The University of the State of New York

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

No. 17-041

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Massapequa Union Free School District

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, Randy Glasser, Esq., of counsel

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 parent) appeals from a decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the proceeding with prejudice. The appeal must be sustained, and the matter is remanded to the IHO for further administrative proceedings, as outlined below.[1]

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

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although most of the impartial hearing took place before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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

A. 2014-15 and 2015-16 School Years

At the time of the impartial hearing, the student was described as having deficits in receptive and expressive language and while she is generally nonverbal, she uses an augmentative communication device, a Nova chat, to request desired toys and food, as well as to request some actions (i.e., a squeeze) (Dist. Ex. 101). The student also presents with deficits in basic cognitive,

preacademic/readiness and daily living skills and although she is willing to participate in most classroom activities, her participation and functioning vary throughout the day (Dist. Ex. 101). However, the student is able to follow simple one-step directions given gestural cues, repetition, or hand over hand assistance (Dist. Ex. 101). She demonstrates deficits in attention and requires physical and visual supports including a visual schedule to transition (Dist. Ex. 101). The student also presents with significant deficits in fine motor and sensory motor/processing skills (Dist. Ex. 101). With regard to social development, the student presents with deficits in play skills and in her ability to interact with peers and adults; however, will seek out the attention of adults, smile and giggle at them, and maintain joint attention during chase games (Dist. Ex. 101). In addition, the student has a history of interfering and self-injurious behaviors including head banging, screaming/crying, and dropping to the floor, which have been managed with a behavior intervention plan (Dist. Ex. 101).

The hearing record reflects that the student received a diagnosis of Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS) in March 2013 (Dist. Ex. 3). She initially received services via the Early Intervention Program and the Committee on Preschool Special Education (CPSE) convened in June 2014 and found the student eligible for special education itinerant services as a preschool student with a disability (id.). On August 11, 2014, the CPSE met to consider placement and recommended the student be placed in a four-hour per day 10:1+2 special class in a State approved nonpublic preschool special education program (NPS 1), with the support of a full-time 1:1 teacher aide (due to self-injurious behaviors), and related services, including individual speech-language therapy and occupational therapy (OT), as well as monthly individual parent counseling and training (Dist. Ex. 4). However, on August 27, 2014, the CPSE reconvened and changed the student's placement recommendation to a 5-hour and 45-minute 6:1+2 special class in a different State-approved nonpublic preschool special education program (NPS 2) and discontinued the recommendation for the 1:1 teacher aide (Dist. Ex. 5).[2] The CPSE also modified its recommendations for speech-language therapy, OT, and parent counseling and training (id.).

The hearing record reflects that the student's IEP for the 2014-15 school year was modified six times between November 2014 and March 2015, either as a result of reconvening the CPSE or through the process for amending an IEP without a reconvene of the CPSE (see Dist. Exs. 6-11). Changes to the student's IEP over that time period included adding daily two-hour special education itinerant teacher (SEIT) services in the home; modifying the start date and location of the SEIT services from home to home and community and approving the provision of SEIT services during school breaks; removing group parent training services; modifying the location of the delivery of the student's OT services to the therapy room only; and updating SEIT goals for home and community (Dist. Exs. 6-11).

On April 24, 2015, the CPSE convened to review the student's program and to develop the student's IEP for the 2015-16 school year (Dist. Ex. 12). The April 2015 CPSE recommended for summer 2015 and for the balance of the 2015-16 school year, that the student continue her placement at NPS 2 in a 6:1+2 special class with four weekly sessions of speech-language therapy

[2] The August 27, 2014 IEP reflected that staff from NPS 2 indicated that the level of support in place in the recommended classroom did not warrant an individual aide (Dist. Ex. 5).

and OT, continuation of daily SEIT services provided in the home/community, and individual parent counseling and training (id.). In addition, the April 2015 CPSE recommended an augmentative communication device (id.). On May 27, 2015, the CPSE reconvened to discuss other placement options, in light of the parent's concerns that NPS 2 might not be an appropriate preschool for the student (Dist. Ex. 13). Consequently, the district agreed to send out placement packets to potential programs requesting placement for September 2015 (id.). The hearing record does not reflect that the location of the student's program was changed; however, other changes were subsequently made to the student's IEP for the 2015-16 school year via written amendments, including the addition of an assistive technology device and goals for the device, OT services once per month at home to generalize skills learned at school, and a monthly OT consultation (Dist. Exs. 14-16).

On February 1, 2016, the CPSE convened for an annual review of the student's program and recommended the addition of individual home-based OT and individual home-based speech-language therapy twice per week for 30 minutes for the duration of the 2015-16 school year (Dist. Ex. 17). For summer 2016, the CPSE recommended that the student continue with the same program and services she was receiving at the end of the 2015-16 school year (Dist. Ex. 18).[3] On April 20, 2016, the CPSE amended the student's 2015-16 IEP to add "uninterrupted" home-based OT and speech-language therapy during school breaks to prevent substantial regression and recommended that the student's make-up services be implemented on weekends and evenings up to 8:00 PM instead of the previous 7:00 PM (Dist. Ex. 19).

1. First Due Process Complaint Notice

On May 23, 2016, the parent filed a due process complaint notice in which she asserted that the parent and district are in disagreement over the needs of the student (Dist. Ex. 1). Initially, the parent asserted that the district and county CPSE policies and programming were discriminatory and resulted in the student "being denied a much needed 1:1 SEIT at the school based program" for the past two years (id. at p. 3). The parent also asserted that the CPSE denied several of her requests for services (i.e., home-based applied behavioral analysis (ABA) therapy, and increased speech-language therapy and OT) based on deliberate misinformation, and that she was told that she should be "happy with the full day program", as others "do not even get that" (id. at pp. 3-5). Regarding the denial of her request for five sessions per week of OT and speech-language therapy, the parent asserted that she was told it was programmatically impossible because the occupational therapists must have one day a week for make-up sessions (id. at p. 4). The parent also asserted that the student was owed make-up ABA instruction due to 38 hours of missed home-based ABA instruction during the 2014-15 school year, and 76 hours missed during the 2015-16 school year (id. at p. 5). Furthermore, the parent argued that the district failed to offer the student a FAPE, because the summer sessions lasted only six weeks and were not individually designed to address the student's need for continuous services (id.). As relief for the summer services, the parent sought compensatory instruction, ABA therapy, speech-language therapy, and OT in an amount to be determined by the IHO (id.). Additionally, the parent requested an award of monetary damages for the need to hire an educational advocate and stress and because she had to

[3] It appears from the IEPs as though the recommendation for one monthly OT consultation was changed to one monthly session of individual home-based OT (compare Dist. Ex. 17, with Dist. Ex. 18).

incur out-of-pocket expenses for private ABA therapy, OT, and sensory gym sessions (id.). She further requested an award of 400 hours of compensatory ABA instruction, 90 sessions each of compensatory speech-language therapy and OT, and 114 hours of make-up ABA SEIT services (id. at p. 19).

B. 2016-17 School Year

After the May 2016 due process complaint notice was filed, the CSE convened on June 15, 2016 as the student transitioned from the CPSE to the CSE (Dist. Ex. 101). For the 2016-17 school year, the CSE deemed the student eligible for special education programs and services as a student with autism and recommended placement in a 6:1+2 special class setting with the board of cooperative educational services (BOCES) and the support of a 1:1 teacher aide (id.). The June 2016 CSE also recommended that the student receive related services in 30-minute sessions, including individual speech-language therapy four times per week in the therapy room and one time per week in the classroom; individual OT two times per week in the therapy room; and individual physical therapy (PT) two times per week in the therapy room (id.). The parent disagreed with the CSE's placement recommendations and requested another placement that provided the student with opportunities for interaction with typical peers (id.).

On July 19, 2016, the district filed a motion to dismiss concerning the May 23, 2016 due process complaint notice, asserting that the allegations raised by the parent were untimely, the student was not entitled to the relief requested in the form of compensatory education, and the IDEA precluded an award of monetary damages (Dist. 7/19/16 Mot. to Dismiss).[4] On August 2, 2016, the IHO denied in part, the district's motion (IHO 8/2/16 Interim Decision). The IHO denied the district's request to dismiss the parent's due process complaint notice with respect to the timeliness of the complaints and as to the question of entitlement to compensatory education; however, the IHO dismissed the parent's claim with respect to her request for monetary damages (id.).

On August 5, 2016, the CSE amended the June 2016 IEP to add home-based ABA instruction, speech-language therapy, and OT (Dist. Ex. 102). On August 19, 2016, the impartial hearing convened (see August 19, 2016 Tr. at p. 3), and the IHO issued a written decision determining that NPS 2 was the student's pendency placement; however, without a State waiver, the district was not permitted to fund the student's placement at NPS 2 (IHO Ex. I). On the same

[4] When submitting the hearing record in accordance with Part 279, the district identified in its transmittal letter, dated May 19, 2017, a number of other documents that, under State regulation, are mandated to be included as a part of the administrative hearing record but which were not marked in as part of the administrative hearing record during the impartial hearing (8 NYCRR 279.9[a]; see 8 NYCRR 200.5[j][5][vi]). The documents are items 6-16 as enumerated in the May 19, 2019 transmittal letter. References to these additional documents in this decision are made by identifying what the document purports to be, the date and exhibit and page number, were possible (e.g. Dist. 4/10/17 Mot. to Dismiss; IHO 8/2/16 Interim Decision).

day that the impartial hearing convened, the parent also filed a second due process complaint notice containing claims pertaining to the 2016-17 school year (Dist. Ex. 103).[5]

1. Second Due Process Complaint Notice

In the August 19, 2016 due process complaint notice, the parent asserted that she disagreed with the district regarding the student's placement for the 2016-17 school year (Dist. Ex. 103). Specifically, the parent asserted that the recommendation for a BOCES placement was not the student's least restrictive environment (LRE), the student was not receiving sufficient OT, PT, and speech-language therapy, the student should also receive 2.5 hours of "discreet ABA trials" per day for five days a week, and the student should be provided with a 1:1 teaching assistant (id. at p. 3). For relief, the parent requested that the district provide the student with a full-day [kindergarten] program with 2.5 hours per day of ABA, along with five sessions per week of individual OT, PT, and speech-language therapy and the support of a 1:1 teaching assistant (id. at p. 4).

2. Impartial Hearing and Intervening Events

The parties proceeded to an impartial hearing on August 19, 2016, which took place over ten days of proceedings.[6]

On September 8, 2016, the IHO issued a second determination on pendency, finding that NPS 2 was unable to obtain a variance for the student to continue at NPS 2 after turning five years of age and that the educational program provided by the BOCES Children's Resource Center (CRC) was substantially similar to NPS 2 and that it would serve as the student's pendency placement (IHO Ex. II). Also on September 8, 2016, the IHO ordered that the proceedings initiated by the May 2016 and August 2016 due process complaint notices be consolidated into one hearing (IHO Ex. III).

While the impartial hearing was pending, on November 9, 2016, the CSE reconvened at parental request to review the student's program, and create an IEP for the student's 2016-17 school year (Dist. 4/10/17 Mot. to Dismiss, Ex. C at pp. 5-18). The district agreed to the parent's request to provide the student with home-based instruction as an interim placement (id. at pp. 5-6).

On December 6, 2016, the student's father, with the assistance of the same advocate who was representing the student's mother in the May and August 2016 complaints, filed a third due

[5] The student was due to "age out" of the preschool program at NPS 2, and the school required a waiver from the State Education Department to allow the student to continue at the school; however, one was not obtained prior to the first day of the hearing (Tr. p. 5; IHO Ex. I; see 8NYCR 200.16[i][3] [vi]).

[6] The transcripts in the hearing record were not consecutively paginated throughout the entirety of the impartial hearing. Therefore, for ease of reference, the impartial hearing date will precede the transcript page citations. As this matter is being remanded for further proceedings, for purposes of clarity, on remand, the IHO should consider having the transcription company (or stenographer) provide a corrected transcript with proper pagination to the parent, and for the record.

process complaint notice related to the student, this one concerning the November 2016 IEP (Dist. 4/10/17 Mot. to Dismiss, Ex. C).

During the impartial hearing on December 15, 2016, the IHO denied the parent's request to consolidate the third December 2016 due process complaint notice into the pending hearing convened to adjudicate the first two due process complaint notices (e.g. May and August 2016 complaints) (December 15, 2016 Tr. pp. 1180-81).[7]

On January 13, 2017, the district moved to disqualify and remove the parent's advocate and sought appointment of a guardian ad litem for the student (Dist. 1/13/17 Mot. to Disqualify). The district asserted that the parent's advocate had a conflict of interest created by his representation of the student's father, because the December 2016 due process complaint notice contradicted the mother's alleged agreement with the placement recommended in the November 2016 IEP (id. at pp. 2-4).

On January 24, 2017, the IHO ordered that the parent's advocate be "disqualified and removed" from advocating on behalf of the parent, and that, no later than February 3, 2017, the district appoint a guardian ad litem to represent the student (IHO 1/24/17 Interim Decision).

That same day, shortly after the IHO issued the order to disqualify and remove the advocate, the parent notified the IHO that she had not seen the district's e-mail that included the motion and requested additional time to respond to the motion (Parent 1/24/17 E-mail Correspondence).[8] The IHO replied via e-mail on the same day, and notified the parties she would "delay a decision on the motion" for one week, until January 31, 2017, to allow the parent an opportunity to be heard (IHO 1/24/17 E-mail Correspondence).

In a joint letter dated January 28, 2017, the parents responded to the district's motion to remove the advocate, asserting that both parents were in agreement that the November 2016 IEP was deficient and that the advocate represented their concerns; the parents also requested that the IHO recuse herself (Parent 1/28/17 Letter at p. 3). On February 1, 2017, the IHO notified the parties in an e-mail that she was recusing herself from the case and that the new IHO would address the district's pending motion (IHO 2/1/17 Interim Decision). A new IHO (IHO 2) was subsequently appointed to continue with the impartial hearing (see March 28, 2017 Tr. at p. 128).

On March 24, 2017, a CSE reconvened for the purposes of reviewing the student's educational program for the 2016-17 school year (Dist. 4/10/17 Mot. to Dismiss, Ex. E). The March 2017 CSE recommended that the student be placed in a 12:1+1 integrated special class placement at an out-of-district public school, and that she receive the following individual in-school related services: five 30-minute sessions of individual speech-language therapy per week (two in the classroom during snack and three in the therapy room); five 30-minute sessions of individual OT per week (three in the therapy room and two in the cafeteria during lunch); and five

[7] The hearing record suggests that the IHO denied the motion via e-mail; however, a copy of the e-mail is not included in the hearing record.

[8] In essence, these back and forth e-mail transmissions appear to constitute a very informal motion to reconsider the disqualification of the advocate and an order granting such motion for reconsideration.

30-minute sessions of individual PT per week (two in the therapy room and three in the school environment) (id. at pp. 1-2, 10). The March 2017 IEP also recommended the provision of behavior consultant services to assist the student's transition to a new classroom and new school environment (five hours per week direct and five hours per week indirect), and the support of a full-time 1:1 teacher assistant (id. at pp. 2, 10-11). The March 2017 CSE also recommended the following individual related services in the home/community: five two-hour long sessions of ABA services per week; two 30-minute sessions of OT per week); two 30-minute sessions of speech-language therapy per week); and (two hour-long sessions of parent training per month (id. at p. 10). The CSE further recommended the use of a NovaChat augmentative communication device (id. at pp. 1-2, 10). The March 2017 IEP also included a provision to allow the student to receive home-based services during school breaks (id. at p. 1).

The district provided the parent with prior written notice of the CSE's recommendations via letter which was also dated March 24, 2017 (Dist. 4/10/17 Mot. to Dismiss, Ex. F). The prior written notice also indicated that the CSE discussed make-up sessions for missed services, including 750 hours of ABA instruction, 198 hours of ABA SEIT services, 136 sessions of speech-language therapy, and 140 sessions of OT (id.). The prior-written notice indicated that those services would not expire until completed and that they could be completed at home, after school until 8pm, on weekends, and during breaks (except federal holidays) (id.).

On March 28, 2017 the parties convened telephonically, but did not take new evidence, and IHO 2 tentatively scheduled April 18, 2017 as the next hearing date (March 28, 2017 Tr. pp. 133-36).

On April 10, 2017, the district filed a second motion to dismiss the proceeding, asserting that since the March 2017 IEP recommended everything that the parent had demanded as relief in the consolidated due process complaint notices, the matter was moot (Dist. 4/10/17 Mot. to Dismiss).

C. IHO Decision

IHO 2 reached a decision in this matter in two e-mails dated April 12 and May 6, 2017, wherein the parent's due process complaint notices were dismissed with prejudice (IHO Decision at pp. 1-2). In granting the district's motion to dismiss, IHO 2 determined "that the disagreements in this impartial hearing have been settled" (IHO Decision). In a letter to the parent dated May 15, 2017, the IHO verified that his earlier e-mail dismissed the proceeding and indicated that the parent's request for a hearing was "moot" because "the district agreed to provide all the remedies asked for by the parent in their Due Process Complaint Notices."[9]

IV. Appeal for State-Level Review

The parent appeals, and while the parent enumerated nine points in her request for review, the crux of her assertions is that IHO 2 erred by (a) dismissing the proceeding without allowing

[9] The initial record submission in this matter on May 19, 2017 did not include the May 15, 2017 letter-version of the IHO's decision. The district was directed to submit a copy of the IHO's decision and responded with May 15 version of the IHO's decision on June 2, 2017.

the parent an opportunity to present evidence and testimony, thus denying her due process; (b) using email and a follow-up letter to transmit the dismissal; (c) failing to adequately provide an appropriate reason for the dismissal; and (d) basing the decision on a determination of the district CSE, which the parent can only challenge through a subsequent due process complaint notice. The parent also objects to the IHO concluding the proceeding without addressing the issues of whether the student was offered a FAPE and whether relief should have been awarded for the period beginning August 2016 and ending April 2017. The parent requests that IHO 2's decision be reversed and that the proceeding be remanded back to IHO 2 (or a new IHO) for the purposes of completing the hearing.

In its answer, the district generally asserts admissions and denials to the allegations, and requests that the SRO dismiss the parent's request for review on the procedural grounds that the request for review lacked the required information as contained in Part 279 of the Commissioner's Regulations. Specifically, the district asserts that the request for review failed to contain a clear and concise statement of the issues on appeal, the grounds for which the parent requests relief, each issue enumerated, the IHO's ruling or failure to rule that the parent is challenging and proper citations to the hearing record. The district also asserts that the request for review was not verified, nor was it accompanied by the required notice of request for review, and further, the parent did not provide her name, mailing address, and phone number in the request for review itself.

The district also asserts that the IHO properly dismissed the due process complaint notices because the parent's claims had been rendered moot. Specifically, the district asserts that after it had agreed to provide all of the combined relief that the parent sought, with respect to both the May and August 2016 due process complaint notices, as found in the March 2017 IEP, the parent no longer had a live dispute. The district also asserts the parent's request for remand amounts to improper judge-shopping. Finally, to the extent that any delays during the impartial hearing process occurred, the district asserts that the behavior of the parent's advocate was the cause of the disruptions and delays in the proceedings. The district requests that the SRO dismiss the parent's request for review in its entirety.

V. Discussion

A. Initial Matters

1. Compliance with the Commissioner's Regulations

a. Form Requirements for Pleadings

The district has asserted that the request for review be rejected by the SRO based on several drafting and procedural errors. More specifically, the district argues that the request for review was defective because the parent: (1) did not endorse the request for review with the required information; (2) did not verify the request for review; (3) did not serve or file a notice of request for review; (4) failed to clearly identify the findings, conclusions, and orders to which she took exception; and (5) failed to provide a concise statement of the issues presented on appeal with citations to the hearing record.

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a

responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). State regulation further provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in pertinent part, that a request for review set forth:

> (1) the specific relief in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise ruling, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). Moreover, all pleadings and papers submitted to an SRO must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney (8 NYCRR 279.7[a]). Additionally, all pleadings shall be verified (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], aff'd C.E. v Chappaqua Cent. Sch. Dist., 2017 WL 2569701 [2d Cir. June 14, 2017], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Although the request for review was not artfully drafted, contrary to the district's assertions, it was verified by the parent and sufficiently identified the issues presented for review with each issue numbered and set forth separately. The parent enumerated her concerns and indicated that the relief she was seeking through the review process was a remand so that she would have the opportunity to present testimony and evidence and obtain a decision regarding whether the student was provided with a FAPE.[10] While the parent did not cite to the hearing record to support the arguments contained in her request for review, it would not be prudent to dismiss the request for

[10] To the extent that the district asserts that the parent is circumventing the prohibition against judge-shopping by means of seeking a remand. I disagree. The request for review states that the parent is seeking "an immediate remand back to the IHO…or to a new IHO" (Req. for Rev. at p. 4). The plain language shows that the parent is not "judge shopping," and this argument is without merit.

review on this basis, especially considering that the request for review is based primarily on procedural matters, the IHO's decision being appealed contained no citations to the hearing record, and the district's answer also contained scant citations to the hearing record.

The district correctly indicates that the parent failed to serve a "Notice of Request for Review." The notice of request for review serves the important purpose of providing a respondent with the critical regulatory directives for properly responding to an appeal. However, in this instance it is unclear why the absence of the notice requires one of the highest forms of sanction—dismissal of the parent's request for review—when, in this case, the district timely prepared, served, and filed an answer responding to the allegations in the parent's request for review (8 NYCRR 279.3). Moreover, the district does not allege how the absence of such notice otherwise compromised its ability to participate in this review and, therefore, even a sanction than is less than outright dismissal would be unwarranted.

Overall, while the request for review does not adhere to all of the technical aspects of the practice requirements, it sufficiently identifies the issues raised on appeal and the district was not prevented from timely preparing and filing an answer. Accordingly, in the exercise of my discretion, any deficiencies are insufficient to dismiss the parent's request for review for failure to adhere to the practice requirements. However, the parent and her advocate are cautioned that in preparing future appeals, an SRO may be more inclined to do dismiss a request for review if a party exhibits a pattern of failing to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-015), or it becomes apparent that noncompliance is purposeful.[11]

b. Requirements for IHO Decisions

The parent appeals the dismissal of her case based on the format, content, and method of delivery of the decision. An IHO must "possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). In this case, and contrary to standard legal practice, IHO 2 ruled on a motion to dismiss the parent's due process complaint notice without giving the parent an opportunity to respond to the motion, and further, used the informal text of an e-mail to render his determination on the motion (Additional IHO Decision at p. 2).

An IHO's decision shall also be based solely upon the record of the proceeding before the IHO and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. (8 NYCRR 200.5[j][5][v]). While IHO 2 set forth a reason for his dismissal (that being "that the disagreements

[11] For future reference, the parent and her advocate are reminded that newly promulgated regulations governing the practice before the Office of State Review were amended and became effective for appeals filed on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Instructions about the amended practice regulations—as well as forms consistent with the amended practice regulations that became effective on January 1, 2017—have been provided on the Office of State Review's website (see http://www.sro.nysed.gov).

in this impartial hearing have been settled"), IHO 2 failed to reference any facts to support his conclusion, just that the district's counsel astutely applied the caselaw in the motion to dismiss (IHO Decision at p. 2).

Due process is the most formal of the dispute resolution mechanisms called for by the IDEA, and in keeping with the formalities of standard legal practice, an IHO's written order should appear as a finalized document that includes basic elements such as a caption, a case number, the critical procedural history, the key facts and law relied upon in reaching the decision, and the orders. In this case, IHO 2's format and content of the decision did not comport with standard legal practice and the writing expected to be produced by an IHO (see 8 NYCRR 200.1[x][5][v]; 200.5[j][5][v]).[12] While the use of e-mail to transmit an IHO decision is well within the dictates of standard legal practice, it is more typical in standard legal practice to attach a formal order to the e-mail, rather than the approach used in this case, which was more akin to a colloquy with the parties in the text of e-mail.[13]

2. Scope of Proceeding

The parent has not challenged the decision by IHO 1 dated August 2, 2016, which dismissed the parent's request for monetary damages as a form of relief and neither party has challenged IHO's determinations regarding pendency. "The law of the case doctrine' is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.'" (Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013], appeal dismissed [Dec. 10, 2013], citing U.S. v. Quintieri, 306 F.3d 1217, 1226 [2d Cir. 2002]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as '"a kind of intra-action res judicata"']; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by a State Review Officer would not be reopened during the proceeding once it was decided]). In this case, I am not reaching a decision on the merits of the case, and as

[12] I have reviewed other matters in which the IHO has presided. He generally encourages parties to participate in due process in a collegial, noncombative manner and I am confident that the IHO can observe the formalities that the parties and process require.

[13] The IHO is reminded to make every effort to issue a final decision in the first instance and refrain from issuing additions to the decision (i.e. the second decision added the statement that the dismissal was "with prejudice"). The timeclock for appealing a decision to an SRO begins to run from the date of the final decision (that is the first decision) issued by an IHO. In this case, the IHO's statements that he issued his e-mail decision dismissing the case on April 12, 2017 would suggest that service of a request for review 43 days later, in derogation of the strict 40-day timeline set forth in 8 NYCRR 279.49(a). However, subsequent communications in May 2017 suggest that the IHO did not transmit his April decision to the parent directly, nor did he intend to. When the IHO reached a decision and first communicated it to the parties is muddled in the record. Consequently, I will not, in this instance, hold the parent accountable for what may have been a failure to adhere the 40-day appeal timelines, especially when the parent continued to seek a ruling from the IHO.

such, there is no finality to the IHO's determination concerning monetary damages and pendency; however, in light of the remand further discussed below, unless "cogent and compelling reasons militate otherwise" (Pape, 2013 WL 3929630, at *8), the IHO should restrain himself from re-hearing those issues.[14]

B. Procedural Rights and Mootness

The parent asserts that she was deprived of the right to be heard in two ways during the impartial hearing, first when the IHO dismissed the proceeding upon motion by the district without giving her an opportunity to object and, second, by dismissing the matter before she had the opportunity to testify or present witnesses.

State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies," including, the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Burlington, 471 U.S. 359, 361 [1985]; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA provides parents involved in a complaint the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). 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]).

Several days after the March 2017 CSE meeting, on March 28, 2017, the tenth day of proceedings in this matter, the district's attorney indicated that the district required an additional two days of hearings to finish presenting its case, and the parent's advocate indicated that the parent expected to take an additional three hearing days to present her case (March 28, 2017 Tr. pp. 131-32).

In April 2017, the district moved to dismiss the proceeding based on the theory that the March 24, 2017 IEP had provided all the relief that the parent had requested in the two due process complaint notices, leaving the parent without a dispute to pursue, and thus rendering the issues in the proceeding moot (Dist. 4/10/17 Mot. to Dismiss). As explained in greater detail below, the IHO's determination that the matter be dismissed on mootness grounds was premature as the parent had not yet had an opportunity to present her case and the parent's due process complaint notice included a claim for out of pocket expenses for private ABA, OT, and sensory gym services, which was not addressed.

A dispute between parties must at all stages be "real and live," and not "academic," or

[14] The IDEA does not provide for, nor have the courts allowed, monetary damages (see Baldessarre v. Monroe-Woodbury Cent. Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 483-86 [2d Cir. 2002]; R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]).

it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Toth v. New York City Dep't of Educ., 2017 WL 78483, at *9 [E.D.N.Y. Jan. 9, 2017]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering question of the "potential mootness of a claim for declaratory relief"]). Furthermore, a party's "unwillingness to admit liability is insufficient, standing alone, to make [a] case a live controversy," where the party has otherwise agreed to fully resolve the dispute (McCauley v. Trans Union, L.L.C., 402 F.3d 340, 341-42 [2d Cir. 2005]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; but see Toth, 2017 WL 78483, at *10 [finding the matter moot where the student had been receiving at-home therapy pursuant to resolution agreements, which was "the very compensatory education that [the parent] sought]).

In this case, it is indisputable that the March 2017 IEP offered much of the relief requested by the parent in her May 2016 and August 2016 due process complaint notices (compare Dist. 4/10/17 Mot. to Dismiss, Ex. E at pp. 1-2, 10, with Dist. Ex. 1 at pp. 6, 19, and Dist. Ex. 103). However, it did not, as the district suggests, resolve every last claim in the due process complaint notice. For example, on appeal, the parent asserts that, part of the relief she is seeking, includes monetary reimbursement. A reasonable reading of the parent's May 2016 due process complaint notice shows that the parent requested reimbursement for out of pocket expenses that she alleged to have incurred for private ABA, OT, and sensory gym services (Dist. Ex. 1 at pp. 6, 19). The parent also requested that the IHO determine the number of hours of make-up services the student should receive, presumably after finding, as the parent argues, that there was a denial of a FAPE (id. at p. 5). These unresolved matters alone preclude a finding that the case can be dismissed as moot.

Although ten days of proceedings have taken place, and the district presented witnesses on at least four of those days, the parent was not provided with an opportunity to present her arguments or any contradictory evidence she may have with respect to the above claims. Additionally, even if some of the issues have, for practical purposes, been rendered moot, the manner in which it was addressed failed to comport with the requirements of due process inasmuch as the hearing record does not indicate that the parent was provided with an opportunity to be heard in response to the district's motion to dismiss the proceeding on mootness grounds, however strong the IHO believed the district's legal argument may or may not have been. Under these circumstances, and considering there are additional demands for relief in the parent's request for due process that remained unaddressed by the March 2017 IEP (and which the parent continues to

press on appeal), the IHO's decision granting the district's motion to dismiss must be vacated and the matter remanded for further proceedings.

Notwithstanding the above, while this case should not have been dismissed as moot as of the time that the district made its motion, the district is not precluded from renewing its motion upon remand and addressing the questions raised herein. If the district chooses to renew its motion, IHO may make a reasoned determination, after allowing both sides an appropriate opportunity to be heard, as to the extent to which each issue in the case remains live in light of the CSE's agreement to change the students IEP in many of the ways that the parent sought in this proceeding. In addition, mootness is not an all-or-nothing proposition. In some circumstances decisions on the merits of some issues must be rendered even when those issues are no longer live. These situations are the so-called exceptions to the doctrine of mootness. Prior to determining that the parent's claims are moot due to the district's efforts to appease the parent, the parties and the IHO should consider whether one of the exceptions to the mootness doctrine applies, in other words, whether a decision on the merits of some or all of the issues should be issued even though certain issues may no longer be live.

The parent asserts on appeal that she is entitled to a determination as to whether the district offered the student a FAPE in the LRE, contending that the IHO should be required to rule on the appropriateness of the BOCES CRC placement and whether the district was required to offer the student a placement in the district. One of the exceptions to the mootness doctrine provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). The "capable of repetition, yet evading review" exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; see also L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 102 [2d Cir. Jan. 19, 2017]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the in the facts at bar the controversy of "whether and to what extent the [s]tudent can be mainstreamed" likely constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]).

A second potential exception to the mootness doctrine that arises less frequently may nevertheless be applicable to the facts of this case. Here, the hearing record does not indicate the extent to which the parent has acquiesced to the district's recommended services as outlined in the March 2017 IEP, rather evidence shows that the district has voluntarily agreed to provide those

services. "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" (Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 [2007]). The Second Circuit has observed that "[t]he voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (Lillbask, 397 F.3d 77, 88 [2d Cir. 2005], quoting Lamar Advertising of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 375 [2d Cir.2004] [internal quotations omitted]). The Court also noted that where "the challenged conduct has only been proposed but never implemented because a stay-put order has maintained the status quo, it is the first factor that is critical to mootness analysis" (id.). When appearing before the IHO upon remand, it is expected that both parties will be prepared to create an administrative record for the IHO's consideration that addresses these legal standards and how they apply to the facts of this case.

In light of the determinations and discussion above, this matter is remanded for further administrative proceedings (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]). However, given that this matter has already consumed 10 days of hearings, and the district noted that it required more hearing days to complete its case, the IHO should consider conducting a conference for the purpose of clarifying the specific issues that need to be addressed, including(a) what specific issues are yet to be determined, and which issues, if any, are no longer live; (b) what specific relief has been offered and/or provided to address each specific issue (i.e., hours of make-up services for each service by school year, and why those make-up services were necessary); and (c) for the remaining issues, what specific relief has been requested to address each specific issue (i.e., FAPE, LRE, missed or insufficient services for each service by specific school years).

It is each parties' responsibility to assist the IHO by identifying the remaining issues that must be addressed. Additionally, the IHO is reminded that any further substantive relief awarded to the parent as an equitable matter must be predicated upon a finding that the district did not offer the student a FAPE. Furthermore, the IHO has broad authority and discretion when fashioning equitable relief under the IDEA, and should the IHO ultimately conclude that the district failed to offer the student a FAPE, it would not be unreasonable for the IHO to consider the make-up services and/or compensatory educational services the district has already offered to provide to the student—as set forth in the March 2017 IEP—when crafting a reasonable award of compensatory educational services as an equitable remedy that is tailored to meet the unique circumstances of this case (see Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]).

VII. Conclusion

For the reasons described above, the IHO's dismissal of the case as moot was in error and this matter must be remanded for further proceedings.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the IHO dated April 12 and May 6, 2017 in e-mail form, and dated May 15, 2017 in letter form, is vacated; and,

IT IS FURTHER ORDERED that this matter is remanded to IHO 2 for further proceedings in accordance with this decision; and,

IT IS FURTHER ORDERED that in the event that IHO 2 cannot hear the matter upon remand, the district shall appoint a new IHO.

Dated: **Albany, New York**
July 19, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER