



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-285

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Isaacs Bernstein, PC, attorneys for petitioners, by Lisa Isaacs, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which did not address their requests for respondent (the district) to fund or provide paraprofessional services, transportation, and equipment in addition to funding the costs of the student's tuition at Seton Foundation for Learning (Seton) for the 2023-24 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 this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on February 24, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Parent. Ex. B). The parents disagreed with the recommendations contained in the February 2023 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2023-24 school year, and, as a result, notified the district of their intent to unilaterally place the student at Seton (see Parent Exs. I, L). In a due process complaint notice, dated June 26, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and sought tuition funding for the student's attendance at Seton, as well as funding for the student's paraprofessional and the continued

provision by the district of "transportation and equipment" listed on the student's "most recent" IEP (see Parent Ex. A pp. 2-5, 7).

After a prehearing conference held on August 2, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 3, 2023 (Tr. pp. 1-46). During their closing statement, the parents, through their attorney, reiterated the relief sought, and the IHO stated on the record that she "got it down" (Tr. pp. 34-43). In a decision dated November 17, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that Seton was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of direct funding of the student's tuition at Seton (IHO Decision at pp. 4-6). As relief, the IHO ordered the district to provide direct funding for the balance of the student's tuition at the Seton for the 2023-24 school year (id. at p. 6).

IV. Appeal for State-Level Review

The parents appeal. The parents allege that the IHO erred by failing to award funding for the student's paraprofessional and the continued provision by the district of "transportation and equipment" listed on the student's most recent IEP as part of the relief granted. In an answer, the district responds to the parents' allegations and agrees that the parents' requested relief should be granted.

V. Discussion

A review of the allegations in the parents' appeal, together with the district's answer reveals that the parties generally agree that the IHO's decision contained errors with respect to the relief ordered (see Req. for Rev. ¶¶ 23-25; Answer ¶ 5). In support of their argument that the IHO erred in failing to award the parents' request for funding for the student's paraprofessional and provision of transportation and equipment listed in the student's most recent IEP, the parents submit email correspondence with the IHO after the IHO issued the decision (Req. for Rev. Ex. A).¹ The parents informed the IHO, through counsel, via emails sent on November 17, 2023 and November 20, 2023, of the omission of the requested relief from the November 17, 2023 decision and requested that the IHO amend the decision in order to reflect the correct relief (id. at pp. 1-2). In response, the IHO informed the parents by email dated November 30, 2023, that "it was an oversight that full time paraprofessional services, transportation services, and equipment was not included in the [decision]" but "[u]nfortunately, given that this oversight would not be a correction, but an

¹ Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the additional evidence could not have been offered at the time of the impartial hearing and is relevant to the appeal; accordingly, the additional evidence has been considered. For purposes of this decision, the additional evidence is cited as exhibit A to the request for review (e.g., "Req. for Rev. Ex. A").

amendment to the [decision] the only recourse you have is to appeal to the SRO" because she "no longer ha[d] jurisdiction over the case" (id. at p. 1).²

In an answer, the district states that while "the IHO properly denied the Parents' request to issue an amended decision (as IHOs lack the jurisdiction to do so)," it agrees with the parents "that the requested relief should be granted," and "does not oppose" the parents' request "for an order for the [district] to continue to provide or fund" the student's "paraprofessional and for the provision of special education transportation and equipment, per the Student's most recent IEP" (Answer ¶ 5). As a result, the district "respectfully requests that the Office of State Review grant the requested relief as mentioned" (id. at p. 3).

Based on the parties' assertions on appeal, neither party disputes that the IHO's decision should have included the parents' requested relief for an order directing the district to continue to provide or fund the student's paraprofessional and to provide special education transportation and equipment as per the student's February 2023 IEP (see generally Req. for Rev.; Answer). In light of the parties' agreement, I will modify the IHO's decision accordingly.

VI. Conclusion

Given the parties' respective positions, the necessary inquiry is at an end and no further analysis of issues is required.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 17, 2023, is modified according to the parties' agreement set forth in their respective pleadings on appeal to the extent it did not address all aspects of the parents' requested relief; and

IT IS FURTHER ORDERED that, consistent with the parties' agreement, for the 2023-24 school year, the district shall directly fund through a related services authorization (RSA) the cost of the student's paraprofessional and shall provide the student with the transportation and equipment as per the February 2023 IEP.

Dated: **Albany, New York**
 January 29, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

² Generally, an IHO lacks the authority to retain jurisdiction and materially alter a final decision (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). While the IHO did not have authority to retain jurisdiction over the matter, it is entirely unclear why the parties had to pursue an appeal rather than settle the matter in accordance with their apparent agreement.