The University of the State of New York

The State Education Department
State Review Officer
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No. 24-230

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 Michael Gindi, Esq., 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 that 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 2023-2024 school year. The appeal must be sustained to the extent indicated, 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. 24-229; Application of the Dep't of Educ., Appeal No. 24-223). Given

the limited nature of the appeal and the procedural posture of the matter—namely that the only evidence admitted was two documents during a pendency hearing—there was no evidentiary hearing held on the merits of the parent's claims. Accordingly, the description of the facts and history of this matter is limited to the parent's due process complaint notice and the student's May 2020 IESP, upon which pendency was based (Parent Exs. A-B).

A CSE convened on May 11, 2020 to develop an IESP with an implementation date of September 1, 2020 (Parent Ex. B at pp. 1, 10). The May 2020 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 and two 30-minute sessions of group speech-language therapy per week in Russian (id. at p. 7).[1, 2]

A. Due Process Complaint Notice

By due process complaint notice dated September 13, 2023, the parent alleged, through her attorney, 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).[3] The parent alleged that the last program developed for the student was a May 11, 2020 IESP (id.). According to the due process complaint notice, the May 2020 IESP recommended that the student receive five periods per week SETSS and two 30-minute sessions per week of speech language therapy (id. at p. 2). The parent contended that the district did not supply providers for the services it recommended for the student, failed to inform the parent how the services would be implemented, and improperly shifted the burden to locate providers to the parent (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 an enhanced rate" (id.). The parent further notified that district that if it did not fulfill its obligations to the student, she would "take unilateral action to implement the necessary services for the Student with a Disability, and the Parent will request funding from the [district] for such services obtained" (id.). The parent invoked the student's right to a pendency placement (id. at p. 3). As relief, the parent requested an award of funding for five periods per week of SETSS at an enhanced rate for the 2023-24 school year to "the student's provider/agency," and an award of "all related services set forth on the student's last IESP for the 2023-24 school

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] 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.

[3] The due process complaint notice appears to have been generated from a template complaint (see Parent Ex. A). For example, in one paragraph the student's information was omitted and the paragraph reads, "Therefore, the DOE's failure to implement services for NAME was not in compliance with the IDEA and NYS Education Law and denied NAME the right to equitable special education services" (id. at p. 2). Where identified, the student's information is written in a smaller font size than the rest of the document (id. at pp. 1-2).

year" as well as a "[c]ompensatory [e]ducation services as a bank, to make-up for any mandated services not provided by the [district]" (id.).

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 the parent's and district's attorneys attended (Tr. pp. 1-15). 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 May 11, 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).[4]

During the October 16, 2023 hearing date, the parent identified Edopt as the private provider of the student's services (Tr. pp. 5-6). The IHO inquired on the record when the district last evaluated the student and when the last IESP had been developed for the student (Tr. pp. 6-7). The parent's attorney responded that "the last one she had" was from 2020 and that she did not know if another had been developed since then (Tr. p. 7). The district responded that an IESP had been created for the student in March 2023 and the IHO asked the district's attorney to check for the most recent evaluation, to which the district's attorney replied that "the last one I'm able to locate is dated from 2020" (Tr. pp. 7-8). On the basis of the attorney responses to his questions, the IHO indicated that the student's evaluations were overdue and stated that he would order the district to reevaluate the student and reconvene the CSE (Tr. pp. 6, 8).

The IHO issued a third interim decision 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 scheduled on November 2, 2023, but the parent's attorney did not appear (Tr. pp. 17-14). The IHO proceeded to conduct the conference in the absence of the parent's attorney, and the district's attorney indicated that she did not believe the matter could be settled and requested to schedule the matter for an evidentiary hearing (Tr. 19). The IHO asked the district's attorney to check the status of compliance with his October 16, 2023 interim decision ordering the district to evaluate the student and reconvene the CSE, and to inquire again if the matter could be settled (Tr. pp. 20-21).[5] The district's attorney indicated during the prehearing conference that she would notify the parent of the district's intention to raise the defense that the parent had not requested dual enrollment services prior to June 1, 2023 (Tr. p. 20).

[4] The IHO also issued a second interim decision also dated October 16, 2023, wherein he sua sponte struck paragraphs from the district representative's notice of appearance, which he had found objectionable (Oct. 16, 2023 Interim IHO Decision at p. 6). The district has not lodged any challenges to the pendency determination in this proceeding (IHO Oct. 16, 2023 Interim Decision).

[5] The IHO also stated in contradiction, that he knew settlement was not an option and lamented that the attorney lacked authority to settle the case (Tr. pp. 21-22).

During a status conference on November 29, 2023, a non-attorney advocate appeared on behalf of the parent who made a request to withdraw the due process complaint notice without prejudice because the parent was not ready to proceed, and she indicated that the parent intended to refile the due process complaint when the parent's representative was able to properly represent the client, to which the district's attorney requested to have the parent call and confirm the request (Tr. pp. 27-28). The IHO indicated that he was aware that "there's been a variety of things that have gone on with this particular agency, such as all the attorneys resigning for whatever reason" and the IHO stated he would permit the withdrawal (Tr. p. 28). Notwithstanding the parent's withdrawal of the case, the IHO proceeded to schedule another date for the proceeding on December 19, 2023 (Tr. pp. 30-31). The district's attorney also notified IHO that upon checking the district's records, they showed her that the student had been evaluated in March 2023 (Tr. p. 23).

On December 19, 2023, the parent's representative appeared to confirm the withdrawal of the case and the IHO told her she was wrong and that he didn't see a reason to withdraw the case (Tr. pp. 34-35). The parent's advocate acceded to the IHO indicating that "it was my understanding that the [p]arent had to come on to confirm the withdrawal. But again, IHO, you're the one leading the hearing, so if that's information that I have (indiscernible) then we can continue" (Tr. p. 35). The district confirmed again that the parent would not be withdrawing the due process complaint notice (Tr. p. 36), and the matter was adjourned again because no further activities had occurred with the proceeding and the parent wished to see if the matter could be resolved without the need for a hearing (Tr. p. 38).

In a status conference on January 18, 2024, the IHO indicated his belief that a "potential resolution" was in process, and the parent indicated that they "haven't gotten anything" and that she tried to "nudge" district (Tr. p. 42). The district representative asked again to schedule a hearing on the merits, which the IHO denied, reasoning "primarily" that the district's attorney did not have "resolution authority," and instead the IHO entreated the parties to ask for a resolution and suggested individual district employees to contact for assistance (Tr. pp. 42-43, 46-47).

At a status conference on February 12, 2024, the IHO again inquired about the status of the student's evaluations and the attorney for the district inquired if they were necessary for purposes of conducting the hearing (Tr. pp. 53-54). The IHO responded that the evaluations were outdated (Tr. p. 54). The district again raised the issue of resolving its June 1 defense issue, to which the parent's advocate indicated that she had proof that the request for dual enrollment services was sent by the parent and that she would share the proof with the district (Tr. pp. 55, 60-61). The matter was adjourned by the IHO again (Tr. p. 63).

At a status conference on February 27, 2024, the IHO inquired again about the evaluation of the student and the district responded that it had been conducted in January 2024 and completed on February 5, 2024 after consent had been received from the parent (Tr. 68-70, 75-76). The IHO stated that the parent had sent him a notice requesting dual enrollment services that was dated May 11, 2023, and the district's attorney requested that it be sent to her (Tr. pp. 74). The matter was adjourned once more so that the parent could "receive the new IEP" from the district (Tr. p. 80).

During the March 12, 2024 status conference, it appears that the district withdrew its June 1 defense (Tr. p. 85).[6] The parent's advocate indicated that the CSE had not reached out to the parent about conducting a CSE meeting, but the district's attorney indicated that a CSE had created a new IEP dated February 15, 2024, and agreed to send it to the parent's advocate (Tr. pp. 86, 89).

During the April 17, 2024 status conference, the IHO and parties reviewed events again; including the 2020 IESP, the modifications to the student's 2023 IESP, and changes made to the February 2024 IESP, including the removal of SETSS and changes to the student's speech-language services (from Russian to English) (Tr. pp. 96-101). The parent's advocate indicated that the parent stopped the services from the private provider in mid-February, and when the IHO asked if the parent agreed with the changes to the student's IESP, the parent advocate indicated "apparently" (Tr. pp. 101-102). The parent's advocated indicated that Edopt was not providing speech-language services, but the district's attorney stated that she could view service records showing that the district was providing the student's speech-language services during the 2023-24 school year (Tr. pp. 103-104). The district's attorney also indicated that she had scrutinized the parent's May 2023 request for dual enrollment services further and that she intended to make an argument raising the June 1 defense (Tr. pp. 105-106). The parent's advocate wanted to wait and see if the case could be resolved through resolution and the district's attorney did not oppose the request, but wanted to schedule the matter for an evidentiary hearing on the merits (Tr. pp. 106-07). The IHO scheduled the matter for another status conference (Tr. p. 111).

Prior to the next scheduled status conference, the IHO issued a final decision dated April 29, 2024. The IHO stated that the parent alleged in the due process complaint notice that the district "fail[ed] to implement the [s]tudent's program and [failed] to evaluate the Student and develop a new IESP for the Student for the 2023- 2024" school year (IHO Decision at p. 3). The IHO recounted the evaluation and IESP development that occurred while the impartial hearing was pending and stated that these events occurred because the district "did not reevaluate the Student as was its obligation pursuant to its Child Find mandate" (id. at p. 4).

Next the IHO held that determined that "[n]o [j]usticiable [c]ontroversy [e]xist[ed]" due to the district having the burden to implement the "the undisputed IESPS," and that it failed to do so (IHO Decision at p. 4). The IHO reasoned that if the district had fulfilled its responsibilities, the student's SETSS provider would have been paid from September 2023 through February 2024 and that there was no evidence in the hearing record that the parent had obstructed or was uncooperative with the district's efforts (id.). The IHO noted that a private school need not employ certified special education teachers and determined that 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 also reasoned that the district "c[ould not] take issue with the rate charged by the SETSS provider" because the district had "unclean hands" (id.). With regard to the June 1 defense raised by the district, the IHO held that the district's failure to evaluate the student barred that defense (id.). Next, the IHO determined that the parent was not required to prove her inability to pay and was entitled to direct payment (id. at pp. 8-9).

[6] The hearing record was muddled because parties were talking over one another (Tr. p. 85).

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 programs contained in the IESPS" and by failing to reevaluate the student and develop an IESP for the 2023-24 school year (IHO Decision at p. 9). The IHO ordered the district to pay the parent's SETSS provider at the "rate contracted for" upon presentation of the "applicable attendance records and invoices" for the time period between September 7, 2023 and February 21, 2024 (id.) The IHO further ordered 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. 9-10).

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 due process rights. The district asserts that due process requires a full hearing before an IHO makes a substantive determination on the parent's claims. In the request for review the district cites to instances in which the IHO repeatedly stated that he required a full record to render a determination. The district contends that there was no evidence in the hearing record of the district conceding that it denied the student a FAPE, waived any affirmative 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 alleges that there was no claim in the parent's due process complaint notice that the district failed to reevaluate the student, and the IHO's interim decision ordering a reevaluation was not a concession by the district that the student was entitled to equitable services for the 2023-24 school year. Further, the district argues that there was insufficient evidence that the parent properly provided a June 1 notice, that the document was not part of the evidentiary record, and thus, no basis to conclude that the district failed to provide equitable services to the student for the 2023-24 school year. The district also argues that the IHO erred in determining that the districts' actions constituted a bar to raising the June 1 affirmative defense, and that the matter should be developed upon a remand.

The district also contends that prongs II and III of the Burlington/Carter analysis also remain justiciable for the IHO to consider. The district further alleges that the IHO's erroneous assertions shifted the parent's burden to show that Edopt was appropriate onto the district, essentially entered an improper "default judgement" against the district, and improperly barred the district from raising equitable considerations. The district also argues that the IHO improperly issued the October 16, 2023 interim order for evaluations sua sponte and that such interim order should be vacated, again arguing that the adequacy of the evaluation of the student was not raised in the parent's due process complaint notice. As relief, the district requests that both the IHO's October 16, 2023 interim order to evaluate the student and the final decision be vacated and that the matter be remanded for a full and complete hearing.

The parent has not interposed an answer in this matter.

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]).[7] "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.).[8] 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

[7] 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]).

[8] 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.

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]). 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 on Evaluations

Here, the IHO issued three interim decisions on October 16, 2023, one of which ordered the district to conduct a psychoeducational evaluation of the student and then convene a CSE (see Oct. 16, 2023 IHO Interim Decision). As noted above, the IHO then continued asking the parties whether the evaluation had taken place and whether the CSE had reconvened as he ordered (Tr. pp. 35-36, 43, 53, 68-69). Upon learning that the psychoeducational evaluation had be completed, the IHO again continued the case (Tr. pp. 73, 77-79). After learning the CSE had convened, the IHO continued the case, noting that they were now able to "start moving this case along because the big delays are now resolved" (Tr. pp. 89, 92).

The district correctly argues that the IHO erred by ordering the district to conduct the psychoeducational evaluation because the parent did not make any allegations regarding the sufficiency of the student's evaluations.

In the October 16, 2023 interim decision, the IHO stated that the:

> [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. Moreover, the IHO does not have plenary authority to order a district to reevaluate a school district anytime he wishes.

The administrative record is bereft of any request by the parent to have the district conduct a reevaluation the student, and there was no reliable evidence regarding the most recent evaluation of the student when the due process complaint notice was filed. Instead, the parent's attorney acquiesced to the IHO's conclusory statements and interim decision (Tr. pp. 6-7). The parent did not seek reevaluation by the district in her due process complaint notice (see Parent Ex. A at pp. 1-3). Contrary to the IHO's statements in the interim decision, there is no plenary authority for an IHO to order a CSE to reevaluate a student anytime an IHO wishes, especially in the absence of an evidentiary hearing and without the agreement of the school district. As noted above, the district's attorney appeared to have located district records on November 29, 2023 showing that the student had been evaluated in March 2023 (Tr. p. 23), which was a few months prior to when the due process complaint was filed, and if the IHO had conducted an evidentiary hearing on the issue, he might have realized that his unwarranted supposition of the district's guilt might not bear out as fact. The IHO's factual assumptions, hearing procedures, and legal analysis were unsound, and the district is correct that the IHO erred.

However, as the reevaluation was completed by the district, there is no relief to award on this issue nor is there a reason to vacate the order since the evaluation and CSE meeting have both already occurred.[9] Notably, the hearing record demonstrates that the completion of the evaluation led to a CSE recommending a new program and that parent agreed to with the new recommendations made by the CSE (Tr. pp. 100-01). As such, even though the IHO's October 16, 2023 interim order directing the district to reevaluate the student was error, the issue has become moot due to the new CSE recommendations and agreement between the parties.

[9] The 2024 reevaluation and IESP post-date the due process complaint notice and are therefore irrelevant to the alleged violations by the district therein. Of greater relevance would be the purported March 2023 evaluation that the district's attorney mentioned at the November 29, 2023 status conference and the March 2023 IESP that she mentioned during the October 16, 2023 pendency hearing. Upon remand, the parties and IHO should develop the evidentiary record with respect to these documents because it is at least plausible that far more happened after 2020 that what the parent alleged in the due process complaint notice.

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 this case, the attorney for the district indicated during the December 2, 2023 prehearing conference 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 (Tr. pp. 20). As noted above, after examining documents provided by the parent's advocate, the attorney for the district indicated at the April 17, 2024 status conference that she would continue to assert the June 1 argument during the impartial hearing (Tr. p. 105).

The IHO cited the child find requirements but did not conduct any factual analysis of the child find provision as it relates to a parent's request for dual enrollment provisions in State law by the June 1 deadline, and the parties have no dispute regarding the fact that the student has been found eligible for special education as a student with a speech or language impairment. The IHO more specifically reasoned, without an evidentiary hearing, that the district had failed to reevaluate the student that the June 1 defense was therefore barred, which is not among the provisions of Education Law § 3602-c. The IHO also cited 79 IDELR 23 which was miscaptioned as "Letter to Franklin" and is not relevant because it is a U.S. Department of Education (USDOE) Office of Civil Rights document that addressed group instruction of students with disabilities (IHO Decision at p. 6). Another authority purportedly from the USDOE's Office of Special Education Policy (OSEP) cited by the IHO as Letter to Anonymous112 LRP 526 on March 7, 2012 does not even exist (see id.). 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 cite 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. 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"; however, while at least related to the topic of a parentally placed nonpublic school student, the letter 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 the 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 Board. of Education of the Bay Shore Union Free School District 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 evidentiary record and the IHO's holding that the district was barred from raising the June 1 deadline must be vacated.

3. Justiciability Determination

The IHO found that no "[j]usticiable [c]ontroversy [e]xist[ed]" in this matter (IHO Decision at pp. 4-5).[10] 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, 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 convene an CSE, and recommend and implement a program for the student for the start of 2023-24 school year—and had standing to seek redress due to the alleged failure of the district to provide special education services to the student, therefore, the case neither lacks ripeness nor is moot based upon the administrative record (see Parent Ex. A).[11] 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.

4. 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

[10] At the April 17, 2024 status conference, the IHO indicated that he would set one more status conference to pursue resolution and then asked the parties whether there was any controversy, because pendency was "in place" (Tr. pp. 107-08). To answer the IHO's question, the district's attorney asserted that she had to determine whether the claim had "already been paid out to pendency" (Tr. p. 108). Before the close of the hearing, the IHO noted that he did not want to have another hearing, if possible, and encouraged the parties to get it "taken care of" (Tr. p. 112).

[11] The parent's agreement with the recommendations of the February 2024 IESP did not render the parties' dispute moot and the claims from September 2023 through the date that IESP was implemented were still ripe for consideration.

at pp. 8-9). 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.

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 written decisions in accordance with standard legal practice, and he did not conduct the proceeding in accordance with the requirements of due process.[12] 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.

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 TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the IHO dated April 29, 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 3, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] Particularly concerning in this case are two instances in which the parent's advocate requested to withdraw the due process complaint notice due to a lack of attorney resources to prosecute the case on the client's behalf, which the IHO rebuffed, telling the advocate she was "wrong." Additionally, the record is clear that the IHO was only concerned with enforcing his interim order to evaluate the student and have the CSE reconvene, which was irrelevant to the dispute regarding the implementation of the student's IESP that the parent set forth in the due process complaint notice. The IHO granted the parent's request to withdraw and at that juncture should have closed the case, but instead pressed the non-attorney advocate to press forward at another status conference. Additionally, as noted above, the administrative record is clear that the IHO was pressuring the parties to seek extensions to settle the matter, when the district had indicated that no resolution via settlement was forthcoming and had requested multiple times to schedule an evidentiary hearing. It was not the IHO's function to dictate the parties' positions to them or apply undue pressure to follow a course of action or achieve a particular outcome. Although the motivations of the IHO were not clear, the IHO lacked an impartial demeanor in this proceeding.