The University of the State of New York

The State Education Department
State Review Officer
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No. 24-232

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 Thomas Burke, Esq.

Gulkowitz Berger, LLP, attorneys for respondent, by Shaya M. Berger, 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 ordered the district to fund special education itinerant teacher (SEIT) services and related services unilaterally-obtained by respondent (the parent) for her son for the 2023-24 school year and awarded a bank of compensatory educational services to remedy the district's failure to implement services for the student. 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 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*]).[1]

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[a]). 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]).

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[1] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

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. 24-231; Application of the Dep't of Educ., Appeal No. 24-230; Application of the Dep't of Educ., Appeal No. 24-229; Application of the Dep't of Educ., Appeal No. 24-228; Application of the Dep't of Educ., Appeal No. 24-226; Application of the Dep't of Educ., Appeal No. 24-225; 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 IHO entered two documents into the hearing record as evidence for the purpose of issuing an interim order on pendency, but thereafter, no evidentiary hearing was held on the merits of the parties' claims—a description of the facts and educational history of this student is limited (see Tr. pp. 1-51; Parent Exs. A-B; Interim IHO Decision at pp. 1-6).

Based on the evidence in the hearing record, a CPSE convened on July 17, 2023 to develop an IEP for the student for the 2023-24 school year with an implementation date of September 1, 2023 (see Parent Ex. B at p. 1). Finding the student eligible to receive special education as a preschool student with a disability, the July 2023 CPSE recommended the following 10-month program to address his needs: three 60-minute sessions per week of SEIT services in a group, three 30-minute sessions per week of occupational therapy (OT) in a group, two 30-minute sessions per week of physical therapy (PT) in a group, and two 30-minute sessions per week of speech-language therapy in a group (id. at pp. 1, 10).[2, 3]

A. Due Process Complaint Notice

In a due process complaint notice dated November 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "and/or equitable services" for the 2023-24 school year (see Parent Ex. A at p. 1).[4] According to the parent, the student's July 2023 "individualized education services program" (IESP) represented the last program developed for the student, which included recommendations for three 30-minute sessions per week of OT in a group, two 30-minute sessions per week of PT in a group, and two 30-minute sessions per week of speech-language therapy in a group (id.). The parent further indicated that she "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that, for

[2] The student's eligibility for special education as a preschool student with a disability is not in dispute (see 8 NYCRR 200.1[mm]).

[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.

[4] Based on the limited evidence, it appears that the student was parentally placed at a religious, nonpublic school for the 2023-24 school year at issue (see Parent Ex. A at p. 1).

the "full 2023-2024 school year," the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers to work at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (Parent Ex. A at p. 1).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency and to directly fund the costs of the student's related services (i.e., three 30-minute sessions per week of OT in a group, two 30-minute sessions per week of PT in a group, and two 30-minute sessions per week of speech-language therapy in a group) at the "enhanced rate each charge[d] for their service" for the 2023-24 school year (Parent Ex. A at p. 2).[5]

B. Impartial Hearing and Decisions

An IHO was appointed to this matter on November 7, 2023, and on November 16, 2023, the IHO conducted a prehearing conference without an appearance on the district's behalf (see Nov. 16, 2023 Tr. pp. 1-15).[6] At that time, the IHO discussed the matter with the parent's attorney and addressed her request for pendency services (id.; see generally Parent Exs. A-G).[7] The impartial hearing resumed on December 18, 2023, and the IHO conducted a status conference (see Dec. 18, 2023 Tr. pp. 10-15). The status conference proceeded without any appearances on the district's behalf (id.). Thereafter, the IHO conducted four additional status conferences on January 17, 2024, February 20, 2024, March 8, 2024, and April 16, 2024; both parties appeared at all of these status conferences (see Jan. 17, 2024 Tr. p. 16; Feb. 20, 2024 Tr. p. 27; Mar. 8, 2024 Tr. p. 37; Apr. 6, 2024 Tr. p. 44). During the impartial hearing, the parent's attorney stated on the record that parent had obtained some of the services from Always a Step Ahead (Nov. 16, 2023 Tr. p. 4, Apr. 6, 2024 Tr. p. 49). At the last status conference, on April 16, 2024, the parent's attorney noted that the district was "finalizing a new IESP" for the student (Apr. 6, 2024 Tr. pp. 45-46). The IHO

[5] Due to the undeveloped state of the hearing record, it is not clear why the parent did not request SEIT services in the due process complaint notice, although they had been recommended in the July 2023 IEP (Parent Exs. A at p. 2; B at p. 10).

[6] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Nov. 16, 2023 Tr. p. 1."

[7] In an interim decision on pendency, dated November 16, 2023, the IHO found that the student's July 2023 IEP formed the basis for the student's pendency services, and ordered the district to provide the student with such services "consistent with and contained in" the July 2023 IEP, including OT, PT, and speech-language therapy, effective November 6, 2023 (date of the due process complaint notice) (see Interim IHO Decision at p. 4). SEIT services were not requested or included as part of pendency, although they were recommended in the July 2023 IEP which formed the basis of the parent's request for pendency. The IHO also noted in the decision that, with respect to the student's pendency services, the district had "waived its objections due to its unexcused absence" at the impartial hearing (id. at p. 2).

indicated, however, that this new information did not "assist" with the present matter and questioned the status of the related services at issue in the present matter (Apr. 6, 2024 Tr. p. 46). According to the parent's attorney, the parent was awaiting an "update" from the district as to "why the evaluations ha[d] not been finalized" (id.). The district's attorney could not, at that time, locate "an evaluation of the related services" on the district's special education student information system (i.e., "SESIS"); as a result, the IHO asked the parent's attorney if she wanted to "wait a little bit more" (Apr. 6, 2024 Tr. p. 47). The parent's attorney stated that she would like additional time, and the IHO noted that the matter could be scheduled for another status conference to get a "little bit more clarity in where [they we]re at that point" (id.). The district's attorney agreed to proceed in this manner, and the IHO then adjourned the matter to May 15, 2024 and granted a request to extend the compliance date for issuing a decision to June 4, 2024 (Apr. 6, 2024 Tr. pp. 47-49).

In a final decision dated April 29, 2024, the IHO indicated that an "[impartial] hearing did not go forward as it [wa]s unnecessary due to a lack of any controversy" (IHO Decision at p. 3).

Initially, the IHO noted that it was undisputed that the student was eligible for special education as a preschool student with a disability (see IHO Decision at p. 3). According to the IHO, it was also undisputed that the student's July 2023 IEP included recommendations for three 30-minute sessions per week of OT in a group, two 30-minute sessions per week of PT in a group, and two 30-minute sessions per week of speech-language therapy in a group (id.). The IHO then noted that the parent had alleged the district failed to offer the student a FAPE by failing to implement the student's program and the parent, as a result of the district's "nonfeasance," was "forced to retain a private provider 'Always A Step Ahead' to provide [the s]tudent with his related services" (id.).[8]

Next, in a portion of the decision entitled "No Justiciable Controversy Exists," the IHO noted that the district had the "burden to implement the undisputed IESP (sic) it created and it failed to do so," and moreover, the hearing record failed to contain any evidence that the parent "obstructed or was uncooperative with the [district's] efforts to meet its obligations" (IHO Decision at pp. 3-4, citing C.K. v. Scarsdale Union Free Sch. Dist., 874 F.3d 826, 840 [2d Cir. 2014]). In addition, the IHO found that the district could not transfer its obligation to locate related service providers to the parent, and having done so, equitable considerations weighed in the parent's favor (see IHO Decision at p. 4, citing Anchorage Sch. Dist. V. M.P., 689 F.3d 1047, 1055-56 [9th Cir. 2012] and Gabel v. Bd. of Educ. of the Hyde Park Cent. Sch. Dist., 368 F. Supp. 2d 313, 329 [S.D.N.Y. 2005]).

Next, the IHO found that because a private school need not employ certified special education teachers, the district was "precluded from raising the issue of the S[pecial] E[ducation] T[eacher] S[upport] S[ervices] (SETSS) provider's certification as a bar to recovery" (IHO Decision at p. 4).[9] The IHO further found that the district was "equitably barred from objecting to

[8] As referenced by the IHO, the agency purportedly delivering the student's related services—Always A Step Ahead—does not appear anywhere in the hearing record, other than in a statement made by the parent's attorney at the November 16, 2023 prehearing conference, which was not attended by either the parent or a district representative (see Nov. 16, 2023 Tr. pp. 3-4).

[9] To be clear, the parent was not seeking direct funding of the costs of SETSS for the student, because the July

the rate of payment for services due to its nonfeasance," and noted that the district had "unclean hands" (id. at pp. 4-5).

The IHO turned next to address the direct funding sought by the parent as relief (see IHO Decision at p. 5). The IHO determined that the parent was not required to prove her inability to pay and was entitled to direct payment to the student's service providers (id.). The IHO then determined that the June 1 putative bar to recovery was not at issue, as the district failed to raise it and was now barred from doing so, without further explanation (id.).

The IHO then addressed the parent's request for compensatory education for the district's failure to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 5-8). Initially, the IHO specifically noted that the district had not "introduce[d] any evidence whatsoever to bar such an award," and moreover, that the district had not disputed the "hours of compensatory education" requested by the parent for the district's failure to implement the related services in the July 2023 IEP (id. at p. 6). After reciting legal authority relevant to relief in the form of compensatory educational services, the IHO determined that the relief, herein, was "predicated upon the quantitative method and [wa]s undisputed" (id. at p. 8). Consequently, the IHO found that the "[p]arent established that a compensatory education award [was warranted] to the extent that [the s]tudent's related services were not fully implemented" for the 10-month school year program (id.).

Finally, the IHO noted the parent was "entitled to the following relief based on the lack of judiciable controversy" (IHO Decision at p. 8). The IHO ordered the district to pay the parent's "provider[s] that have been retained in accordance with the mandate contained" in the July 2023 IEP and at the "contracted" rate upon presentation of the "applicable attendance records invoices" (id. [emphasis in original]). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's twelve (sic) month 2023-2024 school year, the same services set forth above at the same rate of pay and frequency" (id.). As part of the order awarding direct funding of the parent's unilaterally-obtained services, the IHO precluded the district from attempting to "apply a uniform rate of [$125.00] an hour for each and any service" (id. at pp. 8-9 [emphasis in original]). The IHO also awarded a bank of compensatory education, "to the extent that a portion of the [s]tudent's related services ha[d] not been implemented" for the 2023-24 school year, which would be "good for two calendar years" and which authorized payment to the provider at a rate not to exceed $300.00 dollars per hour for each service (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in failing to allow the parties to develop the hearing record and denied the district its right to due process. The district asserts that due process requires a full hearing before an IHO makes a substantive determination on the parent's claims. The district contends that there was no evidence in the hearing record of the district conceding that it denied the student a FAPE, that the district waived a possible June 1 affirmative

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2023 CPSE did not recommend SETSS (see Parent Exs. A at p. 2; B at p. 10). Additionally, although the July 2023 CPSE did recommended SEIT services for the student, the parent did not request SEIT services as part of this proceeding (id.).

defense, or that it agreed the parent had satisfied her burden of establishing the appropriateness of her unilaterally-obtained services. 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 further contends that issues related to the appropriateness of the unilaterally-obtained services and equitable considerations under the Burlington/Carter analysis also remain justiciable, as well as what, if any, relief would be appropriate. As relief, the district requests that both the IHO's decision be vacated and that the matter be remanded for a hearing.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. The parent argues that in a dispute under Education Law § 4410, the parent has no burden of proof and a Burlington/Carter analysis does not apply in the context of the privately selected services she obtained from Always a Step Ahead and that she "simply sought funding for these services since [the district] failed to provide providers." Alternatively, the parent contends that the only viable relief herein is to remand the matter, rather than denying the parent's requested relief.

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 or CPSE 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]).[10]

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[10] 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

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

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. June 1 Defense

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]).

However, since the student in this case was preschool-aged during the 2023-24 school year at issue, the student was not eligible for dual enrollment services under State law through an IESP. State guidance explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same

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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).

building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("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 at p. 13, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). Consequently, since the district cannot assert a June 1 defense in this matter, the IHO's finding that the district is barred from asserting it because it was not raised was irrelevant.

2. Justiciability Determination

Although not raised at any of the six impartial hearing dates, the IHO for the first time in his final decision, determined that a "justiciable controversy" was not present in this matter (IHO Decision at pp. 3-4). 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, including that the district failed to 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, and the case neither lacks ripeness nor is moot based upon the items in the administrative record (see generally Parent Ex. A). Therefore, the IHO's finding as to justiciability was at best misplaced and must be vacated.

3. Direct Funding of Related Services

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 (see IHO Decision at p. 5). 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.

As for the parent's allegations in the answer that a Burlington/Carter analysis does not apply to services that she obtained from Always a Step Ahead,[11] if the parent privately obtained the services without the consent of school district officials, the argument is without merit and she must be prepared upon remand to satisfy her burden of proof under that test in order to obtain funding or reimbursement from the public fisc. The CPSE's mere creation of an IEP for the student with the same or similar services listed in it would not constitute the consent of school district officials for the parent to privately obtain the services from Always a Step Ahead. The parent would be required to prove that the services as provided by Always a Step Ahead were proper under the Act, which means that, under the totality of the circumstances, the services privately obtained by the parent were reasonably calculated to enable the student to receive educational benefits (Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 11 [1993]; Gagliardo, 489 F.3d at 112).

B. Remand

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

Due to the infirmities in the hearing process, there is no recourse but to vacate the IHO's final decision dated April 29, 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. Multiple administrative 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.

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[11] Due to the errors of the IHO, the hearing record, in its current state, contains no information about Always a Step Ahead or any services that may have been provided to the student other than the statements by the parent's attorney noted above.

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 IHO's decision, 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 31, 2024

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JUSTYN P. BATES
STATE REVIEW OFFICER