The University of the State of New York

The State Education Department
State Review Officer
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No. 24-198

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Headway Services (Headway) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which directed the district to reevaluate the student. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

Briefly, a CSE convened on January 16 2020, determined that the student was eligible for special education as a student with a speech or language impairment, and recommended that the student receive five periods per week of direct individual special education teacher support services (SETSS), with one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services (Parent Ex. D at pp. 1, 7).[1, 2]

The student was the subject of a prior due process proceeding in which the district failed to appear and in a decision dated November 8, 2021, the IHO in that case found that, for the 2020-21 school year, the student was entitled to the services the CSE recommended in the January 2020 IESP.(Parent Ex. B at p. 8). The IHO ordered the district to directly fund five periods per week of individual direct SETSS for the 2020-21 school year (id.).[3]

On April 25, 2023, the parent signed a district form in which she notified the CSE that the student was parentally placed in a nonpublic school and she wanted the student to receive special education at the nonpublic school (Parent Ex. E).

On July 19, 2023, the parent entered into a contract with Headway for the 2023-24 school year (see Parent Ex. F). The contract indicated that Headway would provide the student with individual SETSS in English "at a rate of $225" (id. at p. 1).[4]

A. Due Process Complaint Notice & Facts Subsequent to its Filing

In a due process complaint notice dated September 7, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent alleged that the student's pendency placement was based upon the November 2021 IHO decision and that the student should receive five periods of direct individual SETSS per week, one 30-minute session of individual speech-language therapy per week, one 30-

[1] The January 2020 IESP was also entered into the hearing record as district exhibit 1. For the sake of clarity, the IESP will be cited to as parent exhibit D throughout this decision. The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The January 2020 CSE recommended that all of the student's speech-language therapy and counseling services be delivered in Yiddish, while the SETSS were recommended to be delivered in English (Parent Ex. D at p. 7).

[3] For the 2022-23 school year, the parent challenged the district's provision of services and the parent and district entered into a resolution agreement for the student to receive five hours per week of SETSS at a specified rate, as well as related services at a "DOE RSA rate" consisting of one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of individual counseling services, and one 30-minute session per week of group counseling services with all of the related services to be provided in Yiddish (see IHO Exs. I-III). A January 2022 speech language progress report on district letterhead was placed in evidence, but it bears marginal relevance to the parties' current dispute.

[4] The contract listed the recommended related services in the January 2020 IESP; however, it did not indicate that Headway would provide related services to the student for the 2023-24 school year (Parent Ex. F).

minute session of group speech-language therapy, one 30-minute session of individual counseling services, and one 30-minute session of group counseling services (id. at p. 2).[5]

The parent asserted that the January 2020 IESP was "outdated and expired" and indicated that she had not received any new documents and was "uncertain" whether there was a more recent program (Parent Ex. A at p. 2). The parent asserted that this resulted in a denial of a FAPE to the student for the 2023-24 school year (id.). The parent alleged that she "has been unable to locate SETSS and related services providers" and that the district failed to implement its own recommendations (id. at p. 3). The parent argued that without support, the student's placement in a mainstream class was "untenable" (id.). As relief, the parent requested an order for the district to fund the program outlined in the November 8, 2021 IHO decision for the 2023-24 school year at a reasonable market rate and an order for the district to "fund a bank of compensatory periods of all services which [the student] is entitled to under pendency for the entire 2023-24 school year - or the parts of which were not serviced" (id.).

B. Events Postdating the Due Process Complaint Notice

On September 8, 2023, the parent emailed the district notice of her intent to unilaterally obtain private SETSS and related services for the student (see Parent Ex. C).[6] The parent stated that the district had failed to implement the recommended services listed in the January 2020 IESP; therefore, she had no choice but to implement them on her own and to seek reimbursement and/or direct funding (id. at p. 3).

C. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO on October 19, 2023 which continued through March 14, 2024, with eight total days of proceedings (see Tr. pp. 1-160).[7] In an interim decision dated February 8, 2024, the IHO noted that the district would not present a "Prong I defense" and found that due to the passage of time there was no information that would allow the IHO to determine what would constitute an appropriate education for the student and, therefore, ordered the district to conduct an evaluation of the student immediately and upon completion of that evaluation to convene a CSE to develop an IEP or IESP for the student (IHO Interim Decision at pp. 1, 3, 5). The IHO noted that the student's last IESP was in January 2020 and there was no evidence in the hearing record to show that the district had evaluated the student since January 2020 (id.). Therefore, the IHO ordered the district to immediately conduct an evaluation of the

[5] The parent attached a pendency program form to the due process complaint notice, which was not signed by the district (Parent Ex. A at pp. 5-6).

[6] The letter was dated September 7, 2023; however, it was transmitted to the district by the parent's attorney via email on September 8, 2023 (Parent Ex. C at pp. 1, 3).

[7] The hearing held on October 24, 2024 was a pendency hearing (Tr. pp. 9, 11). The parent presented three exhibits to support her claim for pendency, which were admitted without objection from the district (Tr. p. 18; see Parent Exs. A-C). The IHO inquired if the district agreed with the parent's position on pendency, which was described in an attachment to the parent's due process complaint notice (Parent Ex. A at pp. 5-6; Tr. pp. 18-19). The district affirmatively stated that it did not object to the pendency request and the IHO indicated that she would so-order pendency per the proposed pendency implementation form (Tr. p. 19; see also Parent Ex. A at pp. 5-6).

student and upon conclusion of the evaluation, to develop an IEP or an IESP for the student (id. at p. 5).

During the last day of the impartial hearing, the district and parent entered additional evidence (see Tr. pp. 153-154; Parent Ex. K; Dist. Ex. 8). Specifically, the district entered into the hearing record a February 29, 2024 "consent for additional assessments" form, which indicated that the parent denied consent for a reevaluation of the student (see Dist. Ex. 8). The parent's attorney indicated that the parent filled that form out in error and that the parent wished to go forward with evaluations (Tr. pp. 145-46). According to the attorney for the parent, he was encouraging the parent to resend a consent for evaluation of the student, and he believed she may have already done so (Tr. p. 146).

In a final decision dated April 12, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 7, 9-11). The IHO recounted that the district had offered the parent's refusal to consent to the evaluation of the student into evidence, and the representations of the parent's attorney that the parent's refusal was an error as well as the parent's request to further delay the hearing process to have the student reevaluated, which was denied after weighing the points raised by both sides. (IHO Decision at 4).

Turning to a review of the January 2020 IESP, the IHO held that the IESP contained no information to identify the student's "levels of functioning, by age or grade, in any area, including academic skill levels" (IHO Decision at p. 7). Further, the IHO found that the goals in the January 2020 IESP did not "identify anticipated levels of achievement by age or grade" (id.). The IHO noted that the parent pointed out that the January 2020 IESP was outdated and expired and that the IESP was insufficient on several grounds (id. at p. 8). [8] However, the IHO determined that the parent's evidence and testimony was "similarly vague" and because of those shortcomings, the IHO was unable to "assess whether or not [the] Student has made any progress at any time under the existing plan," and there was nothing in the hearing record "to assess the [s]tudent's progress, the pace of the [s]tudent's progress, the effectiveness of the existing plan or how the existing plan needs to be revised" (id.).

The IHO recounted that the parent had the burden to prove that the services that she obtained from Headway were appropriate to address the student's needs (IHO Decision at pp. 11-13). The IHO found that the parent's "witnesses provided affidavit testimony that [wa]s as vague as the January IESP and add[ed] no detail to show [s]tudent's base line performance or progress" (id. at p. 13). The IHO determined that the parent's evidence was insufficient to satisfy her burden to show that the services she obtained from Headway were appropriate (id. at pp. 9, 11, 13). The IHO noted that:

> [t]his conclusion has no impact on the [district]'s obligations to fulfil the obligations to provide services that accrued during the pendency of this action. From the date this matter was filed to the date of this [decision], the [district] was to continue to

[8] Moreover, the IHO held that the parent's position that the January 2020 IESP remained appropriate was "unreasonable and unsupported" (IHO Decision at p. 13). The IHO determined that there was no showing the services recommended in the January 2020 IESP would have provided the student an appropriate program for the 2023-24 school year (id.).

> fund the services set forth in the January 2020 IESP. Accordingly, by law, the [district] is to fund the actual number of hours that accrued during the pendency of this matter at the same hourly rate as paid during the 2022/2023 school year (id. at pp. 13).

With regard to equitable considerations, the IHO determined that equitable considerations did not support either party (id. at p. 9, 18-19). The IHO found that the failure to evaluate the student weighed against the district with regard to equitable considerations (IHO Decision at p. 8). The IHO also held that the parent did not seek an evaluation or CSE meeting since the development of the January 2020 IESP, or at least explain why she did not, and that equitable factors likewise weighed against the parent (id. at pp. 9, 18-19).

Because the district failed to timely and appropriately evaluate the student, the IHO ruled that appropriate relief was to again direct the district to immediately conduct a comprehensive evaluation of the student and, upon completion of the evaluation, immediately convene the CSE to develop and IEP/IESP for the student (IHO Decision at pp. 9, 14-19).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO incorrectly concluded that "the record contains nothing that can be used to assess [s]tudent's progress," and argued that the IHO did not properly consider the SETSS progress report that demonstrated the student's strengths and weaknesses. The parent argues that she had "clearly" met her burden. The parent contends that she should not penalized for the district's failure to evaluate the student. Overall, according to the parent, the documentation entered into the hearing record identifies the student's present levels of performance and the student's progress. The parent argues that the evidence supports a finding that the services provided to the student by Headway during the 2023-24 school year were appropriate.

Related to the IHO's interim order, the parent contends that the district was required to evaluate the student and conduct a CSE meeting but failed to do so. The parent argues that confusion over consent for additional evaluations should have resulted in updated evaluations and a new CSE meeting. The parent asserts that, at the March 2024 hearing, the parent was prepared to testify to rebut the district's submission of the consent form and that it was a "clerical error," "but the IHO had already made up her mind and did not allow Parent to testify as a rebuttal witness."[9]

In an answer, the district argues that the request for review is deficient because it fails to identify what relief the parent is seeking from an SRO and fails to identify what relief the parent sought in the underlying action. Further, the district argues that the parent attached an additional exhibit but did not request that it be considered as evidence or reference it in the request for review. The district notes that the Office of State Review has "chided" this attorney's office in the past for

[9] It is noted that the conclusion paragraph of the request for review was left blank below the headline "Conclusion" and the parent attached an exhibit but did not request for the exhibit to be entered into the hearing record. The exhibit was an updated copy of the consent for additional evaluation form and, in this copy, the parent signed the from giving consent to the district to conduct a new evaluation on March 14, 2024.

procedural deficiencies and therefore, an SRO should dismiss the parent's appeal as "procedurally infirm."

Next, the district contends that the IHO correctly held that the parent failed to meet her burden to demonstrate that the services provided to the student were appropriate. The district argues that the IHO correctly reviewed and interpreted the evidence and testimony from the parent.

The district cross-appeals from the IHO's finding that equitable considerations did not favor either party. The district contends that equitable factors favor the district on this point because the parent failed to sign the consent for evaluation form and the parent did not have any interest in having the district satisfy its obligations to evaluate the student or develop a program. Further, the district argues that the parent failed to file a timely 10-day notice as the notice was sent on September 8, 2023, well after the parent had signed a contract with Headway to provide services to the student. The district asserts that the SRO should find that equities weigh against the parent, which should be found as an additional bar against the parent's request for funding of SETSS.

In its cross-appeal, the district further argues that the IHO erred in ordering a comprehensive evaluation of the student and the development of an IESP or IEP. The district asserts that the parent did not request this relief and, therefore, both orders directing the district to reevaluate the student should be reversed. The district contends that the IHO's orders would not provide relief for the 2023-24 school year. Moreover, the district argues that the IHO's order should be reversed as the IHO did not have the authority to dictate the contents of any proposed IEP or IESP. The district argues that absent the parent making a timely request for equitable service pursuant to Education Law § 3602-c, the parent would not be entitled to an IESP.

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]).[10]

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

Here, the parent seeks funding for five hours per week of SETSS for the 2023-24 school year. The IHO declined to grant the parent's request for relief because the IHO found the parent failed to meet her burden of proof in this matter as she did not provide sufficient evidence of the specially designed instruction provided to the student by Headway during the 2023-24 school year. Based on the facts of this case and the length of time it took to reach this point in the proceeding, I find that it is unnecessary to reach a conclusion on whether the IHO erred in finding the services obtained by Headway were appropriate or whether equitable considerations bar relief because the parent has obtained all of the relief she sought pursuant to pendency.[11] In other words, 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

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

[11] I note only that I understand the IHO's concern that relying on an IESP that is over four years old and was itself vague did not lend itself well to how the student presents today and the hearing record regarding the student was otherwise very thin because so much of it is focused on how much money should be exchange hands between adults in the business aspects of special education.

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 funding for five hours per week of SETSS for the 2023-24 school year (Parent Ex. A at pp. 2-3). There is no dispute that the district was required to fund five hours per week of SETSS for the student for the 10-month 2023-24 school year pursuant to the parties' pendency agreement (Tr. p. 55; IHO Decision at p. 13).[12] 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]). However, in this instance, the student received pendency for the entirety of the 2023-24 school year and the parent's due process complaint notice requested the same services for both pendency and the ultimate relief as part of the hearing (see Parent Ex. A at pp. 2-3). During the hearing, counsel for the parent indicated that the student's pendency program was in place (Tr. p. 55); further, during the appeal, both counsel for the parent and counsel for the district represented, in correspondence to this office requesting extensions, that the student was receiving services pursuant to pendency. Accordingly, the parent has received the relief sought in this proceeding. To the extent that the attorney for the parent asserted, during the hearing, that the relief afforded under pendency might not have included the same rate for services as was being requested in this proceeding (Tr. pp. 105-09), the requested relief consists of the same services so regardless of what was paid for those services, the fact that the student received them is the key factor.

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

[12] After the filing of this request for review, the parties, through letters to this office, indicated that they were having settlement discussions and made requests for extensions while those were ongoing. All of these letters indicated that the student was receiving services pursuant to pendency.

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]' 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"]).

Initially, review of the district court decision in V.S., shows that matter was determined not to be moot because a decision as to the adequacy of the proposed IEP in that matter would have supplanted the student's then-current pendency placement in that matter and established a new educational placement for the student (V.S., 2011 WL 3273922, at *10). However, in this matter, neither party has appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at p. 7). In fact, the hearing record does not include any indication that the district developed an educational program for the student for the 2023-24 school year. Accordingly, there can be no pendency changing determination in this proceeding and there is no further relief that could be addressed in this matter that is ongoing and remediable.

Additionally, the capable of repetition yet evading review exception to mootness would not apply because the conduct complained of—the district's failure to offer the student a FAPE—is no longer at issue in this proceeding. Rather, the parties' dispute centers around the particular after-school services the parent obtained as self-help to remedy the district's denial of a FAPE to the student. As the FAPE determination has already been addressed and the only issues in this matter relate to the appropriateness of unilaterally obtained services and the weighing of equitable considerations, any parental concern that the district would continue to recommend the same program is not addressable at this level of the proceeding and cannot be used to justify a finding that the matter is "capable of repetition, yet evading review." While the Second Circuit has noted that "IEP disputes likely satisfy the first factor for avoiding mootness dismissals" because "judicial review of an IEP is 'ponderous'" (Lillbask, 397 F.3d at 87), this does not seem to be a concern in this matter as the IEP dispute has been removed. Without an IEP dispute, the question of the appropriateness of unilaterally obtained services could be made in a much shorter time frame. More pertinently, however, because there is no longer a dispute as to the student's educational programming, there is no district action "capable of repetition, yet evading review." As such, the issue of whether a unilateral placement is appropriate, unlike FAPE, does not fit into the mootness exception as it is not capable of repetition yet evading review.[13]

Based on the foregoing, the matter is moot as there is no further relief that may be granted.[14]

[13] The district requested at the March 14, 2024 hearing that the IHO continue the case for 60 days because the case "would be mooted" by the time [the parties] g[o]t to the final hearing under that timeframe" (Tr. p. 148). The district noted that the case was "almost mooted now" (Tr. p. 148).

[14] The district's request to reverse the IHO's order for it to conduct an evaluation of the student and develop an IEP or an IESP is without merit. The district does not dispute that the student is entitled to special education services in this case. Based on the evidence in the hearing record, the district last developed an IESP for the student in January 2020, and the district has not submitted any evidence showing that it has since evaluated the student. Therefore the IHO's conclusion that district is past the timeframe for conducting a reevaluation of the student and well beyond the annual review requirement for an IEP will not be disturbed. Although this is a dual enrollment case, the failure of the parent to request dual enrollment services does not, by itself, eliminate the district's obligation to evaluate the student and develop appropriate public school programming, the district and the CSE may not simply treat the student as if she had been declassified when she has not. Mere inaction by the parent does not establish that the parent made clear her intention to keep the student enrolled in the nonpublic despite needing special education services and would thus not be required to make a FAPE available in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). Therefore, given the potential length of time since the student's last evaluation and development of an educational program for the student, the IHO did not abuse her discretion by ordering the district to reevaluate the student and develop a new educational program. Additionally, counsel for the parent has indicated that she is interested in the student being evaluated (Tr. pp. 145-46). Further, the district is able to inquire whether the parent would like an IEP or IESP upon the completion of the reevaluation. As such, even though this portion of the IHO's relief was not moot, I decline to reverse the IHO's order.

VII. Conclusion

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 DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 25, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER