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IS A PAID IDEA TUITION REIMBURSEMENT CASE MOOT? THE INTERSECTION OF PENDENCY, TUITION REIMBURSEMENT, AND MOOTNESS

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I. INTRODUCTION

If a plaintiff filed a lawsuit seeking $10,000 in damages and subsequently received a check from the defendant for $10,000, her lawsuit would be of no practical significance (moot). The court would then dismiss her case. However, the matter is not so simple within the context of certain tuition reimbursement cases under the Individuals with Disabilities Education Act (IDEA). These cases typically involve the following scenario: parents enroll their children in private schools, file an administrative complaint alleging that their school district violated the IDEA, prevail in an administrative hearing, and receive reimbursement for the tuition paid to the private school as a remedy. The next school year, the parents file a new administrative complaint asserting another violation of the IDEA and, again, requesting tuition reimbursement. Due to the pendency provision of the IDEA, which requires school districts to ensure that students remain in their "then-current educational placement" during administrative or judicial review, the school district must ensure that the student remain in the private school. Courts have further held that the pendency provision, under these circumstances, obligates school districts to pay the private school tuition during the entirety of the subsequent proceeding. By the time such an administrative complaint is appealed to a court—sometimes several years later—the student's tuition has been paid and the school district has most likely devised a new educational plan for the student.

Are these cases moot? Courts have struggled to answer this question and have reached differing conclusions. This article explores how courts have applied the mootness doctrine to paid tuition reimbursement cases under the IDEA. This article further explains how courts have reached

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divergent results as the result of a conflict between the doctrines of pendency, tuition reimbursement, and mootness. Therefore, this article offers a proposed amendment to the IDEA that would reconcile these incongruous doctrines.

Part II outlines the basic provisions of the IDEA, with special attention afforded to pendency and the availability of tuition reimbursement as a remedy. Part III is a brief summary of the doctrine of mootness and judicial exceptions to the doctrine. Part IV analyzes judicial decisions that have addressed the intersection of pendency, tuition reimbursement, and mootness and how these decisions have reached conflicting outcomes. Part V describes a proposed amendment that would resolve the question of whether paid tuition reimbursement claims are moot. Part VI offers a brief conclusion.

II. THE IDEA

A. Overview

The primary goal of the IDEA is to ensure that students with disabilities are provided with a free appropriate public education (FAPE).[1] To accomplish this goal, the IDEA offers financial assistance to states that comply with its procedures.[2,3]

The most significant procedural requirements under the IDEA are detailed below. A school district must identify students with disabilities who reside within the district.[4] Having done so, the school district must conduct an initial evaluation of these students.[5] If the school district determines that these students have needs that require special education, the school district must generate an Individualized Education Plan (IEP)

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[1] *See* 20 U.S.C. § 1400(c)(2), (d) (2012); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 192, 199, 200 (1982).

[2] This article discusses Part B of the IDEA, which pertains to students aged 3–21. Part C of the IDEA concerns Early Intervention services, which are special education services offered to infants through age two.

[3] Strictly speaking, the IDEA is a funding statute—although it also contains elements of a civil rights statute. For instance, the IDEA allows a parent who is a prevailing party to recover his or her attorneys' fees (20 U.S.C. § 1415(i)(3)(B) (2012)). Also, with regard to a student's right to participate in extracurricular activities, the IDEA incorporates the civil rights standard imposed by Section 504 of the Rehabilitation Act (34 C.F.R. § 300.107 (2006)); § 34 C.F.R. 300.117 (2006); *see* Nonacademic Services, 42 Fed. Reg. 42,489 (Aug. 23, 1977) (to be codified at 45 C.F.R. pt. 100(b), 121(a), and 121(m)); Nonacademic Settings, 42 Fed. Reg. 42,497 (Aug. 23, 1977) (to be codified at 45 C.F.R. pt. 100(b), 121(a), and 121(m)); Transfer and Redesignation of ED Regulations, 45 Fed. Reg. 77, 368, 77, 370 (Nov. 21, 1980) (to be codified 24 C.F.R. Ch. II); *see generally* Application of the Bd. of Educ., Appeal No. 13-152 (New York State Educ. Dep't Office of State Review), *available at* http://www.sro.nysed.gov/decisionindex/ 2013/13-152.pdf (last accessed Mar. 18, 2015).

[4] 20 U.S.C. § 1412(a) (2012); 34 C.F.R. § 300.111 (2006).

[5] § 1414(a), (b).

for each student.[6] The IEP is generated by an IEP team that includes the student's parents, teacher, and a representative of the school district.[7] The IEP identifies pertinent information about each student, including his or her academic, social, emotional, and physical levels.[8] Each IEP must also contain annual goals based upon a student's academic, social, emotional, and physical needs.[9] After developing an IEP, a school district must generally implement it within its public school system. IEPs must be reviewed on an annual basis to ensure they continue to meet students' needs.[10]

If the parents of a student with a disability believe that an IEP was not developed in conformity with the IDEA, they have the right to administrative, and then judicial, review of the student's IEP.[11] Specifically, parents may file an administrative form called a due process complaint notice that identifies the school district's alleged violations of the IDEA.[12] These allegations are adjudicated in an informal administrative trial presided over by an Impartial Hearing Officer (IHO); the officer is vested with the authority to determine whether the student received a FAPE.[13] The decision of an impartial hearing officer is subject to judicial review, with some states, such as New York, providing a second level of administrative review by a State Review Officer (SRO).[14]

B. Tuition Reimbursement

The IDEA's remedies include injunctive relief and reimbursement for private school tuition.[15] Many jurisdictions also recognize compensatory education, an equitable remedy that provides students with educational services in order to make up for a denial of FAPE.[16] While

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[6] § 1414(d).

[7] § 1414(d)(1)(B).

[8] § 1414(d)(1)(A)(i) .

[9] § 1414(d)(1)(A)(i)(II).

[10] § 1414(d)(4)(A).

[11] 20 U.S.C. §§ 1415(b)(6); (c)(2)(A); (f); (i)(2) (2012).

[12] § 1415(c)(2)(A).

[13] § 1415(f); *see* (f)(3)(E).

[14] § 1415(g), (i). While states use various initials or acronyms to refer to these administrative officials, I refer to the initial decision-makers as "IHOs" and the second-level reviewers as "SROs" throughout this article for consistency.

[15] § 1415 (f)(3)(E)(iii) (injunctive relief: "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a[n] [LEA] to comply with procedural requirements under this section."); §1415(b)(1), 34 C.F.R. § 300.502(b) (2006) (independent educational evaluations); 20 U.S.C § 1412(a)(10)(C)(ii) (2012); 34 C.F.R. § 300.148(c) (2006) (tuition reimbursement).

[16] *See generally* Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 ED. LAW REP. 501 (2010); *see also* P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307 (6th Cir. 2007); Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994); Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005). Courts

the IDEA was originally concerned with promoting access to the public education system, IDEA litigation has become increasingly concerned with tuition reimbursement.[17] The remedy was endorsed by the United States Supreme Court in two seminal cases and later codified into the language of the IDEA.[18]

The tuition reimbursement remedy is available to parents who, dissatisfied with the recommendations of an IEP, unilaterally enroll their child in a private school.[19] If the parents file a due process complaint notice and an administrative officer finds that both (1) the school district did not offer the student a FAPE; and (2) the private school was appropriate to meet the student's needs, the parent may recoup tuition paid (or owed) to the private school for the school year in question.[20] Additionally, in keeping with its civil rights leanings, the IDEA permits an award of attorneys' fees to parents' attorneys who substantially prevail in any aspect of an administrative or judicial proceeding.[21]

C. Pendency

A unique provision of the IDEA, and the provision giving rise to the issue discussed in this article, is its pendency provision.[22] This provision

unanimously agree that a claim for compensatory education presents a live controversy and insulates a case from being moot. For recent cases, *see* J.T. *ex rel*. J.T. v. Newark Bd. of Educ., 564 F. App'x 677 (3d Cir. 2014); L.O. *ex rel*. D.O. v. E. Allen Cnty. Sch. Corp., No. 1:11 CV 178, 2014 WL 4905484 (N.D. Ind. Sept. 30, 2014); Simmons v. Pittsburg Unified Sch. Dist., No. 4:13-CV-04446-KAW, 2014 WL 2738214, at n.7 (N.D. Cal. June 11, 2014); Fullmore v. D.C., No. 1:13-CV-00409 (CRC), 2014 WL 1871343, at *3 (D.D.C. May 9, 2014); Morris v. D.C., No.: 14–0338 (RC), 2014 WL 1648293 (D.D.C. April 25, 2014).

[17] *See* Thomas Mayes & Perry Zirkel, *Trends in Tuition Reimbursement Cases*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

[18] 20 U.S.C. § 1412(a)(10)(C)(ii) (2012); *see* Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter, 510 U.S. 7 (1993); Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 373–74 (1985).

[19] § 1412(a)(10)(C)(ii).

[20] Although the IDEA and case law contemplate tuition reimbursement, a recent decision by the Second Circuit Court of Appeals held that a parent may pursue a direct payment from a school district to a private school "in appropriate circumstances." E.M. v. N.Y.C. Dep't of Educ., 758 F.3d 442, 453 (2d Cir. 2014). The court did not define what "appropriate circumstances" must exist before such a remedy becomes feasible. Additionally, as recognized by the Court in *Burlington*, "equitable considerations are relevant in fashioning relief",
Burlington, 471 U.S. at 374. Many courts conceive of equitable considerations as a third requirement that must be assessed before tuition may be awarded to a parent.

[21] 20 U.S.C. § 1415(i)(3)(B) (2012). School districts may also recover attorneys' fees under limited circumstances; s*ee* § 1415(i)(3)(B).

[22] Courts have used different terms to describe this provision. *See, e.g.*, Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199–200 (2d Cir. 2002) (stay-put); Student X v. N.Y.C. Dep't of Educ., No. 07-CV-2316 (NGG)(RER), 2008 WL 4890440, at *7, 15, 20–26 (E.D.N.Y. Oct. 30, 2008) (pendency); Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 81 (3d Cir. 1996) (pendent placement). I refer to this provision as "pendency" throughout this article for consistency.

requires in relevant part,

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or [school district] and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . .[23]

The intention behind the pendency provision was to ensure that, if a dispute arose, a student with a disability would continue to receive services from his or her public school during the dispute. In other words, as explained by the Third Circuit Court of Appeals in *Drinker by Drinker v. Colonial School Dist.*, pendency was intended "to strip schools of the unilateral authority that they had traditionally employed to exclude disabled students . . . from school."[24] It bears mentioning that "placement" has an idiomatic meaning within the context of the IDEA, referring to the general contours of a student's special education program and not the literal "placement" of a student within a school building.[25] Thus, a student's pendency placement refers to a program and not a physical location.[26]

The IDEA's pendency provision imposes a default rule: if parents and school districts disagree, then the student must stay in his or her current placement during administrative and judicial review. Therefore, an agreement between parents and the school district on an appropriate placement will always control. Courts have held that an administrative or judicial decision that a unilateral placement was appropriate constitutes a constructive "agreement" between the parties that the private school is a student's pendency placement.[27] This fiction obligates school districts to

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[23] 20 U.S.C. § 1415(j) (2012).

[24] Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996); *see also* George M. Holland, *The Stay-Put Provision and its Implications to Practitioners*, N.J. LAWYER: THE MAGAZINE, June 2003, at 35 (2003), *available at* http://www.njsba.com/images/content/1/0/1001996/june2003.pdf (last accessed Mar. 19, 2015).

[25] *See, e.g.*, T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); James v. D.C., No. 12–376(RJL), 2013 WL 2650091, at *3 (D.D.C. June 9, 2013).

[26] T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 (2d Cir. 2014) ("the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving"); *Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. N.Y.C Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980).

[27] Bd. of Educ. of the Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 (2d Cir. 2002); *Susquenita*, 96 F.3d at 83; Clovis Unified Sch. Dist. v. Cali. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990); Marcus I. *ex rel*. Karen I. v. Dep't of Educ., Hawaii, 868 F. Supp. 2d 1015, 1019 (D. Haw. 2012) *aff'd sub nom.* Marcus I. *ex rel*. Karen I. v. Dep't of Educ., 506 F. App'x 613 (9th Cir. 2013) (unpublished opinion); City Sch. Dist. of City of Buffalo v. Darlene S., No. 05-CV-0572E(F), 2006 WL 287871, at *3 (W.D.N.Y. Feb. 6, 2006). The IDEA's implementing regulations explicitly provide that if an IHO's decision in a one-tier State or an SRO's decision in a two-tier State "agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents" 34 C.F.R. § 300.518(d) (2006).

maintain a student's enrollment in a private school. Further, courts have held that a school district must pay the student's tuition at the private school during the pendency of the proceedings.[28] This obligation is absolute: even if an administrative or judicial official eventually finds that the school district offered a student a FAPE, it may not recoup the tuition paid to the private school.[29]

Having won a prior tuition reimbursement appeal, it is conceivable that a parent could maintain a student's enrollment in a private school at public expense for several additional years by continuing to file administrative complaints. Thus, pendency can prove a significant boon for parents who seek to maintain their children in a private school at public expense.[30] This remarkable effect of pendency is amplified by the length of the administrative and judicial review process. Although the drafters of the IDEA appear to have intended a quick resolution to impartial hearings, disputes can often last for several years. This delay is due to several reasons. First, although the IDEA imposes deadlines for the issuance of administrative decisions at both the district and state level, federal regulations permit potentially indefinite extensions to these deadlines.[31] Second, judicial decision dates are subject to varying court rules and internal deadlines. Finally, administrative and judicial tribunals, for a multitude of reasons, may not issue decisions in a timely manner.

If the parties do not agree as to a student's current placement and a

[28] *Schutz*, 290 F.3d at 482–84; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 200–01 (2d Cir. 2002); Zvi D. *ex rel*. Shirley D. v. Ambach, 694 F.2d 904, 906, 908 (2d Cir. 1982); Vander Malle v. Ambach, 673 F.2d 49, 52 (2d Cir. 1982); T.M. *ex rel*. A.M. v. Cornwall Cent. Sch. Dist., No. 11 CV 6459(VB), 2012 WL 4069299, at *4 (S.D.N.Y. Aug. 7, 2012), *vacated on other grounds*, 752 F.3d 145 (2d Cir. 2014); N.Y.C. Dep't of Educ. v. S.S., No. 09 Civ. 810(CM), 2010 WL 983719, at *1, *6, *8–*9 (S.D.N.Y. Mar. 17, 2010); Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 (S.D.N.Y. 2006); Gabel *ex rel*. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist., 368 F. Supp. 2d 313, 324 (S.D.N.Y. 2005); Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 (E.D.N.Y. 1985). The Supreme Court recently granted a writ of certiorari in M.R. v. Ridley Sch. Dist., a Third Circuit case challenging the scope of a school district's obligation to pay private tuition under pendency. 744 F.2d 112 (3d Cir. 2014). *Ridley* affirmed that a school district's obligation to pay arises at the time a due process complaint notice is filed and continues through the entirety of administrative and judicial proceedings. *Id.* at 123– 28. The court concluded its decision by noting that it was "not insensitive to the financial burden [the] decision will impose on school districts" but reasoned that the pendency payment rule was "an unavoidable consequence of the balance Congress struck to ensure stability for a vulnerable group of children." *Id.* at 128.

[29] *Clovis*, 903 F.2d at 641; *S.S.*, 2010 WL 983719, at *8–*12; D.C. v. Jeppsen, 468 F. Supp. 2d 107, 112 (D.D.C. 2006) *remanded on other grounds*, 514 F.3d 1287 (D.C. Cir. 2008); Aaron M. v. Yomtoob, No. 00 C 7732, 2003 WL 22836308, at *7 (N.D. Ill. Nov. 25, 2003).

[30] The administrative decision must explicitly indicate that the parent's unilateral placement was appropriate (*see* L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 904 (9th Cir. 2009) ("Unless the district court or agency actually reaches the merits of the appropriate placement, we will not imply a current educational placement. . . .").

[31] 34 C.F.R. § 300.515(c) (2006) ("A hearing or reviewing officer may grant specific extensions of time . . . at the request of either party.").

parent did not previously prevail in a tuition reimbursement proceeding, a court or administrative agency must conduct a more fact-intensive investigation to determine what constitutes the student's then-current educational placement. Courts utilize different approaches to make this determination, the three most prevalent being: (1) "the placement described in the child's most recently implemented IEP"; (2) the actual placement operating at the time of the most recently implemented IEP; and (3) "the operative placement actually functioning at the time . . . when the stay put provision of the IDEA was invoked."[32] An interpretative letter issued by the U.S. Department of Education's Office of Special Education Programs (OSEP) in 2007 opined that a student's pendency is determined at the time the due process complaint notice is filed, lending some support to the third formulation.[33]

III. MOOTNESS AND STANDING

Black's Law Dictionary defines the term "moot" as "[h]aving no practical significance; hypothetical or academic."[34] Thus, a moot case is one that presents no issues for a court to rule upon — or issues without practical import. Mootness can also be conceived of as "an extension of the doctrine of standing," the doctrine that governs who may pursue a legal claim in federal court.[35] According to the United States Supreme Court, "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'"[36] The Court also recently cited with approval the following statement from a 1984

[32] Mackey *ex rel*. Thomas M. v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 (2d Cir. 2004), *supplemented sub nom.* Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 112 F. App'x 89 (2d Cir. 2004); *see* also Marcus I. *ex rel*. Karen I., 868 F. Supp. 2d at 1019, *aff'd sub nom.* Marcus I. *ex rel*. Karen I., 506 F. App'x 613 (citing cases).

[33] *Letter to Hampden*, 49 IDELR 197 (Dep't of Educ. Office of Special Education Programs Sept. 4, 2007), *available at* https://www2.ed.gov/policy/speced/ guid/idea/letters/2007-3/hampden090407stayput3q2007.pdf (last accessed Mar. 19, 2015). An OSEP letter from two decades prior, however, noted that the last agreed-upon IEP would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (*Letter to Baugh*, 211 IDELR 481) (Dep't of Educ. Office of Special Education Programs July 2 1987).

[34] BLACK'S LAW DICTIONARY 1099 (9th ed. 2009).

[35] Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143, 150 n.65 (1991) (citing Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) ["The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).]"). Although some courts have indicated that the quote from Professor Monaghan originated with the Supreme Court's opinion in U.S. Parole Comm'n v. Geraghty, this decision merely quoted Professor Monaghan's formulation. 445 U.S. 388, 397 (1980); *see* Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 661 (5th Cir. 2006).

[36] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1335 (2013) (*quoting* Knox v. Serv. Emp. Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012)).

case: "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, [a] case is not moot."[37]

The Supreme Court has held that the mootness doctrine derives from the "cases" and "controversies" jurisdiction granted to the federal judiciary by Article III of the United States Constitution.[38] Thus, in federal court, mootness is a constitutional predicate for jurisdiction. This is relevant to the case law discussed in this article, which is largely (although not exclusively) composed of federal cases. A competing theory of mootness advanced by judges and commentators is that mootness is a prudential doctrine that merely provides judges with the discretion to excise non-adversarial litigation from their dockets.[39] Some state courts adopted this interpretation.[40] Scholars have produced gradations of these theories, but each generally aligns with the constitutional or prudential school.[41]

A. Exceptions

If a dispute is moot, the ordinary result is that the case is dismissed. Because mootness derives from the Constitution, federal courts *must* dismiss a moot case for lack of subject matter jurisdiction. However, courts faced with what they deemed to be unpalatable results stemming from this doctrine created exceptions to the general rule. Most notably, an otherwise moot case may be retained by a court if (1) the complained-of activity is capable of repetition, yet evading review; (2) dismissal of the case would impose collateral legal consequences on a party; (3) resolution of the case would be in the public interest; or (4) the defendant voluntarily ceased the activity giving rise to the lawsuit at some point during the litigation.[42]

There are two requirements litigants must satisfy to avoid a mootness dismissal under the "capable of repetition, yet evading review"

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[37] *Knox*, 132 S. Ct. at 2287 (*quoting* Ellis v. Railway Clerks, 466 U.S. 435, 442 (1984)).

[38] U.S. Const. art. III, § 2, cl. 1; *see also* Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1171 (S.D.N.Y. 1992).

[39] Watson, *supra* note 35, at 151–53.

[40] *See, e.g.*, Hussein v. State, 81 A.D.3d 132, 135 (App. Div. 2011), *aff'd*, 19 N.Y.3d 899 (2012); City of New York v. Maul, 59 A.D.3d 187, 197, 873 N.Y.S.2d 540, 549 (App. Div. 2009), *aff'd*, 14 N.Y.3d 499 (2010) (McGuire, J., dissenting). Therefore, a state whose constitution does not compel the dismissal of moot cases would arguably have greater discretion in deciding whether a moot case must be dismissed.

[41] *See* Watson, *supra* note 35, at 150–59.

[42] *See, e.g.*, Murphy v. Hunt, 455 U.S. 478, 482 (1982) (*citing* Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (capable of repetition yet evading review); Sibron v. N.Y., 392 U.S. 40 (1968) (collateral legal consequences); Barnett v. Adams, 273 P.3d 378, 381 (Utah 2012) (public interest); Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 88 (2d Cir. 2005) (voluntary cessation).

exception: (1) the complained-of activity must be "too short to be fully litigated prior to its cessation" and (2) there must be "a reasonable expectation that the [plaintiff will] be subjected to the same action again."[43] This exception requires that defendants remain accountable for wrongs committed against plaintiffs that are short in duration and likely to reoccur. The short in duration requirement ensures that defendants are not insulated from liability if their wrongful conduct happens to be short in duration. The recurrence requirement mitigates the exception, however, by requiring that the wrongful activity was more than a fleeting or isolated incident.[44]

Additionally, some courts have applied a "collateral legal consequences" exception to moot claims.[45] The first significant pronouncement of this doctrine came from the Supreme Court's 1968 decision in *Sibron v. New York*.[46] In *Sibron*, the City of New York convicted the defendant of possession of heroin.[47] The defendant moved to suppress the heroin before trial.[48] When this motion was denied, the defendant pled guilty and received a six-month sentence.[49] By the time the defendant's appeal reached the U.S. Supreme Court, the defendant had served his sentence, but his appeal of the denial of the suppression motion remained pending.[50]

The Supreme Court held that Sibron's appeal was not moot, indicating that collateral legal consequences would affect the defendant were his appeal dismissed.[51] In this respect, the Court announced a general rule: "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the

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[43] Murphy, 455 U.S. at 482.

[44] Briefly, I note that the Federal Declaratory Judgments Act does not affect the mootness inquiry because a federal court only has jurisdiction where there is an actual case or controversy (28 U.S.C. § 2201 et seq. (2012); *see* Christopher P. by Norma P. v. Marcus, 915 F.2d 794, 802 (2d Cir. 1990); San Diego Cnty. Office of Educ. v. Pollock, No. 13-CV-1647-BEN BLM, 2014 WL 2860279 (S.D. Cal. Jun. 20, 2014).

[45] *See Pollock*, 2014 WL 2860279, at *3; Dep't of Educ., State of Haw. v. Rodarte *ex rel.* Chavez, 127 F. Supp. 2d 1103, 1113 (D. Haw. 2000); Browell v. Lemahieu, 127 F. Supp. 2d 1117, 1128 (D. Haw. 2000); *see also* Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 799 (9th Cir. 1999); Pub. Utilities Comm'n of State of Cal. v. F.E.R.C., 100 F.3d 1451, 1460 (9th Cir. 1996) (collateral legal consequences exception "is most commonly applied in habeas corpus proceedings where the petitioner has subsequently obtained the relief sought."); Jenkins v. Squillacote, 935 F.2d 303, 306 (D.C. Cir. 1991).

[46] Sibron v. N. Y., 392 U.S. 40 (1968). Sibron's appeal was a "companion case [ ]" (*id.* at 43) to the Court's famed well-known decision in Terry v. Ohio which upheld police officers' right to stop and frisk individuals under certain circumstances. *See* Terry v. Ohio, 392 U.S. 1 (1968).

[47] *Sibron*, 392 U.S. at 44.

[48] *Id.* at 44–45.

[49] *Id.* at 50–51.

[50] *Id.* at 45, 50.

[51] *Id.* at 50, 57.

basis of the challenged conviction."[52] In Sibron's case, these consequences were potential impeachment and increased penalties (contingent upon his commission of a crime and subsequent prosecution).[53] Without further elaboration, the Court also stated that "[t]here are doubtless other collateral consequences."[54]

The *Sibron* rationale has crept into civil cases.[55] Some courts have even shifted the inquiry so as to hold that collateral *practical* consequences prevented cases from being moot.[56] While practical consequences that pertain to "criteria that affect job accessibility and social status" are similar to the effects of a criminal conviction, other practical consequences—such as the payment of tuition costs under the IDEA—are far removed from the criteria envisioned by the Court.[57]

Several state courts also apply a public interest exception to the mootness doctrine.[58] Generally, this doctrine requires that a case present an issue of public importance that is likely to reoccur. While several courts have held that an injunction ordering compliance with the IDEA is in the public interest for purposes of a preliminary injunction, it is doubtful that a paid tuition reimbursement case would meet these criteria given its focus on compensation for a single student.[59]

Finally, a court will refuse to find a case moot if a defendant voluntarily ceases the activity that gave rise to the litigation "at some

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[52] *Id.* at 57.

[53] *Id.* at 55–56.

[54] *Id.* at 56. The legal consequences that flow from a criminal conviction can indeed be numerous and severe. A recent investigation found that "Federal, state, and local laws impose a convoluted network of barriers on anyone with a criminal record" and that "[t]hese collateral consequences of conviction . . . can affect nearly every aspect of a person's life . . . ." Monica Haymond, *Should A Criminal Record Come With Collateral Consequences?*, NPR NEWS Dec. 6, 2014, *available a*t http://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with-collateral-consequences (last visited Mar. 19, 2015).

[55] *See* David H. Donaldson, Jr., *A Search for Principles of Mootness in the Federal Courts Part One–The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1314 (1976) and cases cited therein. Not all courts have applied this doctrine in civil cases. *See, e.g.*, Barnett v. Adams, 273 P.3d 378, 381 (Utah 2012). The U.S. Supreme Court explicitly dodged the issue in a 1978 case involving alleged collateral legal consequences stemming from suspension ordered issued by the Securities and Exchange Commission. S.E.C. v. Sloan, 436 U.S. 103, 108 n.3 (1978); *see also* Vitek v. Jones, 445 U.S. 480, 502 n.1 (1980) (Blackmun, J.J., dissenting).

[56] Donaldson, *supra* note 55, at 1315, 1316.

[57] *Id.* at 1317.

[58] *See, e.g.*, *Barnett*, 273 P.3d at 382; Glantz v. Daniel, 837 N.W.2d 563, 569 (Neb. Ct. App. 2013), *review denied* (Sept. 25, 2013); Gallery v. W. Va. Secondary Sch. Activities Comm'n, 518 S.E.2d 368, 371 (W. Va. 1999); In re Laura H., 936 N.E.2d 801, 804–05 (Ill. App. Ct. 2010). New York has condensed the capable of repetition yet evading review and public interest exceptions into a single exception. *See* Hearst Corp. v. Clyne, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878 (1980); Matter of McGrath, 245 A.D.2d 1081, 1082, 667 N.Y.S.2d 550, 551 (App. Div. 4th Dep't 1997).

[59] *See* W.H. *ex rel.* B.H. v. Clovis Unified Sch. Dist., No. CVF080374LJODLB, 2009 WL 2959849, at *7 (E.D. Cal. Sept. 10, 2009).

advanced stage of the appellate proceedings."[60] The rationale underlying this exception is that it would allow defendants to game the judicial system: a defendant could subject a plaintiff to illegal activity through the duration of legal proceedings and, at the last minute, escape liability by ceasing the activity before an appellate court rendered a decision. Under these circumstances, it would be inequitable to allow a defendant to take advantage of a dismissal based upon mootness. This exception is not applicable to the paid tuition reimbursement cases discussed in this article because any alleged harm would pertain to an expired school year and, thus, could not be remediated by a school district's voluntary cessation of an activity.

IV. THE INTERSECTION OF PENDENCY, TUITION REIMBURSEMENT, AND MOOTNESS

Pendency, tuition reimbursement, and mootness have coalesced in several reported cases. The bulk of these cases arise in New York, whose courts entertain an unusually high number of IDEA appeals.[61] The cases discussed below present several factors to consider in determining whether a paid tuition reimbursement claim under the IDEA may be considered moot. Courts have generally found these disputes moot and proceeded to analyze them under the "capable of repetition, yet evading review" exception or the collateral legal consequence exception (which, as explained below, is more accurately characterized as a school district's interest in avoiding future pendency obligations).

A. Capable of Repetition Yet Evading Review

1. Honig v. Doe

Before analyzing paid tuition reimbursement cases that have applied this exception, it is necessary to discuss the seminal case involving the IDEA and recurrence, *Honig v. Doe*.[62] In *Honig*, two students eligible for special education as students with an emotional disturbance challenged

[60] Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring).

[61] *See* Perry A. Zirkel, *Trends in Impartial Hearings Under the IDEA: A Follow-Up Analysis*, 303 ED. LAW REP. 1 (2014) ("[T]he top six jurisdictions in [impartial hearing] adjudications were, in descending order, Puerto Rico, the District of Columbia, New York, California, Pennsylvania, and New Jersey, with a different sequence among them for filings."); *see also* Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 236 (2013) ("[T]he states of "Hawaii, New Jersey, and New York appear to have a particular propensity for tuition and related reimbursement [claims].").

[62] *Honig*, 484 U.S. at 305.

indefinite suspensions imposed by their school district.[63] The activity giving rise to these suspensions was not insubstantial; one student choked a fellow student and left "abrasions on the child's neck" while the other "st[ole], extort[ed] money from fellow students, and ma[de] sexual comments to female classmates."[64] The crux of the Court's decision was that a school district may not unilaterally impose a suspension of more than ten days under the IDEA without violating the IDEA's pendency protections.[65]

Before reaching this conclusion, however, the Court examined the two plaintiffs' standing to pursue their IDEA claims.[66] One plaintiff, by the time of the Court's decision, was twenty-four years old and no longer eligible for special education and related services under the IDEA.[67] The Court dismissed this plaintiff's claim as moot with little elaboration.[68] The second plaintiff, however, presented a more complicated factual scenario. On the one hand, he was "not faced with any proposed expulsion or suspension proceedings" and no longer resided within the defendant school district.[69] But, on the other hand, this plaintiff remained eligible for special education services and had not yet graduated high school.[70]

First, the Court in *Honig* found that the complained-of activity—a school suspension imposed following in response to classroom behaviors—was too short to be fully litigated prior to its cessation. The Court noted, borrowing a phrase from an IDEA case issued three years prior to its decision, *Burlington School Committee v. Mass. Department of Education*, that the student had already been illegally kept out of school for years due to the "ponderous" nature of IDEA litigation.[71] Therefore, the Court implied that dismissing the case as moot would constitute a tacit endorsement of this lethargy. Thus, the Court concluded that the situation was too short in duration.[72]

Second, the Supreme Court found that there was a reasonable expectation that the student would be subjected to the same action again.[73] It based its holding on three considerations: (1) the student's

[63] *Id.* at 312.
[64] *Id.* at 314–15.
[65] *Id.* at 325–26.
[66] *Id.* at 317–23.
[67] *Id.* at 318.
[68] *Id.* at 317–18.
[69] *Id.*
[70] *Id.* at 318, 337.
[71] *Id.* at 322.
[72] *Id.* at 333.
[73] *Id.* at 322.

continued eligibility for services under the IDEA; (2) the "nature of [the student's] disability"; and (3) the school district's continued insistence that it could unilaterally withdraw IDEA-eligible students from public schools.[74] The Court did not find the student's residence within another school district relevant because California's lack of a policy regarding disciplinary suspensions meant the student would have encountered this problem in any California school district.[75]

2. Post-Honig *analyses*

Following *Honig*, courts have agreed that claims relating to IEPs or IEP meetings—the bread and butter of tuition reimbursement claims—are too short to be fully litigated prior to their cessation.[76] These courts frequently reiterate the "ponderous" rationale in support of this determination.[77] It appears, then, that the first prong of the capable of repetition exception will inevitably be satisfied in a tuition reimbursement claim. However, the second prong, which asks whether there is a reasonable expectation that the student will again be subjected to the same action, must also be satisfied. Analyses of this prong have produced varied outcomes.

The three factors considered by the Court in *Honig* relate to the possibility of recurrence. The first factor asks how many years the student will be eligible for services under the IDEA. Thus, a claim presented on behalf of a student with few years of eligibility left would, according to *Honig*, be less likely to recur since there are less total years in which a parent could file a due process complaint notice. Taken literally, the second and third factors would not make much sense in the paid tuition reimbursement context where the student did not actually attend the public school placement recommended by the district. These can be better understood as fact-specific applications of the general question of how likely an act is to reoccur.[78]

Reported cases have offered two additional IDEA-specific recurrence issues. One is whether the parties possess divergent views on educational issues affecting the student and, if so, how long they have held these views. For example, in *Student X v. New York City*

[74] *Id.* at 318–19.

[75] *Id.* at 321.

[76] *See, e.g.*, Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 85 (2d Cir. 2005); Rome Sch. Comm. v. Mrs. B., 247 F.3d 29, 31 (1st Cir. 2001); Daniel R.R. v. State Board of Educ., 874 F.2d 1036, 1041 (5th Cir. 1989); Sacramento City Unified Sch. Dist., Board of Educ. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994).

[77] See cases cited in note 76, *supra*.

[78] Whereas, in *Honig*, the student attended the public school system and, due to the nature of his disability, was likely to bring about the consequences complained of in the lawsuit.

Departmemnt of Education, the opposing parties consistently disagreed over the necessity of home-based services for several years prior to the school year challenged on appeal.[79] This led the court to conclude that the parties possessed "divergent views" on the necessity of home-based services such that the plaintiff had a "reasonable expectation of confronting this controversy every year . . . ."[80] Conversely, in *Lillibask ex rel. Mauclaire v. State of Connecticut Department of Education*, the school district contended that the student should be placed in a non-public school for a single year and, over seven years after making this recommendation (and consistently educating the student within the public school system), conceded that its original position was no longer defensible.[81] Under these facts, the Second Circuit found the dispute moot.[82]

The second issue is how many IEPs the parent or parents have challenged. The assumption is that parents who have voiced objections to a district's services year after year are more likely to complain the following year. Some courts, however, have not been persuaded by this rationale.[83] The concern of these courts appears to be that parents could create the appearance of controversy by complaining year after year.[84]

3. M.S. ex rel. M.S. v. New York City Department of Education

The District Court for the Southern District of New York, in no

[79] Student X v. N.Y.C. Dep't of Educ., No. 07-CV-2316(NGG)RER, 2008 WL 4890440, at *4 (E.D.N.Y. 2008).

[80] *Id.* at *14; *accord* Rachel H., 14 F.3d at 1403 (9th Cir. 1994) (explaining case not moot) ("[T]he [d]istrict and the [parents] ha[d] conflicting educational philosophies and perceptions of the [d]istrict's mainstreaming obligation."); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 (5th Cir. 1989) (explaining case not moot) ("Each side of this controversy steadfastly adhere[d] to its perception of the [IDEA]'s mainstreaming requirement.").

[81] Lillibask *ex rel.* Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 83 (2d Cir. 2005).

[82] *Id.* A district's change of position, in and of itself, would not appear a relevant factor. Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring); s*ee* D.C. v. Jeppsen *ex rel.* M.J., 468 F. Supp. 2d 107, 112 n.5 (D.D.C. 2006) ("Though it is likely both that [the district] will attempt to move [the student's] placement in the future and that the change will be challenged by defendant, such likelihood does not create an exception to the mootness doctrine.").

[83] V.M. v. No. Colonie Sch. Dist., 954 F.Supp.2d 102 (N.D.N.Y. 2013); B.J.S. *ex rel.* N.S. v. State Educ. Dep't, 815 F. Supp. 2d 601 (W.D.N.Y. 2011).

[84] The Supreme Court has disapproved of this practice. *See* Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("A litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it . . . ."). It is of particular concern in the IDEA context as there is no filing fee associated with filing a due process complaint notice. Additionally, the IDEA does not impose penalties or sanctions relating to frivolous administrative complaints. The IDEA does, however, allow a court to award a school district or state educational authority attorneys' fees if a "parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(III) (2012).

uncertain terms, rejected a paid for tuition reimbursement case in *M.S. ex rel. M.S. v. New York City Department of Education.*[85] For the 2007–08 school year, an IHO found that a June 2007 IEP did not offer the student a FAPE and that the parent was entitled to an award of tuition reimbursement at a private school.[86] This IHO also ordered the district to reconvene an IEP meeting to develop an IEP for the student.[87] The district complied, and the parent proceeded to challenge the resultant June 2008 IEP that applied to the 2008–09 school year.[88] Both an IHO and an SRO found that the June 2008 IEP offered the student a FAPE.[89] The school district paid the student's expenses at the private school for the 2008–09 school year pursuant to pendency.[90]

On appeal, the parent argued that the administrative officers erred and that the school district failed to offer the student a FAPE for the 2008–09 school year.[91] The court handily rejected this argument.[92] The court had little trouble finding the dispute moot, noting that the "parents receiv[ed] full compensation for their expenditures at the [private school] for the 2008–2009 school year."[93] The court also rejected the parents' argument that the case was capable of repetition yet evading review "because each year a new determination is made based on [the student's] continuing development, requiring a new assessment under the IDEA."[94]

The court further deduced that the true purpose of the parents' appeal was attorneys' fees.[95] Noting that the parent "received exactly the kind of educational placement in a private school that he sought" and that "[t]he result [of the case] would have been exactly the same" had the attorney elected not to appeal, the court rejected the parent's appeal and its accompanying request for attorneys' fees.[96]

4. New York City Department of Education v. S.A. ex rel. N.A.

The District Court for the Southern District of New York squarely considered the issue of whether a challenge to an IEP for a paid and expired school year was moot in *New York City Department of*

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85 M.S. *ex rel.* M.S. v. N.Y.C. Dep't of Educ., 734 F. Supp. 2d 271 (E.D.N.Y. 2010).
86 *Id.* at 275.
87 *Id.*
88 *Id.* at 275–77.
89 *Id.* at 277–78.
90 *Id.* at 278.
91 *Id.*
92 *Id.* at 279–81.
93 *Id.* at 280.
94 *Id.*
95 *Id.* at 273.
96 *Id.* at 273; *see id.* at 281.

Education v. S.A. ex rel. N.A.[97] The court began by noting that the parents and the school district had a "long history of litigation" over the student's placement, dating back to 2004.[98] The court also noted that an unappealed IHO decision pertaining to the 2006–07 school year established the student's placement at the private school.[99] One of the relevant due process complaint notices filed by the parents in the case requested tuition reimbursement for the 2009–10 school year.[100] An IHO granted reimbursement, but an SRO reversed.[101] The parents then filed an appeal in federal court in December 2010 (i.e. in the middle of the 2010–11 school year).[102] The district court agreed with the SRO in a separate decision that was issued in March 2012.[103]

Contemporaneously with these events, the parents filed an "amended" due process complaint notice seeking tuition reimbursement for the 2010–11 school year in November of 2010.[104] An IHO granted this relief in August of 2011 and the school district appealed to an SRO.[105] Before an SRO issued a decision, the school district "fully reimbursed the [p]arents for all tuition and related services as to the 2010–11 school year in accordance with . . . pendency."[106] An SRO thus dismissed the school district's appeal as moot.[107] The school district appealed the SRO's dismissal of its appeal regarding the 2010–11 school year.[108]

On appeal to the District Court for the Southern District of New York, the court found the school district's appeal presented a live controversy under the "capable of repetition, yet evading review" exception. On the first prong of this exception, whether the action was too short in duration to be fully litigated, the court curtly concluded that it was given IDEA litigation's "ponderous" nature.[109] Turning to the

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[97] No. 12 CIV. 1108 DLC, 2012 WL 6028938 (S.D.N.Y. 2012).

[98] *Id.* at *2.

[99] *Id.* at *2 n.3.

[100] *Id.* at *2.

[101] *Id.*

[102] *Id.*

[103] *See* J.A. v. N.Y.C. Dep't of Educ., No. 10 CIV. 9056 DAB, 2012 WL 1075843 (S.D.N.Y. 2012).

[104] N.Y.C. Dep''t of Educ. v. S.A. ex rel. N.A., No. 12 CIV. 1108 DLC, 2012 WL 6028938, at *2 (S.D.N.Y. 2012). The court's terminology here is likely incorrect; it would have been improper for the parents to amend their due process complaint notice as both the IHO and SRO issued their decisions before this alleged amendment (*see J.A.*, 2012 WL 1075843, at *5 (S.D.N.Y. 2012) (IHO decision issued in April 2010; SRO decision issued in August 2010).

[105] *S.A.*, 2012 WL 6028938, at *2.

[106] *Id.*

[107] *Id.*

[108] *Id.* at *1.

[109] *Id.* at *2.

second prong, whether the claim was reasonably capable of repetition, the court found that it was based upon two factors: (1) "the ongoing pecuniary interest of the school district based on the IDEA's stay-put provision"; and (2) "the prospect of continuing litigation over the student's placement."[110] As for the first factor, the *S.A.* court found "the [d]istrict's obligation to pay [the student's] tuition pending resolution on the merits of a given proposed, and rejected, IEP" would be uncertain absent a judicial resolution.[111] Regarding the second factor, the court impliedly concluded that because the parties disagreed in the past, they would continue to do so in the future. Indeed, the court observed that the parents had already filed a due process complaint notice for the 2011–12 by the time of the court's decision.[112] Therefore, the court concluded that there was "no question" that the present scenario fit the reasonably capable of repetition requirement.[113] The court then remanded the case to the SRO to issue findings as to the disputed issues.[114]

B. School Districts' Future Pendency Obligation

Some courts, as discussed below, have held that a district's future pendency (i.e. financial) obligation may render a paid tuition reimbursement claim justiciable. The rationale is that there remains a controversy between the parties because without a judicial determination on the merits, a school district might have to finance a student's education at a unilateral placement well beyond the school year (or years) challenged in a due process complaint notice under pendency.[115]

Some courts have framed this inquiry in terms of the collateral legal consequences exception.[116] However, it is more appropriate to view a district's interest in avoiding indefinite pendency payments as an interest that presents a live controversy. As noted above, the collateral legal consequences exception was intended to ensure that an unlawful

[110] *Id.* at *2 n.4. The court's first reason is discussed more fully below in Section IV. B.

[111] *Id.* at *2. The court's reliance on Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, was misplaced. In *Schutz*, the district disputed its obligation to pay for the student's placement at a private school during the pendency of proceedings (290 F.3d 476, 479 n.1 (2d Cir. 2002)). Subsequent law has clarified that the district was indeed responsible for doing so (*Letter to Hampden*, *supra* note 33; *see also* Student X v. N.Y.C. Dep't of Educ., No. 07-CV-2316(NGG)RER, 2008 WL 4890440, at *23 (E.D.N.Y. 2008).

[112] *S.A.*, 2012 WL 6028938, at *2.

[113] *Id.*

[114] *Id.* at *3.

[115] On this note, courts have debated whether this interest may constitute irreparable injury sufficient to grant a preliminary injunction; *compare* D.C. v. Masucci, No. CV 13-1008 (PLF), 2014 WL 331344, at *5 (D.D.C. 2014) (irreparable injury), *with* D.C. v. Vineyard, 901 F. Supp. 2d 77, 88–89 (D.D.C. 2012) (not irreparable injury).

[116] Marcus I. *ex rel.* Karen I. v. Dep't of Educ., 868 F. Supp. 2d 1015, 1017–18 (D. Haw. 2012), *aff'd sub nom.* Marcus I. *ex rel.* Karen I. v. Dep't of Educ., 506 F. App'x 613 (9th Cir. 2013).

conviction did not plague a criminal defendant. Dismissing such a case as moot would sanction (allegedly) illegal governmental activity long after the original criminal proceeding continued to have legal effects. Courts carried this doctrine into the civil context with little reasoning and its application in the IDEA context feels particularly strained.[117]

1. V.S. v. New York City Department of Education

In *V.S. v. New York City Department of Education*, a parent challenged a May 2009 IEP in a July 2009 due process complaint notice and requested tuition reimbursement for the 2009–10 school year.[118] The student attended a private school pursuant to an IHO decision dated December 2008.[119] In an April 2010 decision, an IHO sided with a parent and ordered tuition reimbursement for the 2009–10 school year. An SRO held that the case was moot because 2009–10 school year had expired and the parent would receive tuition reimbursement for this school year under pendency regardless of the SRO's determination.[120] On appeal, both parties urged the court to overrule the SRO's mootness determination.[121]

First, the court agreed with the SRO that "funding for the 2009–2010 school year . . . [was] no longer at issue."[122] The court further agreed that the parent's sought relief would be unaffected by an administrative or judicial determination as to this issue.[123] However, the court next determined that the case was not moot because "the [school district] s[ought] redress from an alleged injury that, although collateral to the central issue in the case, [wa]s ongoing and remediable."[124] The court identified this injury as the district's future financial obligation of pendency. As the court explained that a determination of whether or not the school district offered a FAPE for the 2009–10 school year would "control [the student's] pendency placement going forward."[125]

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[117] In this regard, the Ninth Circuit explicitly rejected the argument that future financial obligation could constitute a collateral legal consequence in a non-IDEA civil case, *Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451 (9th Cir. 1996). In the case, the petitioner and an intervener argued that dismissal on mootness grounds would bring about the "forced discounting of natural gas rates for state-regulated local distribution companies" as well as "lost revenues." *Id.* at 1460. The Ninth Circuit held that these financial concerns were not legal effects and thus did not justify imposition of the collateral legal effects doctrine. *Id.* at 1460–61.

[118] No. 10–CV–05120 (JG)(JO), 2011 WL 3273922, at *3, *4 (E.D.N.Y 2011).

[119] *Id.* at *3.

[120] *Id.* at *8.

[121] *Id.* at *9.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at *10.

Therefore, based upon this injury, the court found that the dispute was not moot. On the merits of the case, the court held that the school district failed to offer the student a FAPE, the unilateral placement was appropriate, and that no equitable factors diminished or precluded an award of tuition reimbursement.[126]

2. Pawling Center School District v. New York State Education Department

In *Pawling Center School District v. New York State Education Department*, a school district appealed a decision that it failed to offer the student a FAPE for the 1999–2000 school year.[127] A prior SRO decision established the student's pendency placement at a private school.[128] The school district paid the student's tuition during the 1997–98 and 1998–99 school years.[129] For the 1999–2000 school year, the school district developed an IEP that recommended placement in a public school.[130] The parents filed a due process complaint notice alleging a denial of FAPE and requesting tuition reimbursement for the 1999–2000 school year.[131] An IHO found that the district offered a FAPE.[132] An SRO reversed, finding that the district failed to offer a FAPE and that the unilateral placement was appropriate.[133]

On appeal, the school district admitted that it was financially responsible for the 1999–2000 school year and that no determination by the Appellate Division would affect the student's placement during the expired 1999–2000 school year.[134] Nevertheless, the school district argued that the appeal was not moot because the court's determination would affect the student's future pendency placement.[135] The Appellate Division agreed with this argument, briefly stating that "a decision in [the district's] favor . . . could alter the child's current educational placement . . . [as well as] petitioner's concomitant responsibility to pay tuition during any challenges to future IEPs."[136] As for the substantive issues in the case, the court agreed with the SRO and affirmed the private

126 *Id.* at *13–17.
127 3 A.D.3d 821, 824 (N.Y. App. Div. 2004).
128 *Id.* at 822.
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.* at 823.
135 *Id.*
136 *Id.* at 824.

school as the student's pendency placement going forward.[137]

3. Marcus I. ex rel. Karen I. v. Department of Education

While it recognized the effect of a judicial decision on a school district's future pendency obligation, the Ninth Circuit rejected the argument that this interest presented a live controversy in *Marcus I ex rel. Karen I. v. Department of Education.*[138] The student had attended a private school since 2001.[139] For the 2007–08 school year, the school district recommended a residential placement for the student.[140] The parent objected and filed a due process complaint notice.[141] The sole issue in the due process complaint notice was whether the residential program constituted, as required by the IDEA, the student's least restrictive environment (LRE).[142] An IHO rejected the parents' claims and held that the recommended placement was the LRE.[143]

In a decision dated May 23, 2011, the Ninth Circuit indicated that the issue of whether a residential placement represented the LRE for the student during the 2007–08 school year was moot.[144] The court noted that the IEP developed for the subsequent 2008–09 school year reversed course and recommended placement in a public school.[145] This led the court to conclude that the school district "apparently no longer believe[d] that [the student] need[ed] a highly restrictive residential program."[146] Further, the court noted that the student "remained at [the private school] pursuant to the IDEA's stay-put provision" and did not enroll in the

[137] *Id.* In a footnote, the court acknowledged that this could produce a curious result as, at the time of the court's decision, the student no longer attended the private school in question. *Id.* at 824 n.2.

[138] 434 F. App'x 600, 601 (9th Cir. 2011). Strictly speaking, *Marcus I* is a partially-paid tuition reimbursement case. Before the district court, the parents complained that the district was responsible for the costs of the student's education at the private school and had not issued payment. The court found that it did not have jurisdiction to entertain this claim as it was not raised in the parents' due process complaint notice. Marcus I. ex rel. Karen I. v. Haw., Dep't of Educ., No. 08–00491 DAEBMK, 2009 WL 3378589, at *10 (D. Haw. Oct. 21, 2009). The Ninth Circuit affirmed. *Marcus I.*, 434 F. App'x at 602. Nevertheless, *Marcus I* is a paid tuition reimbursement claim in substance notwithstanding the district's alleged failure to satisfy its pendency obligations.

[139] *Marcus I.*, 2009 WL 3378589, at *1 (district court decision).

[140] *Id.* at *2.

[141] *Id.* at *3.

[142] *Id.* at *3. It is unclear whether the parent requested an award of tuition reimbursement. *See id.* However, given the student's pre-existing pendency entitlements, *Marcus I.* is nevertheless relevant to the issue discussed in this section.

[143] *Id.* at *3, *5–7.

[144] Marcus I ex rel. Karen I. v. Dep't of Educ. 434 F. App'x 600, 601 (9th Cir. 2011) (Ninth Circuit decision).

[145] *Id.*

[146] *Id.*

residential program.[147] Therefore, according to the court, it was "unclear what effect any decision by this court would have on the parties."[148]

The parent specifically argued that the appeal was not moot because "it would affect whether the [school district] allow[ed] him to remain at [the private school] pursuant to the stay-put provision."[149] The Ninth Circuit rejected the argument that the pendency provision "guarantee[d] a child the right to remain in any particular institution once proceedings have concluded."[150] Even more to the point, the court stated that:

> [T]he fact that dismissing an appeal as moot would remove a child from the protection of the stay-put provision cannot in and of itself create a live controversy, as the stay-put order will lapse however the litigation concludes.[151]

C. Attorneys' Fees

Because it can be the driving force in pursuing otherwise moot claims, it is necessary to offer a final note on the applicability of mootness to an attorneys' fee determination. As noted above, parents may recover their attorneys' fees if they are deemed prevailing parties in IDEA litigation. This includes fees expended at both the administrative and judicial level. If a court declares a dispute moot because it was paid for under pendency, attorneys' fees related to the court proceeding—i.e., the proceeding where the dispute was deemed moot—will not be recoverable.[152] A judicial determination of mootness, however, does not otherwise affect a party's prevailing party status.[153] Courts have reasoned

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[147] *Id.* at 602.

[148] *Id.*

[149] *Id.* The parent characterized this as a "collateral legal consequence." *Id.*

[150] *Id.*

[151] *Id.*

[152] O'Shea v. Bd. of Educ. of Poughkeepsie City Sch. Dist., 521 F. Supp. 2d 284, 291 (S.D.N.Y. 2007); *see* M.S. *ex rel*. M.S. v. N.Y.C. Dep't of Educ., 734 F. Supp. 2d 271, 273 (E.D.N.Y. 2010); D.C. v. Jeppsen *ex rel*. M.J., 468 F. Supp. 2d 107, 113 (D.D.C. 2006); *see also* Buckhannon Bd. and Care Home, Inc. v. W. Virginia Dep't of Health and Human Res., 532 U.S. 598, 605 (2001). For a useful general discussion of prevailing party status under the IDEA, *see* A.R. *ex rel*. R.V. v. N.Y.C. Dep't of Educ., 407 F.3d 65, 75 (2d Cir. 2005).

[153] For example, in J.S. *ex rel*. Z.S. v. Carmel Cent. Sch. Dist., 501 F. App'x 95, 97–98 (2d Cir. 2012), a May 2009 IHO decision found that the parents were entitled to tuition reimbursement for the 2007–08 school year. *Id.* at 97. This school year had been paid through pendency. *Id.* The SRO deemed the appeal moot. *Id.* The District Court awarded fees for the IHO proceedings but did not award "any fees incurred in drafting" the documents submitted to the SRO, J.S. ex rel. Z.S. v. Carmel Cent. Sch. Dist., No. 7:10 CV 8021(VB), 2011 WL 3251801, at *6–8 (S.D.N.Y. July 26, 2011). The District Court also awarded attorneys' fees connected with the District Court action even though neither party appealed the SRO's decision because "[d]espite due demand, [the school district] . . . refused to pay any attorneys' fees or costs incurred by plaintiffs. . . ." *J.S.*, 2011 WL 3251801, at *2. Without discussion of the effect of the SRO's mootness determination (or whether mootness may be applied in an administrative context), the Second Circuit declared the parents prevailing parties and upheld the District Court's determination. *J.S.,* 501 F. App'x at 98–99.

that a decision giving rise to prevailing party status must "alter the legal relationship between the parties," and the parties' legal rights with regard to a paid and expired school year could not possibly be altered by a judicial decision. Additionally, it bears mentioning that, as seen in *M.S.*, attorneys' fees do not render an otherwise moot action justiciable.[154]

V. RESOLVING THE CONFLICT: A PROPOSED AMENDMENT

Faced with the issue of whether a paid tuition reimbursement case is moot, the above cases have reached varied conclusions. A review of these decisions reveals that there is no satisfactory resolution to this problem under current law. The argument for mootness correctly recognizes that a dispute is moot if the complaining party received all of the relief he or she requested. However, it turns a blind eye to the advantageous circumstances that a mootness dismissal can bestow upon parents intent upon educating their children in private schools. Both exceptions to the mootness doctrine discussed above address this inequity, but ignore the fact that satisfaction of a plaintiff's requested relief (i.e., tuition reimbursement) leaves nothing for a court to adjudicate. Therefore, I propose an amendment to the IDEA that would reconcile the conflict between pendency and mootness. Given the jurisprudential (and, in federal court, Constitutional) roots of the mootness doctrine, change must lie with pendency.

I contend that the pendency provision should be amended to address paid tuition reimbursement claims and provide an incentive for students to remain in the public school system. Specifically, school districts should be afforded an opportunity to implement students' pendency placements within a public school.[155] School districts interested in pursuing this option would be required to submit a written letter to parents that identifies the student's then-current educational placement and offers to implement it in a public school by the start of the upcoming

[154] *M.S.*, 734 F. Supp. 2d at 273, 281; *see* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990) ("[an] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim. . ."); M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 857 (9th Cir. 2014), *as amended* Oct. 1, 2014 ("[t]he existence of an attorneys' fees claim . . . does not resuscitate an otherwise moot controversy."), *quoting* Cammermeyer v. Perry, 97 F.3d 1235, 1238 (9th Cir. 1996); *see also* Spirit of the Sage Council v. Norton, 411 F.3d 225, 229 (D.C. Cir. 2005).

[155] This approach is consistent with the Second Circuit's approach in T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 172 (2d Cir. 2014). In *T.M.*, the district offered to implement summer services that were currently provided by private providers. *Id.* at 171–72. The parents declined, preferring the "stability and consistency" of the private services. *Id.* at 172. The Second Circuit reversed this determination and stated that "the IDEA does not bar [a school district] from subsequently correcting its mistake and offering to provide the required pendency services directly." *Id.* at 171.

school year. If accepted by a parent, the school district would be required to implement this program at the start of the school year or as soon as reasonably possible. If a school district failed to implement this pendency placement or chose to forego this procedure entirely, it would remain responsible for the private tuition under current pendency doctrine.

Should parents refuse a school district's offer, they would remain free to proceed to an impartial hearing. However, the school district would not be responsible for private tuition costs as the proceeding unfolded. To the extent this forces a parent to choose between accepting a deficient IEP or accepting financial risk by enrolling the student in a private school, this dilemma is already being faced by parents who cannot take advantage of private school pendency. The current pendency arrangement singles out a subset of parents for financial advantage and condemns the rest to financial risk. If some parents must "unilaterally change their child's placement during the pendency of review proceedings . . . at their own financial risk," it is unclear why others are absolved from this requirement based on a prior administrative victory.[156]

This amendment eliminates the mootness problem. If a parent accepted a school district's offer of public implementation, the parent could not request tuition reimbursement for that school year because the student was in a public school. If a parent rejected the offer, he or she would not be entitled to funding from the school district during administrative and judicial review by the terms of the amendment. And if the school district did not utilize this procedure, its future pendency obligation would not be a relevant factor in a mootness analysis because it could utilize the written notice option to avoid these costs in the following year.[157] This amendment would additionally clarify the meaning of "placement" in the pendency context.[158]

Proposed language for this amendment follows. For consistency, the proposed amendment uses "school district" where the IDEA would use "local educational agency."

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[156] Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 373–74 (1985). *Burlington* held that parents do not waive their right to tuition reimbursement when they unilateral place a child in a private school. The school district's argument to the contrary was based upon the language of the pendency provision. *See id.* at 370–72.

[157] This approach does not eliminate all the ambiguities or problems associated with pendency. For example, an IHO would have to determine whether a school district's offer of a similar but not identical program would allow it to take advantage of this written notice provision.

[158] T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009); James v. D.C., No. 12–376(RJL), 2013 WL 2650091, at *3 (D.D.C. June 9, 2013).

A. Current Educational Placement Where Student Attends a Private School at Public Expense

(a) This section shall apply to students who, as the result of an administrative or judicial determination that a school district failed to make FAPE available and that a private school was appropriate, currently attend a private school at public expense.

(b) If a parent files a due process complaint notice and the circumstances described above in paragraph (a) are present, the student's then-current educational placement shall refer to his or her educational program and not a physical location.

(c) If the parent rejects a written offer submitted by the school district ten (10) days after the filing of a due process complaint notice whereby the school district offers to implement the student's then-current educational placement in a public or state-approved nonpublic school, the school district shall not be responsible for the student's tuition costs during administrative or judicial review pertaining to the aforementioned due process complaint notice.

(i) The written offer described in paragraph (c) above shall identify the student's then-current educational placement which shall include, but shall not be limited to, the classroom type (e.g., regular or special classroom), student to teacher ratio, frequency and duration of related service sessions, supplementary aids and services, and any services, devices, or plans pertaining to special factors.

(ii) If the parent accepts the written offer described in paragraph (c) above, the school district must implement the offered placement at the start of the school year or as soon as reasonably possible. If a school district fails to implement this placement, the school district must pay the student's tuition at a private school during the pendency of administrative and/or judicial review when and until the due process complaint is resolved.

(iii) If a school district fails to implement the program outlined in its written offer within a reasonable period of time, a parent may resort to the due process procedures outlined in part (f) of this Section.

(iv) If information as to the student's then-current educational placement is not available to the school district and the parents do not respond to reasonable requests for this information, an impartial hearing officer may take this into account in determining whether a school district shall be responsible for the student's tuition costs during administrative or judicial review.

(d) Nothing in this section shall affect a parent's right to reimbursement for private tuition expenses if an administrative or judicial official

concludes that a school district failed to make FAPE available and that the services unilaterally obtained by the parent were appropriate.

VI. CONCLUSION

No court has been able to satisfactorily resolve whether paid tuition reimbursement claims are moot. This is due to the irreconcilable relationship between tuition reimbursement, mootness, pendency, judicial interpretations of these concepts. Therefore, this article proposes an amendment to the IDEA's pendency provision that would solve this problem. Under this approach, a greater number of cases would be deemed moot. This would not favor parents or school districts—it would simply favor whoever was the victor at the administrative level. It would, however, conserve judicial resources which, at present, are being used to decide what otherwise appear to be moot cases. Mootness is a judicial imperative that should be respected by amending the IDEA to prohibit the consideration of moot paid tuition reimbursement claims.[159]

[159] *See* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990).