The University of the State of New York

The State Education Department
State Review Officer
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No. 23-089

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 decision of an impartial hearing officer (IHO) which found that the district failed to provide the student with equitable services during the 2022-23 school year and awarded the parent compensatory educational services. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law§ 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 4402; see 20 U.S.C. § 1414[d][l][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special

education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][l]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 nature of the issue presented in the instant appeal, a full recitation of the underlying facts and procedural history of this matter is not necessary.

Briefly, a CSE convened on January 17, 2020 and developed an IESP for the student with an implementation date of January 30, 2020 (Parent Ex. B at pp. 1, 10). The CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) and two 30-minute sessions per week of individual speech-language therapy services (id. at p. 8).

The parent filed an amended due process complaint notice on February 1, 2023, alleging that the district failed to create an IESP for the student for the 2022-23 school year (Parent Ex. A).[1] Specifically, the parent asserted, among other things, that the student's pendency services included five periods of SETSS in a group setting per week and two weekly sessions of 1:1 speech-langue therapy (id. at p. 2).

A pendency hearing convened on March 16, 2023 (Tr. pp. 1-18). As part of the pendency hearing, the parent, district, and IHO all reviewed, reiterated, and otherwise acknowledged that the only services the parent sought under pendency were the SETSS and speech-language therapy (Tr. pp. 12-13). In an interim decision dated March 29, 2023, the IHO ordered the district to provide both the SETSS and speech-language services as agreed upon by the district during the pendency of the proceeding (Interim IHO Decision).

On April 14, 2023, the parties appeared for a hearing on the merits, during which the district conceded that the student was entitled to SETSS at a reasonable market rate and continued speech-language therapy, both at the frequency and duration as set forth in the January 2020 IESP (Tr. pp. 19-26). At no point during the impartial hearing did the parent mention or request occupational therapy (OT) as a related service for the student (Tr. pp. 1-26).

In a decision dated April 28, 2023, the IHO reiterated the parents' assertions that the student was entitled to equitable services provided for under the January 2020 IESP, specifically "SETSS -5 periods per week (Direct, Group); Speech Language Therapy – 2x30 min. per week (Individual)" and noted that the district did not contest the relief requested by the parent (IHO Decision at pp. 1-2).[2] However, the IHO ordered the district to issue [related services] authorizations (RSAs) to the parent for "2 Occupational Therapy sessions per week (30 minutes per 1:1 session) from appropriately qualified providers at market rate" and did not order any speech-language therapy sessions (id. at p. 2).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred substantively in ordering OT services rather than the speech-language therapy referred to elsewhere in the IHO's decision. The parent

[1] The original due process complaint notice dated January 4, 2023 was included in the hearing record (IHO Ex. I).

[2] The first page of the decision is the unnumbered cover page. The pagination begins on the first page of the substantive discussion, and all references to the decision cite to the pagination used by the IHO.

attaches additional evidence to the request for review consisting of an affidavit from the IHO describing the error in the IHO's ordering clause.[3] For relief, the parent requests that the IHO decision be amended to properly reflect that the district should have been ordered to fund SETSS at a reasonable market rate and continue funding two 30-minute sessions of speech-language therapy per week instead of the erroneously ordered OT.

In its answer, the district states that it generally denies the parent's assertions; however, it also admits that both the hearing record and the IHO's decision demonstrate that the petitioner is entitled to the "[a]greed [u]pon [r]elief delineated at the hearing" and, as such, the so-ordered portion of the IHO's decision was incorrect. The district requests that an SRO grant the parent's appeal by annulling the portion of the IHO's order and by granting the parent's requested relief.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[4] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending

[3] Generally, documentary evidence not presented at an impartial hearing may be 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]). A review of the document reveals that it was created by the IHO after the impartial hearing had concluded and is relevant to my determination in this matter; therefore it is accepted as additional evidence (SRO Ex. A).

[4] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[5]

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. of Mass., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d. Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 - Relief

The only issue on appeal is whether the IHO erred in granting OT services, rather than the SETSS and speech-language therapy services requested by the parent.

The parent has submitted an affidavit from the IHO, which states "[m]y intention was to order the District to fund the SETSS with direct payment to the provider at the reasonable market rate and to continue funding the Speech Language Therapy through RSA" but [a]s a result of a clerical error, the Order section contained in the [decision] directed the District to fund Occupational Therapy despite the fact that the student was not mandated for Occupational Therapy and Occupational Therapy was never at issue" (SRO A at ¶ 4). The IHO further noted that "[t]he District representative . . . has informed me that the District has no objection to my correcting the [decision] to include the proper Order" (id. at ¶ 5). However, the IHO indicated that "[d]espite my best efforts to correct my error which amounts to a typographical error, I have been informed by

[5] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

the District's Impartial Hearing Office that I am not permitted to issue a corrected [decision] in the above described circumstances" and concludes that "there is no way . . . to correct my error and to issue a corrected decision" (id. at ¶¶ 6-7).[6]

Based on the parties' assertions on appeal, and the affidavit of the IHO, neither party, nor the IHO, disputes that the IHO Decision should have included an order directing the district to fund the requested five periods per week of SETSS and two sessions per week of speech-language therapy at a reasonable market rate rather than the order directing the district to fund two OT sessions per week. As there is no dispute concerning the relief that should have been ordered by the IHO, and as the IHO believes that she lacked the authority to issue a corrected decision in this matter, I find that the parent has demonstrated that her requested relief should be granted on appeal.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO decision dated April 28, 2023 is modified by reversing the ordered relief and by directing the district to fund for the 2022-23 school year, to the extent not already provided for under pendency, five periods per week of direct, group SETSS and two individual, 30-minute sessions per week of speech-language therapy at a reasonable market rate.

Dated: **Albany, New York**
July 10, 2023

STEVEN KROLAK
STATE REVIEW OFFICER

[6] Generally, 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). In this instance, as the parent appeals from the IHO's finding, I need not determine whether a change to the ordering clause in IHO decision in this matter would have constituted a material change to the decision rendering it null and void or if it would have been a permissible correction of a typographical error.