The University of the State of New York

The State Education Department
State Review Officer
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No. 23-277

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, PC, 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) insofar as the relief ordered by the IHO in the form of reciting an appropriate educational program for his son for the 2022-23 school year omitted the provision of a 1:1 paraprofessional. 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

Given the limited scope of this appeal and the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary.

A. Due Process Complaint Notice

In a due process complaint notice dated December 13, 2022, the parent alleged that the respondent (the district) violated Section 504 of the Rehabilitation Act of 1973 (section 504), the IDEA, and Article 89 of the New York Education Law (Parent Ex. A). The parent asserted many procedural and substantive claims in support of his position that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year and sought relief

in the form of compensatory education and services, as well as a determination that the student's programming should consist of specified services (id.). The parties agreed that the student's current educational placement during the pendency of the proceeding consisted of (1) special education itinerant teacher (SEIT) services of 7.5 hours per week on a 12-month basis; (2) 1:1 occupational therapy (OT) two times per week for 30-minute sessions on a 12-month basis; (3) 1:1 counseling services two times per week for 30-minute sessions on a 12-month basis; and (4) a 1:1 full-time paraprofessional in school on a 10-month basis (Parent Ex. C; see Tr. p. 3).

On March 20, 2023, the parties appeared before an IHO for a prehearing conference where the parent's counsel indicated that the district had recently convened a CSE for the student and that a new IEP would be forthcoming (Tr. pp. 1-8). The parent anticipated that the forthcoming IEP would relate to the student's current school year that was being challenged and would therefore require the parent to amend the due process complaint notice (Tr. pp. 5-8). The IHO adjourned the proceeding, the impartial hearing was rescheduled for a future date, and then later rescheduled two more times to allow the parent an opportunity to amend the due process complaint notice (Tr. pp. 9-24). On July 6, 2023, the parent amended the due process complaint notice to assert in addition to his prior allegations that the March 2023 IEP was procedurally and substantively deficient on many grounds and failed to meet the student's unique learning needs (Parent Ex. B).

B. Impartial Hearing Officer Decision

An impartial hearing regarding the parent's requests for relief was held on September 13, 2023 and October 17, 2023. The district did not submit any documentary or testimonial evidence into the hearing record, nor did the district representative appear on the second hearing date to cross-examine the parent's witness who delivered his direct testimony by affidavit (Tr. pp. 36, 61-62; see generally Parent Ex. FF). The parent submitted thirty-two documents into the hearing record (Tr. pp. 19, 60; see generally Parent Exs. A-FF). Both parties submitted closing briefs.

The IHO issued a final written decision to the parties dated October 25, 2023. The IHO emphasized that the district failed to present any evidence during the hearing (IHO Decision at p. 4). The IHO found that, contrary to the district's argument in its closing brief, the parent had offered sufficient evidence to demonstrate the appropriateness of the parent's request for 20 hours per week of 1:1 SEIT services on a 12-month basis, three hours per week of at-home applied behavior analysis (ABA) services on a 12-month basis, one hour per week of training with a Board Certified Behavior Analyst (BCBA), counseling services three times per week for 30-minute sessions on a 12-month basis, a full-time 1:1 paraprofessional, and OT three times per week for 30-minute sessions (id. at pp. 4-5). The IHO further noted that the district did not challenge any portion of the evidence presented by the parent (id.). The IHO determined that the district failed to offer a FAPE to the student for the 2022-23 school year and that the student was entitled to an award of compensatory education and services (id. at p. 9).

As relief, the IHO ordered that the student was entitled to the following compensatory education services by providers selected by the parent and compensated by the district: (1) a bank of 920 hours of 1:1 SEIT instruction less what the student actually received during the 2022-23 school year; (2) a bank of 69 hours of 1:1 OT less what the student actually received during the 2022-23 school year; (3) a bank of 69 hours of 1:1 counseling services less what the student actually received during the 2022-23 school year; (4) a bank of 138 hours of behavior therapy by

a BCBA; and (5) a bank of 46 hours of parent training and counseling by a BCBA (IHO Decision at pp. 10-11).

The IHO further ordered that the student was entitled to the following program for the 2022-23 school year: (1) 1:1 SEIT instruction (20 hours per week); (2) 1:1 counseling services (three times per week for 30 minutes); (3) "Home-based ABA services," (three hours per week); (4) parent training and counseling by a BCBA (one hour per week); and (5) 1:1 OT (three times per week for 30 minutes) (IHO Decision at p. 11). The IHO's order further included that the student was afforded extended time (1.5) to take tests and complete assignments and that the student was entitled to a 12-month school year (id.).

IV. Appeal for State-Level Review

The parent appeals only insofar as the IHO did not include the provision of a 1:1 paraprofessional in his order delineating the student's program for the 2022-23 school year. The parent characterizes the IHO's omission as "inadvertent" and states that the IHO acknowledged his error but could not correct it because doing so would be in contravention of State regulations. I agree that the IHO is not permitted to do so once the due process proceeding has concluded and a final decision has been issued. The parent further represents that the district consents to the amendment. To support the parent's position that the IHO made an inadvertent mistake by leaving out the 1:1 paraprofessional in the order, the parent points out that he had specifically requested in his October 24, 2023 closing brief an order that included a 1:1 paraprofessional, that the IHO determined in the body of his decision that a 1:1 paraprofessional was appropriate for the student, and that the student received a 1:1 paraprofessional during pendency. According to the parent, his request is not moot because it affects the student's pendency. The parent offers additional evidence with the request for review to corroborate his arguments on appeal and requests that an SRO accept and consider such additional evidence (SRO Exs. A-E).[1, 2] As relief, the parent requests that 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 includes email communications that the parent's counsel had with the IHO and district regarding the parent's request for the IHO to amend his order (SRO Exs. B; D; E) and a second amended findings of fact and decision dated November 18, 2023 (SRO Ex. A). These four documents could not have been offered at the time of the impartial hearing and are necessary for addressing the parties' arguments. Accordingly, SRO Exhibits A, B, D and E have been considered. SRO Exhibit C, a due process complaint notice dated December 2, 2023, is not relevant to the instant appeal and has not been considered.

[2] The parent also asserts that the IHO failed to rule on the issue of whether the district violated section 504. An SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed.

SRO correct the IHO's "inadvertent omission" and amend the order to include a 1:1 paraprofessional to the student's educational program.

In its answer, the district agrees that the parent's requested relief should be granted.

V. Discussion

A review of the allegations in the parent's appeal and the additional evidence submitted by the parent on appeal, together with the district's answer, reveals that the parties agree that the IHO's October 25, 2023 decision contained errors with respect to the relief ordered (see Req. for Rev. ¶¶ 1-4; Answer ¶ 5; see also SRO Exs. B; D; E). After issuing a final written decision dated October 25, 2023, the IHO subsequently rendered an amended decision on October 26, 2023 wherein he modified the decretal language from "Home-based ABA services, 3 hours per week" to "Home-based behavior therapy, 3 hours per week" (compare Oct. 25, 2023 IHO Decision at p. 11, with Oct. 26, 2023 IHO Decision at p. 11). The IHO explained to the parties in an email dated October 26, 2023 that the "amendment was needed due to a typographical error as to one of the services to which the [s]tudent is entitled" (SRO Ex. B at p. 2).[3] By email dated October 27, 2023, the parent's counsel advised that "there is another issue" with the IHO's decision because "it does not reference the 1:1 paraprofessional to which the student is entitled to" (id.). The IHO responded that he inadvertently omitted the provision of a 1:1 paraprofessional from his decision, but he lacked the authority to make a substantive change to correct the decision (id. at pp. 1-2).

In an email dated November 18, 2023, the IHO attached a second amended decision that was signed and dated the same day which the IHO characterized as making an additional "substantive change to the original and first amended" IHO decisions by adding the provision of a 1:1 paraprofessional to the student's educational program (SRO Ex. D at p. 1; see SRO Ex. A). According to the IHO, the provision of a 1:1 paraprofessional was inadvertently omitted from his

App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

[3] 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 it is a strained interpretation to view the deletion of a specific methodology in an ordering clause of an IHO decision as a mere clerical or typographical correction, I will set aside my reservations about the IHO's ability to clarify the decision under the unique circumstances of this case and in the interests of providing the parties a final resolution when it is evident that neither party is appealing the IHO's modification in his amended decision dated October 26, 2023. However, I note that the IHO should not have issued an amended decision of a different date to correct what he viewed as a typographical error. Having multiple IHO decisions of different dates leads to confusion and contravenes statutory and regulatory provisions that provide an IHO's decision is final unless appealed to an SRO (see 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]).

prior decisions and the district consented to the amendment (SRO Ex. D at p. 1).[4] In his request for review, the parent references the IHO's attempt to submit a corrected second 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. ¶ 2). The parent requests that an SRO "correct the [IHO's] inadvertent omission and add a 1:1 school paraprofessional to the [s]tudent's educational program" (see id. at p. 7).

In an answer, although the district denies each and 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 the IHO "omitted the 1:1 school paraprofessional" (see Answer ¶¶ 2, 5). The district further states that "the [district] does not object to the [p]arent's request that the SRO amend the IHO's Decision to identify the [s]tudent's educational program for the 2022/23 school year include a 1:1 paraprofessional" (id. at ¶ 5). As a result, the district requests that "the Office of State Review grant the requested relief" (id. at p. 3).

Based on the parties' assertions on appeal, neither party disputes that the IHO's decision should have included the parent's requested relief that the student's educational program for the 2022-23 school year include the provision of a 1:1 paraprofessional (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 terms of the IHO's decision, dated October 25, 2023, are modified to include the modifications to the decision made by the IHO on October 26, 2023 and in accordance with the parties' further agreement set forth in their respective pleadings on appeal to provide that the student's educational program for the 2022-23 school year should have included the provision of a 1:1 full-time, daily paraprofessional.

Dated: **Albany, New York**
March 13, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] As explained in the preceding footnote, while the IHO did not have authority to retain jurisdiction over the matter, it is entirely unclear why the parties resorted to further litigation to resolve agreed upon matters rather than enter into a stipulation agreeing that a 1:1 aide should have been included. An agreement between the parties serves just as well for stay-put purposes in the future as an IHO decision that provides quasi-judicial imprimatur and consumes far less of the parties' and the taxpayers' resources.