The University of the State of New York

The State Education Department
State Review Officer
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No. 24-289

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:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Richa Raghute, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied, in part, their request that respondent (the district) fund the costs of their son's private transportation services to and from his unilateral placement at the International Academy for the Brain ("iBrain") for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which ordered it to conduct an assistive technology evaluation. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

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 here in detail.

A CSE convened on January 25, 2023 to create an IEP for the student (Dist. Ex. 2 at pp. 41, 44). The CSE found the student eligible for special education as a student with a traumatic

brain injury (id. at p. 1).[1] The CSE recommended that the student attend a 12-month program of an 8:1+1 special class in a district specialized school with adapted physical education three times per week (id. at pp. 34, 36). For related services, the CSE recommended the student receive four 60-minute sessions of individual occupational therapy (OT) per week, one 60-minute session of group OT per week, five 60-minute sessions of individual physical therapy (PT) per week, four 60-minute sessions of individual speech-language therapy per week, one 60-minute session of group speech-language therapy per week, three 60-minutes sessions of individual vision services per week, one 60-minute session of parent counseling and training monthly, and individual school nurse services as needed (id. at p. 35). The student was also recommended for a full-time daily individual paraprofessional for health, ambulation, safety, and feeding (id. at p. 36). Additionally, the CSE recommended special transportation services for the student, including transportation from the closest safest curb, support of a 1:1 paraprofessional, and provision of a lift bus that would accommodate the student's regular size wheelchair (id. at p. 40).

In a letter dated June 20, 2023, the parents notified the district of their intent to enroll the student at iBrain for the 2023-24 school year and seeking public funding (Parent Ex. B at p. 1).[2] The parents asserted that they disagreed with the district's recommendations and that they rejected the January 2023 CSE's recommendations (id.).

The parents signed an enrollment agreement with iBrain for the 2023-24 school year on June 29, 2023 (see Parent Ex. K). The parents also signed transportation agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the transportation of the student to and from the student's home and iBrain for the entire 2023-24 school year, approximately 218 school days (see Parent Ex. L).[3] The agreement indicated that the transportation each way would be no more than 90 minutes, that the vehicle would be air conditioned and able to accommodate a regular size wheel-chair, and that Sisters Travel would be responsible to provide the student a 1:1 transportation paraprofessional, if required (id. at pp. 1-2).

In a school location letter dated July 20, 2023, the district notified the parents of the particular public school location to which the student was assigned to attend for the 2023-24 school year (Dist. Ex. 5 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2023, the parents alleged that the district procedurally and substantially denied the student a free appropriate public education (FAPE) for

[1] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[2] iBrain has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The signature page of the agreement is not dated (Parent Ex. L at p. 6); however, attached to the contract is an "audit report" from SignWell, which indicated that the parents viewed and signed the document on July 7, 2023 (id. at p. 7).

the 2023-24 extended school year (Parent Ex. A).[4] The parents contended that January 2023 CSE's recommendation for the student to attend a district public specialized school was not appropriate for the student (id. at pp. 4-5). Moreover, the parents alleged that the CSE inappropriately failed to recommend an extended school day, music therapy, and "proper transportation services . . . including an air conditioned bus and limited travel time" (id. at pp. 4, 6). The parents asserted that, as of the date of the letter, the parents had not received a school location letter or prior written notice for the 2023-24 school year (id. at pp. 4-5). Finally, the parents claimed that the district failed to conduct appropriate and timely evaluations (id. at pp. 5-6).

For relief, the parents requested direct funding for the full cost of tuition for the student's attendance at iBrain, related services, a 1:1 paraprofessional, and special transportation services (Parent Ex. A at p. 7). The parents also requested an order requiring the CSE to reconvene, the district to conduct all necessary evaluations, and the district to fund an independent neuropsychological evaluation to be conducted by a provider of the parents' choosing at a reasonable market rate (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 25, 2023 and concluded on May 3, 2024, after three days of proceedings (see Tr. pp. 1-130). In a decision dated May 29, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year (IHO Decision at pp. 17-19). In particular, the IHO found that the district failed to assign the student to attend a particular public-school location by the start of the school year on July 1, 2023 (id.). Moreover, the IHO determined that the "IEP was developed in a way as to render it void" because the district deviated from the clear consensus of the evaluative information before it (id. at p. 18). The IHO held that iBrain was an appropriate unilateral placement finding the district's arguments to the contrary as "unpersuasive" (id. at pp. 19-21).

Regarding the parents' request for district funding of private transportation services, the IHO indicated that there was no dispute that the student was recommended for these services and required them (IHO Decision at p. 21). The IHO acknowledged that the hearing record was "somewhat muddled" on the issue of transportation, but found that based on the record, "it was impossible to conclude that the district took reasonable steps to ensure that this student was offered district-supplied transportation as of the first day of school" (id.). Therefore, the IHO held that the district had not met its burden on that matter (id.). However, the IHO went on to find that the parents did not request transportation services or indicate that they would seek transportation in the 10-day notice, noting that these actions weighed against the parents in equities (id. at p. 25). Also, the IHO noted that the district did not demonstrate that the cost for the transportation services was unreasonable as there was an absence of sufficient evidence on the matter (id.). The IHO then held that the issue "[wa]s rendered moot by the simple fact that th[e] entire school year [wa]s [then] almost complete" as the parents had received the transportation services through pendency (id. at p. 26). The IHO determined that to the extent there were "several days between the end of pendency here and the end of the school year, . . . the equities support[ed] that minimal diminution

[4] The parents requested pendency services based on an unappealed IHO decision dated March 13, 2023, which awarded full payment by the district of the student's tuition and related services at iBrain, as well as special transportation and nursing services (Parent Ex. A at p. 2; see Parent Ex. C).

in the district's responsibility for the student's transportation costs, in light of both sides' failure to engage adequately with their respective burdens" (id.).

Turning to other equitable considerations, the IHO found that the record reflected the parents cooperated with district (IHO Decision at p. 26). Lastly, the IHO held that the requested assistive technology evaluation was "a relevant area of potential clinical inquiry" even if the request was not in writing and ordered the district to conduct an assistive technology evaluation (id. at pp. 26-27).

Based on the foregoing, the IHO ordered the district to fund the student's tuition at iBrain for the 2023-2024 school year along "all items that would routinely be included on the student's IEP pursuant to law and regulation, such as related services and augmentation equipment, but transportation costs only to the extent detailed above" (IHO Decision at p. 27). As for transportation, the IHO denied the parents' request "other than [the] continuing order that it be paid for as a matter of pendency for so long as pendency inheres" (id.). Finally, as noted, the IHO ordered the district to conduct an assistive technology evaluation of the student (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by not awarding full direct funding of the special transportation costs per the terms of the agreement with Sisters Travel. The parents contend that the issue of transportation will arise every year and that the IHO's decision in the present matter will serve as the basis for pendency in future impartial hearings and, therefore, falls into the exception for the mootness doctrine. Additionally, the parents assert that the IHO erred in finding that they did not timely object to the district's failure to recommend appropriate transportation services. Moreover, the parents allege that the district failed to support its assertion that the transportation agreement was excessive or unreasonable. The parents assert that the transportation contract provided for appropriate accommodations to the student and the district did not present any evidence to refute it.

In an answer with cross appeal, the district argues that the IHO properly denied the request for transportation services but argues that the IHO erred in ordering the district to conduct an assistive technology evaluation. The district contends that the parents made the request for an independent educational evaluation (IEE) for the first time in the due process complaint which was improper and did not allege in the due process complaint notice that district failed to conduct an assistive technology evaluation.

In a reply and answer to the district's cross-appeal, the parents contend that the IHO properly used his discretion to order the assistive technology evaluation.[5]

[5] In its answer with cross-appeal, the district asserts that the parents' appeal should be dismissed for failure to comply with the practice requirements as the parents' verification was not verified by oath as required by the State regulations (see 8 NYCRR 279.7[b]). In their reply and answer to the cross-appeal, the parents concede that the verification served on the district was not notarized but respond that any issue with the verification was a mere procedural error and the request for review should be accepted. The parents' verification filed with the Office of State Review was notarized. Under the circumstances and as an exercise of my discretion, I decline to dismiss the parents' appeal on this ground.

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]).[6]

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).

[6] 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

Initially, it is noted that neither party appealed the IHO's determinations that the district failed to offer the student a FAPE, that iBrain was an appropriate unilateral placement, and that equitable considerations (except with respect to transportation) did not warrant reduction or denial of an award of district funding for iBrain including related services (see IHO Decision at pp. 17-21, 26). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Transportation Funding

In this instance, while the question of the transportation funding was not moot at the time of the IHO's May 29, 2024 decision since there was approximately one month remaining in the 2023-24 school year, the issue has since become moot as of the date of this decision (see IHO Decision at p. 28). Accordingly, I do not find it necessary to review that portion of the IHO's decision which found that, to the extent the issue was not moot, equitable considerations would warrant a reduction for the portion of funding for the requested transportation services not covered by pendency.

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, the parents sought funding for the costs of transportation from Sisters Travel for the 2023-24 school year (see Parent Ex. A at p. 7). There is no dispute that the district funded or is obligated to fund the transportation costs pursuant to pendency (see Interim IHO Decision at p. 11; Parent Ex. C at p. 18). The student's first day at iBrain for the 2023-24 school year was July 5, 2023 (Parent Exs. H; K at p. 1) and pendency came into effect as of July 5, 2023, when the

parents filed the due process complaint notice (Parent Ex. A). The impartial hearing combined with the period of time during which this appeal has been pending has encompassed the entire 2023-24 school year. Accordingly, the parents have received the relief sought.

However, there are limited circumstances in which cases that have been mooted by the passage of time must nevertheless be decided if certain exceptions apply. 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"]).

The capable of repetition yet evading review exception to mootness would not apply here 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 costs of the transportation services the parents 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 issue in this matter relates to the weighing of equitable considerations pertaining specifically to the transportation funding, 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." As such, an issue related to equitable considerations, unlike an issue related to a FAPE, does not fit into the mootness exception as it is not capable of repetition yet evading review.

Even if the lingering question of the parents' relief alone could form the basis of applying the exception, review of the parents' privately-obtained transportation has not evaded review. Rather, the appropriateness of the parents' privately-obtained transportation for the 2022-23 school year was addressed in a prior proceeding (Parent Ex. C at pp. 11-13, 18). Even further, the appropriateness of Sisters Travel transportation for the 2023-24 school year was addressed in this matter in the parents' favor and the district has not cross-appealed that portion of the IHO's decision (IHO Decision at pp. 21-25). The only remaining question relating to transportation at this juncture is equitable in nature.

The parents also argue that the matter is not moot because the "final order in the instant matter will serve as the basis for pendency in future impartial hearings." However, there is no indication that the IHO's final order regarding transportation would affect the student's pendency placement. Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Here, to the extent some aspects of the IHO's determination relating to equitable considerations could be deemed adverse to the parents it would, nevertheless, not effectuate a change in the student's pendency.[7]

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.

[7] 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 that student's then-current pendency placement and established a new educational placement for the student (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. 17-19).

B. Evaluations

The district argues that the IHO erred by ordering it to conduct an assistive technology evaluation as the parents' request for an IEE was first made in the due process complaint notice. In addition, the district argues that the parents did not allege that the district failed to evaluate the student for assistive technology.

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 original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). 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]).

The parents' requested relief in the due process complaint notice included a request for the district to be ordered to conduct all necessary evaluations as well as a request for district funding of a neuropsychological IEE (Parent Ex. A at p. 7). Additionally, the parents claimed that the district had failed to timely and adequately evaluate the student for the 2023-24 school year asserting that they did not agree with the most recent district evaluation conducted in January 2022 (id. at p. 5). Accordingly, the district's contention that the parents did not raise an issue pertaining to the district's failure to evaluate is without merit.

As to the district's concern about the parents' failure to request an IEE prior to the due process complaint notice, the parents requested an IEE in the due process complaint notice, the IHO did not rule on that request (see IHO Decision at p. 28).[8] Thus, to the extent the district's

[8] The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). I have, in the past, expressed concerns with the parents' inclusion of the request for an IEE in the due process complaint notice in the first instance (see, e.g., Application of the Dep't of Educ., Appeal No. 23-272; Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150); however, as noted herein, the parents' request for an IEE at public expense is not at issue on appeal.

rationale in arguing that the IHO erred in ordering the assistive technology evaluation relates to the process for a parent requesting district funding of an independent evaluation, that process is not at issue here.

Instead, the IHO noted that the hearing record indicated the parents requested the district reevaluate the student's assistive technology needs, but that the CSE declined, asserting that the parents had to put the request in writing (IHO Decision at p. 26; Dist. Ex. 2 at p. 44). The CSE noted that the student did not then use or have an assistive technology device but that he might benefit from additional examination of his communication needs (Dist. Ex. 2 at p. 44). The IHO noted that assistive technology was a relevant area of need for the student and in light of that ordered the evaluation (see IHO Decision at pp. 26-27).

The district in no way alleges that the IHO erred in finding that the student would benefit from an assistive technology evaluation or in the IHO's reasoning for ordering the district to conduct the evaluation (IHO Decision at p. 28). Under IDEA, the district court enjoys broad discretion in considering equitable factors relevant to fashioning relief (Gagliardo, 489 F.3d 105, 112), and the courts have generally accorded similarly broad discretion to IHOs when fashioning equitable relief (L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 (D. Conn. July 7, 2017). Here, the district has not presented a convincing challenge the IHO's order for the district to conduct an assistive technology evaluation and, accordingly, I decline to disturb the IHO's directive that fell within his discretionary authority to order equitable relief.

VII. Conclusion

Having found that the dispute regarding the funding for transportation services is moot and that there is no basis to disturb the IHO's order directing the district to conduct an assistive technology evaluation of the student, the inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER