The University of the State of New York

The State Education Department
State Review Officer
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No. 24-307

**Application of a STUDENT WITH A DISABILITY, by her 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:**
Law Offices of Irina Roller, PLLC, attorneys for petitioners, by Irina Roller, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their daughter's private services delivered by Kew Gardens SEP, Inc. (Kew Gardens) for the12-month 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found the parents' unilaterally obtained services were appropriate. 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 in detail.

Briefly, a CSE convened on May 9, 2023, determined that the student was eligible for special education as a student with multiple disabilities, and recommended that the student receive 12-month services consisting of five two-hour sessions per week of individual special class home instruction, with four 45-minute sessions per week of individual occupational therapy (OT), four

45-minute sessions per week of individual physical therapy (PT), and six 60-minute sessions per week of individual speech-language therapy, all of which were to be delivered in the student's home (Parent Ex. I at pp. 1, 21-22, 27-28).[1]

In a letter dated June 5, 2023, the parents wrote to the chairperson of the CSE stating that they had received a copy of the May 2023 IEP along with prior written notice and upon review found that the recommendations of the May 2023 CSE were not appropriate for the student (Parent Ex. B at p. 1). In correspondence dated June 16, 2023, the parents' attorney provided 10-day written notice that the parents disagreed with the May 2023 IEP and intended to assert the student's pendency right to continue the student's home-based program and home instruction for the 2023-24 school year in accordance with a prior IHO decision (Parent Ex. C at pp. 1-2). The parents' attorney also wrote that the parents reserved their right to seek funding and/or reimbursement for any services they must obtain unilaterally (id. at p. 2).

In a letter dated June 16, 2023, the parents also provided written notice to the district that the May 2023 IEP did not offer the student a free appropriate public education (FAPE) and that they were asserting the student's right to pendency in accordance with an unappealed IHO decision dated April 8, 2022 (Parent Ex. D at pp. 1, 18). The parents stated that they reserved their right to seek funding or reimbursement for any services they obtained unilaterally (id. at p. 2).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 4, 2023, the parents, through their attorney, alleged that the district denied the student a FAPE for the 12-month, 2023-24 school year (Parent Ex. A at p. 2). The parents asserted that the May 2023 IEP was procedurally and substantively deficient (id. at pp. 5-12). Among other things, the parent asserted that the student would chronologically be in the ninth grade, had never attended a school placement, and had been in a home-based program since the 2013-14 school year and the parents challenged all of the IEP programming developed by the district since (id. at pp. 4-5). According to the parents, the district did not offer an appropriate IEP, failed to convene a CSE meeting to develop an IEP for over two years, and did not invite necessary or appropriate participants to the May 2023 CSE meeting (id. at p. 5-6). The parents also alleged that the district did not provide compensatory education services despite acknowledging the lack of speech and language services from December 2022 to June 2023 (id. at p. 8). Additionally, they claimed the IEP goals and objectives were inappropriate, the programming recommendation was predetermined, and the district failed to consider a continuum of services or the student's specific needs (id. at pp. 7-9). Additionally, the parents contended that the district failed to provide a school location letter and did not comply with their June 5, 2023 request to reconvene a CSE meeting (id. at pp. 10-11). The parents asserted that the student's pendency placement was established in a prior IHO decision dated April 8, 2022 (id. at p. 3). As relief, the parents sought findings that the services, which consisted of the parents' home-based program, were appropriate and funding for the student's providers at reasonable current market rates and reimbursement for any out-of-pocket expenses (id. at pp. 12-14). The parents also requested funding for evaluations and compensatory education (id. at p. 14).

[1] The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

**B. Impartial Hearing Officer Decision**

This matter was initially assigned to a per diem IHO who convened a hearing on pendency on September 29, 2023 (Sept. 29, 2023 Tr. pp. 6-15).[2] The parties agreed to pendency; however, the per diem IHO stated that he was prepared to issue a decision on pendency (Sept. 29, 2023 Tr. p. 7).[3] In an interim decision on pendency, the per diem IHO found that the student was entitled to 12-month services, 25 hours per week of special education itinerant teacher (SEIT) services, 10 hours per week of home instruction, six 60-minute sessions per week of individual speech and feeding therapy, four 45-minute sessions per week of individual OT, four 45-minute sessions per week of individual PT, assistive technology, sign language specialist services to support the student's speech-language therapy, five hours per week of feeding therapy by a certified feeding therapist, and one 90-minute session per month of a team meeting (Sept. 29, 2023 Interim IHO Decision at p. 2).[4]

After recusal of the per diem IHO, the matter was reassigned to the Office of Administrative Trials and Hearings (OATH), and an IHO with that office (the IHO) conducted a prehearing conference on February 8, 2024 (Tr. pp. 1-30).[5] On February 15, 2024, the parents' attorney filed a motion requesting that the IHO recuse herself (IHO Ex. IV). In an interim decision dated February 26, 2024, the IHO denied the parents' motion (Feb. 26, 2024 Interim IHO Decision at p. 8). The parties reconvened on March 1, 2024 for an impartial hearing on the merits of the parents' claims, which concluded on March 18, 2024 after four nonconsecutive days of proceedings (Tr. pp. 31-447). In a decision dated June 9, 2024, the IHO found that the May 2023 IEP did not meet the student's educational needs and that the recommendation for home instruction was not "in accord with the regulations" (IHO Decision at p. 18). The IHO further found that the district failed to implement the student's recommended speech-language therapy and that overall, the student was not provided a FAPE in both "the development of the recommended program and its implementation" (id. at pp. 18, 31). Next, the IHO engaged in an analysis of the parents' home-based programming and determined that the academic instruction was approximately 50 percent

[2] The parents' attorney and the per diem IHO initially appeared on September 19, 2023 to discuss pendency (Sept. 19, 2023 Tr. pp. 1-5). After the district failed to appear, an additional date for the hearing on pendency was scheduled for September 29, 2023 (Sept. 19, 2023 Tr. pp. 2-3). The district also failed to appear at a subsequent hearing date before the prior IHO (Nov. 16, 2023 Tr. pp. 16-21).

[3] The hearing record also includes a pendency implementation form based on the unappealed April 8, 2022 IHO decision, which was dated July 4, 2023 and countersigned by the district on September 29, 2023 (see Pendency Imp. Form).

[4] The pendency implementation form was consistent with the interim pendency decision; however, the form indicated that the student's home instruction, OT, assistive technology, sign language specialist services, and feeding therapy were provided by the district (Pendency Imp. Form). The student's SEIT services, PT, and speech-language therapy were provided privately, and both the district and the private providers participated in the monthly team meeting (id.).

[5] As pagination for the hearing transcripts restarted as of the February 8, 2024 prehearing conference when the matter was transferred to OATH, all transcripts of the hearings and conferences held prior to the transfer to OATH will be designated by date and all transcripts subsequent to the transfer to OATH will only be referenced by page number.

of the student's day (id. at p. 26). The IHO found that In addition, the IHO found that two of the student's three SEIT providers spent approximately 7.5 hours per week feeding the student, while the student continued to rely on a G-tube and she further noted that the SEIT providers were not trained in feeding techniques (id.). The IHO also noted overlap between the SEIT providers and the OT and PT providers in the skills and exercises delivered to the student (id.). The IHO questioned the number of hours of related services that should be recommended and directed the CSE to reconvene to assess the student in all areas of disability (id. at pp. 26, 31). The IHO further found that the totality of the parents' home-based programming may have been of great assistance to the parent in caring for the student, but was not necessary for the student to make progress, "minimal as that might be," and that it appeared that the student had received the same programming since the student was three years old and the parents simply wanted the same level of services without regard for its appropriateness (id. at pp. 27-28). The IHO also found that the hearing record did not support a need for an extended school day (id. at pp. 28-29). The IHO then determined that the student required 13 hours of "special education support services" to ensure she had access to an educational program that allowed her to make meaningful progress (id. at p. 29).

The IHO next determined that equitable considerations favored the parents (id. at pp. 29-30). As relief, the IHO initially directed that the district either provide or fund services as agreed to by the parties: 10 hours per week of home instruction, four 45-minute sessions per week of individual OT, four 45-minute sessions per week of individual PT, and six 60-minute sessions per week of individual speech-language therapy on a 12-month basis (id. at p. 30). The IHO awarded reasonable market rates for the providers of OT, PT, and speech-language therapy (id.). In addition, the IHO directed the district to "provide and fund" 13 hours of special education teacher support services (SETSS) per week, and to "authorize and fund" one 60-minute monthly collaborative team meeting among the student's providers (id. at p. 31).[6]

**IV. Appeal for State-Level Review**

The parents appeal, alleging that the IHO improperly addressed equitable considerations together with her analysis of the appropriateness of the parents' unilaterally obtained services. The parents further argue that the IHO excluded evidence related to equitable considerations, which was clear legal error and fundamentally unfair to the parents to consider excessive services in her appropriateness analysis. The parents also assert that the IHO improperly shifted the burden of proof to the parents to demonstrate that the home-based program was not excessive. The parents further contend that the hearing record does not support the IHO's arbitrary reductions of SETSS and monthly team meeting time. The parents also allege that the IHO conducted the impartial hearing in a manner that favored the district. As relief, the parents request funding the parents' home-based program.

In an answer with cross-appeal, the district argues that the parents' unilaterally obtained SEIT services were not appropriate and that the IHO erred in awarding 13 hours of SETSS for the

[6] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

student. The district further contends that the IHO's decision should be affirmed in all other aspects.

The parents interposed an answer to the district's cross-appeal.

**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]).[7]

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).

[7] 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).

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 parents seek funding for 25 hours per week of SEIT/SETSS and one 90-minute team meeting per month for the 2023-24 school year. The IHO awarded the parents' 13 hours of SETSS and one 60-minute team meeting per month and declined to grant the full amount of the parents' requested relief because the IHO found the parents failed to meet their burden of proof in this matter as they did not provide sufficient evidence that the program was necessary for the student to make progress 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 correctly determined the appropriateness of the parents' unilaterally obtained services or whether or not equitable considerations warrant a reduction in relief because the parents have obtained all of the relief they sought pursuant to pendency. 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 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 parents sought funding for 25 hours per week of SEIT/SETSS and for one 90-minute team meeting per month for the 2023-24 school year (Parent Ex. A at pp. 13-14). There is no dispute that the district was required to fund 25 hours per week of SEIT services and one 90-minute team meeting per month for the student for the 12-month 2023-24 school year pursuant to both the prior IHO's interim decision on pendency and the parties' pendency agreement (Tr. pp. 17, 28, 238, 442; Pendency Imp. Form; Sept. 29, 2023 Interim IHO Decision at p. 2; IHO

Decision at p. 19).[8] 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 services under pendency for the entirety of the 12-month 2023-24 school year and past the time for developing a new IEP for the student in May 2024, and the parents' 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 p. 13). During the hearing, counsel for the parents indicated that the student's pendency program was in place (Tr. pp. 17, 28, 238, 442); further, during the appeal, both counsel for the parents and counsel for the district represented, in correspondence to this office requesting extensions, that the student was receiving services pursuant to pendency. Accordingly, the parents have received all of the relief sought in this proceeding.

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]).

Some courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ.

[8] 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.

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 pp. 18, 31). 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 home-based 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 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.

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

**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**
**October 17, 2024**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**