



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-036

### **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:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, 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 awarded the parent monetary compensation for lost wages she incurred due to the district's failure to provide the student with adequate transportation for the 2022-23 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 facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail.

In an amended due process complaint notice, dated May 11, 2023, the parent alleged that the district failed to reconvene after a neuropsychological evaluation was completed, failed to provide an appropriate program and placement for the student, and failed to provide the student with adequate bus services causing him to miss school and regress (see IHO Ex. II at p. 2).<sup>1</sup> As relief, the parent sought, as relevant to this appeal, the costs of transportation and lost wages she incurred as a result of the district's failure to provide transportation for the student (id.).

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<sup>1</sup> The parent filed her initial due process complaint notice on March 22, 2023 (IHO Ex. I).

An impartial hearing conducted by the Office of Administrative Hearings and Trials (OATH) convened on July 11, 2023 and concluded on November 16, 2023 after five days of proceedings (Tr. pp. 1-79).

As the hearing progressed, the CSE convened on October 11, 2023, to formulate the student's IEP for the 2023-24 school year with an implementation date of October 12, 2023 (IHO Ex. III). At the next hearing date, on October 20, 2023, the parties agreed to the student's educational program and school location for the remainder of the 2023-24 school year, leaving the only issue for the hearing as the parent's requested relief for the district's failure to provide adequate busing for the student (Tr. pp. 38-42).<sup>2</sup> At the November 16, 2023 hearing, the parent testified that she lost wages "due to inadequate busing which [wa]s supposed to be provided according to [the student's] IEP" (Tr. p. 58).<sup>3</sup> The parent submitted documentary evidence and testified as to the number of hours of work she missed due to issues with the student's transportation to school during the 2022-23 school year (Tr. pp. 64-74; Parent Exs. A; B). At the conclusion of the hearing, counsel for the district conceded that the district "failed to provide proper busing for the student as required by the IEP" and indicated that the district had no objection to the parent's requested relief (Tr. p. 75).

In a decision dated December 22, 2023, the IHO determined that the district failed to provide the student with required transportation services for the 2022-23 school year (IHO Decision at p. 3). Finding that the parent had "provided detailed, consistent, and credible testimony of the days that she missed four hours or more of work due to [the district's] busing delays or no-shows," the IHO awarded the parent \$6,500.00 in lost wages based on her testimony and documentation which the IHO determined supported the parent's claim (*id.*). The IHO noted that the district representative conceded that the district had failed to provide "proper busing" for the student as required by the IEP, and also did not object to the parent's request for \$6,500.00 for lost wages (*id.*).

#### **IV. Appeal for State-Level Review**

The parties' familiarity with the particular issues for review on appeal in the district's request for review is also presumed and will not be recited. The sole issue on appeal is whether the IHO erred by awarding the parent lost wages as relief for the district's failure to provide the student with adequate transportation for the 2023-24 school year.<sup>4</sup>

#### **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

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<sup>2</sup> The parent withdrew the claims raised in the amended due process complaint notice, other than her claim of inadequate busing, during the next hearing date (Tr. pp. 62-64).

<sup>3</sup> As per the student's October 2023 IEP, he was not recommended for special transportation (IHO Exhibit III at pp. 37, 39). The IEP in effect for the 2022-23 school year was not submitted into the hearing record.

<sup>4</sup> The parent has not submitted an answer in this matter.

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 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 Andrew 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]).<sup>5</sup>

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**

### **A. Relief**

The district argues correctly on appeal that the IHO exceeded her authority by awarding the parent lost wages as relief. Although the district appears to have consented to the requested relief during the hearing, it is well settled that compensatory monetary damages are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see Avaras v. Clarkstown Cent. Sch. Dist., 2017 WL 3037402, at \*26 [S.D.N.Y. July 17, 2017] [finding lost wages are not recoverable under IDEA]; R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). The prohibition against awarding compensatory damages includes the reimbursement of lost wages as a result of the district's failure to provide the student with transportation (see Taylor, 313 F.3d at 786 n.14; Polera, 288 F.3d at 483; R.B. v. Bd. of Educ., 99 F. Supp. 2d at 418; see also Application of a Student with a Disability, Appeal No. 21-057; Application of a Board of Educ., Appeal No. 20-034; Application of a Board of Educ., Appeal No. 15-048). Here, the sole item of relief awarded was compensation for the parent's lost wages. While it is undisputed that the district failed to meet

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<sup>5</sup> 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" (Andrew F., 137 S. Ct. at 1000).

its obligation to provide the student with transportation to his approved nonpublic school, compensatory damages in the form sought by the parent in this matter are not available under the IDEA. Moreover, although the IHO noted that the district did not object to the relief during the impartial hearing, there is no evidence that the parties reached a formal settlement regarding the parent's lost wages claim and, as previously discussed, the IHO did not have authority to award lost wages as relief. Accordingly, the IHO's decision must be vacated.

**VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's award of lost wages to the parent as relief, the necessary inquiry is at an end.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated December 22, 2023 is vacated and the parent's due process complaint notice in this matter is dismissed.

**Dated:**            **Albany, New York**  
                         **March 1, 2024**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**