The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-039

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 Department of Education

Appearances:
Law Office of Noelle Boostani, attorneys for petitioner, by Noelle Boostani, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for an order regarding transportation services for her son for the 2023-24 school year. The appeal must be dismissed.

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, the CSE convened on January 12, 2023, to formulate the student's IEP for the 2023-24 school year (Parent Ex. A ¶ 21).[1] The parents disagreed with the recommendations contained

[1] The parent asserted that the prior CSE convened in January 2021 (Parent Ex. A ¶ 16).

in the January 2023 IEP and notified the district of their intent to unilaterally place the student at the Churchill School (Churchill) for the 2023-24 school year (Parent Ex. B).[2]

In a due process complaint notice, dated September 11, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent requested findings that Churchill was an appropriate placement for the student for the school year at issue, that equitable considerations favored awarding relief, and specifically requested direct funding or reimbursement for all fees and costs associated with Churchill, including transportation, further requesting appropriate transportation services or transportation funding to enable the student to attend Churchill (id. at p. 8).

An impartial hearing convened before the Office of Administrative Trials and Hearing (OATH) on October 20, 2023 and concluded on December 15, 2023, after three days of proceedings (Tr. pp. 1-69).[3] During the substantive hearing held on December 15, 2023, the district conceded that if failed to offer the student a FAPE for the 2023-24 school year (Tr. p. 29).

In a decision, dated December 23, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that Churchill was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent (IHO Decision at pp. 6-9). As relief, the IHO ordered the district to directly fund the cost of the student's tuition at Churchill for the 2023-24 school year (id. at p. 10). The IHO denied the parent's request for an order on transportation, finding that although the student's IEP indicated the student required transportation from the closest safe curb to school and the student's physician indicated concerns regarding the student's anxiety while traveling to and from school, the hearing record did not include evidence describing what the student required for transportation (id. at p. 10). Accordingly, the IHO found she was unable to award transportation as relief (id.).

IV. Appeal for State-Level Review

The parent appeals. The only issue on appeal is whether the parent is entitled to an award that includes transportation services.

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

[2] Among other contentions, the parent asserted that the district failed to provide notice of a school location where the student's IEP could be implemented (Parent Ex. B at p. 2).[3] An October 20, 2023 prehearing conference summary and order indicated that the parent alleged a denial of FAPE for the 2023-24 school year and that the parent was seeking relief of direct funding of the cost of the student's tuition at Churchill for the 2023-24 school year and an order for appropriate transportation services or transportation funding to enable the student to attend Churchill (Oct. 20, 2023 Pre-Hearing Order).

[3] An October 20, 2023 prehearing conference summary and order indicated that the parent alleged a denial of FAPE for the 2023-24 school year and that the parent was seeking relief of direct funding of the cost of the student's tuition at Churchill for the 2023-24 school year and an order for appropriate transportation services or transportation funding to enable the student to attend Churchill (Oct. 20, 2023 Pre-Hearing Order).

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[4]

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

Here, the only issue for review is whether the IHO properly declined to issue an order regarding transportation services as requested by the parent.

[4] 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., 580 U.S. at 402).

Initially, the IHO noted that the parent's due process complaint notice included a request for an order for transportation services and that the parent's attorney did not repeat this request during the hearing and there was no witness testimony regarding this relief (IHO Decision at p. 3; Tr. pp. 1-69).[5] Further, the IHO noted that she sent the parent's attorney an email requesting clarification; however, there was no response (IHO Decision at p. 3).[6] The IHO then found that there was insufficient evidence to grant relief regarding transportation because the parent did not present any evidence during the hearing and did not request transportation as relief during the hearing (id. at p. 10).

In the request for review, the parent argues that the student has a right to appropriate transportation services to enable him to receive a FAPE. The parent requests an order for the district to perform the related service to and from Churchill or in the alternative an order for the district to fund third-party transportation services. The parent contends that without such an order, the student will be left without a "means to get to and from [Churchill]" and there will be no "responsible party to hold accountable." The parent noted that the district has not disputed the student's right to transportation and that the district has been providing transportation services for the student via pendency. In denying the request for transportation, the parent argues that the IHO shifted the burden of proof for determining what appropriate transportation services were for the student and imposed a heightened pleading standard on the parent.

In response, the district argues that the IHO correctly denied the parent an order on transportation. The district asserts that it has been providing for transportation for the student to and from Churchill due to its obligations under State law. The district attached a declaration indicating that the student was "being bussed to and from the Churchill School, and transportation will continue to be provided for the duration of the school year" (Answer Ex. A at ¶3). The district requests that the SRO accept that document and dismiss the parent's appeal. According to the district, the parent had the ability to clarify the request for transportation services before the IHO during the impartial hearing and failed to do so. The district further contends that the parent has the burden of proving that transportation services are appropriate under the unilateral placement standard; however, the parent presented no evidence on the issue.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law §

[5] As the parent points out on appeal, counsel for the parent did "defer . . . to the due process complaint for specific terms of relief" before specifically requesting tuition funding and reimbursement for Churchill for the 2023-24 school year (Tr. pp. 30-31).

[6] The IHO sent an email to the parties on December 20, 2023, in which the IHO directly asked the parties to clarify if the parent was still seeking transportation services as relief and giving the parties until noon the next day to respond (IHO Ex. III at pp. 1-2). The IHO sent a second email on December 21, 2023 indicating that she was closing the hearing record after receiving no response from the parties (id.at p. 1).

4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

First, it is noted that the parent, in the due process complaint notice, requested an order for "appropriate transportation services or transportation funding" (Parent Ex. A at p. 8). At the pre-hearing conference, the IHO requested that the parent clarify the relief by asking if the parent was seeking funding for tuition for the 2023-24 school year and for "either appropriate transportation services or transportation funding" to which the parent's attorney responded in the affirmative (Tr. p. 4).[7] The parent's attorney then did not indicate that a transportation order was being sought in either her opening or closing statement (Tr. pp. 29-31, 65-66).[8] Additionally, as noted above, after the conclusion of the hearing the IHO requested that the parties clarify if the parent was still seeking transportation services as relief (IHO Ex. IV at pp. 1-2; IHO Decision at p. 3). In that email, the IHO indicated she would entertain a request to "hear arguments and/or additional evidence relating to this requested relief"; however, the IHO received no response (id.).[9] As noted

[7] The prehearing order confirms that this was an issue delineated to the IHO (see Oct. 20, 2023 Prehearing Order).

[8] The parent's attorney did "defer" to the due process complaint notice for specific areas of relief during the opening statement (Tr. p. 29-30).

[9] Although the parent objected to the IHO's determination that the parent did not raise a request for transportation services during the hearing, the parent did not explain why she did not respond to the IHO's December 20, 2023 email requesting clarification regarding the request for transportation services (see Req. for Rev. at pp. 3-4; IHO

by the IHO, no documentary or testimonial evidence pertaining to transportation was presented during the impartial hearing (Tr. pp. 1-69; Parent Exs. A-P; IHO Exs. I-III; see IHO Decision at p. 10).

Additionally, the parent also has not made a request for a specific special transportation service and only generally contends that the district should be required to transport the student to Churchill or pay for such transportation (see Req. for Rev. at p. 2). However, the parent has not asserted that the district has failed to comply with State law which requires it to provide transportation services for the student. State law provides that districts must generally provide transportation for children residing in the district "to and from the school they legally attend" (Educ. Law § 3635[1][a]). A request for transportation must be made by April 1 of the preceding school year, except that a district may not deny a late request "where a reasonable explanation is provided for the delay" (Educ. Law § 3635[2]). In fact, the parent has conceded that the district is providing transportation services to the student, yet the parent has not identified any specific special transportation services being provided. In fact, at this point, although the parent has had ample opportunity, the parent has not asserted that the student requires special transportation separate from the transportation services the district is already required to provide the student under State law.[10]

Accordingly, without further evidence or explanation, there is insufficient indication in the hearing record or in the documentation submitted by the parent, to show that the district has refused to provide appropriate transportation services without a formal order requiring it to do so. After review, for the reasons stated above, the IHO properly denied the parent's request for an order for transportation services.

VII. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 8, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

Ex. III at pp. 1-2).

[10] The January 2023 IEP indicated that the student required transportation from the closest safe curb location to school (IHO Ex. I at p. 26); however, there is no indication in the hearing record or provided on appeal that the student would not receive the same services for the remainder of the school year at issue.