DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: November 2, 2012

Hearing Officer: Jim Mortenson

OSSE
STUDENT HEARING OFFICE
2012 NOV -2 PM 2:03

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on August 28, 2012. A timely response to the complaint was filed on September 7, 2012. A prehearing conference was convened by the undersigned on September 12, 2012, and a prehearing order was issued on that date. A resolution meeting was convened on September 27, 2012, and resulted in no agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on September 28, 2012.

The Respondent filed a motion to dismiss on September 28, 2012, arguing it was not responsible for the Student's transportation. The Petitioner filed a reply on October 3, 2012. The undersigned denied the motion in an order dated October 10, 2012, finding the Respondent was

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

responsible for ensuring the implementation of the Student's individualized education program (IEP) which included the related service of transportation.

The Petitioner filed a trial brief and sent disclosures to the Respondent on October 26, 2012. The disclosures included a compensatory education plan specifying the compensatory education the Petitioner sought for the Student. The Respondent also filed a trial brief and sent disclosures to the Petitioner on October 26, 2012. The Respondent's disclosure included the authorization of tutoring for missed services for the Student.

The hearing was convened at 9:30 a.m. on November 2, 2012, in room 2009 at 810 First Street NE, Washington, D.C. It concluded approximately 11:00 a.m. The hearing was closed to the public. The Petitioner was represented by Miguel Hull, Esq., and the Respondent was represented by Daniel McCall, Esq. The due date for this HOD is November 11, 2012. This HOD is issued on November 2, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUE

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide transportation in conformity with his individualized education program (IEP) since August 20, 2012?

1. RESPONDENT'S MOTION TO DISMISS

As a preliminary matter the undersigned reviewed the issue for hearing, the Respondent's position, and the relief sought by the Petitioner. The Petitioner was seeking the provision of transportation for the Student and 27.9 hours of compensatory education in the form of tutoring to make up for the nine days of missed school due to the lack of transportation required by his IEP. The parties agreed that transportation had begun effective September 4, 2012, and that the Petitioner had been authorized to obtain 30 hours of tutoring for the Student to make up for the missed services, at public expense. No settlement agreement had been offered by either side, however.

The Respondent moved, on the record, for dismissal of the case, arguing it was moot because the relief requested had been provided by the Respondent. The Petitioner argued that the case was capable of repetition, yet would evade review, and so was an exception to the mootness doctrine. The parties positions were argued and the undersigned queried both sides extensively about what happened, when it happened, and why things may or may not have happened, particularly with regard to the provision of transportation and compensatory services.

Based on the undisputed facts of this case, the arguments of counsel, and the Undersigned's own legal research, the Respondent's motion to dismiss was granted and this written order follows.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is enrolled at a non-public school in MD, and has an IEP that provides the related service of transportation.[2]
2. Transportation was not provided for nine days during the first two weeks of school for the 2012-2013 school year, and the Student did not attend school during that time, missing nine instructional days, returning September 4, 2012, when transportation was provided.[3]
3. The Respondent authorized 30 hours of tutoring to make up for the missed services on October 26, 2012, following the receipt of the Petitioner's disclosures which included a detailed compensatory education plan requesting 27.9 hours of tutoring.[4] The Petitioner accepted this without condition.[5]

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The rules for special education due process hearings include no provisions specifically for determining whether a case is moot or whether an exception to such an argument applies. An independent hearing officer (IHO) does have the responsibility to manage to hearing process efficiently and fairly, however. *See,* Standard Operating Procedure (SOP) § 600.1 (Hearing Officers have the "authority and responsibility" to "take actions necessary to complete the hearing in an efficient and expeditious manner[.]"), 34 C.F.R. § 300.511(c)(iii) (Hearing Officers "[m]ust possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice[.]", and *Schaffer v Weast*, 546 US 49, 61 (2005),

[2] Exhibit 1 to Petitioner's Response to Respondent's Motion to Dismiss, Undisputed Fact.
[3] Undisputed Fact.
[4] Undisputed Fact.
[5] Undisputed Fact.

("[H]earings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence."). Thus, it is within the discretion of the independent hearing officer to make procedural determinations that balance the rights and responsibilities of the parties even when not explicitly laid out in the Statute or regulations. Given that the Petitioner had obtained the relief she sought through her complaint had been provided, accepting it without condition, it is reasonable to consider whether the complaint is moot as well as whether an exception applies, borrowing legal analysis used in other forums.

2. Generally, a case is moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1979), citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Thus, where the purpose of the complaint has been satisfied, such as here – to ensure the Student was provided a FAPE through implementation of the IEP and compensatory services to make up for missed services – there is no longer a reason to proceed with litigation.
3. An exception to this general rule applies when the matter is "capable of repetition yet evading review[.]" *United States v. Weston,* 194 F.3d 145, 148 (D.C.Cir. 1999). The analysis applied is whether: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration[;] and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Id.*, citing, *LaRouche v. Fowler,* 152 F.3d 974, 978 (D.C.Cir.1998) (alterations in original) (citing *Spencer v. Kemna,* 523 U.S. 1 (1998).
4. It is undisputed the relief sought through the complaint (the provision of transportation in conformity with the IEP and compensatory education consisting of tutoring) was accepted without condition by the Petitioner for the Student prior to the due process hearing convened

on November 2, 2012. The transportation was provided early on and probably was not the result of the complaint. The Petitioner still had a valid concern about educational harm to the Student for missing the first two weeks of school. She believed tutoring would help him, and did not, at the time the complaint was filed, know how much tutoring would be necessary to put him in the place he would have been had he not missed those two weeks. She still did not know at the time of the prehearing conference on September 12, 2012. It is not clear when she did know, but what is known is that she did not share that she believed the Student required 27.9 hours of tutoring with the Respondent until October 26, 2012. At that point the Respondent authorized 30 hours of tutoring. The Respondent did not offer this as a condition to settle the case and the Petitioner accepted it without conditions.

5. The exceptions to the mootness doctrine do not apply in this case. The Petitioner argues the matter is capable of repetition yet evading review. In support of this, the Petitioner argues that there is a long history of transportation problems for the Respondent, referring to the class action lawsuit concerning special education transportation in *Petties v. District of Columbia*, 881 F.Supp. 63 (D.D.C. 1995), which is still engaged. That lawsuit has resulted in the State Education Agency taking over the provision and management of transportation for the Respondent (though not taking over the responsibility to ensure FAPE is provided). Thus, the undersigned is not convinced that the error resulting in two weeks of missed school for the Student was the result of the Respondent's past problems with providing transportation. The Petitioner also argues that the Student has several years before he graduates, and so it is not unlikely, given the history of transportation problems the Respondent has been responsible for, there will be a repetition of the problem precipitating this complaint. This problem for the Student appears to be an isolated incident. Using the Petitioner's logic,

almost any error on the Respondent's part could be determined to be an exception to the mootness doctrine. Furthermore, there is no relief to be granted that would preempt future violations. The Student obtained transportation and compensatory education. Even if a hearing was held, and those things ordered by the undersigned, another transportation problem could occur again.[6] Furthermore, while the Respondent did provide the compensatory education requested, it could have continued to deny it, thus keeping the case live. This did not happen, but that does not, in itself, make the action too short is duration to be fully litigation (such as a specified disciplinary period).[7]

6. The Petitioner argues that the second prong of the mootness exception is also satisfied because in any case the Respondent can provide the requested relief a week prior to the hearing and arguing mootness in order to evade a review of failure to provide transportation. This argument is unpersuasive because it could be made for any violation of IDEA resulting in an alleged denial of FAPE. There is nothing the undersigned could order to prevent that from happening. The education of a child is an on-going process and requires constant, and at least annual, modification of IEPs. At any point a claim may arise that would be legitimate due to the changing needs of the child. This is not a case genuinely evading review like a discipline case where a Student could be repeatedly denied a hearing where the discipline was completed prior to the hearing. Thus, the second prong of the mootness exception is also not met because there is no reasonable expectation that Student will be subject to a failure to provide transportation again.

[6] The Petitioner proffered that there was a transportation problem in the spring of 2012. Assuming this is true, the two events do not demonstrate a pattern that could be remedied by the undersigned in this case.

VII. DECISION

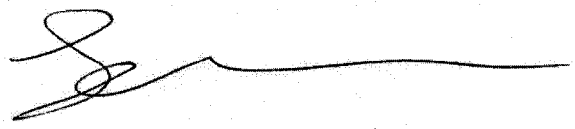
The Petitioner has been provided the relief she requested to ensure the Student is provided a FAPE, by the Respondent, and the Respondent's motion to dismiss this matter as moot is granted.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that:

The complaint in this matter is dismissed with prejudice.

IT IS SO ORDERED.



Date: November 2, 2012

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).