The University of the State of New York

The State Education Department
State Review Officer
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No. 20-034

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Brian J. Reimels, Esq., attorney[s] for petitioner, by Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a portion of the decision of an impartial hearing officer (IHO) granting monetary payment as relief due to its failure to offer an appropriate educational program to respondents' (the parents') daughter. 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). 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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. On October 18, 2018, an Interim Order was issued by the IHO in which he directed that the district fund the following transportation related services:

> 6.The [district] will prospectively fund Uber gift cards in $4,000 intervals every four weeks (which represents the travel funds necessary for four weeks of school) for the parents to use to fund the student's travel to and from school on the days she is unable to travel safely by bus and until such time as she is able to safely travel by bus. The parents may only use this gift card for transportation relating to (a) transporting the student to and from home and the school; (b) or transporting the parents and/or behavioral support staff to and from the student's school where use of public transportation is not feasible.

> 7. Upon the presentation of receipts and dates of school attendance, the [district] will reimburse the parents for any out-of-pocket costs for Uber, taxi and/or car service that they have incurred or will incur transporting the student to and from school during the 2018-19 school year

(Interim Order at pp. 3-4).

An impartial hearing convened on July 27, 2018 and concluded on June 13, 2019, after eight days of proceedings (Tr. pp. 1-192). In a final decision dated January 14, 2020, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18,[1] and 2018-19 school years, that Atlas was an appropriate placement for the 2018-2019 school year, and any tuition for Atlas Autism School (Atlas) for the 2018-19 school year must be funded by the district (IHO Decision at pp. 7-11). As further relief—and the only issue in this State-level appeal—the IHO ordered the district to "compensate [the parents] for [their] services as [the student's] 1:1 Travel Aid[e] during the 2017-18 and 2018-19 school years, for up to 2 hours per day during the time [the student] has attended Atlas and up to one hour per day while [the student] attended [a district public school], at a rate of $70 per hour (as per the pendency order), upon [the parents'] submission of an affidavit… setting forth the dates and times that [the parents] traveled with [the student] to and/or from school" (IHO Decision at p. 12).[2]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and will not be recited here in detail. As mentioned previously, the only disputed issue on in this State-level review is whether the IHO erred in awarding the parents compensation at a rate of $70.00 per hour for their services as the student's travel aide during the 2017-18 and 2018-19 school years.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

[1] In a decision dated October 16, 2017, that IHO ordered the district to pay tuition and related costs for Atlas for the 2017-18 school year (Parent Ex. B at p. 8).

[2] Significantly, the rate of $70.00 per hour was not discussed in the IHO's Interim Order (Interim Order at pp. 1-4).

(Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Compensatory Services and Monetary Damages

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[4] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards

[4] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

"should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

It is clear that special transportation services were necessary for the student to receive a FAPE during the 2017-18, and 2018-19 school years. Beginning on March 3, 2015, the student's IEP provided a paraprofessional for transportation as a supplementary aide and service on a full-time basis (Parent Ex. C at p. 10). The March 2015 IEP also provided that the student required special transportation in the form of adult supervision – paraprofessional (id. at p. 12). On May 4, 2017, the district developed an IEP for the 2017-18 school year (Parent Ex. D at p. 24).[5] One of the management needs listed in the student's IEP was a 1:1 transportation paraprofessional to assist the student on the bus (id. at p. 6). The IEP again listed a transportation paraprofessional under special transportation, as well as under supplementary aids and services (id. at pp. 13, 21).

It is undisputed by the parties that the student requires 1:1 paraprofessional services for transportation. It is also undisputed that the district failed to provide for said services.

The parents testified that in fall 2017 and through part of November 2017, they transported their daughter to and from school (Tr. pp. 152-153). Then, for the remainder of the 2017-18 school year, the district was unable to consistently provide transportation paraprofessional services (Tr. p. 154). To address that deficiency in the implementation of services, the parents accessed other transportation such as a car service to transport the student to and from school (Tr. p. 155). The student's mother rode to and from school with the student using a car service paid for by the district (Tr. pp. 162-163). Reimbursement or direct payment for the costs of that transportation is appropriate compensatory relief.

However, with respect to relief, the IHO went further than just awarding the costs of the transportation itself when awarding $70.00 per hour to the parents. As defined above, the payment of $70.00 per hour to function in the role of a 1:1 travel aide for the student is not a compensatory service that makes up for a payment that district was supposed to provide to the parents in the first place. In fact, it is quite the opposite, because as further described below, districts should not be employing or contracting with parents for their time as service providers for their own children. That would be the hallmark of a damages claim. Compensatory services are an available remedy to make up for a denial of FAPE. E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014].

It is well settled that monetary damages or reimbursement of lost wages as a result of the district's alleged failure to provide the student with transportation services is a form of compensatory damages which are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; R.B. v. Bd. of Educ., 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]).

Here, when the parents traveled to and from school with the student and were reimbursed for the costs of the transportation, the student was able to attend school and access a FAPE. For

[5] It should be noted that this was the last IEP developed. No other IEPs were presented at the hearing.

these reasons, the award of $70.00 per hour for the parents' time acting as a travel aide is not a compensatory service, and therefore that aspect of the IHO's decision—paying parents for the time they expended—must be reversed as improper under the IDEA.[6]

While I understand that it was a clear violation of the district to fail to provide the service and leave the parents looking for a solution, that does not alter the prohibition against damages under IDEA and, consequently, the IHO exceeded his jurisdiction in awarding the parents an hourly rate to act as a 1:1 travel aide. The only mention in the hearing record of a 1:1 supervision/behavior support for transportation was in the affidavit of the parents' board certified behavior analyst (BCBA-D) (Parent Ex. W at pp. 1-4). The BCBA-D submitted an affidavit as the founder, president, and Chief Executive/Clinical Director of Kidz Choice Services Inc. (Kidz Choice) (id. at p. 2). On July 30, 2018, the BCBA-D conducted a ten-minute clinical observation of the student (id. at p. 3). He stated that Kidz Choice was "secured to provide" the student with 1:1 supervision/behavior support on the bus to and from school at a rate of $70.00 per hour (id. at pp. 3-4). However, I cannot award these services as reimbursement because the hearing record does not indicate whether these services were actually provided to the student.

There is no authority for an IHO acting under IDEA or SRO to award parents a monetary amount for them to act as a 1:1 travel aide. Therefore, I find that the IHO erred in awarding the parents compensation for the services of a 1:1 travel aide, and I am constrained to vacate the IHO's award of $70.00 per hour for services rendered by the parent.

B. Relief

In these circumstances, appropriate equitable relief is warranted given the substantial period of time that the district appears to have been incapable of delivering the transportation-related services that the student requires. There was ample testimony in the hearing record that the student required a paraprofessional for purposes of transportation.

As previously stated, the district had recommended the services of a 1:1 paraprofessional for transportation purposes in the student's IEPs (Parent Exs. C at pp. 10. 12; D at pp. 6, 13, 21). The parents also submitted into evidence the affidavit of a licensed psychologist who conducted a functional behavioral assessment (FBA) of the student on March 29, 2019 and April 12, 2019 (Parent Exs. VV; XX at p. 1). According to the FBA report, the student was observed in the school, home, and during transportation to and from school (Parent Ex. XX at p. 2). During transportation, the student exhibited self-injurious behavior which involved the student hitting the side of her head with the palm of her hand; elopement which included attempts to leave her seat while in the vehicle; and tantrums (id. at pp. 2, 6-8). The licensed psychologist's clinical impression was that the parents provided "continuous reinforcement" throughout the entire commute (id. at p. 12). "The current transportation environment has become [the student's] routine and according to interviews and observations, changes to her routine are an antecedent to interfering behavior. Therefore, working toward having [the student] take the school bus would need to be a very gradual process… Any adult working with [the student] to decrease her interfering behaviors

[6] It is possible that a claim for damages could be pursued under other statutory schemes, but this forum only addresses claims brought pursuant to Article 89 and the IDEA, neither of which authorizes claims for damages.

during transportation would first need to spend a significant amount of time building rapport with [the student]" (id.). The licensed psychologist recommended that the student receive 1:1 applied behavior analysis (ABA) services across all settings to address, in part, behaviors that occur in "transportation environments" (id. at p. 14).[7]

Based upon the foregoing hearing record and in an exercise of my discretion, I will direct the district to ensure that the services necessary enable the student to attend school by providing the student with full-time 1:1 supervision/behavior support by Kidz Choice (or another provider if the parties shall agree) to and from school at a minimum rate of $70.00 per hour, a rate for which there does not appear to be any contest in the hearing record.

VII. Conclusion

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO's decision dated January 14, 2020 which awarded the parents $70.00 per hour to function as the student's travel aide is vacated; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the district shall fund as a compensatory remedy support services from Kidz Choice consisting of full-time 1:1 supervision/behavior support during transportation of the student for a period of one year from the date of this decision.

Dated: **Albany, New York**
March 25, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] The licensed psychologist also developed a Behavior Intervention Plan (BIP) to address the student's behaviors that interfered with her ability to learn and function in her daily environment (Parent Ex. YY at pp. 1-10).