The University of the State of New York

The State Education Department
State Review Officer
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No. 23-187

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed without prejudice the parents' claim regarding the implementation of the respondent's (the district's) recommended educational program for their son for the 2023-24 school year. The appeal must be sustained, and the matter remanded to the IHO for further administrative proceedings.

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

In anticipation of his transition to the Committee on Preschool Education (CPSE), the student was evaluated by an approved agency, which completed its evaluations in November 2022 (see Dist. Ex. 2).[1] The parents disagreed with the results of the agency's evaluations and requested that the district reevaluate the student (see Tr. pp. 19-20, 40, 96-97; Dist. Ex. 1 at pp. 6-7, 9-10).

[1] According to the hearing record, district's exhibit 2 consisted of the evaluations conducted by the approved agency with annotations from the parents consisting of highlighting and comments (see Tr. pp. 121-22). The copy of the exhibit entered into evidence showed the highlighted text but did not include the parents' comments (see Tr. p. 124; Dist. Ex. 2).

The district conducted a reevaluation of the student between December 2022 and February 2023 (see IHO Ex. III-VI); in addition, the student underwent a private neuropsychological evaluation in December 2022 (see IHO Ex. VII).

A CPSE convened on March 8, 2023, and formulated an IEP for the student with a projected implementation date of March 2023 and a projected annual review date of March 8, 2024 (see generally Dist. Ex. 3). The March 2023 CPSE found the student eligible for special education as a preschool student with a disability and recommended that, for the 10-month school year, he attend a bilingual special class in an integrated setting (SCIS) in an approved special education program and receive weekly related services of: one 30-minute individual session and one 30-minute group (2:1) session of speech language therapy, both in Spanish; two 30-minute group (2:1) sessions of occupational therapy (OT); and one 30-minute individual session and one 30-minute group (2:1) session of physical therapy (PT) (Dist. Ex. 3 at pp. 1, 15). In addition, the March 2023 CPSE recommended that for July and August 2023 the student receive five hours per week of group (2:1) special education itinerant teacher (SEIT) services with related services at the same frequency and duration as mentioned above, to be delivered in a "[c]hildcare [l]ocation [s]elected by [p]arent" (id. at p. 16).

Following the March 2023 CPSE meeting, the district sought a location for the student to receive the program recommended in the IEP by contacting several preschool programs and, alternatively, sought a SEIT provider to "help in partially servicing the IEP" (Dist. Ex. 1 at pp. 2-3). On April 17, 2023, the parents toured one available public school site identified by the district as available for the remainder of the 2022-23 school year, but the parents did not find it appropriate for the student's needs, noting concerns about the building, the ability of staff to address the student's toileting needs, and the size of the classroom (id. at pp. 3-5). The district informed the parents that they could visit SCIS and 12:1+2 special class placements and that "[t]here [we]re options available . . . both for September, and possibly July," but that the "options for immediate placement [we]re very slim" (id. at p. 5).

A. Due Process Complaint Notice

In a due process complaint notice, dated April 22, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) (IHO Ex. I). The parents set forth allegations regarding the CPSE process, noting delays in the evaluation process between December and March 2023 (id. at pp. 1-2). The parents further asserted that the district was not able to provide the student with a school location (id.). For relief, the parents sought a 12-month bilingual program in "[a] proper school" for the student that would address his needs related to balance and coordination and activities of daily living, noting that the student's doctors recommended that a paraprofessional accompany him during the day (id. at p. 2). In addition, the parents sought three weekly sessions per week of OT, PT, and speech-language therapy (id.). The parents specifically requested a school assignment for the student immediately as well as for the "next school year" beginning in September (id.).

B. Events Post-Dating the Due Process Complaint Notice

On May 4, 2023, the parents notified the district that they visited one preschool location identified by the district and wanted to send the student there in September and, in the interim, requested that the district continue to look for providers to deliver related services (Dist. Ex. 1 at p. 2).[2] Thereafter, the district confirmed the student's enrollment in the preschool location for September 2023 (id.).[3]

The CPSE reconvened on May 26, 2023 to discuss the parent's request for a 1:1 paraprofessional (Dist. Ex. 8 at pp. 1, 4, 13). The May 2023 CSE developed an IEP with a projected implementation date of July 2023 and a projected date of annual review as March 8, 2024 (id. at pp. 1, 13-14). The May 2023 CSE added a fulltime 1:1 paraprofessional to the student's recommended programming (compare Dist. Ex. 8 at p. 13, with Dist. Ex. 3 at p. 16).

On May 31, 2023, the district secured a provider to deliver SEIT services to the student in July and August 2023 (Dist. Exs. 1 at p. 1; 5); however, the identified provider was not a bilingual special education teacher (Tr. p. 73).

C. Impartial Hearing Officer Decision

After a prehearing conference on May 31, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 13, 2023 and June 16, 2023 (May 31, 2023 Tr. pp. 1-17; Tr. pp. 1-142).[4]

In a decision dated July 20, 2023, the IHO determined that the district failed to provide the student with a FAPE for the 2022-23 school year, as it did not provide a school location that could implement the mandates of the IEP, and that the student was entitled to an award of compensatory education (IHO Decision at pp. 6-12). As relief, for the period of March 8, 2023 through June 30, 2023, the IHO ordered the district to directly fund the cost of the following compensatory education services: 25 one-hour sessions of special education teacher support services (SETSS) per week in Spanish, two 30-minute group (2:1) sessions of OT per week, one 30-minute individual session and two 30-minute group (2:1) sessions of PT per week, and one 30-minute individual session and two 30-minute group (2:1) sessions of speech-language therapy per week in Spanish, with all services delivered by licensed providers chosen by the parents at a reasonable market rates (id. at pp. 11-12).

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[2] As discussed further below, during the impartial hearing, the student's mother testified that this preschool location was "not bilingual" but that the parents "accept[ed] that" because the district told them "there w[ere] no other options" (Tr. p. 103).

[3] On May 23, 2023, the parents visited another preschool location identified by the district and indicated they would like the student to attend for July 2023 if the site could provide paraprofessional support (Dist. Ex. 1 at p. 1). Ultimately, however, that preschool location did not have availability for summer 2023 (see Tr. pp. 34, 36, 115).

[4] The transcript of the May 31, 2023 prehearing conference was not consecutively paginated with the remaining transcripts and, therefore, any citations thereto will be preceded by the date (see May 31, 2023 Tr. pp. 1-17).

With respect to the 2023-24 school year, the IHO dismissed the parent's claims "without prejudice" (IHO Decision at p. 3). The IHO reasoned that the hearing dates were held prior to the start of the 2023-24 school year, the parents testified that they accepted a preschool location for the student for the 2023-24 school year, and the parents did not present evidence or seek relief related to the 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in dismissing the parents' claim for the 2023-24 school year. The parents request that the district be required to implement the student's IEP. In its answer, the district responds to the parents' material allegations and argues that the IHO's decision be upheld in its entirety.

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]).[5]

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).

[5] 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).

VI. Discussion

As an initial matter, neither the parents nor the district appeal the IHO's determinations that the district failed to provide the student with a FAPE for the 2022-23 school year or the IHO's award of compensatory education. Accordingly, the IHO's determinations as to those issues have become final and binding upon the parties and will not be discussed further (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]).

Turning to the crux of the appeal, the parents contend that the IHO erred by dismissing their claim that the district denied the student a FAPE for the 2023-24 school year.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, in their April 2023 due process complaint notice, the parents provided a timeline, but did not frame their claims by reference to the school year(s) challenged (see IHO Ex. I). Further, the parents did not challenge the March 2023 IEP as designed (see id.). Instead, the parents alleged the district had not been able to provide the student "any school option," referring to the district's failure to identify a school that could implement the programming recommended in the March 2023 (see id.). Further, as relief, the parent sought a "proper school" for the student, both immediately and for the school year starting in September 2023 (id. at p. 2). The IHO acknowledged that the parents, in their due process complaint notice, but bifurcated the parents' claim about the failure to implement the March 2023 IEP into separate issues when the IHO stated that "in essence" the parents challenged the district's failure to offer the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at p. 2).[6] However, as noted above, the IHO dismissed the claims pertaining to the 2023-24 school year citing the timing of the hearing, the parents' acceptance of a preschool location for the 2023-24 school year, and the lack of evidence

[6] In its answer, the district claims that, during the impartial hearing, the parents "clarified that [they] w[ere] only seeking relief for the 2022-23 school year" (Answer ¶ 3). However, review of the transcript pages cited by the district does not support this contention (see Tr. pp. 19-21, 130). Further, while the parents sought compensatory education to remedy past failures that took place during the 2022-23 school year, they did not withdraw their request for an order requiring the district to implement the student's IEP by identifying an appropriate school placement (see IHO Exs. I at p. 2; II).

presented related to the 2023-24 school year (id. at p. 3). The IHO's rationale in this regard appears to rest on the view that the allegations pertaining to the 2023-24 school year were premature (i.e., speculative) and/or moot.[7]

The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis" upon which to seek relief (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Contrary to the IHO's reasoning that the claims pertaining to the 2023-24 school year were premature or overly speculative, the March 2023 IEP had a projected implementation date of

[7] In addition, as to the IHO's finding that the "[p]arents did not present testimony, arguments, or evidence to establish a claim for the 2023-2024 school year" (IHO Decision at p. 3), the district carried the burden of production and persuasion on all issues in this matter (Educ. Law § 4404[1][c]); therefore, even if the parents failed to present evidence regarding the 2023-24 school year, this would not amount to a waiver of their claims and requests for relief as presented in their due process complaint notice (see IHO Ex. II).

March 2023 and a projected annual review date of March 8, 2024 (see Dist. Ex. 3 at p. 1). Thus, the CSE intended the IEP to span the end of the 2022-23 school year and the beginning of the 2023-24 school year. Furthermore, as of the date of the parents' April 2023 due process complaint notice, the district had already failed to implement that IEP. Thus, as of the date of her April 2023 due process complaint notice, the parent's concerns about the implementation of the March 2023 IEP were not speculative but had in fact been realized. The fact that subsequent events occurred that were relevant to the implementation of the March 2023 IEP at or around the beginning of the 2023-24 school year did not, without more, suddenly invalidate the parents' nonspeculative allegations that were based in factual, historical events that are present in the evidentiary record. The relief with respect to the 10-month portion of the 2023-24 school year might differ, but the parents were not required to wait until the 2023-24 school year proceeded and file a second due process proceeding in order to claim that the district had continued in its failure to implement the same IEP.

To be sure, the hearing record establishes that the district took significant action after the filing of the parent's due process complaint and that during the hearing process there were evolving circumstances that affected the relief sought by the parents. The district's Special Education Student Information System (SESIS) log reflects that the parent submitted the "completed [Office of School Health (OSH)] packet for the 1:1 [p]araprofessional" on April 25, 2023 and the district submitted the completed packet to the OSH the following day (Dist. Ex. 1 at p. 3). The district's May 1, 2023 SESIS entry logs show that the district reached out to multiple schools and SEIT agencies to establish availability (id. at pp. 2-3). The SESIS log noted that on May 4, 2023 the parent confirmed with the district that she visited a preschool location identified by the district and that she "would like to send [the student] th[ere] in September… [and] requested that, in the interim, the district continue to look for services between now and September," such as related services (id. at p. 2). The SESIS log subsequently noted that on May 23, 2023 the parent toured another preschool location and wished to enroll the student there in July 2023 pending confirmation that the site could provide "1:1 paraprofessional support (which was recently approved by OSH)" (id. at p. 1).[8] The SESIS log also documented that a CSE reconvene meeting was scheduled to be held on May 27, 2023 (id. at p. 2). According to the hearing record, CSE reconvene was held on May 26, 2023 and the CSE added 1:1 paraprofessional services to the student's IEP (Dist Exs. 1 at p. 1; 8 at p. 13). The status log further reflects that on May 31, 2023 the district secured summer SEIT services for the student, but that it had to send the parent "a consent form for approval of the partial service plan (due to language)" because the services were not bilingual (Tr. p. 73; Dist. Ex. 1 at p. 1).

While the district took significant steps toward implementing and revising the student's IEP, the parents' complaints nevertheless continued as valid and live disputes to be adjudicated. 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

[8] As noted above, this location was not ultimately available for the student to attend for summer 2023 (see Tr. pp. 34, 36, 115).

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"]). In most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

Here, the implementation period of the March 2023 IEP had not concluded as of the dates of the impartial hearing and there was meaningful relief that could be awarded. For example, the May 2023 amendment to the IEP did not, on its own, resolve the parents' complaint by adding paraprofessional services to the student's programming (see Dist. Ex. 8).[9] Further, although, as set forth above, the district identified a preschool location for the student to attend beginning in September 2023 and the parent accepted this location (Tr. pp. 33, 114), the question of the school location's ability to implement the IEP remained. During the impartial hearing, the parent testified that the preschool location for the 2023-24 school year was not bilingual but the parents accepted it because the district told them there was no other option and that the district did not have "any other building-wide program" (Tr. pp. 103-04). However, she noted that the school did not comply completely with the student's IEP (Tr. p. 104).

In her opening statement, the pro se parent explained that "there's been nothing in, in Spanish. Everything that they offer [in] these schools they have all been exclusively in English in spite of the fact that the IEP said that it had to be a bilingual program" (Tr. p. 21). When the parent cross-examined the district's CPSE administrator and asked why the student was not receiving the bilingual special education program recommended in his IEPs, the CPSE administrator answered, "[w]e don't have one" (Tr. p. 48). The CPSE administrator explained that the student's IEP "recommendation was made for the bilingual program because that Spanish is [the student's] language of dominance and, and [that she] fully believe[d] in bilingual education and w[ould] continue to look for a bilingual program"; however, she acknowledged that she "ha[d] not been able to find one" (id.). A review of the parents' due process complaint notice and the hearing

[9] The IDEA specifically contemplates a resolution period, which allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B]; see 8 NYCRR 200.5[j][2][v]). The Second Circuit has described the resolution period as a mechanism to "to foster a mutual process, in line with the cooperative CSE that is the hallmark of the IEP development process" (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 169[2d Cir. 2021]). Thus, while it is not clear that in this instance the May 2023 IEP was developed as part of the resolution process, the IDEA contemplates the type of developing circumstances that occurred in the present matter but also acknowledges that the impartial hearing should proceed if the parents remain dissatisfied (see 20 U.S.C. § 1415[f][1][B]).

testimony indicates that the parents stated a claim against the district for failing to implement the student's IEP and did not waive this claim simply because they agreed, without other viable options available, to enroll the student in the identified preschool location for the 2023-24 school year notwithstanding that the preschool did not have the capacity to implement the bilingual aspects of the recommended programming.

Based on the foregoing, the hearing record shows that, while the district has resolved some aspects of the parents' concerns, the district has essentially acknowledged that a bilingual preschool program does not exist (see Tr. p. 48). Thus, the question remains whether the district's inability to implement the bilingual aspects of the student's IEP rises to the level of a denial of a FAPE and whether any appropriate equitable relief is available.[10]

In reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

To address this question, the matter must be remanded to the IHO for further proceedings.[11] When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, while I am cognizant of the time constraints this IHO was under to render a decision within the compliance deadline and note that the IHO was not at fault for the evolving circumstances occurring in this case after the parent filed the due process

[10] With respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time " (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]). Thus, to the extent the parties or the IHO might conceive of additional or different relief than that proposed by the parents, the IHO would not necessarily be constrained by the parents' requested relief as stated in the due process complaint notice (see IHO Ex. I at p. 2).

[11] It is unclear from the hearing record whether, even if the preschool location identified for the 2023-24 school year was not programmatically bilingual, there was or could be bilingual staff at the preschool location including the student's paraprofessional. Developing the hearing record on this question could affect the FAPE analysis or the remedy.

complaint notice, I have determined that it was in error for the IHO to dismiss the parent's claims for the 2023-24 school year.[12] In this instance it would have been appropriate for the IHO to explain the time constraints for issuing a decision, and the inadequate level of the development of the hearing record with regard to the circumstances of the IEP implementation claim and then inform the parents and/or district of the option to request an extension of the decision timeline to accommodate further development of the hearing record on the IEP implementation claim.[13]

VII. Conclusion

The evidence in the hearing record demonstrates the IHO erred in dismissing the parents' claim regarding the 2023-24 school year; therefore, the matter is remanded to the IHO to further develop the hearing record and make determinations on whether the district had the capacity to implement or has been implementing the student's IEP for the 2023-24 school year and, if not, whether the deviations amounted to a denial of a FAPE for which relief is warranted.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 20, 2023 is modified by reversing the portion of the decision that dismissed the parent's claim for the 2023-24 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the 2023-24 school year.

Dated: **Albany, New York**
October 19, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] I acknowledge the appeal recently decided in Application of the Department of Education, Appeal No. 23-178 that presented a similar timeline and facts; however, that case is distinguishable from the present matter because the IHO that presided over the impartial hearing underlying Appeal No. 23-178 ruled that the 2023-24 school year was not at issue, and the parents, who were the respondents in that appeal, did not interpose a cross-appeal challenging the IHO's finding that the school year was outside the scope of the impartial hearing; therefore, the IHO's determination regarding the 2023-24 school year was final and binding upon the parties (see Application of the Department of Education, Appeal No. 23-178).

[13] The IHO should, however, stop short of actively soliciting such an extension request and instead only explain that extensions are permissible if requested by a party for a legitimate purpose (see 8 NYCRR 200.5[j][5][i]).