The University of the State of New York

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

No. 24-231

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.

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 the parent's unilaterally obtained services. 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 Individuals with Disabilities Education Act (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 related to IESPs, 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 of the IDEA and the analogous State law provisions 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*]).

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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, 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 other 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. 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 educational history of this student is limited to the allegations in the parent's due process complaint notice and an October 4, 2021 IESP, upon which a pendency determination was based (see Parent Exs. A-B).

A CSE convened on October 4, 2021 to develop an IESP with an implementation date of October 4, 2021 (Parent Ex. B at p. 1). The October 2021 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 per week of individual speech-language therapy in English both to be delivered in separate locations (id. at pp. 1, 6).[1, 2]

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a free appropriate public education (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 an October 2021 IESP (id.). According to the due process complaint notice, the October 2021 IESP recommended that the student receive five periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy (id. at p. 2). The parent contended that the district did not assign qualified providers for the services it recommended for the student, nor did it take steps to implement the services (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 providers 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 a rate higher than the standard district 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

[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.

services for the student and would request funding from the district for such services obtained (id.). The parent invoked pendency rights (id.). As relief, the parent requested a pendency hearing and order; an award of funding for five periods per week of group SETSS at an enhanced rate; two 30-minute sessions per week of individual speech-language therapy at an enhanced rate; and a bank of compensatory education services to make-up for any mandated services not provided by the district during the 2023-24 school year (id. at p. 3).

B. Impartial Hearing and Decisions

On October 16, 2023, a pendency hearing was held in which only the parent's attorney was in attendance (Tr. pp. 1-9).[3] Two exhibits were admitted into evidence (see generally Parent Exs. A-B). During the pendency hearing the IHO inquired as to when the student was last evaluated, and the parent's attorney responded that she was unsure when the student was last evaluated and the IHO stated that the last evaluation was most likely over two years old (Tr. pp. 5-6). In an interim decision on pendency dated October 16, 2023, the IHO ordered the district to provide the student with "services consistent with" the October 4, 2021 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] The IHO also issued an interim order directing 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 8, 2023, at which neither party appeared (Tr. pp. 10-13). The IHO stated on the record that the compliance date expired on November 26, 2023, that it needed to be addressed, and if it was not addressed, the matter would be dismissed (Tr. pp. 11-12). The IHO also stated the matter would be dismissed if both parties failed to appear one more time (id.).

Six status conferences were held thereafter on November 29, 2023, December 21, 2023, January 24, 2024, February 21, 2024, March 20, 2024, and April 25, 2024 (Tr. pp. 14-71). During the November 29, 2023 status conference, the IHO inquired about the status of the reevaluation of the student, but the district was unaware that such order for evaluations had been issued by the IHO (Tr. pp. 16-17). The IHO stated that it was within his "discretionary authority" to direct a revaluation of the student (Tr. p. 17). At the December 21, 2023 and January 24, 2024 status conferences there was a discussion about the reevaluation and the district was waiting to receive a signed consent from the parent (Tr. pp. 29-30, 36-38). During the February 21, 2024 status conference, it was discussed that consent was signed by the parent and returned to the district (Tr. pp. 47-48, 50-51). At the March 20, 2024 status conference, wherein the district's attorney did not appear, the parent's lay advocate indicated that the IHO's ordered evaluations had not been

[3] It appears that the parent was only represented by an attorney for the pendency hearing and then a lay advocate for the prehearing conference and six status conferences (see Tr. pp. 1-71).

[4] The IHO also issued an interim decision on November 15, 2023, wherein he sua sponte struck paragraphs from the district representative's notice of appearance which he had found improper (Nov. 15, 2023 Interim IHO Decision at pp. 3-5).

scheduled or conducted (Tr. pp. 58-59). The IHO stated that he was going to "issue an interim order" "permitting the [p]arent to go have the student evaluated" and then when the evaluation was completed to have the CSE reconvene and develop an IESP and "adopt all the recommendations" (Tr. p. 58). During the April 25, 2024 status conference, district's counsel stated that a vocational interview with the parent, vocational interview with the student, and a psychoeducational evaluation had been completed and a new IESP was drafted but not finalized (Tr. pp. 64-65). The parent's lay advocate indicated that the student was receiving pendency services of SETSS and speech-language therapy from Ed Opt (Tr. p. 66). She represented that the rate for the SETSS was $195 but she was not sure of the hourly rate for the speech-language therapy services (id.). Next, the IHO inquired as to when the parties wanted to return for presumably another status conference and the parties agreed on May 28, 2024 (Tr. pp. 67-68).

In a decision dated April 30, 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 and develop a new IESP for the 2023-24 school year denied the student a FAPE (id. at p. 4). 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 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.). Then, the IHO noted the district did not "reevaluate the [s]tudent or develop a new IESP using the data from that reevaluation in a timely manner although the process is almost complete as of the date of this [decision]" (id. at p. 5). The IHO concluded that "since the [district] failed in its non-delegable duty to evaluate the [s]tudent, the [district] is barred from raising the June 1 putative bar to recovery even if perchance, [the] [p]arent did not meet her notification requirements" (id. at p. 8). Next, the IHO determined that the parent was not required to prove her inability to pay and was entitled to direct payment (id. at p. 9). The IHO addressed the parent's request for compensatory education for the services not implemented during the 2023-24 school year noting that the district did not introduce evidence to preclude a compensatory award (id. at p. 9). The IHO found that the requested relief for compensatory education was "undisputed by the [district] because the services at issue are undisputed" (id.). The IHO further addressed the parent's request for compensatory education for the services not implemented during the 2023-24 school year noting the requested relief was "predicated upon the quantitative method and [wa]s undisputed" by the district (id. at p. 11). Ultimately, the IHO determined that compensatory education was warranted and stated "[t]he [p]arent established that a compensatory education award of the following services that have not yet been implemented for the 2023-[]24 [10-month school year]" five 60-minute sessions per week of group SETSS in English and two 30-minute sessions per week of individual speech-language therapy in English, "based on the quantitative method, to be used over the next two years" (id.). Finally, the IHO found that the parent was entitled to the requested relief "based on the lack of judiciable controversy" (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 [October] 2021 IESP" and by failing to reevaluate the student and develop an IESP for the 2023-24 school year (IHO Decision at pp. 11-12). The IHO ordered the district to pay the parent's SETSS and speech-language therapy providers at the contracted rate upon

presentation of the "applicable attendance records and invoices" and 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 p. 12). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's [ten] month 2023-[]24 school year, the same services set forth above at the same rate of pay and frequency" and again noted that the district was prohibited and barred from charging $125 dollars an hour for SETSS (id.). The IHO also awarded "a bank of compensatory education of the following services to the extent that they have not yet been implemented for the 2023-[]24 10[-month school year]" and the "entire bank of hours [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 hours for each service (id. at pp. 12-13).

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 affirmative defenses or agreed that the parent had satisfied her burden of demonstrating the appropriateness of the unilaterally-obtained SETSS and speech-language therapy services. 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 claims 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 evaluate the student constituted a bar to raising the June 1st affirmative defense. The district contends that prongs II and III of the Burlington/Carter analysis together with the issue of appropriate relief remains 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 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 October 2023 interim order for evaluations 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 this proceeding.

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]).[5] "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.).[6] 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]).

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[5] 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]).

[6] 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.

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.

B. October 16, 2023 Interim Decision

Turning first to the district's challenge to the IHO's interim decision directing the district to evaluate the student, the hearing record shows that during the pendency hearing on October 16, 2023, the IHO indicated that the district was not present at the hearing and that the absence was unexcused (Tr. p. 3). The IHO then requested the date of the last evaluation of the student in which the parent's lay advocate responded she did have the exact date and it was not listed on the October 2021 IESP, but the IHO nevertheless stated that since the evaluation was not listed on the IESP it was not timely "because that evaluation is now over two years old" (Tr. pp. 5-6). Furthermore, the IHO stated that "I'm assuming that it's at least three years old" and if not, he could issue an order withdrawing the interim order for evaluations (Tr. p. 6).

The IHO erred in ordering the district to evaluate the student in his October 16, 2023 interim decision. To the extent the IHO construed that the student's IESP was required to show the dates of the evaluative material upon which it was based, such reasoning was also in error because there is no such requirement in State or federal law for that information to be listed in an IEP or an IESP (see, e.g., 8 NYCRR 200.4[d]2]). Furthermore, such a determination would defy logic because the October 2021 IESP would not have listed any information about the student or events that may have occurred after the date the IESP was drafted which spanned approximately two and a half years by the time the IHO issued the interim decision. Thus, 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, the IHO also 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.

(IHO Ex. I at p. 2). These points were also erroneous. The administrative record is bereft of any request by the parent to have the district reevaluate the student. 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 district. The IHO's factual assumptions, hearing procedures, and legal analysis were unsound, and the district is correct that the IHO erred. Accordingly, the IHO's interim decision dated October 16, 2023 must be vacated.

C. June 1 First Affirmative 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]).

The IHO in his decision cited 79 IDELR 23 which he 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. Another authority purportedly from the USDOE's Office of Special Education Policy (OSEP) cited by the IHO as Letter to Anonymous 112 LRP 526 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]).

Additionally, the IHO mentioned Letter to Wayne, 73 IDELR 263, 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 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.

While the district did not raise the June 1 defense on the record during its appearances in this matter (see Tr. pp. 1-71), an impartial hearing never occurred and the parties had been led to believe that at least one other status conference would be held prior to a hearing. 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.

D. 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, 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 - that the district failed to prepare appropriate special education programming for the student for the 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, and therefore, the case neither lacks ripeness nor is moot based upon the items in the administrative record (see Parent Ex. A).

E. 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 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.

F. Compensatory Education

Lastly, the IHO noted that the parent requested compensatory education for a denial of a FAPE for the 2023-24 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 [p]arent's providers that have been retained in accordance with the mandate contained in the 2021 IESP. The [p]arent's providers 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 [s]tudent'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 pp. 11-12). 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 (id. at p. 12). In addition, to the retrospective and prospective funding, the IHO ordered that the

> Student is awarded a bank of compensatory education of the following services to the extent that they have not yet been implemented for the 2023-[]24 [10-month school year]; SET[S]S [five 60-minute sessions per week, group, English and [speech-language therapy two 30-minute sessions per week, individual], English. 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.

(id. at pp. 12-13). During the hearing date that pendency was addressed the IHO inquired of the parent's lay advocate if a private SETSS provider had been identified by the parent, to which the parent's attorney replied "Ed Opt" and that the rate being requested for the SETSS services was $195 per hour but she was unaware of the rate for the speech-language therapy provider (Tr. p. 5), however there was no evidence in this case regarding these or any facts related to Ed Opt or any private services that the parent may have unilaterally obtained.

First, since no impartial hearing was conducted, the district did not have any opportunity to offer evidence, and although another date was scheduled for May 28, 2024 for an appearance by the parties it was unknown if it was another status conference or impartial hearing (Tr. pp. 62-71). Based upon discussions during the November 29, 2023 and March 20, 2024 status

conferences there was no resolution discussion by the parties (Tr. pp. 19-20, 58).[7] Then, without any warning that appears in the administrative record, the IHO issued the final decision on April 30, 2024 granting the parent's requested relief.

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 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 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 its June 1 defense. As noted repeatedly 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 decisions 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 were of very marginal relevance to the legal issues presented. Due to the infirmities in this impartial hearing process, there is no recourse but to vacate the IHO's interim decision dated October 16, 2023 and his final decision dated April 30, 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 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. As a result, the matter must be remanded to conduct an evidentiary hearing. Given the number of proceedings recently filed with the Office of State Review demonstrating similar conduct by the same IHO, 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;

[7] Five of the six extension orders issued by the IHO in this matter were premised upon the fact that the parties were negotiating a settlement, which appears to have been inaccurate (see Extension Order Reports).

[8] In the interim decision dated October 16, 2023, the IHO provided no legal authority at all for his decision to order the district to evaluate the student and did so without any relevant evidence.

IT IS FURTHER ORDERED that the decision of the IHO dated April 30, 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

CAROL H. HAUGE
STATE REVIEW OFFICER