The University of the State of New York

The State Education Department
State Review Officer
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No. 24-062

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 ordered respondent (the district) to fund an award of compensatory educational services. 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[a]). 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 issues on appeal, a full recitation of the student's educational history is unwarranted. Briefly, in a due process complaint notice dated September 2, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years based on various procedural and substantive violations (see generally Parent Ex. A). As relief, the parent sought compensatory educational services consisting of the following: 414 hours of services delivered by a reading specialist trained in the Orton-Gillingham approach at a "'fair market rate'"; 552 hours of enhanced rate special education teacher support services (SETSS), delivered by a provider trained in Orton-Gillingham, at a "'fair market rate'"; 48 sessions of occupational therapy (OT) at a "fair market rate"; and reimbursement for the costs of a neuropsychological evaluation, Orton-Gillingham services, and a reading evaluation (id. at pp. 8-10).

On October 10, 2023, the parties proceeded to an impartial hearing, which concluded on January 5, 2024 after six days of proceedings (see Tr. pp. 1-90). At the impartial hearing, the district did not enter any documentary or testimonial evidence into the hearing record (see Tr. pp. 18, 40-41). The district objected to the parent's requested relief as inappropriate, and alternatively asked the IHO to limit any reading services or SETSS awarded to the student to the hours equivalent to a 10-month school year program (i.e., 36 weeks) (see Tr. pp. 25-26).

In a decision dated January 19, 2024, the IHO found that the district failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (see IHO Decision at pp. 3-5). With respect to the parent's requested relief, the IHO noted that the district had not challenged the requests for compensatory educational services or the evaluations (id. at p. 8). As a result, the IHO awarded the following relief: a bank of 414 hours of compensatory educational services consisting of tutoring delivered by an individual trained in Orton-Gillingham, funded at "market rate"; a bank of 552 hours of compensatory educational services consisting of SETSS delivered by an individual trained in Orton-Gillingham, funded at "market rate"; a bank of 48 hours of OT services, funded at "market rate"; reimbursement for the costs of the neuropsychological evaluation of the student ($5,850.00); reimbursement for the costs of Orton-Gillingham services delivered to the student ($11,775.00); and funding for the costs of an evaluation by a reading specialist ($575.00) (id. at pp. 9-10). With regard to the compensatory educational services, the IHO directed the parent to select the providers, and upon presentation of the specified documentation (i.e., invoices, supporting documents, attendance records), ordered the district to directly fund the compensatory educational services at a "market rate, capped at the lowest rate paid to such provider by the [district's] impartial hearing implementation unit, but no less than $150.00 per hour for such services" (id. at p. 10).[1]

IV. Appeal for State-Level Review

The parent appeals, initially noting that the IHO found that she was entitled to all of the relief requested in the due process complaint notice. The parent contends, however, that the IHO erred by capping the hourly rate of the providers selected to deliver the compensatory educational services at $150.00 per hour, which, according to the parent, limits her ability to use the ordered relief. In support of this contention, the parent argues that the hearing record lacked any evidence of the rates paid by the district's implementation unit. The parent also argues that the only testimonial evidence in the hearing record concerning hourly rates was elicited through a witness proffered by the parent, who testified that her agency did not accept district payments for services, but who, at that time, privately delivered services to the student at a rate of $150.00 per hour. Additionally, the parent asserts that the IHO's limitations on the hourly rates for the compensatory educational services awarded severely curtails her ability to locate and secure providers willing to accept those rates, and moreover, subjects the award to the interpretation of the district's implementation unit. As relief, the parent seeks an order vacating the IHO's language capping the

[1] In ordering this relief, the IHO cited to invoices from the agency that had been providing the student with Orton Gillingham tutoring services, which show that the rate for those services was $150.00 per hour (IHO Decision at p. 10; see Parent Ex. O).

hourly rates, and instead, orders the district to fund the compensatory educational services at "reasonable market rate[s]."

In an answer, the district responds to the parent's allegations and argues that her appeal must be dismissed because the parent is not aggrieved by the IHO's decision and award. The district contends that, in the due process complaint notice, the parent requested relief at the "'fair market rate,'" and the IHO found that the student was entitled to compensatory educational services at the "'fair market rate.'" In addition, the district asserts that the IHO defined that "'fair market rate'" in the decision as a minimum of $150.00 per hour and a "maximum rate equal to the lowest ra[te] paid by [the district's implementation unit" to the [p]arent's chosen provider." Additionally, the district asserts that the IHO properly relied on evidence in the hearing record when formulating the minimum hourly rate to be paid for the compensatory educational services, which was elicited from the parent's own witness. Overall, the district argues that the parent has misread the IHO's decision and the relief as ordered, and thus, the appeal must be dismissed.

V. Applicable Standards—Compensatory Educational Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that

compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

Initially, the parent—in her request for review—admits that the IHO found in her favor at the impartial hearing and determined that she was entitled to all of the relief requested in the due process complaint notice; on appeal, the parent does not challenge the relief awarded, other than what she perceives as a cap on the hourly rates to obtain the compensatory educational services.

After independently reviewing the IHO's decision, it appears, as the district asserts, that the parent misunderstood the IHO's order because the IHO's language set the $150.00 hourly rate for the compensatory educational services as a minimum, and not, as the parent contends, as a cap or an upper limit on those services. In doing so, the IHO properly relied on the only evidence in the hearing record of an hourly rate for services, which the parent was already obtaining and delivering to the student (see Tr. pp. 72-73, 75-77; Parent Ex. O). Given that the parent's selected provider was accepting $150.00 per hour for services, the hearing record establishes that $150.00 per hour represented a fair market rate. Because the hearing record lacked any other evidence of hourly rates or reasonable market rates for services, the IHO properly relied on evidence that $150.00 per hour was an appropriate rate in formulating the equitable relief sought by the parent. The remainder of the IHO's award, permitting an agency to receive in excess of $150.00 per hour from the district for delivering the awarded relief if it is the "lowest rate paid to such provider by the [district's] impartial hearing implementation unit" does not make the award unreasonable.

Moreover, to the extent that the parent contends that the IHO's reliance on rates paid by the district's implementation unit will curtail her ability to locate and secure providers, this argument is also misplaced. As noted by the district in its answer, any agency the parent attempts to contract for services will know the "lowest rate paid to such provider by the [district's] impartial hearing implementation unit" (IHO Decision at p. 10). The IHO ordered the district to pay an hourly rate for the compensatory educational services consistent with the actual rates paid by the implementation unit to the specific providers selected by the parent—and not based on rates paid for similar services. Although the parent points to a previous SRO decision as support for her contention, here, the IHO's order sufficiently removes the uncertainty that was injected into the order in the prior matter and instead, reasonably limits the hourly rates to those previously paid to the same providers, and at a rate not less than $150.00 per hour. Conversely, adopting the "reasonable market rate" language desired by the parent would inject the very uncertainty the parent indicates she is attempting to avoid, as it is unclear how such a "reasonable market rate" would be determined outside of the hearing process.

In light of the foregoing, the parent's appeal must be dismissed.

VII. Conclusion

Having determined that there is no basis to depart from the IHO's decision, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER