The University of the State of New York

The State Education Department
State Review Officer
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No. 24-229

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, Counsel, attorneys for petitioner, by Shoshana Kravitz, Esq.

DECISION

I. Introduction General

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 the 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 and awarded the student a bank of hours of compensatory education. 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

New York City Dep't of Educ., Appeal No. 24-223). Given the limited nature of the appeal and the procedural posture of the matter, especially, when no evidentiary hearing was held on the merits of the parent's 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 a November 2020 IESP, upon which a pendency determination was based (Parent Exs. A-B). [1]

A CSE convened on November 5, 2020 to develop an IESP with an implementation date of November 19, 2020 and a projected annual review date in May 2021 (Parent Ex. B at p. 1). The November 2020 CSE found the student eligible for special education as a student with a learning disability and recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in English and delivered in a separate location, and one 30-minute session per week of individual counseling services at a separate location (id. at pp. 1,6). [2, 3]

A. Due Process Complaint Notice

By due process complaint notice dated September 8, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) by failing to develop and implement a program of 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 a November 5, 2020 IESP (id.). According to the due process complaint notice, the November 2020 IESP recommended that the student receive five "time(s) per week" of group special education teacher support services (SETSS), and "one time(s) per week individual counseling services (id. at p. 2). The parent contended that the district did not supply providers for the services it recommended for the student and failed to inform the parent how the services would be implemented (id.). The parent also argued that the district had improperly and impermissibly shifted its responsibility to provide the services to the student onto the parent who was required to locate providers (id.). The parent alleged that in preparing for the 2023-24 school year, she was unable to procure a provider for the school year at the district's rates and had no choice but to retain the services of an agency to provide the mandated services at enhanced rates (id.). The parent further notified that district that if it did

[1] The exhibits submitted by the parent were not admitted into the record by the IHO during the pendency hearing as they were "marked for identification" and indicated as "unopposed" in the interim pendency order (Tr. p.13). Moreover, District's Exhibit 1 was neither offered into evidence during the pendency hearing or during any subsequent status conference, nor was it offered for identification (Tr. pp. 1-99). It appears the IHO marked and admitted the document without telling the parties the context of his October 6, 2023 interim order for which no hearing was held and no transcript was taken (see IHO Interim Order dated October 6, 2023 at p. 7). The district filed an "Amended Certification" including both of parent's exhibits. Neither certification addresses the discrepancy with the district's exhibit only to state that "We have transmitted the exhibits exactly as submitted and certified by the Hearing Officer." (Dist. Amended Cert. of the Record at p. 2).

[2] The student's eligibility for special education as a student with learning disability is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] 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.

not fulfill its obligations to the student, she would take unilateral action to implement the necessary services for the student and would request funding from the district for such services obtained (id.).

The parent sought an order of pendency to "fund" the student's current educational placement and, further, sought a declaration that the district failed to provide the student with a FAPE as well as with equitable services (id. at p. 3). As additional relief, the parent requested an award of funding for five "time(s) per week" of group special education teacher support services (SETSS), and one "time(s) per week" individual counseling services at enhanced rates for the 2023-24 school year; an allowance of funding for payment to the student's provider/agency for SETSS and counseling services at enhanced rates for the 2023-24 school year, an award of all related services set forth on the student's last IESP for the 2023-24 school year and a bank of compensatory education services to make-up for any mandated services not provided by the district (id.).

B. Impartial Hearing and Decisions

On October 16, 2023, the parent's attorney, a representative from the district,[4] and the IHO convened for a pendency hearing (Tr. pp. 1-17). Two exhibits were offered into evidence, although never formally admitted during the hearing, because the district representative had not had an opportunity to see them was provided time to lodge any objections (Parent Exs. A-B; see Tr. p 14). In an interim decision on pendency dated October 16, 2023, the IHO ordered the district to provide the student with "services consistent with" the November 2020 IESP, which consisted of five periods per week of SETSS and related services "for the duration of this pendency agreement" (Oct. 16, 2023 Interim IHO Decision at p. 4).

During the October 16, 2023 pendency hearing, the IHO asked who the parent had obtained private services from and the parent's attorney disclosed that it was "Edopt" (Tr. p. 4). The IHO and parent's attorney engaged in a colloquy on the record and the parent's attorney remarked that the student was last evaluated on October 21, 2020 and the IHO then asked the district representative whether she believed the student's evaluation was overdue (Tr. p. 5). The IHO further stated that he was going to issue an interim order for an evaluation and for the CSE to reconvene and develop a new IESP based on the new evaluative information (see Tr. p. 5-9). The district representative stated that she was looking at the student's January 31, 2023 IESP and, because the recommended services were the same as the November 2020 IESP, she did not contest the description of the pendency programming (Tr. p. 13). The IHO issued an interim 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)" (Oct. 16, 2023 Interim IHO Decision at p. 3; see IHO Ex. I).

A prehearing conference was held on November 2, 2023, at which both parties appeared and the IHO denied a request from the district for a subpoena related to Edopt (Tr. pp. 19-40). During a December 1, 2023 status conference, the district's attorney indicated that the IHO's ordered evaluations had not been scheduled or conducted (Tr. pp. 43-46). The district's attorney

[4] At the time, the district's representative was awaiting admission to the bar and was covering for another attorney for the district (Tr. p. 3, 8).

declined to concur with the IHO's statement that a resolution offer was inaccurate because evaluations had not been conducted (id. at p. 44). The IHO requested the district's attorney seek a resolution in the matter and appeared to question if the district would be raising the "June 1st deadline" to which the district's attorney responded "that's part of it" (id. at p. 47). At the December 1, 2023 status conference, the district's attorney made an application to have the parent appear at the hearing to verify their "aware[ness]" of the proceedings which was denied by the IHO and "struck" from the record (id. at p. 48-49).

Next, at a December 20, 2023 status conference, the district's attorney confirmed that the student had been scheduled for a psychological "reevaluation" on January 16, 2024 (id. at p. 58.). At a January 23, 2024 status conference, the IHO confirmed with the district's attorney and the parent's lay advocate that the student had been evaluated on January 16, 2024 (id. at p. 65). At a March 13, 2023 status conference, the parties and IHO took note that a CSE meeting was scheduled for March 21, 2024 (Tr. p. 78).

During a status conference on April 17, 2024, the IHO confirmed that the district held a CSE meeting on March 21, 2024 where an IESP was developed with an implementation date of March 25, 2024 that contained a recommended program of six periods of SETSS with no counseling (id. at p. 87). The parent's advocate represented at the conference that "[she] believed the parent agree[d] with [the recommendation]" (id. at p. 88). The district's attorney requested a hearing and refused to consent to any further status conferences and indicated it would be arguing the parent did not comply with the June 1 deadline under Education Law § 3602-c (id. at pp. 90-94). The IHO "overruled" the district attorney's objection to any further status conferences and scheduled a subsequent status conference for May 6, 2024 (id. at p. 98).

In a decision dated April 28, 2024, the IHO recounted that the final status conference in the matter occurred on April 17, 2024 and "[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 found that the district had failed to "reevaluate the Student as was its obligation pursuant to its Child Find mandate and [he] issued an order dated October 16, 2024" requiring the student to be reevaluated and develop a new IESP (id. at pp. 3-4). The IHO stated further that "upon information and belief" the district had completed the reevaluation but had not "finished developing the [s]tudent's new IESP despite [his] issuing [an] order back on October 16, 2023 (id. at p. 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 November 2020 IESP and its failure to do so (id.). The IHO further found that the district was "equitably barred" from objecting to the rate of payment for services "due to nonfeasance" and on the basis that the district had "unclean hands" (id.).[5] Next, the IHO determined that the district was barred from raising the June 1 notice requirement as it had disregarded his prior order and failed to either reevaluate the student or develop a new IESP even if the parent did not comply with Education Law § 3602-c (id. at pp. 5-

[5] The IHO fails to cite to any evidence in the record to which he relied in making his finding of "unclean hands." It is worth noting that no testimony was taken in any of the hearings held in this matter.

8). The IHO then held the parent was entitled to direct payment to the provider and compensatory education (id. at pp. 8-11).

The IHO 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 November 2020 IESP (IHO Decision at p. 11). The IHO ordered the district to pay the parent's providers at their contracted rates "that have been retained in accordance with the mandate contained in the 2020 IESP" upon provision of the applicable attendance records and invoices (id. at p. 11). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's ten month 2023-2024 school year, the same services set forth above at the same rate of pay and frequency," upon presentation of the applicable invoices and attendance records (id. at 12.). The IHO ordered that district was prohibited and barred from charging $125 dollars an hour for SETSS (id.).

The IHO stated that the parent requested compensatory education and that the district failed to introduce evidence to bar such an award (IHO Decision at p. 9). The IHO held that "[t]he [p]arent established that a compensatory education award for the SETSS and [c]ounseling up to the extent they have not been provided and consistent with the program contained in the November 5, 2020 IESP, all on a twelve month basis based on the quantitative method, to be used over the next two years" (IHO Decision at p. 11). Without specifying any quantity, the IHO awarded the student a bank of compensatory education for unimplemented services for the 10-month, 2023-24 school year, which consisted of group SETSS and individual counseling services to be delivered by the parent's chosen providers at a rate not to exceed $300 per hour for counseling and $195 for SETSS (IHO Decision at p. 12).

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 therefore 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 waived any affirmation defenses or agreed that the parent had satisfied her burden of demonstrating the appropriateness of her unilaterally obtained SETSS. 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 asserts that the parent's due process complaint notice did not contain allegations that the district failed to evaluate the student and the IHO's interim decision ordering the district to conduct an evaluation was not a concession by the district that it failed in its obligations. The district also argues the IHO erred in determining without evidence that the district's actions constituted a bar to raising the June 1 notice provision as an affirmative defense. The district also contends that the remainder of the Burlington/Carter analysis is also justiciable. The district further alleges that the IHO's erroneous assertions shifted the parent's burden onto the district and improperly barred the district from raising equitable considerations. Lastly, the district also argues that the IHO improperly

issued an award for relief that was previously withdrawn by the parent and on that basis alone the decision should be vacated. As relief, the district requests the decision be remanded for further proceedings.

The parent did not file an answer in this proceeding.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Conduct of the Impartial Hearing

Having reviewed the hearing record and the district's request for review, the district's appeal must be sustained because the impartial hearing was improperly conducted and this matter must be remanded for further proceedings.

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

Initially, the district argues that the IHO's failure to conduct a full hearing on the merits of the case violated due process, which, consistent with the requirements of federal and 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 (34 CFR 300.512; 8 NYCRR 200.5[j]). 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. 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 this case, the district's representative advised during two separate appearances that it would pursue the June 1 notice provision affirmative defense, indicating first during the October 16, 2023 pendency hearing as well as the April 17, 2024 status conference (Tr. pp. 16, 94). At the April 17, 2024 status conference the attorney for the district objected to the IHO scheduling an additional status conference, and instead, requested a hearing on the merits of the parent's claim (id. p. 94). The district's attorney stated on the record again that the district intended to raise the defense that the parent did not file a request for dual enrollment services prior to June 1, 2023 (id. pp. 94-95) The IHO responded that he was overruling the district's objection and that "by operation of law" the district had "waived the June 1st defense" and that "those claims are. . . waived or unprovable by the [district] at this point" (id. p. 95). In his decision, the IHO determined that the district's failure to evaluate the student precluded the district from raising the June 1 defense (IHO Decision at p. 5). The IHO reasoned that in his interim decision he "further directed that upon completion of the reevaluation(s) the applicable CSE was to reconvene and develop a new IESP for the [s]tudent incorporating the results of the reevaluation. The [district] has upon

information and belief, failed to act in a timely manner" (id.). The IHO's decision failed to note that the only information reported by the parties was that the evaluation had been conducted and the CSE meeting the IHO ordered had occurred (Tr. pp. 65, 87), and it bears no relationship to whether the parent requested equitable services under an IESP prior to June 1, 2023.[7]

As further reasoning in support of his determination that the district's June 1 defense was barred, the IHO relied on "Letter to Franklin 79 IDELR 23" and "Letter to Anonymous 112 LRP 526" (IHO Decision at p. 6). However, the citation "79 IDELR 23" is an error as it is a letter advising the superintendent of a California school district of the disposition of a complaint filed with the U.S. Department of Education (USDOE) Office of Civil Rights (OCR) ruling. Further, it is not relevant because it is a document that addressed group instruction of students with disabilities. Another authority purportedly from the USDOE's Office of Special Education Policy (OSEP) cited by the IHO as Letter to Anonymous 112 LRP 526 issued on March 7, 2012 does not even exist. The undersigned's research shows that an actual letter issued by OSEP from the same date, addressed two questions regarding an OSEP visit to Oregon, which is not relevant to this proceeding (Letter to Anonymous, 112 LRP 52263 [March 7, 2012][addressing tutoring time and the order of presentation of evidence during an impartial hearing]).

The IHO mentioned—but failed to include the citation—another OSEP letter that explained that a district's child find duty continues even if the student is placed by the parent in a nonpublic school (IHO Decision at p. 6). Specifically, that OSEP letter indicated that if a parent "makes clear his or her intent to keep the child enrolled in the private school, the LEA where the child's parent resides, is not required to make FAPE available to the child. However, the LEA where the child's parents reside must make FAPE available and be prepared to develop an IEP if the parent enrolls the child in public school"; while this OSEP letter was at least related to the topic of a parentally placed nonpublic school student, it does not address the June 1 deadline for dual enrollment services under State law (Letter to Wayne, 73 IDELR 263 [OSEP 2019][federal register citation omitted]). The IHO also cited to a State regulation regarding a parent, teacher or administrator's right to refer a student to the CSE for review of the student's programming (8 NYCRR 200.4 [e][4]), the federal child find obligation to locate and evaluate students to determine their eligibility for special education, and to Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., (14 N.Y.3d 289 [2010]); but the student's eligibility for special education is not in dispute and there was no allegation that the parent or anyone else referred the student to the CSE for review of an IEP or IESP for the student, and none of these authorities address the June 1 notice deadline for dual enrollment services for students who have been parentally placed in nonpublic schools. Critically, an assessment of whether or not the parent complied with the June 1 notice deadline would require the IHO to conduct a fact analysis based upon an evidentiary record. But since the IHO failed to hold an evidentiary hearing, there was no opportunity for either party to develop an

[7] The district has not challenged the IHO's interim decision directing the district to evaluate the student and convene the CSE and those events appear to have come to pass. The events post date the due process complaint notice and, while important to the student's educational programming going forward, they are not relevant to the disputed issues in this proceeding. If in fact it was created by the parties, the January 2023 IESP mentioned by the district's representative would precede the due process complaint notice and would be relevant to the parties' dispute (Tr. p. 13).

evidentiary record and the IHO's holding that the district was barred from raising the June 1 deadline must be vacated.

2. Justiciability Determination

For the first time in his final decision, the IHO indicated that the case was not a "justiciable controversy" (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.

However, in this case, the 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 and implement 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, the case neither lacks ripeness nor is moot based upon the items in the administrative record (see Parent Ex. A at p. 1). Rather than address the question of whether the parent's claims could be permissibly heard, the IHO's statement regarding justiciability appeared to be little more than a vague attack, rife with the IHO's speculation on whether the district would or should be permitted to assert defenses to the parent's claims which was an intemperate and careless misapplication of the law.

3. Direct Funding

Turning next to IHO's final determination to award direct payment to a private provider, the IHO cited to Cohen v. New York City Department of Education (2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023]) to state the conclusion, once again without any basis in an evidentiary hearing, that he could order direct funding of private services obtained by the parent (IHO Decision at p. 8). However, the Cohen case, which held that parents "are not required to establish financial hardship in order to seek direct retrospective payment," addressed only the narrow issue of proof regarding the financial hardship of a parent and did not address the question of whether an IHO should award relief and skip over the impartial hearing process. Thus, the IHO's reasoning in this aspect of his decision must be vacated due to the lack of an evidentiary record.

4. Compensatory Education

Lastly the IHO noted that the parent requested compensatory education for a denial of a FAPE for the 2023-2024 school year and ruled that the district "did not introduce any evidence whatsoever to bar such an award," and that the "the hours of compensatory education that are requested are undisputed by the [district]" (IHO Decision at p. 9). The IHO then proceeded to order the district "based on the lack of judiciable controversy," to

> pay Parent's providers that have been retained in accordance with the mandate contained in the 2020 IESP. The Parent's provider will be paid at the rate

> contracted for with the respective provider and the [district] is prohibited and barred as a matter of equity and as a direct result of its nonfeasance in implementing the Student's program, from attempting to apply a uniform rate of one hundred twenty five dollars an hour for each and any service

(IHO Decision at p. 11-12 [emphasis omitted]). The IHO then directed the district to continue to pay for private providers under the same terms described above for the remainder of the 2023-24 school year (IHO Decision at p. 12). In addition, to the retrospective and prospective funding, the IHO ordered that the

> Student is awarded a bank of compensatory education to the extent that a portion of Student's SETSS services have not been implemented for the 2023-2024 [school year]. The entire bank of hours will be good for two calendar years from the date of this [Findings of Fact and Decision] and the provider is authorized to be paid at a rate not to exceed three hundred ($300.00) dollars per hour for each service

(IHO Decision at p. 12). During the pendency hearing, the IHO inquired of the parent's attorney whether the parent had retained an agency at an enhanced rate to provide services, to which the parent's attorney replied "Edopt" and at a subsequent status conference the parent's representative confirmed that the rate being requested was $195 per hour (Tr. pp. 4, 15-16, 25); however, there is no evidence in this hearing record regarding these or any facts related to Edopt or any private services that the parent may have unilaterally obtained.

Review of the hearing record, such as it is, reflects that following the pendency hearing, neither party was given the opportunity to present either documentary or testimonial evidence (see Tr. pp. 19-100.). The proceedings in this matter consisted of a hearing on pendency and seven status conferences. During the April 17, 2024 status conference, an additional date for a status conference was set for May 6, 2024 (Tr. p. 98). Then, without any warning appearing in the administrative record, the IHO issued the final decision on April 28, 2024, which granted the parent's requested relief.

As a result of the IHO's foregoing errors, 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 upon 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 the facts alleged by the parent in the due process complaint notice were true, and improperly precluded the district from asserting its June 1 defense. As noted numerous times above, no evidentiary hearing was conducted at all and therefore the district was, at a minimum, denied the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. There was no evidentiary basis upon which the IHO could be permitted to make factual findings. As noted above, the IHO's written decision cited in several instances to irrelevant and/or non-existent legal authorities to justify his actions,[8] and other legal authorities cited by the IHO

[8] Although unappealed, I note that in the interim decision dated October 16, 2023, the IHO provided no legal authority for his decision to order the district to evaluate the student without an evidentiary hearing (Tr. p. 6).

were of very marginal relevance to the legal issues presented. Due to the infirmities in the impartial hearing process, there is no other recourse but to vacate the IHO's April 28, 2024 decision.

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 process or prepare his decision in accordance with standard legal practice, and he did not conduct the proceeding in accordance with the requirements of due process. As a result, the matter must be remanded to conduct an evidentiary hearing. Nine 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.

Upon remand, the IHO should ensure that the hearing record is clarified with regard to the details of the January 2023 IESP mentioned on the record by the district's representative on October 16, 2023 and the district shall be permitted to assert its June 1 defense to which the parent should respond. To the extent that the parent continues to seek direct funding for the costs of the student's unilaterally obtained services during the 2023-24 school year from Edopt, the parent bears the burden of establishing that such unilateral services were appropriate.

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 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 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER