



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-097

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Cuddy Law Firm, PLLC, attorneys for petitioner, by Katherine Aquino-Melendez, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, her request to fully fund independent educational evaluations (IEEs) of the student. The appeal must be sustained in part.

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]).

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]).

III. Facts and Procedural History

Given the limited scope of this appeal, a recitation of the student's educational history is not necessary. Briefly, however, the student attended a district public school for the 2016-17 school year (sixth grade) and 2017-18 school year (seventh grade) where he received integrated co-teaching (ICT) services and related services (see Parent Ex. C at pp. 1, 8-9; see also Parent Ex. B at pp. 1, 10-11). On November 23, 2016 during sixth grade, the district conducted a psychoeducational evaluation of the student at the parent's request (see Parent Ex. F at p. 1).

In a letter dated January 29, 2018, the parent wrote to the district and expressed disagreement with the district's November 2016 reevaluation of the student (see Parent Ex. J at p. 1). In particular, the parent noted that the reevaluation failed to "comprehensively evaluate" the

student (id.). As a result, the parent requested the following as IEEs: a neuropsychological evaluation at the rate of \$5000.00, an occupational therapy (OT) evaluation at the rate of \$1200.00, a speech-language evaluation at the rate of \$2100.00, an assistive technology evaluation at the rate of \$2800.00, and an applied behavior analysis (ABA) assessment with observation (ABA assessment) at the rate of \$4200.00 (id.). In the January 2018 letter, the parent identified specific providers to conduct the IEEs, and the "normal and customary rate" charged by each identified provider for the specific evaluation (id. at p. 2). In addition, the parent clarified that she did not want "[district] approved providers at the [district] approved rates," and she asked that the district to respond to her "within ten (10) calendar days" in a letter written in her native language either authorizing the IEEs at public expense or initiating an impartial hearing, consistent with State regulation (id.).

In a letter to the parent dated January 30, 2018, the district indicated that, upon review of the student's educational file, it was "determined that additional assessments [were] required as part of a requested reevaluation or mandated three-year-evaluation" (Parent Ex. K). The district requested the parent's consent to conduct the additional testing (id.). On February 1, 2018, the parent indicated on the district's January 2018 letter that she did not consent to the district's request to conduct additional testing, and included a handwritten note in her native language at the bottom of the district's letter (see Parent Ex. L).

A. Due Process Complaint Notice

By due process complaint notice dated March 19, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, and 2018-19 school years based upon alleged procedural and substantive violations (see Parent Ex. A at pp. 1-7). Relevant to this appeal, the parent alleged that the district failed to respond to her request for IEEs in January and February 2018 (id. at pp. 2, 7). As part of the impartial hearing, the parent requested that the IHO issue an interim order for IEEs (id. at p. 2). Thereafter as relief, the parent requested that the IHO order the district to fund the following IEEs: a neuropsychological evaluation, an OT evaluation, a speech-language evaluation, an assistive technology evaluation, and an ABA assessment (id. at p. 8). The parent further clarified that the IEEs must be conducted by the parent's selected providers and at the "normal and customary" rate for each IEE (id.).¹

B. Impartial Hearing Officer Decision

On June 13, 2018, the parties proceeded to an impartial hearing, which concluded on June 29, 2018 after two days of proceedings (see Tr. pp. 1-77).² In a decision dated July 12, 2018, the IHO ordered the district to fund the following IEEs: an OT evaluation at the rate of \$1200.00, a

¹ The parent did not include a specific rate for each IEE requested as relief in the due process complaint notice (see generally Parent Ex. A).

² At the impartial hearing, the district did not present any documentary or testimonial evidence on behalf of the district, and the district representative who appeared on behalf of the district did not conduct any cross-examination of the parent's witnesses (see generally Tr. pp. 1-77; Parent Exs. A-C; F-G; J-L; S-W; Z).

speech-language evaluation at the rate of \$1800.00, an ABA assessment at the rate of \$2500.00, a neuropsychological evaluation at the rate of \$3375.00, and an assistive technology evaluation at the rate of \$1800.00 (see IHO Decision at p. 10). In reducing the rates awarded for the ABA assessment, the neuropsychological evaluation, and the assistive technology evaluation, the IHO indicated that these witnesses—to wit, the respective IEE providers—were "interested parties" and not credible "as to the number of hours required for their evaluations and not credible as to the fee that [was] an average fee which [was] customary and usual in the community" (id. at p. 7).³ The IHO clarified that the order was "based on the above testimony" and an "analysis of the testimony and the documents presented," noting "again that the parent did not write the letter requesting the listed evaluations" (id. at p. 9). In addition, the IHO opined that if the district "would start to initiate its own hearings then [IHOs] would not have to have these types of hearings and determine the credibility of supposed professionals" (id.). The IHO also indicated that if the district had requested an impartial hearing, the "issue . . . would be whether their evaluations were sufficient and whether the student require[d] additional evaluations" (id.). As a final point, the IHO denied "all other requests in this case" (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by relying upon "extrinsic 'evidence'" to arbitrarily reduce the rates awarded to fund the following IEEs: the neuropsychological evaluation, the ABA assessment, and the assistive technology evaluation. The parent also argues that the IHO misinterpreted and misapplied State and federal laws. Next, the parent contends that the IHO misstated witness testimony and documentary evidence presented at the impartial hearing. Finally, the parent asserts that the IHO expressed "bias" against her as an "English Second Language" parent who sought the "assistance of an attorney for educational guidance and drafting correspondence." As relief, the parent seeks an order directing the district to fund the neuropsychological evaluation at the "normal and customary rate" of \$5000.00, the assistive

³ The IHO specifically found the OT evaluator—whose testimony was provided in an affidavit (see generally Parent Ex. Z)—and the speech-language evaluator, who testified in person at the impartial hearing (see Tr. pp. 49-55), to both be credible witnesses (see IHO Decision at p. 7). While State regulation allows witness testimony to be provided at an impartial hearing "by affidavit in lieu of in-hearing testimony," the same State regulation requires that the "witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]). It does not appear, upon review of the testimonial evidence, that the parent made the OT evaluator—whom the IHO found to be credible—available for cross-examination at the impartial hearing (see Tr. pp. 1-77).

technology evaluation at the "normal and customary rate" of \$2800.00, and the ABA assessment at the "normal and customary rate" of \$4200.00.⁴

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

⁴ While the IHO awarded the parent the full amount requested for the OT evaluation (\$1200.00), the IHO reduced the amount awarded to the parent for the speech-language evaluation she requested from \$2100.00 to \$1800.00 (compare IHO Decision at pp. 5-6, 10, with Parent Ex. J at p. 2). At the impartial hearing, the speech-language evaluator who testified was not the same evaluator initially selected by the parent to conduct the speech-language evaluation (compare Parent Ex. J at p. 2, with Tr. pp. 49-55). Initially, the parent sought a speech-language evaluation at the rate of \$2100.00 to be conducted by the same evaluator the parent selected to complete the assistive technology evaluation of the student (see Parent Ex. J at p. 2). The speech-language evaluator testified that she charged \$1800.00 for an evaluation (same rate for bilingual evaluation) (see Tr. p. 54; see generally Parent Ex. T). Since the parent does not appeal the amount the IHO awarded for the OT evaluation and the parent does not appeal the reduced amount the IHO awarded for the speech-language evaluation, the IHO's determinations regarding these two IEEs have become final and binding on both parties and these determinations will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

VI. Discussion

A. Preliminary Matters—IHO Bias

On appeal, the parent argues that the IHO expressed bias against her "throughout the decision" because she required translation through an interpreter to "understand the English language" and because she did not speak English (Req. for Rev. ¶ 17). In particular, the parent points to the IHO's factual finding that the parent's attorney, as opposed to the parent, herself, drafted the January 2018 letter to the district requesting IEEs as evidence of bias (*id.*). The parent argues that, based on "arbitrary assumptions" not supported by the hearing record—including that the parent lacked knowledge of assistive technology and ABA—the IHO improperly presumed that she did not "write or have any input on the IEE request letter" (Parent Mem. of Law at p. 7; *see* IHO Decision at pp. 2-3, 5, 7; *see also* Parent Ex. J at pp. 1-2). She further argues that the IHO's bias "caused erroneous conclusions" and influenced the IHO's decision to reduce the amounts awarded to fund the ABA assessment and the assistive technology evaluation (Req. for Rev. ¶ 17; *see* Parent Mem. of Law at p. 7).

In response, the district generally denies the parent's allegations of IHO bias, and further argues that there is no evidence linking any of the IHO's statements in the decision concerning the drafting of the parent's January 2018 letter requesting IEEs to the IHO's decision to reduce the amount awarded for the requested IEEs.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (*see, e.g., Application of a Student with a Disability*, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (*e.g., Application of a Student with a Disability*, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). "Generally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality" (*Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 [2d Cir. 2009]; *see Liteky v. United States*, 510 U.S. 540, 555 [1994]).

Here, a review of the hearing record and the IHO's decision reveals that the IHO was, at times, curt and brusque with both parties during the impartial hearing (*see, e.g.,* Tr. pp. 4-7, 10-17, 61-62), and critical of whether the parent's request for IEEs was attributable to the parent's attorney rather than the parent herself (*see* Tr. pp. 42-43; Parent Ex. J at pp. 1-2; IHO Decision at pp. 2-3, 7). Given that the parent's spoken language and mode of communication was not English (*see* Parent Ex. B at p. 15), the letter requesting the IEEs was written in English and specifically identified evaluators and rates to be awarded (*see* Parent Ex. J at pp. 1-2), and the impartial hearing was held to resolve what essentially amounted to a rate dispute over the requested IEEs (*compare*

Parent Ex. A at pp. 1-11, with Tr. pp. 6-7, 10-12), it was not inappropriate for the IHO to express an opinion regarding the basis upon which the rates were requested as the January 2018 letter effectively triggered the administrative proceedings. Moreover, the IHO's criticisms of the request for IEE were "neither unfounded nor so extreme that they suggest that he was biased against" the parent (Chen, 552 F.3d at 227), because ultimately, the IHO noted in the decision that if his decision was appealed, "an SRO . . . may determine whether the evidence and analysis at the hearing warrant[ed] any action on that issue" (IHO Decision at pp. 2-3). In summary, any incivility demonstrated by the IHO does not warrant reversal of his decision in this case.

VII. Relief—Reimbursement for IEEs

A. Neuropsychological IEE

At the impartial hearing, the evaluator explained the process used for the neuropsychological evaluation of the student (see Tr. pp. 67-68). First, the evaluator would meet with the parent (1.5 hours) to obtain a "history of everything . . . from prenatal care to the present" so that she could "tailor the testing" to the particular student (Tr. p. 67).⁵ Next—and "depending on the willingness of the school and the time of year"—the evaluator would speak to the teachers working with the student and "ask them to fill out several questionnaires" (id.). At times, the evaluator had the opportunity to observe the student in a school setting prior to meeting with the teachers, which also allowed the evaluator the opportunity to observe the teachers in "their natural background" (id.). Next, the evaluator administered the testing to students; generally, "school-aged" students engaged in "three 3-hour sessions of testing" (nine hours) that "look[ed] at every aspect of cognitive functioning in order to see [what was] causing the difficulty in school" (Tr. pp. 67-68). If the evaluator discovered an area of "difficulty," she would then "do a deeper dive as opposed to just the screening" (Tr. p. 68). After completing the testing, the evaluator scored the results and wrote a "full report with recommendations" individualized to that particular student (id.). The evaluator would then meet with the parent to discuss the testing results (1.5 hours) (id.). The evaluator also testified that she may then participate in IEP meetings, speak with teachers, or ask for a "different classroom placement" for the student (id.). Finally, the evaluator added that she also conducted a "records review" to learn about past concerns with the student, to complete or correct information provided by the parent, and to understand whether recommendations made for the student in the past worked for the student (Tr. pp. 69-70).

In discussing the rate charged for a neuropsychological evaluation, the evaluator testified that she had conducted "[o]ver 500" such evaluations and charged \$5000.00 for the evaluation when completed for students from the district (Tr. pp. 70-71).⁶ Based upon information provided by her "peers," the evaluator testified that the rates charged at other facilities for

⁵ The evaluator testified that, due to her location, she had access to a "whole host of medical translators" who would "help with the translating" (Tr. p. 69). Based upon the evidence in the hearing record, it does not appear that the use of a translator to assist in the neuropsychological evaluation resulted in an additional fee (see generally Tr. pp. 1-77; Parent Exs. A-C; F-G; J-L; S-W; Z).

⁶ Typically, the evaluator charged \$5500.00 for a neuropsychological evaluation; however, she offered a 10 percent discount of the total cost of these evaluations to the district because her own children attended district public schools (see Tr. pp. 70-71).

neuropsychological evaluations ranged from \$6000.00 to \$7500.00 (Tr. p. 71). Finally, the evaluator testified that her evaluation took "about 20 hours to complete," but noted that the \$5000.00 fee for the neuropsychological evaluation did not change if the evaluation took longer than 20 hours (Tr. pp. 73-74).

In reaching the decision to reduce the amount awarded to fund the neuropsychological evaluation, the IHO first noted that "school [was] not in session" and therefore, the IHO was "positive that the parent's attorney w[ould] not want to wait till September" to administer the evaluation to the student (IHO Decision at pp. 6-7). Next, the IHO found that the "neuropsychological would be submitted for a subsequent hearing request," and the 1.5 hour review of the evaluation results with the parent was "not required by this hearing request" (*id.* at p. 7). With regard to the evaluator's testimony at the impartial hearing, the IHO determined that there would be "no interview of the teachers, the interview of the parent w[ould] certainly not take [1.5] hours, [and] there [was] no requirement to present the document to the parent that would be part of the witness' time and part of the fee the [district] would pay" (*id.*). The IHO also found that the evaluator's testimony about "customary" rates charged in the "community" did not include information related to "psychologists . . . in private practice . . . not affiliated with a hospital" and who "thus may charge less than this witness" (*id.*). As a result, the IHO did not find the evaluator's "claim of customary [rates] in the community credible" and similarly, the IHO did not find the evaluator credible as to the amount of time the evaluation would take to administer (20 hours) (*id.*). Based upon the IHO's own calculations, the IHO determined that the administration of the neuropsychological evaluation would take a "total of 15 hours" and at a rate of \$225.00 per hour (finding that \$250.00 per hour was not the "community and customary rate"), the total cost of the evaluation was \$3375.00 and thereafter reduced the amount awarded to the parent to reflect this total cost (*id.* at pp. 7, 10).

Upon review, the evidence in the hearing record does not support the IHO's rationale for reducing the amount awarded to the parent for the neuropsychological IEE. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). However, in this instance, while the IHO indicated that the evaluator's testimony lacked credibility as to the customary rate within the community for the evaluation and the length of time it would take to complete the evaluation process, the IHO's findings appear more related to the weight that he decided to afford to the evaluator's testimony, rather than to the IHO's observations of the evaluator's demeanor during testimony or any discrepancies between the testimony and any documentary evidence in the hearing record (see S.W. v New York City Dep't of Educ., 92 F. Supp. 3d 143, 159 n.6 [S.D.N.Y. 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; see also K.R. v . New York City Dep't of Educ., 107 F.3d 295, 308-09 [S.D.N.Y. 2015] [describing IHO's observations of the witness's demeanor in assessing credibility, which included "the cadence and volume of [the witness's] speech, hesitations and pauses, and tone of voice"]; see, e.g., Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415,

429 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]). Rather than pointing to any conflicting statements or observations of the evaluator's demeanor as a basis upon which to attribute the credibility determinations, the IHO relied on his own subjective opinion about customary rate information that was not presented as evidence at the impartial hearing and then assessed the witness's credibility against that unstated, subjective opinion.⁷

In addition to the improper credibility determination, the IHO also mistakenly found—without an evidentiary basis in the hearing record—that the neuropsychological evaluation would only take 15 hours, as opposed to 20 hours (see IHO Decision at p. 7). Moreover, the IHO's finding that the "customary rate" for the neuropsychological evaluation, at \$225.00 per hour, was also without evidentiary support in the hearing record. Here, the evaluator testified that the total cost of the neuropsychological evaluation was \$5000.00 (see Tr. pp. 73-74); the evaluator, at no time during the impartial hearing, testified about a specific rate per hour for the neuropsychological evaluation (see generally Tr. pp. 63-76). It appears, therefore, that the IHO may have mistakenly attributed the testimony provided by the evaluator selected to conduct the ABA assessment, who testified about the \$225.00 per hour rate, to the neuropsychological evaluator (compare Tr. p. 36, with Tr. pp. 63-76).

In light of the foregoing, the IHO's decision to reduce the amount awarded to the parent to obtain the independent neuropsychological evaluation was not supported by the evidence in the hearing record and I will direct the district to pay up to \$5000.00 to enable the parent to obtain the independent neuropsychological evaluation of the student.

B. Assistive Technology IEE

At the impartial hearing, the evaluator described the process used to conduct an assistive technology evaluation (see Tr. pp. 19-20). Initially, the evaluator reviewed the student's records to prepare for the evaluation and to identify the student's "strengths and weaknesses," as well as "areas of deficits," that affected the student "academically, in order to access the curriculum" (Tr. p. 20). Next, the evaluator engaged in a process comparing the student's "deficits and needs and strengths with any software or hardware that would be most beneficial for the student to be trialed and utilized during the evaluation itself" (id.). The assistive technology evaluation of the student included a "parent interview before the evaluation to . . . better understand the student's needs" (id.). The evaluation itself entailed the presentation of "any trialed software . . . to understand the students' needs and to see how [they were] able to access the presented technology . . . and the cognizance to understand the presented technologies" (Tr. pp. 20-21). After the evaluation was completed, the evaluator drafted a "comprehensive report with recommendations for . . . any technology that could be beneficial for the student" (Tr. p. 21). According to the evaluator, this entire evaluation process took, on average, "about 40 hours" from "start to finish" (Tr. pp. 22-23).

⁷ It would have been permissible for the IHO to ask additional questions regarding the basis of the evaluator's statement that her peers typically charged \$6000.00 to \$7500.00 for a neuropsychological evaluation (see Tr. p. 71) and, perhaps then, there would be a basis to question the reliability of that customary rate testimony and the credibility of the witness, but the IHO did not engage in that inquiry. For this reason, I find it is an error in judgment, but it does not rise to the level of actual bias on the part of the IHO.

In discussing the rate charged for an assistive technology evaluation, the evaluator testified that she was "very proficient" in the parent's native language (Tr. p. 21). The evaluator further testified that the rate charged for an assistive technology evaluation—\$2500.00—remained "static, unless . . . a bilingual translator [was] required," wherein an additional \$300.00 would be added for the translation service (Tr. pp. 21-22). When asked by the IHO why a translator would be necessary given that she was "proficient" in the parent's native language, the evaluator testified that although her "conversational" skills were "proficient," she was "more proficient in the understanding of the spoken language rather than some vocabulary words [she] may flounder with," and therefore she "like[d] to have somebody [that was] exceptionally proficient in the language" (Tr. p. 22). In addition, the evaluator testified that she charged the same rate—\$2500.00—for an assistive technology evaluation regardless of whether a parent paid "out of pocket" for the evaluation or whether the evaluation was conducted "as a result of a final order or a final decision" (Tr. p. 24). At that time, the evaluator had conducted "approximately 400" assistive technology evaluations, and the evaluator admitted that she has not always received the full amount charged for an evaluation—\$2500.00—in a final decision (Tr. pp. 23-25).

In reaching the decision to reduce the amount awarded for the cost of the assistive technology evaluation, the IHO initially questioned why the assistive technology evaluation would take "40 hours" when other evaluators who testified about the length of time it would take to conduct their respective evaluations stated a range between "6 to 20 hours"—(IHO Decision at p. 5). The IHO acknowledged that while "fully aware that different skill sets require[d] different tests," the evaluator testified that she required an "entire work week" to "review documents," "interview the parent," "conduct a number of assistive technology tests," and "write a report" (*id.*). Based upon information gleaned from the evidence in the hearing record, the IHO noted that the student had "issues" in the areas of "reading, writing and staying on task" (*id.*). The IHO then found that the evaluator's "claim of 40 hours" was not credible, especially when she had never met the student (*id.*). The IHO also noted that, based upon the evaluator's own testimony, she did not always receive the full rate of \$2500.00 for an assistive technology evaluation through "some IHO decisions" (*id.*). Next, the IHO found that because the evaluator was proficient in the parent's native language, an additional \$300.00 for a translator was not warranted as a translator was not required for administering the evaluation to the student and finding that the evaluator's proficiency in the parent's native language was sufficient to conduct the parent interview as part of the evaluation process (*id.*). As a final point, the IHO noted that the evaluator provided no information about the "customary rate of other person conducting assistive technology evaluations" and directed the district to fund the assistive technology evaluation at a total cost of \$1800.00 rather than the requested amount of \$2800.00 (*id.* at pp. 5, 10).

Similar to the analysis of the IHO's reduction of the fee for the independent neuropsychological evaluation set forth above, the evidence in the hearing record does not support the IHO's credibility rationale for reducing the amount awarded to the parent for the assistive technology IEE. Here, rather than relying on the un rebutted testimonial evidence of the evaluator regarding the length of time needed to complete the assistive technology IEE—40 hours (*see* Tr. pp. 22-23)—the IHO again appeared to substitute his own subjective opinion regarding the time necessary to complete the evaluation process, which the IHO formulated based upon the testimony of the other evaluators on this same issue (*see* IHO Decision at p. 5) and his credibility determination was not based upon any observations about the witness's demeanor or evidentiary inconsistencies regarding an assistive technology IEE (*id.*; *see S.W.*, 92 F. Supp. 3d at 159 n.6; *see*

also K.R., 107 F.3d at 308-09; see, e.g., Matrejek, 471 F. Supp. 2d at 429). However, to the extent that the IHO concluded that the amount awarded to the parent to obtain the assistive technology IEE should not include the cost of a translator—for an additional fee of \$300.00—the evidence in the hearing record amply supports this finding because a "very proficient" individual is sufficient for purposes of an IEE, and an "exceptional" translation is an unnecessarily high standard (see IHO Decision at pp. 5, 10). Therefore, the IHO's decision to reduce the amount awarded to the parent for the total cost of the assistive technology IEE is hereby modified, and the district is required to pay up to \$2500.00 for the parent to obtain the assistive technology IEE.

C. ABA Assessment/IEE

The evaluator selected by the parent to conduct the ABA assessment also testified at the impartial hearing (see Tr. pp. 28-48). In terms of the process of conducting the assessment, the evaluator testified that, initially, she reviewed students records to "know[] the student's instructional history" such as "what they learned, . . . what was their rate of acquisition on skills, [and] any behavioral issues and plans that ha[d] been in place" (Tr. p. 34). The ABA assessment would also include a "parent interview, staff interview, [and] then the actual administration of the protocol, writing the report and then making . . . recommendations" (id.). The evaluator estimated that the entire evaluation process took approximately "17 to 20" hours, with the following break down for each task: 60 minutes for the record review ("more or less"), 30 to 45 minutes to interview the parent, 7 to 10 hours to administer the testing to the student (depending on the protocol selected), and 6 to 8 hours to write the evaluation report (Tr. p. 35).

In selecting a protocol, the evaluator relied upon the student's "level of performance and language level," as well as where the student was functioning developmentally, to inform that choice (Tr. pp. 36-37; see Tr. p. 33). For example, the evaluator described one assessment tool used for "younger students"—the Verbal Behavior Milestones Assessment and Placement Programs (VB-MAPP)—as well as a second assessment tool that could be used for a "wider range of age" or "older" students—the Assessment of Basic Language and Learning Skills (ABLLS) (Tr. pp. 35-36; see Tr. pp. 33, 40). The evaluator testified that although the two assessment tools differed, both "look[ed] at a number of different skills and different domains" (Tr. p. 33). Overall, the evaluator described an ABA assessment as "really a behavior analytic assessment that examine[d] the student's repertoire in a variety of different skills domains" (id.).

In discussing the rate charged for an ABA assessment, the evaluator testified that her "customary rate" was \$225.00 per hour, and since the assessment took "about 17 hours," the entire assessment cost "\$4000.00" (Tr. p. 36). According to the evaluator, the cost of the assessment would not change even if the assessment took 20 hours to complete instead of 17 hours (see Tr. pp. 37-38). Having participated in previous impartial hearings, the evaluator testified that she could not recall whether IHOs always awarded the exact costs of her evaluations (see Tr. PP. 38-39). When asked by the IHO if the evaluator could name four other evaluators who charged the "same amount" for an ABA assessment—i.e., \$4000.00—the evaluator testified that she could name "two," but not "four" (Tr. pp. 40-41). Finally, the evaluator testified that, in this case, the estimated total cost for the ABA assessment was \$4200.00, which included an additional \$200.00 fee to pay for the services of a translator (see Tr. pp. 41-46).

In reaching the decision to reduce the amount awarded for the cost of the ABA assessment, the IHO summarized the evaluator's testimony with respect to the evaluation process, the amount of time to complete the assessment (17 to 20 hours), the evaluator's rate of \$225.00 per hour, and the total cost of the evaluation to be capped at \$4000.00 regardless of whether the evaluation took 17 or 20 hours (see IHO Decision at p. 6). The IHO then noted that when asked to provide the names of four other evaluators in the community who charged similar rates for this evaluation, the evaluator could "only provide two names" (id.). Next, the IHO noted that an additional fee of \$200.00 would be charged for a translator to assist in conducting the parent's interview, but that the interview, itself—based on the evaluator's own testimony—would take "less than an hour" (30 to 45 minutes) (id.). The IHO further noted that none of the reports written by the student's "teachers, the prior speech evaluator and all other persons" indicated "any indicia of autism" (id.). The IHO indicated that while the evaluator initially testified that she was "always paid the fee requested from impartial hearings," the evaluator thereafter testified that she "could not actually recall" whether she "always received such fees" (id.). Finally, the IHO concluded that she did not "find the fee requested commensurate with other people in the community," she did not that the evaluation would take 17 hours, and thus, the IHO reduced the amount awarded to fund the ABA assessment from the requested amount of \$4200.00 to \$2500.00 (id. at pp. 6, 10).

Following the same analytical approach set forth above with respect to the neuropsychological and assistive technology IEEs, once again the evidence in the hearing record does not support the IHO's credibility rationale for reducing the amount awarded to the parent for the ABA assessment. While the IHO conducted a more fact-intensive inquiry with respect to the ABA assessment/IEE and correctly summarized the evaluator's testimony, the IHO failed to point to any evidence whatsoever in support of the conclusions that the amount requested for the evaluation differed from rates in the community or that the evaluation would not take 17 hours when the hearing record did not contain any evidence to the contrary (compare IHO Decision at pp. 6, 10, with Tr. pp. 1-77, and Parent Exs. A-C; F-G; J-L; S-W; Z). Moreover, the IHO did not point to any observations about the witness's demeanor or evidentiary inconsistencies to support the conclusion that the evaluator was not credible as to the hours required for the evaluation or as to the fee that was customary and usual in the community (see IHO Decision at pp. 6-7; see S.W., 92 F. Supp. 3d at 159 n.6; see also K.R., 107 F.3d at 308-09; see, e.g., Matrejek, 471 F. Supp. 2d at 429). Based upon an independent calculation, it appears that if the evaluation takes 17 hours and the rate is \$225.00 per hour, the cost for the evaluation is \$3825.00 (17 x \$225.00). Adding in the \$200.00 fee for a translator, the total cost of the ABA assessment is \$4025.00 (\$3825.00 + \$200.00), rather than the total cost of \$4200.00 as quoted during testimony (see Tr. p. 36).⁸ Consequently, the IHO's decision to reduce the amount awarded to the parent for the total cost of the ABA assessment/IEE is hereby modified, and the district must pay up to \$4025.00 to enable the parent to obtain an independent ABA assessment.

VIII. Conclusion

In summary, some cases may present an IHO with the need to weigh conflicting evidence regarding the reasonableness of the costs associated with publicly funded IEEs; however, with the

⁸ The evidence in the hearing record does not explain this total cost discrepancy (see generally Tr. pp. 1-77; Parent Exs. A-C; F-G; J-L; S-W; Z).

exception of the cost of a translator for the assistive technology IEE, this case lacks such conflicting evidence and, for example, is unlike one in which a public school district actually presented evidence at an impartial hearing regarding permissible cost containment policies for publicly funded IEEs (see, e.g., M.V. v. Shenendehowa Cent. Sch. Dist., 11-CV-00701, 60 IDELR 213 [N.Y.N.D. Mar. 7, 2013]).⁹ Instead, the district provided no evidence of district-level policies of cost containment criteria (or any criteria for that matter) for publicly funded IEEs. The available evidence in the hearing record does not otherwise support the IHO's decision to reduce the rates awarded to the parent for the costs of obtaining a neuropsychological IEE, an assistive technology IEE, and an ABA assessment/IEE of the student, and at this juncture, I need not address the parties' remaining arguments.¹⁰

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 12, 2018, is modified and the district shall fund the parent's requested IEEs as follows: the neuropsychological IEE up to the rate of \$5000.00; the assistive technology IEE up to the rate of \$2500.00; and the ABA assessment/IEE up to the rate of \$4025.00.

**Dated: Albany, New York
November 6, 2018**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁹ The M.V. Court noted that with regard to a district policy in evidence that limited IEEs to no more than \$1800.00, "based on the current record, that, [in the relevant time period], in the parties' geographical area, there existed several psychologists or neuropsychologists willing to perform IEEs for less than \$1,800, whom [the parent] never attempted to call (due to an apparent desire to obtain an IEE only from Dr. Curley). . . . The fact that [the parent] perfunctorily attempted to contact (without success) various other doctors after that time period does not render the \$1,800 cap unreasonable, nor does it constitute unique circumstances justifying an exception to the general cap" (M.V., 11-CV-00701).

¹⁰ The IHO did not conduct a hearing on any issues besides the parents IEE requests.