The University of the State of New York

The State Education Department
State Review Officer
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No. 24-054

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:
Mobilization of Justice, Inc., attorneys for petitioner, by Erica Cooper, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a portion of a decision of an impartial hearing officer (IHO) which denied, in part, his requested relief for respondent's (the district's) failure to offer his son an appropriate program for the 2023-24 school year. The appeal must be sustained in part.

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 detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, a prior due process hearing was held with respect to the student's educational programming for the 2022-23 school year, which resulted in an unappealed IHO decision, dated September 18, 2022 (Parent Ex. E). As a result of that proceeding, the prior IHO determined that the district did not offer the student a FAPE and ordered the district to revise the student's IEP for the 2022-23 school year to include: fulltime, in-school 1:1 applied behavior analysis (ABA) services to be provided by a registered behavior technician (RBT) or a certified board analyst assistant (CBAA) at a rate not to exceed $100 per hour in lieu of a behavior paraprofessional, 15 hours per week of home-based 1:1 special education teacher support services (SETSS) with seven

hours to be provided by a board certified behavior analyst (BCBA) or a licensed behavior analyst (LBA) at a rate not to exceed $300 per hour and eight hours to be provided by a RBT/CBAA under the supervision of the BCBA/LBA at a rate not to exceed $100 per hour, four hours per month of parent counseling and training to be provided by a BCBA/LBA at a rate not to exceed $300 per hour and six hours per month of BCBA supervision at a rate not to exceed $300 per hour (Parent Ex. E at pp. 1, 9).

A CSE next convened on November 4, 2022, determined the student was eligible for special education as a student with autism, and formulated an IEP for the student with an implementation date of November 22, 2023 (Parent Ex. C at pp. 1, 28-29, 35).[1] The CSE recommended a 12-month program consisting of placement in a 6:1+1 special class in a district specialized school for 10 periods per week of both English language arts (ELA) and math, and four periods per week of both sciences and social studies instruction (id. at pp. 28-29, 30, 35). For related services, the CSE recommended that the student receive two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of group OT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two, and school nurse services individually on an as-needed basis (id. at p. 29). The CSE also recommended one 60-minute session per month of virtual/school parent counseling and training, and four 60-minute sessions per month of home-based parent counseling and training to be provided from November 22, 2022 to June 27, 2023 (id.). As supplementary aids and services, the CSE recommended daily, individual paraprofessional behavior support provided by an RBT), and, from November 22, 2022 to June 27, 2023, 15 hours per week of home-based SETSS (id. at pp. 29-30). The CSE also recommended special transportation services (id. at pp. 34-35).

In a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Specifically, the parent argued that the district inappropriately terminated the student's school and home-based ABA services at the conclusion of the 2022-23 school year and further argued that the student required ABA services in order to make appropriate progress throughout the 2023-24 school year (id. at p. 2). The parent also argued that the district did not convene the CSE to create an IEP for the 2023-24 school year (id. at p. 8). The parent requested pendency pursuant to the prior unappealed September 2022 IHO decision (id. at pp. 1-2). For relief, the parent requested an order directing the district to amend the student's IEP to extend all the services ordered in the prior unappealed September 2022 IHO decision into the 2023-24 school year and for the district to continue to fund such services in accordance with the prior unappealed September 2022 IHO decision (id. at p. 9).

An impartial hearing convened on September 6, 2023 and concluded on November 28, 2023, after five days of proceedings (Tr. pp. 10-61).[2] In a decision dated January 7, 2024, the IHO

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The parties also convened for a pre-hearing conference on August 11, 2023, in which both parties agreed to present evidence and opening statements on September 6, 2023 (Tr. pp. 1-6). The IHO held an appearance on the record on August 15, 2023 but neither party was present (Tr. pp. 7-9).

determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 1-10). As relief, the IHO ordered the district to provide the student with the following as compensatory education for the 2023-24 school year: (1) fulltime 1:1 ABA services in school to be provided by a RBT or CBAA at a rate not to exceed $100 per hour in lieu of a behavior paraprofessional; (2) "5 hours of home-based 1:1 SETSS per week, with up to 7 hours to be provided by the BCBA/LBA at a rate not to exceed $300" and the remaining eight hours to be provided by an RBT or a CBAA under the supervision of the BCBA/LBA, at a rate not to exceed $100 per hour; (3) four hours per month of parent counseling and training to be provided by a BCBA or LBA at a rate not to exceed $300 per hour; and (4) six hours per month of BCBA supervision at a rate not to exceed $300 per hour (id. at pp. 9-10).[3]

IV. Appeal for State-Level Review

The parent appeals. The parent alleges that the IHO erred in the characterization of his award and that the award had a typographical error. More specifically, the parent argues that the IHO should have awarded 15 hours of home-based 1:1 SETSS per week rather than five hours ordered by the IHO. Additionally, the parent argues that the IHO should have awarded his requested relief as an amendment to the student's IEP for the 2023-24 school year rather than as compensatory education.

In an answer, the district responds to the parent's allegations. The district agrees with the parent's allegation that the IHO made a typographical error in his award and does not contest the parent's request that an SRO correct the error by changing the award from five to fifteen hours of home-based SETSS per week. The district disputes the parent's other allegation, arguing that the IHO properly denied the parent's request for an order directing the district to amend the student's IEP and was correct to award the parent's requested relief as compensatory education.

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 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.,

[3] The IHO did not clarify if the rates for BCBA, LBA, CBAA or RBT were supposed to be per hour rates in his decision; however, there is evidence that the rates specified in the IHO's decision were for a per hour basis as the rates were the same rates indicated by the student's ABA provider in his affidavit (compare IHO Decision at pp. 9-10, with Parent Ex. U at p. 8).

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

A review of the allegations in the parent's appeal, together with the district's answer, reveals that the parties generally agree that the IHO's decision contained an error with respect to the amount of hours per week awarded for home-based 1:1 SETSS for the student (see Req. for Rev. at p. 3; Answer ¶ 5). In support of his argument that the IHO's award contained a typographical error, the parent asserts that the IHO's decision does not refer to five hours of home-based services at any point (Req. for Rev. at p. 3). In an answer, the district states: "The record supports [the parent's] allegations that the IHO mistakenly awarded five hours of home-based services due to a typographical error, as the record supports an award of 15 hours of home-based services as relief" (Answer ¶ 5). Both the parent and district request that an SRO correct the typographical error in the IHO's award of home-based services for the student (Req. for Rev. at pp. 3, 5; Answer at p. 7).

Moreover, the language used in the IHO's awarded relief suggests that the IHO intended to award more than five hours as the IHO awarded up to seven hours per week of home-based SETSS to be provided by a BCBA or a LBA and up to eight hours per week of home-based SETSS to be provided by an RBT or a CBAA under the supervision of the BCBA/LBA (IHO Decision at p. 9).

[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).

The language used by the IHO alone suggests that she intended to award a total of 15 hours per week of home-based services rather than five hours per week (see id.).

Based on the parties' assertions on appeal, neither party disputes that the IHO's award should have been 15 hours of home-based services per week rather than the five ordered (see generally Req. for Rev.; Answer). A plain reading of the IHO's order also supports the parties' assertions that the IHO decision contained a typographical error in the ordering clause. In light of the parties' agreement, I will modify the IHO's decision to fix the typographical error.

Turning to the parent's disagreement with the IHO's award of relief as compensatory education, the parent alleges that he did not request compensatory education but rather, he requested an order requiring the district to continue to provide the student with "intensive ABA services" as part of the student's IEP (Req. for Rev. at p. 3).

In this instance, the IHO indicated she was not granting the parent's request for a prospective award by "authoriz[ing] [her] own IEP recommendations and services for the student" and was instead awarding compensatory education (IHO Decision at p. 9). However, in her award, the IHO explicitly ordered the district to provide the student with the identified services "for the 2023-2024 school year," which at the time the IHO issued her decision encompassed both an award for the portion of the school year which had passed and an award for the remainder of the school year (id. at pp. 9-10). Accordingly, the IHO has already ordered the district to provide the student with the following services for the remainder of the 2023-24 school year: fulltime 1:1 ABA services in school by an RBT or CBAA, home-based 1:1 SETSS with up to seven hours per week provided by a BCBA or an LBA and up to eight hours per week provided by an RBT or a CBAA under the supervision of the BCBA/LBA, four hours per month of parent counseling and training by a BCBA or LBA, and six hours per month of BCBA supervision (id.).

Although the parent requested "an order directing the [district] to amend the [student's] IEP," a review of the parent's due process complaint notice indicates that, ultimately, the relief he sought was to extend all the services ordered in the prior unappealed September 2022 IHO decision into the 2023-24 school year and for the district to continue to fund such services (Parent Ex. A at p. 9). As noted above, the IHO has awarded the student with the same services as ordered in the prior unappealed September 2022 IHO decision and has extended the services for the student through the 2023-24 school year. Accordingly, the parent has already been awarded the relief requested and is not harmed by the IHO's decision not to direct the district to amend the student's IEP. There is no basis for disturbing the IHO's awarded relief for the remainder of the 2023-24 school year.

VII. Conclusion

Given the parties' respective positions, the IHO's order shall be modified in accordance with the parties' agreement as set forth above. The remainder of the IHO's awarded relief will not be disturbed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 7, 2024, is modified according to the parties' agreement set forth in their respective pleadings on appeal and the district is directed to provide the student with 15 hours per week of home-based 1:1 SETSS for the 2023-24 school year.

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

STEVEN KROLAK
STATE REVIEW OFFICER