arrange for the provision of the same (id.). However, the IHO also ordered that the district fund "any un-funded pendency program and services" for the 2019-20 extended school year, including transportation, within 30 days of the order (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO's decision to dismiss her claims with prejudice was improper as it was ultra vires, violated due process, wrongly determined that the claims were moot, and was confusing due to being conditioned upon the "full provision and payment for pendency services".

The parent argues that the IHO's ruling was incorrect because the district did not raise the defense of mootness during the proceeding or request for the case to be dismissed with prejudice, rather the IHO did so sua sponte. The parent asserts that the IHO failed to provide any notice that a dismissal would be forthcoming, providing the parent with no opportunity to be heard or present evidence establishing that the claims were not moot.

On appeal, the parent alleges that this case meets an exception to the mootness doctrine, as the conduct complained of is "capable of repetition, yet evading review." The parent asserts that the district repeated its conduct with relation to the placement process, IEP process, and its failure to provide and recommend appropriate assistive technology even after it had been ordered. Furthermore, the parent asserts that such repetition could be verified by the fact that for two years she had prevailed on claims made regarding the district's failure to create an IEP providing for an 8:1+2 classroom with 1:1 instruction using ABA, as well as the district failing to provide assistive technology. The parent argues that such repetition is also demonstrated by the fact that she again requested impartial hearings on these issues for the 2020-21 and 2021-22 school years.

The parent further argues that the IHO failed to make rulings on the merits for all claims raised in her due process complaint notice, including those associated with the district denying the student a FAPE. The parent asserts that the IHO should have awarded declaratory relief and found that the unilateral placement of the student at MSA was appropriate with additional services and supports because the second portion of the Burlington/Carter test was satisfied. Additionally, the parent argues that IHO should have ruled on the parent's claims made pursuant to section 504 and Section 1983.

The parent alleges that if the case was moot, no relief would have been ordered. The parent states that the IHO's order is contradictory as it requires a review of the student's need for assistive technology before arranging for the provision of the same, but simultaneously states that because the 2019-20 school year ended no further relief could be awarded. The parent asserts that because the previously conducted assistive technology evaluation was submitted into the record and the district did not rebut the parent's ongoing request for replacement assistive technology, the IHO should have simply directed the district to replace or repair the student's device, which had still not occurred. Similarly, the parent asserts that because her request for reimbursement of the student's tuition deposit paid to MSA necessitated review, reversal of the IHO's decision is warranted.

Therefore, as relief the parent requests for a decision to be made on the merits for all issues raised in the due process complaint notice on the grounds that such claims were improperly rendered moot. Specifically, on appeal the parent seeks for the IHO to explicitly find that the district failed to provide the student a FAPE for the 2019-20 school year, that the pendency program at MSA was appropriate, and order the district to provide functional assistive technology and any additional relief deemed appropriate.

In an answer, the district argues that dismissal was proper because the IHO explicitly determined that the district had conceded FAPE for the 2019-20 school year; the parent makes vague, and overbroad claims; and the parent makes systemic claims as well as section 504 and Section 1983 that cannot be reviewed due to a lack of jurisdiction in these administrative proceedings. Additionally, the district asserts that for the first time on appeal, the parent sought a finding that the pendency program provided to the student during the 2019-20 school year was appropriate. The district asserts that the assistive technology ordered by the IHO did not contradict with the finding of mootness, as the IHO found that "no further relief could be awarded after awarding some [assistive technology] relief." The district also argues that the request for reimbursement for a tuition deposit was not moot because the student had been at MSA throughout the pendency of the case and therefore any tuition paid by the parent would be reimbursed. The district asserts the student was able to access remote education during the 2019-20 school year, the student made progress, and no lapse was reported due to missing or broken assistive technology equipment. The district states that the fact that the parent filed due process complaint notices for subsequent school years is not evidence of the assistive technology issue evading review. Lastly, the district asserts that the IHO failing to rule on prongs I and II of the Burlington/Carter analyses did not affect the overall outcome of the case, as the student's entitlement to pendency at MSA had already been addressed.

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]).[10]

[10] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the

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. Scope of Impartial Hearing

Before turning to the merits of the parent's appeal, it is necessary to examine which claims are before me for review. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

With regard to the parent's claim that the pendency program provided to the student during the 2019-20 school year was appropriate, the district argues that such claim was raised for the first time in the parent's request for review, by way of a footnote (Answer ¶ 14; see Request for Review at p. 6 n.3). The district asserts that such allegation was not contained in the parent's due process complaint notice, making it beyond the scope of the impartial hearing and this appeal (id.). The record also does not reflect the parent seeking the district's agreement to expand the scope of the impartial hearing to include such issue, the parent filing an amended due process complaint notice to add this claim, or the district having "opened the door" to this claim by raising evidence as a defense to claims that were not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Moreover, it is well settled that a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct

chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

concepts"]).Therefore, I will not review this issue.[11] However, the distinct issues related to the appropriateness of the program offered by the CSE and suitability of the student's placement at MSA will be discussed below to the extent same is necessary to determine the claims raised by the parent with respect to the relief she currently seeks on appeal .

2. Scope of Review

State regulations governing the practice before the Office of State Review requires that the parties set forth in their pleadings "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 further specify 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][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Furthermore, the IDEA and State regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]).

Here, the IHO also found that the district conceded it failed to provide the student a FAPE during the 2019-20 school year (IHO Decision at p. 4). Furthermore, the IHO recognized that the law provides that the "school district bears the burden of proof with respect to the appropriateness of its recommendation" (IHO Decision at pp. 4-5). Although that finding was not repeated once again in the decretal portion of the decision, on appeal neither party sincerely disagrees with the fact that the district did not present any evidence at all which in this case resulted in a determination that the district did not meet its burden to show that it offered the student a FAPE for the 2019-20 school year. However, the parent argues that more explicit findings should have been made, as the mootness determination caused the parent to lose her FAPE claim (Req. for Rev at pp. 4, 8).

[11] The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531 [2d Cir. 2020] cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 (U.S. Jan. 11, 2021); T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). Pendency for the 2019-20 school year was determined on August 5, 2019, therefore there is no issue to be reviewed regarding the same (see Aug. 5, 2019 Interim IHO Decision at pp. 2-5).

I disagree. While the parent may have preferred a more detailed rulings, the IHO's final decision resolved the issue of FAPE entirely in the parent's favor; therefore, the parent is not entitled to appeal this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

Similarly with regard, to the appropriateness of the student's unilateral placement at MSA, the IHO stated that he did "not doubt that [the student] benefitted from the program and services he received at MSA and in the home ABA program and that the program and services were designed to meet the student's special education needs" (IHO Decision at pp. 3-4). The parent argues that although the IHO made an implicit finding regarding MSA being appropriate, he did not explicitly find that the parent's placement at MSA with 1:1 home ABA instruction was appropriate, despite the parent presenting sufficient evidence for such ruling (Req. for Rev. at p. 6). The parent asserts on appeal that the thirty-three exhibits she submitted into the record and her own testimony, as well as the testimony of three additional witnesses supported the appropriateness of MSA (Req. for Rev. at p. 5). Here, the finding made by the IHO relating to MSA's programming and the home-based ABA programming, although brief and slightly muddled with his mootness statements, was sufficiently clear to support a determination in favor of the parent because he "had no doubt" that the private programming addressed the student's special education needs and that be benefited from it, which findings were not appealed by the district.[12] As such, the finding that parent met the second Burlington/Carter criterion has also become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The parent has also alleged that the district committed systemic violations (i.e., engaging in predetermination; discriminating based upon disability, and applying blanket policies that prevent CSEs from recommending appropriate school placements and services) and violations of various state and federal laws (Parent Ex. A ¶¶ 1-2, 61, 74-76; Req. for Rev. at pp. 7-9) which she asserts should have been determined by the IHO However, regardless of whether the IHO addressed any of these allegations, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see

[12] The district seems to be of the opinion that the IHO did not rule on the second Burlington/Carter criterion, but, unlike the first criterion, the district ignores the IHO's statements about MSA and the home-based ABA services (and record citations to the parent's evidence in this case) that are averse to the district.

Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and accordingly such claims will not be further addressed.[13]

3. Mootness

The parent appeals the IHO finding that the parent received all the requested relief for the 2019-20 school year under pendency which effectively rendered the case moot on the merits.

The parent argues that her claims are not moot as she did not receive all the relief that she requested during the impartial hearing, which is demonstrated by the fact that the IHO ordered some relief, namely for the district to review the student's need for assistive technology and arrange for the provision of the same. However, the parent asserts that such claim remains unresolved, as the district had not repaired or replaced the student's assistive technology device. Additionally, the parent asserts that her claim for the reimbursement of her tuition deposit for MSA was not moot. The parent further argues that the IHO erred by raising the issue of mootness sua sponte because the parent was denied the opportunity to present evidence establishing that her claims warranted a review on the merits, which amounted to a violation of her due process rights.

The 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

[13] The parent appears to acknowledge such jurisdictional limitations on appeal by stating that "the IHO dismissed claims over which he had no and/or failed to assume jurisdiction, that is, section 504 and Section 1983 claims, as well as systemic claims" (Req. for Rev. at p. 1).

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 student's pendency placement for this proceeding was set forth in the IHO's interim August 2019 decision, which provided that the prior un-appealed impartial hearing decision dated April 10, 2018 and an un-appealed pendency decision, dated July 31, 2018, constituted the student's pendency placement and also noted that the student was currently attending the program and placement reflected in both decisions (Aug. 5, 2019 Interim IHO Decision at pp. 4-5). Therefore, the district was directed by the IHO to pay the student's tuition at MSA with a 1:1 paraprofessional, assistive technology, related services, special transportation, and 15 hours per week of ABA in the student's home (id. at p. 4). The district was ordered to fund the student's placement at MSA retroactive to the filing of the due process complaint notice on July 1, 2019, and the start of the 2019-20 extended school year and continue until the matter was completed or agreed to by the parties (id. at p. 4). Contrary to the parent's contention, such order would have required the district to reimburse the parent for the student's tuition deposit. Accordingly, as

determined by the IHO, the parent received all relief that had been requested (IHO Decision at pp. 3-5).

Turning next to the possible application of the "capable of repetition yet evading review" exception to mootness, the parent asserts that the district repeated past conduct associated with recommending a placement for the student, the IEP process, and failure to provide and recommend appropriate assistive technology for the student (Req. for Rev. at pp. 2-4). The parent asserts that in the past she had contested the district failing to create an IEP recommending an 8:1+2 classroom and 1:1 instruction using ABA and failing to provide assistive technology (Req. for Rev. at p. 5). However, neither can be said to be evading review nor that they can reasonably be expected to be repeated. First, as stated above, the appropriateness of MSA for the student had already been determined in a proceeding relating to the 2017-18 school year (Parent Ex. B at pp. 3-4). Even further, the appropriateness of MSA for the student was deemed appropriate in this matter when the IHO implicitly found that he did "not doubt that [the student] benefitted from the program and services he received at MSA and in the home ABA program and that the program and services were designed to meet the student's special education needs" (IHO Decision at pp. 3-4). Second, the district does not appeal the findings made by the IHO that the district failed to offer a FAPE or that MSA provided an appropriate placement for the student. Additionally, it is unclear why it was necessary to have a finding that the pendency order for the 2019-20 school year was appropriate, when there had already been a determination as to the appropriateness of MSA for the 2019-20 school year (Req. for Rev. at p. 6). The fact that the student may eventually be reassessed in accordance with the IDEA is also not a sufficient basis to overcome a finding of mootness (see M.S. ex rel. M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]).

Finally, the parent attempts to fault the district for unreasonably extending the litigation in this matter for over nine months, asserting that the district was not attempting to settle this matter in good faith (Req. for Rev. at p. 3). The parent asserts that the student "should not be punished with a dismissal for mootness where a significant portion of the delay in the proceedings was due to [the district]" (Req. for Rev. at p. 3). The district asserts that the parties merely "reached an impasse" (Answer ¶ 4). When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints; the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[14] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar

[14] During this impartial hearing, State regulation had provided for extensions beyond 30 days but for no more than 60 days during the time that "schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis" (8 NYCRR 200.5[j][5][i]).

reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.).

There are several status updates in the hearing record up to and including during the February 2020 hearing date in which the counsel for the parents asserts that progress was made toward settlement through the exchange of documents (see Tr. p. 35). Neither party has provided a clear description of the steps in the settlement process undertaken or detailed the substance of their confidential settlement negotiations, and neither side seems inclined engage in that kind of disclosure in this forum. So it is not clear what the parent's counsel expects the undersigned to do with unsupported accusations of bath faith negotiations or what further reimbursement relief the parent would be entitled to under IDEA even assuming such accusations were true. Unsurprisingly, the parent points to no IDEA caselaw on the subject of bad faith negotiations while matters are pending in an administrative tribunal because there is likely none at all.

This case was undoubtedly delayed beyond the timeframe envisioned by Congress, instead taking nearly two and a half years. Some of the delay was attributable to the parties' efforts to settle the case. Even further, it is concerning that the IHO in this matter waited until December 10, 2021 to render a determination, well over a year after the final hearing date which occurred on July 13, 2020 and the record was closed in October 2020. In the end, as noted above, the parent received, through pendency, all of the relief sought in her closing brief that an administrative hearing officer is authorized to grant under IDEA, with the limited exception of the assistive technology which was addressed by the IHO and is further addressed below. In view of the forgoing, a finding as to who bears the most fault for the long duration of this proceeding, which was at least in part due to the parties' attempts at settlement, would be an unproductive endeavor at this juncture.

VII. Relief- Assistive Technology Devices

However, the parent also challenges the IHO's rejection of the parent's request to order replacement of the student's assistive technology devices , in favor of ordering the district to "review with parent's counsel and the parent the [assistive technology] that [the student] currently needs according to the [assistive technology] evaluation… and arrange for the provision of such [assistive technology]" (Req. for Rev. at p. 7; IHO Decision at p. 5). Specifically, the parent argues that the IHO failed to consider an assistive technology evaluation that had been conducted of the student in March 2017 when considering her request for replacement devices, despite such evaluative document having been admitted as evidence (id.).[15]

First, it is undisputed that the district conceded it denied the student a FAPE for the 2019-20 school year; however, the hearing record is equally clear that the specific assistive technology device problem was raised by the parent for the first time on the last day of the impartial hearing in the form of a request for replacement devices from the district due to developments in "the last

[15] Pursuant to the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

several weeks," that is, nearly a year after the due process complaint was filed in this case (Tr. pp. 84-86; Parent Ex. A at p. 1). As explained above, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), and however well intentioned, it was not proper to raise new problems with the student's devices at the end of the impartial hearing. On this basis I decline to overturn the IHO and order new devices as part of this proceeding.

The parent tries to evade this problem by bootstrapping the issue of new replacement devices to prior IHO orders from years past. During the hearing, counsel for the parent asserted that an earlier impartial hearing decision associated with the 2017-18 school year specifically identified all the assistive technology devices and support that the student was to receive (Tr. pp. 85-86; see generally Parent Ex. B). A review of the IHO decision indicates that the March 2017 assistive technology assessment was submitted into the underlying record for that proceeding (Parent Ex. B pp. 3-4). However, the IHO did not state whether she was ordering all the assistive technology recommended therein (Parent Ex. B pp. 3-4). Rather the IHO merely ordered the district to "provide and/or fund [assistive technology] supports and services" (Parent Ex. B pp. 3-4). To the extent that the parent may be seeking to enforce an IHO's order, it must be noted that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers, much less to enforce decisions of the courts (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

To be sure, the evidence shows that the March 2017 assistive technology evaluation determined that the student was an excellent candidate for assistive technology, namely "a range of light to high technological based communication and academic interventions" for the development of his communication and academic skills (Parent Ex. GG at pp. 1, 7, 18). It was recommended that the student be provided with a 9.7-inch iPad Pro to serve as the student's AAC support for communication, a 12.9-inch iPad Pro for the student's basic assistive technology tool for education, assistive technology support services, accessories for the recommended devices, noise cancelling headphones, and multiple software applications (id. at pp. 8-15).

While the parent tries to cast the issue as a failure to implement the March 2017 recommendations, this is belied by the evidence because the parent herself testified that the district implemented the evaluator's recommendations (Tr. p. 93). Furthermore, a progress report for the period from September 2019 to December 2019 reflected the student's use of the communication software to supplement, support, and augment his verbal language (Parent Ex. BB at p. 1). The parent also testified that when the assistive technology provided by the district ceased being operable, the district failed to replace the same despite repeated requests (Tr pp. 87-98; see generally Parent Ex. GG).[16] But these events were not the subject of this proceeding, and during

[16] The parent alleged that the March 2017 assistive technology assessment should have been relied upon to order replacement assistive technology for the student (Tr. p. 92, Req. for Rev. at pp. 7; see generally Parent Ex. GG).

the hearing, the student's mother testified, that the district insisted that a new assistive technology evaluation be conducted (Tr. pp. 88-92). Instead, MSA lent the student a device which had the requisite communication software and the student borrowed another device from his sibling (Tr. pp. 84, 89, 91-92).

"Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk" Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020]). The student was placed at MSA by the parent, and while attending the unilateral placement, problems developed with the technology, which, in my view, the parent and MSA had the burden to show that they appropriately addressed. It is undisputed that the parent rejected the January 2019 IEP and decided to continue the student's unilateral placement at MSA (Parent Ex. D at pp. 1, 8-12). Even if the January 2019 IEP recommended the student be provided with two assistive technology devices, once it became clear that the student would not be educated under the proposed IEP, there could be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

Notwithstanding these points, the IHO ordered the district to arrange for the provision of assistive technology after another review of March 2017 AT assessment, now over 5 years old, which goes much further than I believe is appropriate in this case. However, the district did not appeal this aspect of the IHO's decision. Accordingly, while I declined to specify more relief than the IHO already has with respect to how the district must provide the assistive technology devices, under the circumstances presented herein, if the district and the parent agree with regard to the provision of the particular assistive technology devices listed in the March 2017 assessment, I will not prevent the same from occurring.

VIII. Conclusion

Based on the foregoing, the hearing record establishes that the IHO found that the district denied the student a FAPE and that MSA was an appropriate unilateral placement for the student. As a review of the evidence did not establish that there were no equitable considerations that would bar reimbursement and the parent received the relief she had requested, I find that the hearing record does not support a modification of the IHO's determinations. I have considered the remaining contentions, including the parent's request for assistive technology to be ordered without being predicated on a review of a previously completed assistive technology evaluation, and find that any further relief is not appropriate in this case.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 22, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER