The University of the State of New York

The State Education Department
State Review Officer
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No. 23-230

Application of a STUDENT WITH A DISABILITY, by her 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 Firm of Tamara Roff, PC, attorneys for petitioner, by Beth A. Kennelly, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 denied her request for funding for her daughter's tuition costs at the Eden II Programs (Eden II) for the 2022-23 school year. The appeal must be sustained.

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 has received a diagnosis of autism, and presented with deficits in receptive, expressive and pragmatic language, as well as functional communication skills, and demonstrated self-injurious and stereotypic behaviors (Parent Ex. D at pp. 2-3, 5). Additionally, the student presented with delays in her cognitive, attention, social/emotional, adaptive living (eating and toileting, etc.), and motor skills which impacted her ability to interact with her environment, peers and adults (id. at p. 5).

The student attended the Little Miracles Preschool (at Eden II) beginning in September 2020 (Parent Ex. D at p. 2). On November 12, 2021, a Committee on Preschool Special Education (CPSE) convened to develop the student's IEP for the 2021-22 school year and, having determined

the student remained eligible for special education services as a preschool student with a disability, recommended a 12-month school year program consisting of a 6:1+3 special class placement with related services including four 30-minute sessions of individual speech-language therapy per week, and three 30-minute sessions of parent counseling and training in a group per year (Parent Ex. D at pp. 1, 21). The student continued at Eden II for the 2021-22 school year (see Parent Ex. H ¶ 3).

According to the parent, on May 11, 2022, a CSE convened to develop an IEP for the student for the 2022-23 school year (kindergarten) (Parent Ex. H ¶ 4). The parent indicated that the May 2022 CSE recommended a 6:1+1 special class for 18 periods per week in English language arts (ELA) and mathematics with speech-language therapy and parent counseling and training (id.). Also according to the parent, on June 15, 2022, she received notice from the district of the particular public school site to which it assigned the student to attend for the 2022-23 school year (id. ¶ 6).[1]

In a letter dated August 23, 2022, the parent informed the district through her attorney that she disagreed with the May 2022 IEP and the assigned public school and that, in the absence of "an appropriate IEP and placement," the student would continue at "the last agreed upon placement at Eden II" for the 2022-23 school year and the parent would seek public funding for the costs thereof (Parent Ex. B at pp. 1-2).[2]

A. Due Process Complaint Notice

In a due process complaint notice, dated September 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent alleged that the May 2022 CSE was not properly composed, the district denied her the opportunity to meaningfully participate and predetermined the CSE's program recommendations, the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student, and that the May 2022 IEP was inappropriate because it included inadequate present levels of performance, annual goals, management needs, and program and service recommendations and did not specify "any research based methodology or instruction" such as applied behavior analysis (ABA), which the student had been receiving leading up to the CSE meeting (id. at pp. 1-2). Specific to the recommendation for a 6:1+1 special class, the parent alleged that the IEP was silent regarding the student's program outside of the 18 periods for which a special class was recommended, did not provide for sufficient "individualized and 1:1 instruction" and supervision, and did not take into account the student's need for a "small school environment" (id. at p. 2). In addition, the parent alleged that she toured the assigned public school and found it inappropriate due to the arrival procedures, the size of the cafeteria and lack of support during meals, the rules of the observed

[1] Neither the May 2022 IEP nor the June 2022 notice of the assigned public school site was included in the hearing record.

[2] The IHO entered parent exhibits with letter designations A and B during the hearing date devoted to addressing pendency and again during a hearing date on the merits (compare Parent Pendency Exs. A-B, with Parent Exs. A-B). For purposes of this decision, all citations to parent exhibits are to those entered into the hearing record on dates addressing the merits of the parent's claims.

classroom related to beverages and naps, and the lack of 1:1 instruction, instruction in practical skills, and ABA (id.). For relief, the parent requested "[f]unding/reimbursement for unilateral placement at Eden II" for the 2022-23 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened October 17, 2022 and concluded on July 14, 2023 after 10 days of proceedings (Tr. pp. 1-229).[3] In an interim decision dated February 2, 2023, the IHO found that the November 2021 IEP set forth the student's pendency placement but that pendency did not mandate that Eden II be the location for delivery of the program and services (Parent Ex. C at pp. 7-9).

During the impartial hearing, the district did not present any evidence or make any argument to defend its offer of a FAPE to the student (see Tr. pp. 106-07). In a final decision dated September 15, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at p. 11). The IHO reasoned that "[d]espite the paucity of evidence presented, the IEP 'complied with the procedural requirements of the IDEA'; and (b) the IEP was 'reasonably calculated to enable the child to receive educational benefits.'" (id.). The IHO found that the 6:1+1 special class was "reasonably calculated to enable [the] Student to receive educational benefits as a kindergartener with an autism diagnosis" and that State regulations already provided that students with autism receive individual or small group instruction (id. at p. 13). The IHO concluded that the student's needs derived from "her inability to communicate her needs" and that her needs would be met by the support of a paraprofessional in the classroom (id.). The IHO also found that the behaviors about which the parent was concerned were not the type of behaviors that warranted an FBA or BIP (id. at pp. 13-14). Further, the IHO noted that the parent had the opportunity to visit the assigned public site and that the parent's concerns about the school did "not render the district's program inappropriate" (id. at p. 11, 14).

Although the IHO determined that the district offered the student a FAPE, she went on to consider the parent's requested relief (IHO Decision at pp. 11-17). The IHO found that Eden II met all of the criteria for being an appropriate placement and that the student received educational benefit (id. at pp. 12-13). Regarding equitable considerations, the IHO found that the parent did not enter into a contract with Eden II and, therefore, was not entitled to relief in the form of district funding of the student's tuition (id. at pp. 15-17). The IHO denied the parent's requested relief (id. at p. 17).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer, and the parent's reply is presumed and, therefore, the allegations and arguments will not be recited here in detail. Briefly, the parent raises the following issues on appeal:

[3] The hearing dates included one prehearing conference, one hearing date devoted to address the student's stay-put placement during the pendency of the proceedings, six status conferences, and two hearing dates devoted to addressing the merits of the parent's claims (see Tr. pp. 1-229)

(1) that the IHO erred in determining that the district met its burden of establishing the provision of FAPE for the 2022-23 school year;

(2) that the IHO erred in determining that the district's May 11, 2022 IEP's recommendations sufficiently addressed the student's needs;

(3) that the IHO erred in determining that the student's behaviors did not warrant an FBA or a BIP;

(4) that the IHO erred in finding that the assigned public school was appropriate for the student based on her needs; and

(5) that the IHO erred in determining that the lack of a written contract between the parent and Eden II barred the parent's request for funding for the student's continued placement at Eden II.

In its answer, the district argues that the parent is not aggrieved by the IHO's decision since the district fully funded the student's attendance at Eden II for the 2022-23 school year pursuant to pendency. Regarding the merits, the district concedes that it did not meet its burden to prove that it offered the student a FAPE for the 2022-23 school year. However, the district argues that the IHO correctly denied the parent's relief on equitable grounds.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[4]

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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. Free Appropriate Public Education

Prior to the district's opening statement, during pre-hearing conferences on May 17, 2023 and June 14, 2023, the district stated that it would not be presenting testimonial or documentary evidence and would not "be putting on any . . . defense" regarding its offer of a FAPE to the student for the 2022-23 school year (Tr. pp. 88-89, 106). In its answer, the district concedes that it did not meet its burden to prove that it offered the student a FAPE.

The lack of basis for the IHO's finding is highlighted by the district's failure to even offer the disputed IEP into evidence. The IHO informed the parties during the May 17, 2023 hearing that she would "need a copy of the [May 2022] IEP" because she "insist[ed] on knowing what the student's official diagnosis [wa]s" (Tr. p. 89). Despite the IHO's request for the parties to produce the May 2022 IEP, neither party entered it into the record. Because the student's May 2022 IEP is not a part of the hearing record, there was no way for the IHO to assess whether the present levels of performance, annual goals, management needs, or program and service recommendations were appropriate.

In light of the district's failure to present any witnesses or documentation defending its offer of a FAPE, and, further its concession on appeal that it failed to meet its burden, the IHO's determination that the district offered the student a FAPE for the 2022-23 school year is not supported by the hearing record and must be reversed.

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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 chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

B. Relief

Having found that the IHO erred in finding that the district offered the student a FAPE, it remains to be determined what, if any, relief should be awarded. Contrary to the district's position, the parent was aggrieved by the IHO's decision, which found in favor of the district and denied the parent all of the relief sought. However, viewing the argument more closely, the district asserts that the parent obtained all of the relief she sought pursuant to pendency, in other words that there is no longer a live controversy.

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).

Here, as relief, the parent sought a declaratory finding that the district denied the student a FAPE for the 2022-23 school year and funding for the student's placement at Eden II for the 2022-23 school year (Parent Ex. A at p. 3). Although the IHO determined that the student's pendency program did not have to be provided at Eden II (Parent Ex. C), there is no dispute that the district funded the student's tuition at Eden II for the 2022-23 school year pursuant to pendency (Req. for Rev. ¶ 29; Answer ¶ 5; Reply ¶ 18; see Parent Ex. F). Accordingly, aside from the declaratory relief—which is addressed above—the parent has received the relief sought.

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]).

Some 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 (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. Jul. 29, 2011]), while others have found it an acceptable manner of addressing matters in which the relief has already been realized through pendency (see V.M., 954 F. Supp. 2d at 119-20 [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O., 899 F. Supp. 2d at 254-55; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S., 734 F. Supp. 2d at 280-81 [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

Here, relevant to the application of the exceptions to the mootness doctrine, it remains to be determined what type of relief the parent was seeking given that the parent did not incur a financial obligation to Eden II. In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

In the due process complaint notice, the parent requested "[f]unding/reimbursement for unilateral placement at Eden II" (Parent Ex. A at p. 3); however, in response to the IHO's determination that the parent did not have a financial obligation to Eden II (see IHO Decision at pp. 15-17), the parent argues that Eden II does not contract directly with parents and that she did not have to incur an obligation because the district was funding the tuition pursuant to pendency (see Parent Ex. F).

While a student is entitled to remain in his or her stay-put placement during the pendency of a proceeding, this statutory protection is similar to preliminary injunctive relief to protect the student while the proceedings are pending and is distinct from the ultimate relief available to a parent through the due process proceedings (20 U.S.C. § 1415 [j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Had the proceedings concluded before the end of the school year, the parent would not have been entitled to district funding of Eden II as the last agreed upon placement for the remainder of the school year.

Ultimately, putting aside pendency, the parent's request for relief in the form of the student's attendance at Eden II for the 2022-23 school year may be more akin to a request for the district to prospectively place the student directly at Eden II. As noted above, however, relief in the form of changes to a placement or an IEP are moot when the school year at issue ends, and the circumstances of the present matter do not fall in one of the exceptions to the doctrine since the allegation of a denial of a FAPE is addressed above and a decision in the parent's favor will not change the student's pendency placement going forward. Accordingly, aside from the question of declaratory relief, the matter is moot as there is no further relief that may be granted.

VII. Conclusion

Having determined that the district failed to meet its burden of proof that it provided the student with a FAPE for the 2022-23 school year, and having determined that there is no further relief that may be granted, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 15, 2023, is modified by reversing that portion which found that the district met its burden to prove that it offered the student a FAPE for the 2022-23 school year.

Dated: **Albany, New York**
December 14, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER