The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-225

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, 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. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found the district failed to offer the student a free appropriate public education (FAPE) and ordered it to provide direct funding for respondent's (the parent's) unilaterally-obtained services for the 2023-24 school year. The appeal must be sustained, and, for reasons set forth below, the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

This proceeding, as well as eight similar proceedings like it challenging similar decisions by the same IHO, were recently filed with the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 24-223; Application of the Dep't of Educ., Appeal No. 24-229). Given

the limited nature of the appeal and the procedural posture of the matter—namely that the only evidence in the hearing record is two documents admitted during a pendency hearing and an interim order directing the CSE to conduct a psychoeducational evaluation—there was no evidentiary hearing held on the merits of the parties' claims. Accordingly, the description of the facts and educational history of this student is limited to the allegations in the parent's due process complaint notice and the student's August 2017 IESP, upon which a pendency determination was based (Parent Exs. A-B).

A CSE convened on August 18, 2017 to develop an IESP for the student with an implementation date of September 7, 2017 (Parent Ex. B at pp. 1, 8). The August 2017 CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in English delivered at a separate location and two 30-minute sessions of individual speech-language therapy per week in English at a "[s]eparate location therapy office" (id. at p. 6).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated September 7, 2023, the parent alleged that the district denied the student a FAPE by failing to convene a CSE meeting to review and update the student's program and services for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the last program developed for the student was the August 2017 IESP (id.). According to the due process complaint notice, the August 2017 IESP recommended that the student receive five periods per week of group SETSS and two 30-minute sessions of individual speech-language therapy per week (id. at pp. 1-2). The parent contended that the district did not assign providers for the services it recommended for the student or take steps to implement the services (id. at p. 2). The parent also argued that the district had improperly and impermissibly shifted its responsibility to provide the services to the student onto the parent (id.). The parent alleged that, in preparing for the 2023-24 school year, she was unable to locate providers to deliver services to the student at the district's rates and had no choice but to retain the services of a private company to provide the mandated services at an "enhanced rate" (id.). The parent further alleged that she was giving the district notice that, if it did not fulfill its obligations to the student, she would take unilateral action to implement the services necessary for the student and would request funding from the district for such services obtained (id.). The parent then acknowledged that the district had "the right to implement all necessary services directly, through its own providers and support personnel" (id.). Finally, the parent invoked the student's right to receive pendency services (id.). As relief, the parent requested a pendency hearing and order; an award of funding for five periods per week of group SETSS and two 30-minute sessions of individual speech-language therapy per week for the 2023-24 school year at enhanced rates; and a bank of compensatory education services to make-up for any mandated services not provided by the district (id. at p. 3).

[1] 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.

B. Impartial Hearing and Impartial Hearing Officer Decisions

An IHO was appointed to the matter and on October 16, 2023, a pendency hearing was held which only the parent's attorney attended (Tr. pp. 1-8).[2, 3] Two exhibits were admitted into evidence (Parent Exs. A-B). In an interim decision on pendency dated October 16, 2023, the IHO ordered the district to provide the student with "services consistent with" the August 18, 2017 IESP, including "five periods per week of group SETSS and related services for the duration of this pendency agreement" (Oct. 16, 2023 Interim IHO Decision at p. 4).

On the same day, October 16, 2023, the IHO issued another interim decision, this one ordering the district to "conduct a psychoeducational evaluation and any other evaluation deemed necessary within sixty calendar days of the date of this order" and for the CSE to convene "7 calendar days thereafter for the purpose of developing an IESP for the [s]tudent, incorporating the findings of the just completed evaluation(s)" (IHO Ex. I).

A prehearing conference was held on November 9, 2023 which only the attorney for the district attended (Tr. pp. 9-18). The IHO informed the attorney for the district that he had issued a pendency order and "an order for an evaluation" (Tr. p. 11). Six status conferences were held thereafter on December 4, 2023, December 20, 2023, January 18, 2024, February 12, 2024, February 17, 2024 and March 14, 2024 (Tr. pp. 19-77). Only the parent's advocate and the IHO appeared for the December 20, 2023 and January 18, 2024 status conferences (Tr. pp. 26-33, 34-48).

At the December 4, 2023 status conference the parent advocate and the attorney for the district appeared and the parent's advocate informed the IHO that there had been no resolution offer yet from the district (Tr. pp. 20-21). The attorney for the district informed the IHO that the order for an evaluation was "part of the system" but he did not know what the status of the evaluation was beyond that (Tr. pp. 20-21). The IHO set a further status conference date for an update on the evaluation of the student (Tr. 21-24). During the February 12, 2024 and February 27, 2024 status conferences, the parent's advocate and attorney for the district appeared to discuss the status of the student's reevaluation (Tr. pp. 49-66). During the March 14, 2024 status conference, both the parent's lay advocate and the attorney for the district appeared in order to give an update to the IHO concerning the status of the reevaluation of the student (Tr. pp. 68-71). The parent's advocate stated that the parent had given consent for the student to be evaluated, an evaluation had been scheduled for February 1, 2024, and she "assum[ed] that it was probably done, completed" (Tr. p. 70-71). The IHO requested that the parent's advocate and the attorney for the district both obtain confirmation as to whether the evaluation had been conducted and the status

[2] Prior to the hearing on pendency, the IHO issued an interim decision dated October 11, 2023, wherein he sua sponte struck paragraphs which he had found objectionable from the notice of appearance for the district's attorney (October 11, 2023 Interim IHO Decision at p. 6).

[3] An attorney appeared on the parent's behalf for the pendency hearing; thereafter, a lay advocate appeared for six status conferences. Neither an attorney nor a lay advocate appeared for the parent at the November 9, 2023 prehearing conference (see Tr. pp. 1-77). The district has not challenged the pendency order in its appeal.

of any evaluation report or CSE meeting (Tr. p. 71-72) and he set a new status conference date of May 8, 2024 with the compliance date extended to May 20, 2024 (Tr. 76).

In a final decision dated April 28, 2024, the IHO stated "[a] hearing did not go forward as it [wa]s unnecessary due to a lack of any controversy" and that the compliance date had been extended (IHO Decision at p. 3).

Next, the IHO determined that the district's failure to implement the student's program; evaluate the student; and develop a new IESP for the 2023-24 school year denied the student a FAPE (IHO Decision at p. 3). Then, the IHO noted the district did not initially "reevaluate the [s]tudent as was its obligation pursuant to its [c]hild [f]ind mandate," and although the district had since completed the student's reevaluation, it had not "finished developing the [s]tudent's new IESP" despite the IHO's October 2023 interim order and the failure "added to the already considerable delay in this case" (id. at pp. 3-4). The IHO then determined that "[n]o [j]usticiable [c]ontroversy [e]xist[ed]" due to the district having the burden to implement the student's August 2017 IESP and failing to do so (id. at p. 4). The IHO further found that there was no evidence in the hearing record that the parent obstructed or was uncooperative with the district's efforts to meet its obligations, and that the district could not delegate its burden to locate a provider onto the parent (id.). Next, the IHO found that because a private school need not employ certified special education teachers, the district was "precluded from raising the issue of the SETSS or other provider's certification as a bar to recovery" (id. at p. 5). The IHO further found that the district was "equitably barred from objecting to the rate of payment for services due to its nonfeasance" and noted that the district had "unclean hands" (id.). The IHO determined that, because the district failed to evaluate the student and thereafter develop a new IESP as directed pursuant to his October 16, 2023 interim order, the district was "barred from raising the June 1 putative bar to recovery even if perchance, [the p]arent did not meet her notification requirements" (id. at pp. 5-8). Next, the IHO determined that the parent was not required to prove her inability to pay and was entitled to direct payment to the student's service providers (id.). Then, the IHO addressed the parent's request for compensatory education for services not implemented during the 2023-24 school year noting the requested relief was predicated upon the quantitative method and was undisputed by the district (id. at p. 11). The IHO determined that "[t]he [p]arent established that a compensatory education award [was warranted consisting] of the following services that have not yet been implemented for the 2023-2024 10 SY; SETSS, 5 x 60 min per week, English, SLT 2 X 30 min per week, English, based on the quantitative method, to be used over the next two years" (id.).

The IHO then ordered relief based on a finding that the district failed to offer the student a FAPE for the 10-month 2023-24 school year by failing to "implement the undisputed program contained in the 2017 IESP" and by "failing to reevaluate [the s]tudent and develop an IESP for him for the 10 month 2023-2024 school year" (IHO Decision at p. 11). The IHO ordered the district to pay the parent's SETSS provider at their contracted rate upon presentation of the "applicable attendance records and invoices," further ordering that the district was "prohibited and barred as a matter of equity and as a direct result of its nonfeasance in implementing the [s]tudent's program, from attempting to apply a uniform rate of one hundred twenty five dollars an hour for each and any service" (id. at pp. 11-12). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's twelve month 2023-2024 school year, the same service set forth above at the same rate of pay and frequency" and again noted that the district was prohibited and barred from paying $125 dollars an hour for "each and

any service" (id. at p. 12). The IHO also awarded "a bank of compensatory education of the following services that have not yet been implemented for the 2023-2024 [10-month school year]; SETSS, 5 x 60 min per week, English, SLT 2 X 30 min per week" that would be "good for two calendar years" and that the provider was authorized to be paid at a rate not to exceed $300 dollars per hour for each service (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in failing to allow the parties to develop the hearing record and denied the district its right to due process. The district asserts that due process requires a full hearing before an IHO makes a substantive determination on the parent's claims. The district contends that there was no evidence in the hearing record of the district conceding that it denied the student a FAPE or that the district waived any affirmative defenses or agreed that the parent had satisfied her burden of demonstrating the appropriateness of her unilaterally-obtained SETSS or speech-language therapy. The district also argues that the IHO improperly failed to provide notice to the parties that he intended to issue a final decision without holding an impartial hearing on the merits. The district further asserts that the IHO erred in finding that there was no justiciable case or controversy and that the district was barred from raising any defenses at the impartial hearing. The district argues that there was no evidence that the parent provided a June 1 notice and thus, no basis to conclude that the district failed to provide equitable services for the 2023-24 school year. The district also argues the IHO erred in determining that its failure to fully comply with his October 2023 interim order constituted a bar to raising the June 1 affirmative defense. The district further contends that issues related to the appropriateness of the unilaterally obtained services and equitable considerations under the Burlington/Carter analysis also remain justiciable. The district alleges that the IHO's erroneous assertions shifted the parent's burden onto the district and improperly barred the district from raising equitable considerations. The district asserts that the issue of appropriate relief remains a justiciable issue. Finally, the district argues that the IHO improperly issued the October 2023 interim order for evaluations sua sponte and that such interim order should be vacated. As relief, the district requests that both the IHO's December 2022 interim order and final decision be vacated and that the matter be remanded for a full and complete hearing.

The parent did not file an answer in response to the district's request for review.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Conduct of the Impartial Hearing

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]).

[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web-based versions.

Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

1. October 16, 2023 Interim Decision

Initially, the district is correct in its assertion that the IHO erred in ordering the district to evaluate the student in his October 16, 2023 interim decision.

While an IHO may order an independent education evaluation (IEE) as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]), the IHO in this instance made it clear that his October 2023 interim decision was not directing the district to fund an IHO ordered IEE and was instead a direction for the CSE to conduct a reevaluation of the student (Tr. p. 15; IHO Ex. I).

The appropriate way to determine whether the student had been timely evaluated was 1) through a stipulation of fact by both parties, which did not occur in this case, or 2) through an evidentiary hearing, which also did not occur.

In the October 16, 2023 interim decision ordering a reevaluation of the student, the IHO stated that the parent's attorney had informed him that the last evaluation of the student had been performed over three years ago and was overdue. The IHO further stated that:

> [p]arent now seeks an [o]rder directing the [district] to conduct a psychoeducational evaluation and any other evaluation deemed necessary of the [s]tudent and then for [a specific CSE region within the district] to reconvene and create a new IESP incorporating the findings of the updated evaluations into a new IESP.
>
> It is uncontroverted that this IHO has discretion to fashion equitable remedies in any manner as I see fit, provided it is not ultra vires to my authority. The power to direct that an evaluation be conducted and the CSE be convened is well within my authority.

(IHO Ex. I at p. 2). These points in the interim decision were erroneous. The administrative record is bereft of any request by the parent to have the district reevaluate the student. Pertinently, the due process complaint notice did not include any allegations related to an evaluation of the student; in fact, as part of a cover sheet attached to the due process complaint notice, which contained check boxes for "[i]ssues/[r]elief [r]equested" the boxes for evaluations and for independent evaluations were both unchecked Ex. A at p. 4). Contrary to the IHO's statements in the interim decision, there is not unlimited authority for an IHO to order a CSE to reevaluate a student at any time, especially in the absence of a request for an evaluation by the parent, an evidentiary hearing, or the agreement of the district. In fact, in ordering a reevaluation as opposed to an IEE, the IHO appeared to have been attempting to circumvent the notice and consent process, as he indicated notice would be required for an IEE, but not for a reevaluation (see Tr. p. 15); however, it is worth noting that this was also in error, as a district must "make reasonable efforts to obtain informed consent of the parent . . . prior to conducting an initial evaluation or reevaluation" (8 NYCRR 200.5[b][1][i]). Overall, the IHO's factual assumptions, hearing procedures, and legal analysis were unsound, and the district is correct that the IHO erred in the interim order. Accordingly, the IHO's interim decision dated October 16, 2023 must be vacated.

2. June 1 Defense

Next, with regard to the IHO's determination that the district was barred from asserting a June 1 notice defense, the State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

In finding the June 1 deadline "irrelevant," the IHO appears to have determined that that any failure to convene the CSE annually to develop an IESP for the student, necessarily results in a finding that the district denied the student a FAPE (IHO Decision at pp. 5-6). In this matter, although the parent's due process complaint notice requested a finding that the district denied the student a FAPE as well as equitable services for the 2023-24 school year, all of the relief requested by the parent was related to equitable services for a parentally placed student (see Parent Ex. A at pp. 3, 4). Accordingly, rather than barring the district from raising a defense to equitable services, such as the June 1 deadline, the IHO could have conducted a prehearing conference to more accurately identify the issues for the hearing (see 8 NYCRR 200.5[j][3][xi[a]).

Critically, an assessment of whether or not the parent complied with the June 1 notice deadline, or whether the district denied the student a FAPE, would require the IHO to have conducted a fact based analysis with the development of an evidentiary record. However, the IHO failed to hold an evidentiary hearing and there was no opportunity for either party to develop an evidentiary record. Accordingly, the IHO's holding that the district was barred from raising the June 1 deadline must also be vacated.

Moreover, to the extent the IHO barred the district from raising a June 1 defense based on noncompliance with his October 2023 interim order directing the district to evaluate the student and thereafter convene a CSE meeting, the decision was also issued prior to the May 8, 2024 status conference where the district and parent were directed to report back on the status of the district's

compliance with the IHO's interim order after the parent's advocate had represented, at the prior March 14, 2024 status conference, that she believed the student's evaluation had gone forward on February 1, 2024 (Tr. 71-72).

3. Justiciability Determination

Although not raised at any of the eight hearing dates, the IHO for the first time in his final decision, determined that a "justiciable controversy" was not present in this matter (IHO Decision at p. 4). Justiciability addresses whether a court, or in this instance, an administrative tribunal, should intervene in deciding a question that has come before it and is an umbrella term of art for a number of doctrines such as mootness, ripeness, advisory opinions, adjudication of a political question only, and standing (see Flast v. Cohen, 392 U.S. 83, 94–95 [1968]; Renne v. Geary, 501 U.S. 312, 320–21 [1991]). If one of the doctrines applies and the case is not justiciable because, for example, the case has been rendered moot, then the appropriate course of action is to dismiss the matter without addressing the question.

In this case, IHO erred by declaring there was no justiciable controversy and, on that basis, ordering relief on the merits in the absence of any evidentiary hearing at all. The parent's claims are justiciable, because the parent adequately alleged a cognizable injury, including that the district failed to develop appropriate special education programming for the student for the 2023-24 school year, had standing to seek redress due to the alleged failure of the district to provide special education services to the student, and the case neither lacks ripeness nor is moot based on the limited information available in the administrative record (see Parent Ex. A). For all of the foregoing reasons, the IHO's finding as to justiciability was at best misplaced and must be vacated.

4. Remand

As a result of the forgoing errors of the IHO, I find the IHO's process in this matter failed to comport with standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]) and, furthermore, the procedures relied on by the IHO were not consistent with the requirements of due process (34 CFR 300.514[b][2][ii]). In summary, with no evidentiary hearing at all and without providing the district an opportunity to be heard, the IHO made presumptions that facts alleged by the parent in the due process complaint notice were true, used an irrational basis to make factual findings that the student had not been evaluated, and precluded the district from asserting a June 1 defense without determining whether such a defense was applicable to the parent's claims. As discussed above, the IHO denied the parties due process by ordering relief on an interim basis without legal justification, in issuing a final decision prior to the commencement of a hearing on the merits of the parties' dispute, in issuing a final decision prior to a scheduled status conference without providing notice to the parties, in barring a party from raising an affirmative defense prior to the start of the hearing, and in awarding relief after finding that there was no justiciable controversy.

Due to the infirmities in the hearing process, there is no recourse but to vacate the IHO's interim decision dated October 16, 2023 and his final decision dated April 28, 2024.

VII. Conclusion

The IHO may have had some valid concerns to raise with the parties during this proceeding. However, as described above, the IHO failed to conduct the impartial hearing in accordance with the requirements of due process. As a result, the matter must be remanded to conduct an evidentiary hearing. Multiple proceedings were recently filed with the Office of State Review with similar conduct by the same IHO, and in my view, it would be ill advised to remand the matter to the same IHO in this instance. Accordingly, I will direct that the matter be remanded to a new IHO.

I have considered the district's remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the interim decision of the IHO dated October 16, 2023 is vacated; and

IT IS FURTHER ORDERED that the decision of the IHO dated April 28, 2024 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to a different IHO to conduct an impartial hearing and issue a decision after both parties have been afforded a reasonable opportunity to be heard and upon an evidentiary record that has been adequately developed.

Dated: **Albany, New York**
July 5, 2024

STEVEN KROLAK
STATE REVIEW OFFICER