The University of the State of New York

The State Education Department
State Review Officer
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No. 20-145

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 Mark Gutman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, 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 a decision of an impartial hearing officer (IHO) which ordered compensatory education services at hourly rates lower than those requested by the parent to remedy respondent's (the district's) Committee on Special Education's (CSE's) failure to recommend appropriate educational and related services to her son for the 2017-18, 2018-19, and 2019-20 school years. The appeal must be sustained.

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

For the 2016-17 school year, the student attended first grade in a district public school (see Parent Exs. B at p. 1; E at p. 1). A CSE convened on January 5, 2017 to develop an IEP to be implemented beginning on April 20, 2017 (Parent Ex. B at pp. 1, 13, 15). For evaluation results, the CSE listed scores from an administration of the Gilliam Autism Rating Scale-Third Edition (GARS-3), which indicated that the probability that the student met the criteria for an autism

spectrum disorder was "Very Likely" (id. at p. 1).[1] The CSE found the student eligible for special education services as a student with an intellectual disability and recommended a 12:1+1 special class placement in a "Non-Specialized" school, along with adapted physical education (id. at pp. 1, 9, 13). Additionally, the CSE recommended related services of one 30-minute session of group counseling services per week, two 30-minute sessions of group occupational therapy (OT) per week, one 30-minute session of individual speech-language therapy per week, and one 30-minute session of group speech-language therapy per week (id. at p. 9). The IEP reflected that the student had behaviors that impeded his learning or that of other and that he required a behavioral intervention plan (BIP) (id. at p. 3). The CSE did not recommended 12-month services (id. at p. 10). According to the IEP, the parent expressed concerns at the meeting regarding the student's "academic delays and social emotional difficulties" and getting the student "the necessary supports in school and outside" (id. at p. 14).

The student was privately evaluated, and in a "team conference summary" dated December 6, 2017, the private evaluators indicated that the student met the criteria for diagnoses of an autism spectrum disorder, as well as a mixed receptive and expressive language impairment, a moderate intellectual disability, and an attention deficit hyperactivity disorder (ADHD)-inattentive type (Parent Ex. H at p. 1). The private evaluators recommended that the student attend a self-contained center-based program for children with autism spectrum disorder and low cognition, continued related services including speech-language therapy and OT, and applied behavior analysis (ABA) as part of the school recommendations (id. at p. 2). According to the parent, she provided the private evaluations to the district prior to the next CSE meeting (see Parent Ex. W at p. 2).

For the 2017-18 school year (second grade), the student continued attending the district public school (see Parent Ex. C at p. 1; K at p. 1). The CSE convened on February 15, 2018 to develop an IEP to be implemented beginning on March 7, 2018 (Parent Ex. C at pp. 1, 14, 16). According to the IEP, the student "ha[d] demonstrated extreme regression since the beginning of the year" (id. at p. 1). The February 2018 CSE continued the same eligibility classification and program and services recommendations as the January 2017 CSE (compare Parent Ex. C at pp. 1, 9-11, 14, with Parent Ex. B at pp. 1, 9-10, 13). According to the IEP, the student had been making progress over the last two years, which supported the CSE's recommendation of the 12:1+1 special class, but that "due to the lack of progress and the diminishing appearance of abilities, the team w[ould] have to revisit and re-evaluate [the student] for a different setting" (id. at p. 16).

On February 15, 2018, the parent sent a letter to the district and requested that the student be re-evaluated (Parent Ex. M). In the letter, the parent expressed concern about the student's behaviors in school and at home and indicated that the school had been calling her to pick the student up due to his crying (id.). She further stated that she had brought the student to see a neurologist who had expressed concern that the student's special education program had not changed since the student received a diagnosis of autism and that he had not been receiving the "correct" services at school, such as behavioral therapy (id.). A psychological evaluation was

[1] The hearing record includes a report setting forth the results of a December 20, 2016 administration of the GARS-3 (see Parent Ex. E).

conducted over three dates in March and April 2018, the results of which were set forth in a report dated April 18, 2018 (Parent Ex. K).

A CSE convened on May 9, 2018 and developed an IEP to the be implemented beginning on June 25, 2018 (see Parent Ex. D at pp. 1, 15, 17). The IEP stated that attempts were made to administer cognitive testing to the student but that results could not be achieved because the student was not compliant (Parent Ex. D at p. 1; see also Parent Ex. K). The CSE changed the student's eligibility classification to a student with autism (compare Parent Ex. D at p. 1, with Parent Ex. C at p. 1).[2] The CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school with adapted physical education (id. at pp. 10-12, 14). Additionally, the CSE recommended related services of one 30-minute session of group counseling services per week, one 30-minute session of individual OT per week, one 30-minute session of group OT per week, one 30-minute session of individual speech-language therapy per week, one 30-minute session of group speech-language therapy per week, and six 45-minute sessions of parent training and counseling per year (id. at p. 11).

For the 2018-19 school year (third grade), the student attended the recommended 6:1+1 special class (see Parent Ex. W at p. 2). There is no evidence in the hearing record that any CSE meeting was held or IEP developed prior to the beginning of the student's 2019-20 school year.

On July 10, 2019, the parent sent a letter to the district requesting independent educational evaluations (IEEs) (Parent Ex. O at pp. 1-2).[3] The parent asserted that the district last evaluated the student in 2018 and that she disagreed with those evaluations "because they lacked sufficient standardized assessments and recommendations necessary to implement appropriate services for [the student]" (id. at p. 1). The parent requested a neuropsychological evaluation, a bilingual speech-language evaluation, a bilingual assistive technology evaluation, a bilingual OT evaluation, and an ABA skills assessment at district expense (id.).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated October 15, 2020, the parent asserted that the district "procedurally and substantively" denied the student a free appropriate education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A at pp. 1-2, 3-4).

The parent argued that the CSEs failed to: appropriately classify the student until May 2018; recommend a program individualized to the student's needs; recommend and provide

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]); however, the parent objected to the January 2017 and February 2018 CSEs' determinations that the student was eligible for special education as a student with an intellectual disability for that time period at issue prior to the May 2018 CSE meeting (see Parent Ex. A at p. 2; see also Parent Exs. B at p.1; C at p. 1).

[3] The hearing record includes a fax transmission verification report showing that the letter was faxed to the district on July 11, 2019 (Parent Ex. O at p. 3).

[4] There is no response to the parent's request for IEEs in the hearing record. According to the parent, the district did not respond to her request for IEEs (Parent Ex. A at p. 3).

appropriate parent counseling and training services; appropriately respond to the student's behaviors that were impeding his learning; recommend an appropriate peer-reviewed methodology on the IEP; and recommend a program that would enable the student to make meaningful progress (Parent Ex. A at pp. 4-6). In addition, the parent alleged that the district failed to respond to the parent's request for IEEs as required under State and federal regulations (id. at pp. 5-6).

Due to these failures, the parent requested the following IEEs be conducted by evaluators of her choosing: a neuropsychological evaluation; an OT evaluation; a bilingual speech-language evaluation; an assistive technology evaluation; and an ABA skills assessment (Parent Ex. A at pp. 6-7). Further, the parent requested that the district be required to reconvene the CSE to review the IEEs obtained by the parent and to defer a recommendation regarding the student's placement to the central based support team (CBST) within 30 days of the CSE reconvene to locate a State-approved nonpublic school for the student (id.). Moreover, the parent asked for compensatory education in speech-language therapy, OT, parent training and counseling, "ABA tutoring services," and "any such services deemed appropriate by the [IEEs]" (id. at p. 7).[5]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing. After a pre-hearing conference on April 3, 2020, at which the district did not appear (see Tr. pp. 1-9),[6] the IHO issued an interim decision granting the parent's requests for IEEs and directing the district to reimburse and/or directly pay for a neuropsychological evaluation, a bilingual speech-language evaluation, a bilingual assistive technology evaluation, and a bilingual OT evaluation (Interim IHO Decision at pp. 2-3).[7]

The parties continued with the impartial hearing over four additional days of proceedings, concluding on July 13, 2020 (see Tr. pp. 10-44).[8] On the final hearing date, the district conceded

[5] The parent also requested that the district fund the parent's and student's transportation to and from all compensatory education services (Parent Ex. A at p. 8).

[6] Although the parent's due process complaint notice was filed in October 2019 (see Parent Ex. A at p. 9), the matter was not assigned to the IHO who ultimately presided over the impartial hearing until April 2020 (see Tr. p. 4). The district's delay in assigning an IHO to the matter was the subject of a State complaint (see Parent Exs. P-R).

[7] The IHO noted that the district did not object to the parent's request for IEEs (Interim IHO Decision at p. 2). The parent had requested that the evaluations be conducted by specific individuals or agencies and had set forth the maximum costs for the evaluations, and the IHO granted the evaluations as requested (see Tr. p. 5; Interim IHO Decision at pp. 2-3). The parent reserved her request for an ABA skills assessment pending the completion of the neuropsychological evaluation (Tr. pp. 5-6; Interim IHO Decision at p. 3).

[8] The parent offered the affidavits of four witnesses, as well the unsigned and unsworn statements of two additional witnesses, into the record in lieu of in-person testimony (see Parent Exs. S-X). State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]). Regarding the unsigned and unsworn statements, the parent's counsel indicated that the witnesses were available to swear to the contents of their statements, but the IHO indicated that it was not necessary since there was no dispute regarding the contents of the statements (Tr. pp. 42-43; see Tr. pp. 36-37). The district declined to cross-examine the witnesses (Tr. p. 40).

that it did not offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Tr. pp. 33-34). The parent's counsel detailed the relief sought by the parent, including deferral of the student's placement to the CBST and compensatory education consisting of "190 hours of special education tutoring, 90 hours of [OT], 425 hours of speech-language therapy, 750 hours of . . . ABA[] therapy, 100 hours of counseling, and 100 hours of parent counseling and training" (Tr. p. 35). The parent's counsel identified "Rachel Bouvin's Speech Services" as the parent's preferred provider for the speech-language therapy and OT services at a rate of $250 per hour and Manhattan Psychology Group as the parent's preferred provider for tutoring, ABA, counseling, and parent counseling and training at the rate of $300 per hour (Tr. pp. 35-36). The district's representative indicated that the district was "not agreeing to the rates requested by the parent" (Tr. p. 40).

In a decision dated July 25, 2020, the IHO noted that the district conceded its failure to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (IHO Decision at p. 4). Further, the IHO noted that the district agreed to defer the student's placement to the CBST (id.). Finally, the IHO noted that the district agreed to the amount of compensatory education sought by the parent but disagreed with the rate charged by the parent's preferred providers to deliver the compensatory education services (id. at p. 5).

Turning to the disputed issue, the IHO held that the requested rates for the compensatory education services were "excessive because they [we]re not the typical rates for said services in New York City, which [he] ha[d] ordered in hundreds of other cases" (IHO Decision at p. 5). Specifically, the IHO found that the rate of "$300 per hour for tutoring services particularly unconscionable, when the customary rate is $100 to $125 per hour" (id.). The IHO noted the parent's argument that the district failed to submit evidence of another rate and that, therefore, the IHO should not grant any rate other than what was requested (id.). However, the IHO held that "by this logic, the parent's counsel could have submitted an affidavit to hire a Maserati to take the student to and from school, which the IHO would then be compelled to order because the District did not submit an affidavit for more economical transportation. It's not happening" (id.).

Therefore, the IHO granted the following as compensatory education: 190 hours of tutoring services to be provided by a licensed special education teacher at a rate not to exceed $125 per hour; 750 hours of ABA to be provided by a qualified ABA provider at a rate not to exceed $175 per hour; 100 hours of counseling services to be provided by a licensed therapist at a rate not to exceed $125 per hour; 100 hours of parent counseling and training to be provided by a qualified ABA specialist at a rate not to exceed $150 per hour; 425 hours of speech-language therapy to be provided by a State-licensed speech-language therapist at a rate not to exceed $150 per hour; and 90 hours of OT to be provided by a State-licensed occupational therapist at a rate not to exceed $150 per hour (IHO Decision at pp. 5-6). Further, the IHO directed the district to defer the student's placement to the CBST to locate a State-approved nonpublic school for the student (id. at p. 6).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in not ordering the compensatory education services at the rates requested by the parent. The parent argues that the IHO erred by relying on extrinsic evidence and in not relying on the hearing record as required by the State regulations. The parent asserts that the IHO's reduction of the rates requested by the parent was arbitrary.

Specific to speech-language therapy and OT, the parent contends that the IHO erred by reducing the requested rate of $250 per hour to $125 and $150 per hour, respectively. The parent asserts that the testimony of the director of the private agency, Rachel Bouvin Speech Services, was uncontroverted and demonstrated that $250 per hour was a fair market value for speech-language therapy and OT services. The parent argues that there was no credibility determination regarding this testimony and, as there was no cross-examination of this witness, no need for such a determination.

As to the requested $300 per hour rate for tutoring, ABA, counseling, and parent counseling and training services, the parent argues that the IHO erred by arbitrarily reducing the rates to $125, $175, $125, and $150 per hour, respectively. The parent contends that the statement of the director of the Manhattan Psychology Group demonstrated that the rate for all of these services was $300 per hour. The parent asserts that the district did not present any evidence regarding the requested rate and that, therefore, the only evidence that should have been considered was the evidence from the parent, which supported the requested rate.

The parent requests that the portion of the IHO's decision that reduced the rate of compensatory education services be reversed and that the district be required to fund tutoring, ABA, counseling, and parent counseling and training services to be provided by Manhattan Psychology Group at a rate not to exceed $300 per hour and speech-language therapy and OT to be provided by Rachel Bouvin Speech Services at a rate not to exceed $250 per hour.

In an answer, the district responds to the parent's allegations. The district counters that the IHO utilized his wide and sound discretion to order compensatory education services at the rates granted and properly refrained from directing that the services be delivered by specific providers. The district contends that the parent did not offer any evidence which demonstrated that she was contractually obligated to pay for compensatory education services from the providers she chose. As the only testimony in the record was by affidavit, the district argues that all the testimony regarding rates was "self-serving and vague." Further, the district asserts that the affidavits lacked any supporting evidence or specific examples to support the statements made about prevailing rates for services.

The district noted that the rationale adopted in Application of the Department of Education, Appeal No. 20-125, should also be adopted in this instance. The district contends that in that case, the undersigned found that the evidence offered by the district was insufficiently specific and contradicted by the hearing record and that, therefore, the IHO's determination was not disturbed. Here, the district argues that that the parent's evidence has similar deficiencies as the record is "devoid of any specific supporting evidence regarding the prevailing rates of services." Therefore, the district requests that the IHO's determination regarding rates be left undisturbed and the decision affirmed.[9]

[9] Neither party appealed the IHO's directive to the district to defer the student's placement to the CBST for placement in a nonpublic school (see IHO Decision at p. 6). Therefore, the decision of the IHO on this issue has become final and binding on the parties and will not be further discussed (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]).

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]).

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 relief may 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]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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 "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Except for in circumstances not at issue in the present matter, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

Here, the parent is correct that the IHO erred by relying on what amounts to subjective, anecdotal evidence outside of the hearing record to reduce the requested rates for providers to deliver the ordered compensatory education services. In this case, the district conceded FAPE for all three school years in question and did not contest the hours of compensatory education services being requested (Tr. pp. 33-34, 40; IHO Decision at p. 5). The only issue in dispute was the provider payment rate for the agreed upon compensatory education services (IHO Decision at p. 5; Answer at p. 4). Yet, at no point during the impartial hearing did the district offer any evidence regarding what reasonable rates for the requested compensatory education services would be, cross-examine the parent's witnesses in order to question their affidavits or statements regarding the rates they would charge for the compensatory education services, or indicate that the district could or would arrange the delivery of the services to the student (see Tr. pp. 1-44; see also Tr. p. 40). The district also did not challenge that the parent was authorized to select compensatory education service providers of her choosing at the impartial hearing (see generally Tr. pp. 1-44).[10] Instead the district's entire strategy in this case consists of unsworn statement by the district's hearing representative that she did not agree.

This is all notwithstanding that the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Here, the district failed to address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). If the district disagreed with the rates proposed by the parent's preferred providers, it was incumbent on the district to come forward with evidence demonstrating that the rates were not reasonable.

On this point, the district's reliance on Application of the Dep't of Educ., Appeal No. 20-125 to support its argument that the parent did not present sufficient evidence to justify the requested rates for compensatory education services is inapposite (Answer at pp. 6-7). In Application of the Department of Education, Appeal No. 20-125, the undersigned held that the services at issue were obtained by the parent unilaterally, and, therefore, unlike this compensatory education services case, the parents carried a burden of proof to demonstrate the appropriateness of the services (see Educ. Law § 4404[1][c] [providing that a "parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement"]). Further, when

[10] There is nothing that would prevent a district from being responsible for delivering compensatory education to a student, for example, through its own providers. However, in the present matter, there was no indication that the district had such an inclination.

discussing the rate dispute, I found that the evidence provided by the district to demonstrate that the rates to be reimbursed in that matter were excessive was not sufficiently convincing as the evidence contained flaws. In other words the reason the district lost in that is that the district failed to carry its burden of persuasion based upon the competing evidence in that case. In this instance, the district did not even bother to attempt to meet its burden of production, much less its burden of persuasion as the district did not present any evidence to demonstrate that the requested rates for services were unreasonable. The district did not even cross-examine the parent's witnesses to undermine the statements and testimony by affidavit.[11]

Given the district's failure to meet its burden of production or persuasion on the issue of the providers' rates, the evidence introduced by the parent is unrebutted. Specifically, the director of Rachel Bouvin Speech Services testified, via affidavit, that the agency's established rates for both OT services and speech-language therapy services were $250 per hour (Parent Ex. V at pp. 1-2). She indicated that these rates were "comparable to the rates charged by other speech language pathologists and occupational therapists in the New York City area with same level of experience" (id. at p. 2).[12] Additionally, the director of Manhattan Psychology Group indicated in a written statement that the agency charged $300 per hour for ABA therapy, parent counseling and training, and home-based special education instruction (Parent Ex. X at p. 1). She stated that the ABA therapy services and parent counseling and training would be provided by a Licensed Behavior Analyst (LBA) or Board Certified Behavior Analyst (BCBA) (id.). The statement further reflected that the agency charged $360 per hour for the services of a licensed clinical psychologist (id.).[13] She also indicated that these "rates [we]re comparable with the rates charged by other" BCBAs, LBAs, and licensed clinical psychologists in the New York City area with similar levels of experience (id.). There is no other evidence to contradict these statements in the hearing record. Therefore, based upon the evidence, the IHO erred by ignoring relevant evidence establishing that the agencies' hourly rates of $250 per hour for both OT and speech-language services and $300 per hour for, special education instruction, ABA therapy, counseling, and parent counseling and training were reasonable.

In light of the fact that the district did not present any evidence to challenge or otherwise rebut the hourly rate requested by the parents, the IHO, nonetheless, limited the hourly rate awarded for the all awarded compensatory education services based upon his own knowledge and experience of similar cases (i.e., judicial notice) (see Tr. pp. 36-37; IHO Decision at p. 5). Upon review—and consistent with the parent's contention on appeal—the evidence in the hearing record does not support the rationale used by the IHO to reduce the hourly rate. The IHO did not find

[11] Strategically, the parent was savvy enough to offer evidence of the private provider's rates, because if she had not there may not have been any evidentiary basis upon which to fashion relief. Although the IHO felt the rates sought by the parent were excessive, he did not make any attempt to complete the evidentiary record on that point. A colloquy with the parties does not suffice.

[12] The affidavit also noted that the district had ordered services be provided by her agency at these rates as recently as July 2020 (Parent Ex. V at p. 2). The affidavit was dated July 13, 2020 (id.).

[13] The rate of $360 per hour is in excess of the $300 per hour requested by the parent for counseling services; however, I will not order the district to fund such compensatory education services at a rate that exceeds that which the parent has requested in this matter.

that any of parent's witnesses were not credible, although, he did find that the request of $300 per hour for tutoring services "particularly unconscionable, when the customary rate is $100 to $125 per hour" (IHO Decision at p. 5). However, the IHO did not point to any evidence in the hearing record to support this statement. The IHO erred in relying on judicial notice, namely that "they are not the typical rates for said services in New York City, which I have ordered in hundreds of other cases," to reduce the hourly rate awarded to the parent for compensatory education services (IHO Decision at p. 5).[14] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]).

Here, the IHO's use of judicial notice to determine the hourly rate to be paid for compensatory education services offends several factors listed above, including that the IHO took judicial notice of the sole issue disputed in this matter: to wit, the hourly rate to be paid for compensatory education services. The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]). The IHO is reminded that, while not prohibited, the use of judicial notice to establish facts in an impartial hearing cannot be used to sidestep a party's failure to present sufficient evidence or the failure to fully develop the hearing record in order to reach a determination on a particular issue, as IHO's have the authority under State regulation to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the [hearing] record" (8 NYCRR 200.5[j][3][vii]).[15] Moreover, "[j]udicial notice is not to be extended to personal observations of the judge or juror" (Town of Nantucket v. Beinecke, 379 Mass. 345, 352 [1979] [internal citations omitted]).

As a result, the hourly rate for compensatory education services cannot fall within the facts amenable to being judicially noticed because the rate is—and has been—subject to reasonable dispute as evidenced by the IHO's own experience, and the rates for services, while perhaps falling within a predictable range, are not "generally known within the trial court's territorial jurisdiction" and must be determined on a case-by-case basis, which depends, in part, upon the student's needs and the rate charged by the provider or agency selected, as in the present matter.

[14] Its is unknown if the IHO's rulings in the other cases were based upon actual evidence presented by parties about private rates in the region, or just his personal views.

[15] In this case, the IHO specifically declined to question the parent's witnesses regarding the requested rates for services (Tr. pp. 35-36, 42-43). Instead, prior to reviewing or even accepting the witnesses' affidavits or statements into evidence, the IHO announced that he did not agree with the rates and that he believed the requested rates were excessive (Tr. pp. 34-35).

Consequently, given that the IHO improperly relied upon facts outside the record to determine the hourly rates for compensatory education services and that the only evidence in the hearing record as to the hourly rate was produced by the parent, and this was evidence which the district made no effort whatsoever to dispute despite having the responsibility to carrying the burden of production and persuasion. Accordingly, I must reverse the IHO's determination and the district is ordered to fund the student's compensatory education services at the rates evidenced by the parent during the impartial hearing.[16] Specifically, the district is ordered to pay for: 190 hours of compensatory special education tutoring services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour; 750 hours of compensatory ABA services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour; 100 hours of compensatory counseling services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour; 100 hours of compensatory parent counseling and training to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour; 425 hours of compensatory speech-language therapy to be provided by a provider at Rachel Bouvin Speech Services at a rate not to exceed $250 per hour; and 90 hours of compensatory OT to be provided by a provider at Rachel Bouvin Speech Services at a rate not to exceed $250 per hour. I find that this bank of compensatory education services should be utilized within six years.[17]

VII. Conclusion

Having determined that the IHO erred in reducing the hourly rate for the awarded compensatory education services, the parent's appeal must be sustained. The parent is awarded a bank of compensatory education services hours at specified maximum rates to be utilized within six years.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 25, 2020, is modified by vacating that portion which set maximum hourly rates for the compensatory education services;

IT IS FURTHER ORDERED that the district is directed to pay for 190 hours of compensatory special education tutoring services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour;

[16] Had there been any further evidence, it may well been shown that the parents requested rates were excessive, but the matter cannot rest on the arbitrary predilections of an IHO alone, especially when the parent offered to call the providers for cross examination and the IHO did not take up the offer to hear the witnesses (Tr. pp. 36-37).

[17] Although neither party requested a time limitation on the compensatory education award, the student turns eleven years old shortly after this decision will be issued (see Parent Ex. A at p. 1). As noted above, this award is to make the student whole due to the district's failure to provide a FAPE for three years and an award related thereto should not exist into perpetuity; therefore, I will limit the time period in which the student is able to obtain these services to six years, which represents twice the timeframe during which the student was denied a FAPE.

IT IS FURTHER ORDERED that the district is directed to pay for 750 hours of compensatory ABA services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 100 hours of compensatory counseling services to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 100 hours of compensatory parent counseling and training to be provided by a provider at Manhattan Psychology Group at a rate not to exceed $300 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 425 hours of compensatory speech-language therapy to be provided by a provider at Rachel Bouvin Speech Services at a rate not to exceed $250 per hour;

IT IS FURTHER ORDERED that the district is directed to pay for 90 hours of compensatory OT to be provided by a provider at Rachel Bouvin Speech Services at a rate not to exceed $250 per hour.

IT IS FURTHER ORDERED that the awarded compensatory education services shall expire six years from the date of this decision if the student has not used them by such date.

Dated: **Albany, New York**
November 6, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER