



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-430

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:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Nicolas Apter-Vidler, Esq.

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 a decision of an impartial hearing officer (IHO) which ordered respondent (the district) to reimburse the parent for, rather than directly fund, the costs of her son's transportation for the 2023-24 school years. 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 student has received a diagnosis of autism spectrum disorder and attended the Brooklyn Autism Center (BAC) since the 2013-14 school year (Tr. pp. 141-42).

In a December 23, 2020 IHO decision arising from an impartial hearing regarding the 2020-21 school year, the IHO in that matter ordered, in part, that the district "shall provide special education transportation for [the s]tudent to attend the private school including the provision of a bus paraprofessional" (Parent Ex. B at pp. 5-6). As part of an impartial hearing concerning the 2021-22 school year, on October 29, 2021, the parent and the district entered into an agreement stating that the student's pendency program derived from the unappealed December 2020 IHO

decision, which included, among other things, 12-month tuition funding for BAC and daily round trip special education transportation with a bus paraprofessional (Parent Ex. C).

On March 30, 2022 the parent signed an enrollment agreement for the student to attend BAC for the 2022-23 school year (Parent Ex. M at p. 2). On June 18, 2022 the parent advised the district that the student would attend BAC for the 2022-23 12-month school year and requested that the district fund the student's special education transportation to BAC (Parent Ex. F at pp. 1, 11).

In an email dated September 30, 2022, the district advised Special Needs Logistics, LLC (Special Needs) that, as part of the student's pendency placement, the district authorized funding for Special Needs to provide the student with daily round trip transportation to and from BAC for 210 days at a rate of \$400 per day for the period July 1, 2022 through June 30, 2023 (Parent Ex. D).¹

On May 31, 2023 the parent signed an enrollment agreement for the student to attend BAC for the 2023-24 school year (Parent Ex. O at p. 2). On June 19, 2023, the parent advised the district that the student would attend BAC for the 2023-24 12-month school year and requested that the district fund the student's special education transportation to BAC, including prospective payment and/or direct payment or reimbursement to the vendor until the district adequately implemented the student's transportation (Parent Ex. E at pp. 1, 18).

On July 4, 2023 the parent signed an agreement with Special Needs wherein Special Needs agreed to provide vouchers for Uber rideshare services for the parent or a provider to take the student to and from BAC at a rate of \$500 per day (Parent Ex. L at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (Parent Ex. A at pp. 1-21). In particular, the parent alleged that the district failed to convene a CSE or develop an IEP for the student for either school year to recommend, among other things, appropriate transportation services (*id.* at pp. 13-14). The parent also asserted that, although the student was entitled to transportation as part of his pendency placement during the 2022-23 school year, the district failed to arrange for appropriate transportation (*id.* at p. 14). The parent claimed that, although the district agreed to pay for a prospective car service arranged for by the parent, charges were outstanding (*id.*). As relief, the parent sought district funding of special education transportation with a bus paraprofessional for the student to attend BAC for the 2023-24 12-month extended school year (*id.* at pp. 15, 19).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 16, 2023 and concluded on June 25, 2024 after a total of 12 days of proceedings (Tr. pp. 1-420). In a decision dated August 28, 2024, the IHO

¹ The authorization provided that it was subject to change to extend beyond or end prior to June 30, 2023 based on further order of the IHO, withdrawal, or settlement (Parent Ex. D).

found that the district denied the student a FAPE for the 2022-23 and 2023-24 school years and ordered the district to directly fund and/or reimburse the parents for tuition paid for the student's attendance at BAC for the 2023-24 school year and for the costs of requested related services (IHO Decision at pp. 18).² As relevant to this appeal, the IHO ordered the district to "reimburse" the parent for the private transportation costs expended to transport the student to and from BAC during the 2023-24 school year (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred when she only ordered reimbursement to the parent and not direct payment to Special Needs, the company that provided the transportation. The parent also requests a finding that, for the 2022-23 and 2023-24 school years, the district was required to provide the student with transportation with a trained paraprofessional as part of the student's educational program. Accordingly, the parent requests that (1) the IHO's decision be modified to ensure that "special education transportation remain part of [the student's] program"; and (2) the district be required to "satisfy [the student's] debt to and directly fund Special Needs or to "provide comparable rideshare transportation on any day on which the district is unable to implement the special education transportation with a paraprofessional."³

In an answer, the district concedes that the IHO intended to order the district to "fund and/or reimburse" the costs of private transportation to and from BAC for the 2023-24 school year and agrees that the SRO should modify the IHO's decision accordingly. With regard to the parent's request that the IHO modify the IHO's decision to state that the student was entitled to district-provided transportation with a trained paraprofessional during the 2022-23 and 2023-24 school years and that such busing was part of the student's program, the district argues that this constitutes a request for a declaratory judgment that cannot be addressed because it was not properly raised in the due process complaint notice, that the parent's request for an order regarding the student's

² The relief ordered by the IHO included district funding of 1.4 hours per week of 1:1 home-based applied behavior analysis (ABA), two hours per week of Board Certified Behavior Analyst (BCBA) supervision, two hours per week of parent counseling and training, one hour per week of individual speech and language services, and one hour per week of individual occupational therapy (OT) services that the student received after school during the 2023-24 school year minus that portion already funded pursuant to pendency (IHO Decision at p. 18).

³ The parents also allege errors regarding the IHO's decision as it relates to the parents claims under section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a). An SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. 2013]; see also *F.C. v. New York City Dep't of Educ.*, 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

educational program amounts to an inappropriate request for prospective relief that would usurp the authority of the CSE, which should already have convened for the 2024-24 school year.

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., 427 F.3d 186, 192 [2d Cir. 2005]).

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. 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, 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

Notably, the district does not challenge that it failed to offer the student a FAPE for the 2023-24 school year and does not challenge the IHO's award of district funding of the student's tuition at BAC and home-based related services. Therefore, these determinations and awards have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL

1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The sole issues on appeal surround the IHO's decision on the issue of special transportation.

In her decision, the IHO found that there was ample evidence that the student required special transportation for the 2023-24 school year (IHO Decision at p. 15). She also found evidence to establish that, "due to the student's physique, maladaptive behavior, specifically refusing to get [on] or off the school bus, as well as dropping to [the] ground and refusing to get up, along with the lack of consistent paraprofessional support, that the parent needed to secure private transportation to take the student to and from school" (*id.*). Accordingly, the IHO found that the district "shall fund and/or reimburse to the parent any costs paid to privately transport the student to and from school during the 2023-2024 school year" (*id.* at pp. 15-16). However, in the ordering clause, the IHO ordered the district "to reimburse" the parent for private transportation costs (*id.* at p. 18).

To the extent that the IHO ordered reimbursement rather than direct funding for private transportation costs in the ordering clause of her decision, the parties are now in agreement that the district should directly fund the services (*see* Req. for Rev. ¶ 7; Answer ¶ 5). As the parties are in agreement, I do not find it necessary to further discuss this issue. Therefore, consistent with the parties' agreement, I will modify the IHO's decision to require the district to directly fund and/or reimburse to the parent for any costs paid to privately transport the student to and from school during the 2023-24 school year.

Regarding the parent's request for a finding that special transportation with a paraprofessional should have been part of the student's program for the 2022-23 and 2023-24 school years, the request may be characterized as declaratory in nature. Here, the IHO found that the district denied the student a FAPE, and there is no dispute that the district failed to convene a CSE or engage in educational planning for the student for both school years (*see* IHO Decision at p. 18; *see* Parent Ex. A at pp. 13-14). Further, the IHO found that the evidence supported a finding that the student required special transportation including a bus paraprofessional for the 2023-24 school year (IHO Decision at p. 15). The parent is not aggrieved by these determinations (*see* Educ. Law § 4404[2]; *see also* 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]), and I do not find that the hearing record supports any additional declaratory findings on this issue.

To the extent the parent seeks a finding for the 2024-25 school year or beyond, the district is correct that, generally, a parent's request for specific prospectively services through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (*see Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; *see also Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year,

which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Here, the district correctly observes that the CSE should have already convened to develop an IEP for the 2024-25 school year. Further, the testimony and evidence in the record show that the student's needs are evolving. For example, the parent described the student's aggressive and self-injurious behavior and the need for continued prompts, particularly when getting off the school bus and into school, but the BCBA supervisor described that the student had shown substantial progress (compare Tr. pp. 221-27, with Tr. pp. 365-67, 381). Accordingly, the CSE would be in the best position to weigh updated information about the student's abilities and whether the student continues to require paraprofessional services as a special transportation accommodation for the 2024-25 school year. If the CSE did not convene or if the parent does not agree with the CSE's determination regarding transportation, the parent may pursue due process for that school year. However, an order requiring that the service be included on the student's IEP prospectively would not be an appropriate remedy in this matter.

VII. Conclusion

In summary, given the parties' agreement with respect to the order for private transportation services, the district shall be required to directly pay Special Needs for services provided during the 2023-24 school year and/or reimburse the parent if she paid for such services. To the extent the parent seeks a declaratory finding as to the student's need for special transportation for the 2022-23 and 2023-24 school years, the parent is not aggrieved by the IHO's finding that the district denied the student a FAPE for both school years and that the student required paraprofessional services for the 2023-24 school year, and any further findings are not warranted by the hearing record. With regard to the parent's request for a finding of the student's continued need for special transportation including paraprofessional services, such a determination is the purview of the CSE and a prospective finding is not appropriate relief in this instance. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision, dated August 28, 2024, is modified by reversing that portion which directed the district to "reimburse the parent for the private transportation costs expended to transport the student to or from the school during the 2023-2024 school year"; and

IT IS FURTHER ORDERED that the district shall directly fund and/or reimburse to the parent any costs paid to privately transport the student to and from school during the 2023-24 school year upon presentation of invoices, contracts, receipts and/or canceled checks showing actual cost and/or proof of payment.

Dated: Albany, New York
November 25, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER