The University of the State of New York

The State Education Department
State Review Officer
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No. 21-079

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:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Nicholas Marricco, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the parent's son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 school year, and to provide payment for the cost of transportation and related services for the 2020-21 school year. 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

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. Briefly, the CSE convened on June 9, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Parent Ex. J; Dist. Ex. 4). The parent disagreed with the recommendations contained in the June 2020 IEP, and, as a result, notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex.

I).[1] In a due process complaint notice, dated July 6, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

An impartial hearing convened on January 27, 2021 and concluded on February 4, 2021 after three days of proceedings (Tr. pp. 1-75). In a decision dated February 7, 2021, the IHO determined that the district conceded it failed to offer the student a FAPE for the 2020-21 school year, the parent established that iBrain was an appropriate unilateral placement for the student, and equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 3-10). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at iBrain for the 2020-21 school year (id. at p. 10). Additionally, the IHO also ordered the district to "provide payment for transportation of the student for the 2020-21 school year upon proof that the service was provided by issuing payment directly to iBrain for any balance due within two weeks of the submission of an affidavit setting forth the amount due" (id.). Lastly, the IHO ordered "related services at a rate of $99.00 per hour which include individual nursing services, transportation paraprofessional and assistive technology devices for the entire 2020-21 twelve-month school year by issuing payment directly to iBrain for any balance due within two weeks of the submission of an affidavit setting forth the amount due" (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised for review on appeal in the district's request for review, the parent's answer thereto, as well as the district's reply to the parent's answer, is also presumed and will not be recited here in detail. The sole issue to be addressed on appeal is whether the IHO's order should be modified to require proof of delivery of services before payment by the district with respect to the student's transportation paraprofessional and related services, to the extent that proof of delivery of services was not already included in the IHO's decision.

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 (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

[1] The parent executed an enrollment contract for the student's attendance at iBrain for the 2020-21 school year on June 19, 2020 (Parent Ex. F).

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]).[2]

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

There is no dispute in this matter that equitable considerations supported the parent's claim for funding of the student's program at iBrain during the 2020-21 school year. The dispute on appeal solely concerns the wording and effect of the IHO's ordering clause regarding payment of related services (see IHO Decision at p. 10). However, equitable considerations are relevant to fashioning relief generally under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).

Turning to the parties' disagreement in this case, iBrain's director of special education testified that, from the start of the 2020-21 school year up until the time of her testimony in February 2021, the student had attended iBrain as a remote only (home-based) student (Tr. pp. 53-

[2] 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).

55, 64-70; see Parent Ex. L). She also testified that the student's program was altered at one point during the 2020-21 school year as the student's recovery from a surgery placed him in a high risk category and limited some of the activities he could engage in (Tr. pp. 63-65, 69-70).[3] She indicated that she was uncertain if the student's 1:1 paraprofessional had returned to helping the student in the home after the surgery and that she believed the student had a 1:1 nurse in the home (Tr. pp. 67-68). The director stated that the student had continued to "receive services throughout that time, although it might have looked somewhat different, based on the specific restrictions given to him by his doctors" (Tr. p. 70). Although the director offered some testimony with respect to the contract and what was included as part of the student's tuition, as to billing for these services, the director testified that she did not "know the billing side" of the agreement and "ha[d] no idea whether adjustments [we]re made" (Tr. pp. 64-68, 70). In light of the above, it appears that some portion of the related services with respect to transportation and the home-based related services as part of iBrain's remote learning program were not delivered, understandably, in light of the COVID-19 pandemic and the student's surgery during the 2020-21 school year.

The iBrain enrollment contract in the hearing record reads, in pertinent part, that the "Base Tuition includes the cost of an individual paraprofessional, and school nurse as well as the academic programming" (Parent Ex. F. at pp. 1-2). Further, it defines "Supplemental Tuition" in pertinent part as follows:

> 6. Supplemental Tuition. The Base Tuition cost does not include the cost of related services, transportation paraprofessional, any individual nursing services or assistive technology devices and equipment. Supplemental Tuition includes the cost of related services, as well as the cost of a transportation paraprofessional and/or individual nursing services as outlined in Section 3 and those services which iBrain is providing. The cost of these services will be at a rate of $99/hour and will be billed on the first business day of the month for the previous month's services.

(id. at p. 2).

A plain reading of those provisions leads to the conclusion that the cost of the identified related services was intended to be billed to the parent monthly based on the service being delivered, rather than as "Base Tuition" (see Parent Ex. F at pp. 1-2). iBrain's director of special education testified that the reason that related services were billed differently for each student was because different students received differing amounts of one related service or another (Tr. p. 64).

In its appeal, the district does not contend that it should be required to fund a reduced portion of the student's base tuition and does not contest the IHO's order with respect to transportation services, rather it asks that the IHO's order be modified with respect to the funding of the transportation paraprofessional and the other related services set forth in iBrain's enrollment

[3] The surgery had been planned for April 2020; however, it was postponed, and the hearing record is not clear as to when the surgery took place (Tr. p. 69; Parent Exs. E at p. 5; J at p. 9). The physical therapy summary included in the iBrain IEP indicated that during the 2019-20 school year when the student was initially preparing for surgery, the student "missed 30% some sessions" (Parent Ex. E at p. 6).

contract as "Supplemental Tuition" (Req. for Rev. ¶¶ 7-13). In the district's view, the IHO erred in finding that the parent was "obligated to pay for all related services" rather than only the portion of related services that were actually provided to the student (id. at ¶ 6). In her answer, the parent suggests that there is no need to modify the IHO's order because the order already does what the district is seeking on appeal, in that the IHO's order already obligates the parent to submit an affidavit of the amount due to the district before the district is required to provide funding for the student's related services to iBrain (Answer ¶ 16).[4]

Because I find that the related services portion of the student's 2020-21 program at iBrain may not have been fully provided to the student, for reasons that are understandable given the student's circumstances during this school year, and because I find that the enrollment contract between iBrain and the parent provides that the cost of related services under the "Supplemental Tuition" portion of the contract envisions payment by the parent for services provided at a given hourly rate, I now find that the IHO's decision must be modified slightly in order to clarify the district's financial obligations with respect to funding the student's unilateral program at iBrain during the 2020-21 school year as set forth below.

VII. Conclusion

Having determined that the evidence in the hearing record supports the district's assertion that the IHO decision should be modified to clarify the district's obligations to fund the student's program during the 2020-21 school year, the necessary inquiry is at an end. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the IHO's decision dated February 7, 2021 that states as follows:

> ORDERED related services at a rate of $99.00 per hour which include individual nursing services, transportation paraprofessional and assistive technology devices for the entire [2020-21] twelve-month school year by issuing payment directly to iBrain for any balance due within two weeks of the submission of an affidavit setting forth the amount due.

[4] The parent suggests that the entire purpose of the district's appeal may be a tactic to delay payment under the IHO's decision generally (Answer ¶ 16). However, the IHO's order was not as clear as described by the parent. While the IHO did include language indicating that payment would be made after "submission of an affidavit setting forth the amount due" in the ordering clauses for both the transportation and for the related services, only the ordering clause for the transportation indicated that payment was due "upon proof that the service was provided" (IHO Decision at p. 10). Additionally, in discussing the transportation and related services, the IHO specifically noted that the parent was obligated "to pay for all related services," but indicated that because transportation was not utilized on a daily basis, payment was "granted to the extent actually utilized by the student" (id.at p. 8). Accordingly, there appears to be a rational basis for the district to file an appeal in this matter and it is expected that the district is not merely attempting to delay payment pursuant to the IHO's decision.

Is modified to state as follows:

> **ORDERED** the district is required to fund related services for the student's program at iBrain at a rate of $99.00 per hour under the terms of the enrollment contract executed between the parent and iBrain on June 19, 2020 during the 2020-21 twelve-month school year upon proof that the services were provided by issuing payment directly to iBrain for any balance due within two weeks of the submission of an affidavit setting forth frequency and duration of the supplemental related services provided to the student and the amounts due.

Dated: **Albany, New York**
April 16, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER