The University of the State of New York

The State Education Department
State Review Officer
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No. 24-445

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 Legal Aid Society, attorneys for petitioner, by Katherine M. Groot, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 granted her request that respondent (the district) fund the costs of her son's private services delivered by the providers of her choosing for the 2022-23 and 2023-24 school years but limited the funding to a reasonable market rate to be determined by the district. 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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, moreover, the issues presented on appeal are narrow; therefore, the facts underlying this matter will not be recited here in detail. Briefly, a CPSE convened on February 14, 2023, found the student eligible for special education

as a preschool student with a disability and developed an IEP (see Parent Ex. B). On June 5, 2023, a CSE convened, found the student eligible for special education as a student with autism and developed an IEP (see IHO Ex. IV).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated April 25, 2024, 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). In particular, the parent alleged that the district failed to provide the program and services mandated in the student's February 2023 and June 2023 IEPs (id. at p. 3). The parent requested a finding that the district denied the student a FAPE for the 2022-23 and 2023-24 school years between February 15, 2023 and October 16, 2023, when the student enrolled at a nonpublic school, and an order for the district to fund a compensatory education award consisting of 430 hours of private tutoring, 48 hours (or 96 30-minute sessions) of speech language therapy, 56.5 hours (or 113 30-minute sessions) of occupational therapy (OT), and 34.5 hours (or 69 30-minute sessions) of physical therapy (PT) all at an enhanced rate of $150.00 per session to be delivered by providers of the parent's choosing (id. at 4).[2]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 20, 2024 and concluded on July 11, 2024 after three days of proceedings (see Tr. pp. 1-64). During the impartial hearing, the attorney for the parent admitted that she incorrectly calculated the compensatory education hours requested in the due process complaint notice and clarified the correct calculations during the hearing (Tr. pp. 34, 40-41). The parent, in her closing statement, requested compensatory education consisting of 572 hours of special education teacher support services (SETSS), 36 hours of speech-language therapy, 55.5 hours of OT, and 28.5 hours of PT all at an enhanced rate not to exceed $300 per hour (i.e., $150.00 per 30-minute session) to be delivered by providers of the parent's choosing (IHO Ex. III at pp. 2, 8-10).

In a decision dated September 3, 2024, the IHO determined that the district failed to meet its burden to prove that it provided the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at pp. 3, 7). The IHO found that, while the district "did not explicitly concede that it denied the student a FAPE . . . , it effectively did so by failing to present any witness or documentary evidence to support [its] argument that it satisfied its obligation to provide [the s]tudent a FAPE for the 2022-23 school year and 2023-24 extended school year" (id. at p. 7).

The IHO further found the student was entitled to a bank of compensatory education services consisting of 482 hours of SETSS, 27 hours of speech-language therapy, 47.5 hours of

[1] The student's eligibility for special education as a preschool student with a disability for the 2021-22 school year (see 34 CFR 200.1[mm]; 8 NYCRR 200.1[mm]) and as a student with autism for the 2022-23 school year (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]) is not in dispute.

[2] A few lines from the top of page four of parent exhibit A are missing; however, the hearing record includes another copy of the due process complaint notice filed by the district as a supplemental document required by State regulation, which includes the missing text (compare Parent Ex. A at p. 4, with Due Process Compl. Not. at p. 4).

OT, and 21.5 hours of PT (IHO Decision at pp. 9-12).[3] The IHO ordered that the district directly fund the compensatory education services to be delivered by providers of the parent's choosing at "a reasonable market rate to be determined by the [d]istrict's [i]mplementation [u]nit," with no expiration date (id. at p. 12). The IHO declined to order the services at an hourly rate of no more than $300 as requested by the parent because there was no evidence presented to support that rate (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in granting the district's implementation unit the authority to determine a reasonable market rate for the compensatory services awarded to the student. Additionally, the parent argues that the IHO is the final decision maker on the award for a denial of a FAPE and this responsibility cannot be assigned to another. The parent requests an award for compensatory services at a reasonable market rate or that the matter be remanded to determine an appropriate rate for the service. In a memorandum of law submitted in support of her request for review, the parent requests a finding for an enhanced rate of $150 per session of compensatory services.

The district, in an answer, argues that the parent's request to alter the language regarding the implementation unit should be denied because previous awards conditioned on rates paid by the implementation unit have been upheld. The district also argues the parent's request for enhanced rates should not be considered because the request for enhanced rates is not in the parent's request for review and is, instead, contained in a memorandum of law. The district argues that, in the alternative, the parent's request for $150 per session should be denied because there was no evidence presented to support a rate of $150 per session.

In a reply, the parent argues that she did not abandon her request for $150 per session, noting that in the request for review she sought a "reasonable market rate." The parent asserts that $150 per session is a reasonable market rate.

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

[3] The IHO found that the parent's compensatory education request was based on a 40 week 10-month school year and a 10-week summer session, whereas a 12-month school year consists of approximately 42 weeks; accordingly, the IHO reduced the number of hours awarded (IHO Decision at p. 8).

(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]).

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., 758 F.3d at 451; 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 Bd. of Educ., 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]). 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"]).

Except in circumstances not at issue in the present matter, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

Initially, regarding the district's argument that the parent failed to include a request for an enhanced rate of $150 per session in the request for review, as a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Ultimately, it is unnecessary to resolve the district's argument that the parent abandoned a request for the specific rate because, even if appropriately sought in the request for review, there is no evidence in the hearing record to support an award of $150 per session. In an affidavit, a social worker that attempted to help the parent secure services for the student testified that, despite contacting over 100 independent providers for OT, the parent was unable to secure OT services for the student at a rate of $125 per session (Parent Ex. G; H). The parent also testified in an affidavit that she was unable to locate OT and PT services at a rate of $125 per session (Parent Ex. G). However, there is no testimony or evidence regarding potential service providers stating their current rates are $150 per session or similar evidence in

the hearing record supporting an award of $150 per session. Thus, the parent's requested rate of $150 per session is not supported by the evidence.

Finally, regarding the IHO's order allowing the district's implementation unit the authority to determine a reasonable market rate for the compensatory services, I note that the IDEA confers broad discretion on administrative agencies to fashion appropriate compensatory relief (see Sch. Comm. of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 [1985]; see e.g., Application of a Student with a Disability, Appeal No. 20-149). It has been held that delegation of an IHO's authority to craft a compensatory education award to a CSE team that is largely comprised of school district officials is impermissible because it is at odds with the remedial scheme set forth by the IDEA (see Burlington, 471 U.S. at 369 [noting that, while the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district]; M.S. v. Utah Sch. for Deaf & Blind, 822 F.3d 1128, 1135-36 [10th Cir. 2016]; Bd. of Educ. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 317-18 [6th Cir. 2007]; Reid v. Dist. of Columbia, 401 F.3d 516, 526-27 [D.C. Cir. 2005]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *24 [E.D.N.Y. Oct. 30, 2008]).

Here, however, the IHO crafted the award without delegating to the district the calculation of hours of educational services that would place the student in a place he would have been but for the district's denial of a FAPE. It is less clear that limiting the rate to be paid for such compensatory education to a reasonable amount based on the current market rate for such services is an improper delegation. It is not the case that the district's implementation unit may "unilaterally reduce" the award (see Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 660 [2d Cir. 2020] [finding it improper for an escrow agent to be unilaterally able to reduce a compensatory award if the student no longer needed the services]). In many circumstances, a district is directed to provide a student with an award of compensatory education, which places the obligation to deliver the services to the student regardless of cost squarely with the district. However, having granted the parent's specific request that the compensatory education services be delivered by private providers of the parent's choosing, the IHO did not abuse his discretion by limiting the costs of such services to something objectively reasonable based on the market and identifying the district implementation unit as the entity who would initially make that determination.

The parent, however, is not necessarily deprived by the IHO's order of an opportunity to provide input as to a reasonable market rate. For instance, the parties could agree to confer, and are encouraged to do so, to determine the position of the district's implementation unit regarding what constitutes a reasonable market rate for each service ordered by the IHO. If, for instance, the parent submits proof to the unit that no providers are available at the rate identified, this would tend to indicate that the market does not, in fact, support the rate set by the implementation unit. In which case, the district should either identify providers that will accept the identified rates or increase the rates so that the parent may do so. Ultimately, the district is responsible to ensure the student receives compensatory education as ordered by the IHO, and if the implementation unit ultimately sets a rate that prevents or impedes the parent's reasonable efforts to secure the services for the student, the parent may then be able to pursue an enforcement action in an appropriate forum.

Based on the foregoing, there is no basis in the hearing record to modify the IHO's order, as the order falls within the IHO's discretionary authority to order equitable relief.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

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

CAROL H. HAUGE
STATE REVIEW OFFICER