



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 23-295

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:

The Law Office of Elisa Hyman, P.C., attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which directed that the compensatory applied behavior analysis (ABA) services awarded to the parent's son for the 2021-22 and 2022-23 school years be provided by a licensed behavior analyst (LBA), instead of allowing for alternative providers if an LBA could not be secured. 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 parent and respondent's (the district's) 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 in January 2021, to formulate the student's IEP for the 2021-22 school year (see generally Parent Exs. A at p. 15; B at p. 15).¹ The parent disagreed with the recommendations contained in the January 2021 IEP and on June 30, 2021, the parent filed a due process complaint notice requesting pendency pursuant to an unappealed IHO decision that

¹ The January 2021 IEP is not in evidence. As noted by the IHO, "the District did not present any witnesses or documentary evidence to demonstrate that the [district] offered the Student with a FAPE for the school year[s] at issue" (IHO Decision at p. 4).

was issued in a prior proceeding (Parent Ex. A at pp. 1, 14-15, 19). The parent also sought a determination that the student should remain in a district public school placement and receive 1:1 ABA, speech-language therapy, physical therapy (PT), occupational therapy (OT), and assistive technology services along with an award of compensatory education and services (id. at pp. 19-21).

On January 5, 2022, the CSE convened to create an IEP for the student's 2022-23 school year (see Parent Ex. J). The parent disagreed with the recommendations contained in the January 2022 IEP and on August 1, 2022, the parent filed an amended due process complaint notice alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (see Parent Ex. B). For relief, the parent repeated her request for compensatory education and services, as well as a determination that the student's programming should consist of specified services (id. at pp. 14-15, 21-23).

An impartial hearing convened on January 27, 2022 and concluded on October 30, 2023, after 11 days of proceedings (Tr. pp. 1-160). In a decision dated November 3, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 4, 8). As relief, the IHO ordered the district to fund a bank of compensatory education services as follows: (1) thirty hours of individual ABA services to be provided by an LBA as push-in services during the school day; (2) 10 hours of individual ABA services to be provided by an LBA after-school; (3) two hours per week of parent training; (4) four hours per month of board certified behavior analyst (BCBA) supervision for the ABA provider and parent training; (5) five 45-minute sessions per week of individual speech-language therapy with feeding therapy incorporated into such services; (6) four 45-minute sessions per week of individual OT; (7) two 30-minute sessions per week of individual PT; (8) an individual full-time health paraprofessional; (9) assistive technology as recommended in the independent evaluation; and (10) special transportation with air conditioning (id. at p. 8).

On November 3, 2023, the same date the IHO issued her decision, the parent's attorney contacted the IHO via email, expressing her concern that "it is truly difficult to always find an LBA provider for this student" and requested that the IHO add the following language to her decision: "In the event that the [district] cannot ensure an LBA(s) to provide ABA services to the Student, the [district] must fund 1:1 instruction with behavioral support until such time as the [district] locates an LBA" (SRO Ex. A at pp. 1-2). The IHO responded on November 3, 2023, agreeing to make the requested modification and issued an amended decision on that same date (id. at p. 2; see SRO Ex. B). However, on November 17, 2023, the parties were informed by a representative from the New York State Department of Education (NYSED) that NYSED "does not allow an impartial hearing officer (IHO) to 'amend' their decision after they have issued the decision to the parties" and that "once a final decision has been issued, no motion for reconsideration is permissible" (SRO Ex. C at p. 3). The parent was advised to appeal the IHO's decision if she sought a substantive change (id. at p. 1).

IV. Appeal for State-Level Review

The parent appeals only insofar as the IHO limited the provision of compensatory ABA services to LBAs. The parent characterized the IHO's language specifying LBAs as "erroneous[]" and unintentional[]" and stated that if the IHO's order is not amended to allow for ABA services

to be provided by non-LBAs, then "the [p]arent is unlikely to be able to use the compensatory award because of the shortage of LBAs" (Req. for Rev. ¶ 1). The parent further avers that the IHO acknowledged her error and immediately attempted to correct the error but could not do so because State regulations prohibit an IHO from substantively amending his or her decision. In support of her request to amend the IHO's order, the parent submits additional evidence which all post-dates the IHO's decision and requests that an SRO accept and consider such additional evidence (Req. for Rev. ¶ 3, see SRO Exs. 1; 2; 3).² The parent requests that an SRO modify the relief ordered by the IHO to include the parent's requested language.

In an answer, the district responds to the parent's allegations and agrees that the parent's requested relief should be granted.

V. Discussion

A review of the allegations in the parent's appeal and the district's answer reveals that the parties agree the IHO's November 3, 2023 decision should be modified (see Req. for Rev. ¶ 1; Answer ¶ 5). The parent alleges in her appeal that it is difficult to find LBA providers in the area in which the student resides (Req. for Rev. ¶ 1; SRO Ex. A at p. 2). The parent notified the IHO that the November 3, 2023 order included restrictive language that would hamper the parties' ability to secure necessary ABA services for the student and the IHO agreed to make the requested change (SRO Ex. A at p. 2). In her request for review, the parent references the IHO's attempt to submit an amended decision that was rejected by the hearing office because it constituted a substantive alteration that the IHO lacked the authority to render (see Req. for Rev. ¶ 1). The parent requests that an SRO amend the IHO's decision by modifying the relief to include the following language: "In the event that the [district] cannot ensure an LBA(s) to provide ABA services to the Student, the [district] must fund 1:1 instruction with behavioral support until such time as the [district] locates an LBA" (id.).

In an answer, although the district denies every allegation set forth in the parent's request for review, the district acknowledges that it has not asserted a cross-appeal and alleges that "it does not object to the Parent's request that the SRO issu[e] an order adopting [the parent's requested

² Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the additional evidence includes email communications that the parent's counsel had with the IHO and district regarding the parent's request for the IHO to amend her order and an amended IHO decision with the requested modification that the IHO attempted to issue (SRO Exs. A; B; C). The three additional exhibits attached to the parent's request for review all post-date the impartial hearing and contain evidence that is necessary to render a decision as to the propriety of amending the IHO's decision to include clarifying language regarding ABA services. Therefore, SRO exhibits A through C are admitted into the hearing record.

language]" (Answer ¶ 5).³ As a result, the district requests that "the Office of State Review grant the requested relief" (id. at p. 3).

The law is well settled that 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]).

The parent attempted to resolve this issue with the IHO, but as soon as the parent was made aware that the IHO was unable to amend the final decision, the parent submitted an appeal to the Office of State Review. The district affirmed that it does not object to the parent's requested relief (Answer ¶ 5). 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 the issues is required.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 3, 2023, is modified according to the parties' agreement set forth in their respective pleadings on appeal to amend those portions of the IHO's order directing that all compensatory ABA services must be provided by an LBA to include: "In the event that the district cannot ensure an LBA(s) to provide ABA services to the student, the district must fund 1:1 instruction with behavioral support until such time as the district locates an LBA."

Dated: **Albany, New York**
 March 15, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

³ Since the district has not appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).