



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-078

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2010-11 school year. 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

According to the hearing record, the student presented with difficulties in the areas of attention, distractibility, processing speed, concentration, and academics, and has been enrolled at Bay Ridge since 2007 (Tr. pp. 118-22; Dist. Exs. 1; 3; 5; 6 at p. 3).¹ The student's eligibility for special education and related services as a student with a learning disability is not in dispute in these proceedings (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

¹ Bay Ridge has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On November 19, 2009, the CSE convened for a review meeting to develop the student's IEP (Dist. Exs. 1 at pp. 1-2; 8). The November 2009 CSE maintained the student's classification as a student with a learning disability,² and recommended, among other things, a 10-month educational program consisting of an integrated co-teaching (ICT)³ class, counseling services once per week for 30 minutes per session in a 5:1 setting, and a transition plan (Dist. Exs. 1 at pp. 1, 5, 9, 11-13; 8). The projected effective dates of the November 2009 IEP were December 3, 2009 to December 3, 2010, with a projected review date of November 18, 2010 (Dist. Ex. 1 at p. 2).

On May 22, 2010, the parents signed an enrollment contract with Bay Ridge and remitted a nonrefundable deposit of \$3,000 reserving the student's seat in the school for the 2010-11 school year (Tr. p. 189; Parent Exs. E-F).

In a June 1, 2010 notice sent to the parents, the district summarized the November 2009 CSE's recommendations and notified them of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 9).

Subsequent to receiving the district's June 1, 2010 notice, the student's mother visited the public school site (Tr. pp. 183-185; Parent Ex. B).⁴ In a subsequent undated letter to the district, the student's mother referenced her visit to the assigned school and expressed her belief that the assigned school was "not suitable to meet [the student's] needs because the school is too big and overwhelming for him and it is recommended that he work in a small group setting to achieve his academic potential" (Parent Ex. B).

On August 4, 2010, the parents remitted a second nonrefundable payment of \$11,718 to Bay Ridge toward the student's 2010-11 tuition (Tr. p. 191; Parent Exs. E; H).

By letter to the district dated August 16, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, because it failed to offer him "a small school" and "small class environment" (Parent Ex. A at p. 1). The parents advised the district of their intention to unilaterally place the student at Bay

² Although the hearing record does not include any of the student's prior IEPs, the November 2009 IEP indicated that the CSE made no changes to the student's prior recommended education program (see Dist. Ex. 1 at p. 2).

³ The Integrated co-teaching (ICT) placement at issue in this appeal is also referenced in the hearing record as a "collaborative team teaching" (CTT) class (see Tr. pp. 50-51, 94, 96, 102-03, 198; Dist. Ex. 9). For consistency with State regulations, in this decision, I refer to the special education placement at issue in this appeal as an ICT placement. ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

⁴ The student's father reported at the impartial hearing that he was not sure of the exact date of the student's mother's visit to the public school site (Tr. pp. 185-86).

Ridge for the 2010-11 school year and to seek reimbursement/funding at public expense for the student's tuition, related services, and transportation for the 2010-11 school year (id.).

On September 8, 2010, the student began the 2010-11 school year at Bay Ridge (Parent Ex. I).

A. Due Process Complaint Notice

On October 20, 2011, the parents filed an amended due process complaint notice,⁵ alleging, among other things, that the district denied the student a FAPE for the 2010-11 school year because: the November 2009 IEP would have expired prior to the end of the first half of the 2010/11 school year; the recommended ICT class was inappropriate for the student because "it was too big a class program for a highly distractible [sic] child who would be lost in such a class;" the November 2009 IEP did not contain a transition plan, "which invalidated the document;" and the CSE denied the parents of the opportunity to visit the public school site prior to the start of the 2010-11 school year (Parent Ex. C). The parents also asserted that their son required "a small nurturing school, small class environment, [and to be] grouped with like functioning peers, with intensive special education remediation using multi-sensory teaching techniques" (id.). The parents sought an order from an IHO awarding them reimbursement for their son's tuition, related services, and transportation to and from Bay Ridge for the 2010-11 school year (id.).

B. Impartial Hearing Officer Decision

On January 31, 2012, an impartial hearing commenced in this matter, and concluded on February 16, 2012, after two days of proceedings. On March 1, 2012, the IHO issued a decision,⁶ finding, among other things, that the district offered the student a FAPE for the 2010-11 school year; and assuming for the sake of argument that the district failed to offer the student a FAPE for the 2010-11 school year, equitable considerations favored the district and militated against an award of reimbursement for the student's tuition, related services, and transportation at Bay Ridge for the 2010-11 school year (IHO Decision at pp. 8-13). Specifically, the IHO found that the parents did not assert a claim that the November 2009 CSE was improperly constituted; they did not disagree with the student's classification, the recommendations of an ICT class and counseling services, or the annual goals developed during the CSE meeting; the November 2009 IEP "properly detail[ed] the student's present performance levels with specificity . . . ;" and the November 2009 IEP contained appropriate goals and testing accommodations for the student (id. at pp. 4, 9). The IHO also determined that there was insufficient evidence in the hearing record to support the parents' contention that the student would not have benefited educationally from the recommended ICT class simply because of the class size; that the November 2009 IEP did, in

⁵ The original due process complaint notice is not included in the hearing record. For the purposes of this decision, I refer to the parents' amended complaint as the "due process complaint notice."

⁶ I note that, in compliance with State regulations, the IHO properly documented the hearing record to reflect her reasons for granting multiple extensions of time to the parties during the impartial hearing (see Tr. pp. 81-84; IHO Exs. i-ii; see also 8 NYCRR 200.5[j][5][i]).

fact, contain a transition plan;⁷ that the November 2009 IEP was tailored to meet the student's unique needs for the 2010-11 school year; and that it offered the student a FAPE in the least restrictive environment (LRE) (*id.* at pp. 9-10). The IHO stated that he declined to address the parents' argument that the November 2009 IEP was invalid because it would have expired before the end of the 2010-11 school year; however, he elaborated that the parents' offered "no legal support" for the allegation and noted that the IEP would have been in effect when the 2010-11 school year began (*id.* at p. 10).

The IHO also declined to consider whether Bay Ridge was an appropriate placement for the student for the 2010-11 school year (IHO Decision at p. 10). Next, although unnecessary in light of her determination that the district offered the student a FAPE for the 2010-11 school year, the IHO nevertheless made alternative findings that equitable considerations did not support the parents' reimbursement claims, concluding that based on their execution of the enrollment contract with Bay Ridge and payment of the majority of the student's nonrefundable tuition before they formally rejected the district's timely offer of the assigned school, the parents failed to notify the district in a timely manner that they intended to reject the assigned school and that they had "pre-determined to unilaterally place [the student] at [Bay Ridge] with the intent to seek reimbursement of the private tuition at public expense" (*id.* at pp. 10-12). The IHO also found that the parents attended the November 2009 CSE meeting "with no intent whatsoever to accept any offer of placement other than an offer to place [the student] at Bay Ridge" (*id.* at pp. 12-13).

The IHO denied the parents' claim for tuition reimbursement for the reasons discussed above, denied their request for transportation reimbursement because there was no evidence that the student was entitled to special transportation and "[the November 2009] IEP did not award [the parents] transportation," found that the November 2009 IEP was appropriate for the student for the 2010-11 school year, and denied the parents' request for reimbursement for related services because "no testimony or other evidence was offered at [the impartial] hearing to suggest [that the student] was entitled to related services, and no specific related services were sought" by the parents (IHO Decision at p. 13).

IV. Appeal for State-Level Review

The parents appeal from the IHO decision,⁸ alleging, among other things, that the IHO erred in finding that district offered the student a FAPE for the 2010-11 school year; that Bay Ridge was an appropriate placement for the student for the 2010-11 school year; that equitable considerations supported their claims; and that the district consented to maintaining the student's placement at Bay Ridge for the 2010-11 school year by allegedly recommending that the parents defer the student's recommended placement in the district until the 2011-12 school year. Specifically, the parents argue that the November 2009 IEP failed to provide the student with a FAPE because: the present levels of performance failed to specify grade levels at which the

⁷ However, "because the parents submitted no evidence whatsoever regarding the transition plan," the IHO stated that she did not "make a finding as to its possible appropriateness" (IHO Decision at p. 9).

⁸ Although the parents were represented at the impartial hearing by counsel, they appear pro se on appeal (*see* Pet.).

student was functioning and standardized test scores that he achieved during a November 2, 2009 psychoeducational evaluation; the district's ICT class recommendation was inappropriate for the student given his distractibility and attention issues; and the effective dates indicated in the November 2009 IEP did not cover the entire 2010-11 school year. The parents seek reversal of the IHO decision and an order awarding them reimbursement for the student's tuition at Bay Ridge for the 2010-11 school year.

The district answers the parents' petition, arguing, among other things, that the IHO correctly determined that the district offered the student a FAPE for the 2010-11 school year, that the parents failed to satisfy their burden of proving that Bay Ridge was an appropriate placement for the student for the 2010-11 school year, that equitable considerations favored the district, and that the parents are precluded from arguing that the district agreed to maintain the student's placement at Bay Ridge for the 2010-11 school year because they failed to raise this argument in their due process complaint notice. Specifically, the district contends that the descriptions of the student's present levels of performance contained in the November 2009 were adequate, the district's recommendation of an ICT class was appropriate to address the student's needs, and the parents' allegation that the November 2009 IEP was deficient because its effective dates did not encompass the entire 2010-11 school year is without merit because the IEP was effective at the start of the 2010-11 school year, and therefore, the district satisfied its obligation under State and federal regulations. The district requests that the IHO decision be upheld and that the parents' petition be dismissed.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL

3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). 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 Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised *sua sponte*. The parents' contentions in their due process complaint notice allege only two deficiencies regarding the student's November 2009 IEP: (1) that the IEP lacked a transition plan; and (2) that an ICT class was not an appropriate placement for the student (Parent Ex. C). In this case, the IHO also noted that the descriptions of the student's present levels of performance contained in the November 2009 IEP were accurate and that the November 2009 IEP recommended appropriate annual goals and testing accommodations for the student (*see* IHO Decision at pp. 4-5, 9). However, the parents' due process complaint notice did not allege any defects regarding the student's present levels of performance,⁹ or that the annual goals and testing accommodations recommended by the November 2009 CSE were inappropriate, and it cannot be reasonably read to include such allegations (*see* Parent Ex. C). Moreover, there is no indication in the hearing record that the parents requested, or that the IHO authorized, a further amendment to the due process complaint notice to include these additional issues. Nor is there any evidence that the district agreed to expand the scope of the impartial hearing to cover these new issues. Thus, the IHO should have confined her determination to the issues raised in the parents' due process complaint notice¹⁰ and

⁹ Assuming for the sake of argument that that the parents properly raised this issue in their due process complaint notice, although State and federal regulations mandate that an IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student" (8 NYCRR 200.4[d][2]; *see* 34 CFR § 300.320 [a][1]), the regulations do not require the district to list standardized test scores on an IEP. Moreover, the hearing record reflects that, in lieu of actual test scores, the November 2009 IEP provided descriptive ranges, which described the student's then-current academic and cognitive abilities consistent with the evaluative information provided to the CSE (*see* Tr. pp. 73-74; *compare* Dist. Ex. 1 at p. 3, *with* Dist. Ex. 5 at pp. 2-6).

¹⁰ To the extent that the Second Circuit recently held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (*M.H. v. New York City Dep't of Educ.*, 2012 WL 2477649, at *28-*29 [2d Cir. June 29, 2012]), I note that reference at the impartial hearing to the present levels of performance, annual goals, and testing accommodations contained in the November 2009 IEP was initially made by the district's representative during direct examination of a district witness (*see* Tr. pp. 22-30, 32). On cross-examination of the same witness, counsel for the parents raised the issue of the sufficiency of the IEP annual goals (*see* Tr. pp. 61-65), and the district representative, in her closing statement, subsequently argued that the IEP goals were appropriate for the student (Tr. p. 197). Although the district initially questioned its witness during the impartial hearing regarding the present levels of performance, annual goals, and testing accommodations contained in the November 2009 IEP, such questioning was within the context of the process used to develop the IEP and the procedures used by the CSE. The issues as addressed by

it was not necessary to rule on the appropriateness of the present levels of performance, the annual goals, and the testing accommodations contained in the November 2009 IEP (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist.; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156).

B. Scope of Review

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that the parents did not allege in the due process complaint notice that the November 2009 CSE was improperly constituted; that during the November 2009 CSE meeting, the parents did not object to the student's classification, the recommendations of an ICT class and counseling services, or the annual goals as proposed by the CSE; that the annual goals and testing accommodations contained in the November 2009 IEP were appropriate; that the November 2009 IEP contained a transition plan; and that the parents were not entitled to reimbursement of related services and transportation expenses incurred in connection with the student's 2010-11 school year at Bay Ridge (IHO Decision at pp. 4, 9, 13). Accordingly, these determinations 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]). I also note that neither party has appealed the IHO decision to the extent that it did not address the parent's allegations that the district's placement offer was untimely and deprived them of an opportunity to visit the assigned school prior to the start of the 2010-11 school year,¹¹ or to the extent that the IHO declined to address whether the November 2009 IEP's transition plan was appropriate. Consequently, I will not address these issues as they are not properly before me.

2. New Issues Raised on Appeal

the IHO went well beyond the procedures for developing the student's IEP and addressed the substantive adequacy of the IEP (IHO Decision at pp. 4-5, 9). Although the district developed the hearing record and provided background and contextual information, the district did not argue that the November 2009 IEP's present levels of performance, annual goals, and testing accommodations were specifically appropriate to meet the student's needs in response to a claim in the parents' due process complaint notice and, therefore, I find that the district did not "open the door" to this issue under the holding of M.H.

¹¹ Assuming for the sake of argument that the parents had decided to appeal this aspect of the IHO decision, the evidence in the hearing record indicates that the district forwarded the district's notice of placement to the parents on June 1, 2010, and that the student's mother visited the assigned school thereafter in "mid-year" 2010 (see Tr. p. 186; Dist. Ex. 9). As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]). As already discussed, the student in this case was recommended to receive 10-month services, which would have begun in September 2010 (Dist. Ex. 1 at p. 1). Based on the foregoing, the district's notice was not untimely.

A review of the hearing record supports the district's contention that for the first time on appeal, the parents now allege that the district consented to maintaining the student's placement at Bay Ridge for the 2010-11 school year by allegedly recommending that they defer the student's placement in the recommended program until the 2011-12 school year. I note that the parents also allege, for the first time on appeal, that Bay Ridge should have been found appropriate for the student for the 2010-11 school year because the district previously reimbursed them for tuition for the student's nonpublic school placements during prior school years.

With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.W. v. New York City Dep't of Educ., 2012 WL 2149549, at *12 [E.D.N.Y. June 13, 2012]; Dep't of Educ. v. C.B., 2012 WL 220517, at *6-*7 [D. Hawaii Jan. 24, 2012]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' due process complaint notice and like the present levels of performance and annual goal issues discussed above, I find that the complaint may not be reasonably read to raise the issues that the district failed to maintain the student's placement at Bay Ridge for the 2010-11 school year or that Bay Ridge was appropriate for the student because the district had reimbursed the parents for tuition for the student's nonpublic school placements during prior school years (see Parent Ex. C).¹² Moreover, the hearing record does not suggest that the district agreed to expand the scope of the impartial hearing to include these issues (Application of the Bd. of Educ., Appeal No. 10-073), as there is no indication in the hearing record that the parents raised these arguments during the impartial hearing.

¹² Assuming for the sake of argument that the parents properly raised this argument in their due process complaint notice, a determination that a particular educational program is appropriate to provide a student with a disability a FAPE for one school year is not relevant in evaluating the appropriateness of the same educational program in a different school year, nor should a district's decision not to appeal such a determination be construed as an admission with respect to claims for a different school year, insofar as claims for different school years are analyzed separately (see generally Dalrymple v. United Servs. Auto. Ass'n, 40 Cal.App.4th 497, 523 [Cal. Ct. App. 1995] [holding that a party's decision not to appeal was not an admission of any lack of merit of its previous position]; Florence v. Gabinski, 1985 WL 2503 [N.D.Ill. Sept. 11, 1985] [holding that a party's decision not to appeal may be made for a variety of reasons and that such a decision is not an admission]; see also M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *9-*10 [D.Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of the Dep't of Educ., Appeal No. 11-124).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file a second amended due process complaint notice, I decline to review it. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

I further note that the IHO understandably did not reach these issues and find that these contentions have been raised for the first time on appeal and are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).¹³

C. November 2009 IEP

1. Timing of the CSE meeting

Initially I will address the parents' argument that the November 2009 IEP denied the student a FAPE for the 2010-11 school year because the effective dates listed on the IEP did not cover the entire 2010-11 school year. While the IDEA and State Regulations require the CSE to meet "at least annually" (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), they do not preclude additional CSE meetings, prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability

¹³ Assuming for the sake of argument that the issue regarding deferment of placement by the district had been properly raised in the parents' due process complaint notice, the evidence contained in the hearing record compels a contrary conclusion, insofar as the district's June 1, 2010 notice of placement contained no deferment recommendation (see Dist. Ex. 9).

within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). As further discussed below there is no indication that the timing of the IEP in the instant case impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

In the instant case, the hearing record reflects that the student's November 2009 IEP was in effect at the beginning of the 2010-11 school year, in compliance with State and federal regulations (Dist. Ex. 1 at p. 2). Although the parents accurately observe that the November 2009 IEP's scheduled end date of December 3, 2010 fell prior to the conclusion of the 2010-11 school year, this fact by itself did not render the IEP inadequate to provide the student with a FAPE, insofar as the IEP also indicated a projected review date of November 18, 2010, which, had the student been educated under the November 2009 IEP, would have afforded the CSE an opportunity to conduct an annual review and develop a revised IEP for the student to address the balance of the 2010-11 school year prior to the November 2009 IEP's expiration (id.).¹⁴ However, under the circumstances of this case, an annual review of the student's progress under the November 2009 IEP is academic, because the parents did not elect to enroll their son in the public school during the 2009-10 school year to receive services under the IEP and on August 16, 2010, the parents rejected the program offered by the district and advised the district of their intention to reenroll the student at Bay Ridge for the 2010-11 school year (Parent Ex. A at p. 1). Consequently, based upon the hearing record, I decline to find that the effective dates on the November 2009 IEP constituted a procedural violation denying the student of a FAPE for the 2010-11 school year. However, assuming for the sake of argument that there was a violation of IDEA procedures for developing an IEP, under the facts of this case, I find that the evidence does not support that any such violation impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]).

2. Recommended ICT Placement

Next I address the parents' contention that the November 2009 IEP was inappropriate because the district's placement recommendation of an ICT class would not have been appropriate for the student given his distractibility and attention issues. For the reasons discussed more fully below, I find that based upon the hearing record, the CSE's recommendation of an ICT class was appropriate to address the student's needs as identified in the evaluative data available to the November 2009 CSE. The November 2009 CSE reviewed several documents including a 2009 student progress report, a 2009 psychoeducational evaluation, a social history update, and a medical report (Dist. Exs. 3; 5-7).

¹⁴ For administrative convenience or to ease the transition from one educational program to another, school districts and parents may often cooperatively engage in efforts to schedule CSE meetings toward the conclusion of an academic school year in order to align the effective dates of revised IEPs with the beginning of the following academic school year; however, a district is not required in all cases to align the effective dates of an IEP with the beginning of a school year in order to comply with its obligations under the IDEA.

According to the October 29, 2009 student progress report from Bay Ridge, which was completed by the teacher of the student's modified English literature inclusion class, the student was "highly verbal" and "excel[led] in class discussions and debate," responded positively to individual attention, completed all major assignments, and was "receiving quiz grades averaging in the nineties;" however, the progress report also indicated that the student demonstrated difficulties with independent work due to his frustration and inconsistent focus (Dist. Ex. 3). With respect to social/emotional functioning, the student's teacher characterized him as "highly social" and relating "extremely well with his peers," and although he exhibited attention difficulties and required frequent redirection during independent and small group work, she observed that upon receiving such redirection the student participated in class activities and assignments and had exhibited progress in his overall classroom focus (id.).

A November 2, 2009 social history update completed by a district social worker based upon information provided by the student's mother, included information relative to the student's family background, social functioning, physical health,¹⁵ and educational history in furtherance of the student's triennial evaluation, and indicated that the student received a diagnosis of dyslexia subsequent to experiencing reading difficulty in the second grade (Dist. Ex. 6 at pp. 2-3). The student's mother reported that academically, the student "d[id] well in social studies and science" but "struggle[d] with math, reading, and writing;" while socially, she expressed concern about her son's "social life," including his lack of friendships, and indicated that the student exhibited "impulsive" behaviors (id.). She characterized her relationship with her son as "very good," and reported that he and his father spent time together with various activities, and that the student's relationship with his grandmother was "good;" however, she also described the student as "stubborn" and noted that he "does not feel good about himself" (id. at p. 2).

In her November 2, 2009 psychoeducational evaluation of the student, the school psychologist described him as possessing "appropriate" communication skills and being "adequately motivated" and "work[ing] to the best of his ability" on assessment tasks; however, his performance was negatively affected by his distractibility (Dist. Ex. 5 at p. 2). Academically, administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index of 102 (average), a perceptual reasoning index of 104 (average), a working memory index of 77 (borderline), a processing speed index of 73 (borderline), and a full scale IQ of 89 (low average) (id.). She observed that the student demonstrated average verbal and nonverbal reasoning skills, while his working memory and processing speed fell within the borderline range (id. at pp. 3-4). On the Wechsler Individual Achievement Test-Second Edition (WIAT-II), the student achieved a reading composite (percentile rank) of 85 (16), a math composite of 94 (34), and a written language composite of 78 (7) (id. at pp. 4-6). The school psychologist indicated that the student's average reading comprehension skills and decoding skills were better developed than his sight word vocabulary, while in math the student exhibited average calculation and math reasoning skills, but made careless errors in math calculations that lowered his score (id. at pp. 5-6). In the area of written expression, she noted that the student's performance included errors in spelling and punctuation (id. at p. 6).

¹⁵ The hearing record contains a medical report dated September 22, 2009 (Dist. Ex. 7); however, there is no evidence that this document was reviewed by the November 2009 CSE in developing the student's IEP.

Relative to the student's social/emotional functioning, the psychoeducational evaluation report characterized the student as "cooperative," "relatively well adjusted," and demonstrating "generally age appropriate interests and concerns," but also noted that his awareness of his reading difficulties negatively affected his self-concept, and that the student exhibited significant difficulties in the areas of attention, concentration, mental control, and processing speed (Dist. Ex. 5 at p. 7). The November 2, 2009 psychoeducational evaluation report also contained a vocational assessment component, which reflected that the student enjoyed working with people and aspired to work in the science or history fields (id.).

The November 2009 IEP accurately reflected the student's academic and social/emotional abilities as reflected in the evaluations available to the CSE. Academically, in relation to his performance on the WISC-IV and the WIAT-II, the November 2009 IEP noted his difficulties with attention, concentration, mental control and processing speed; reflected that the student's verbal and nonverbal reasoning abilities fell within the average range; indicated that his reading and math composites fell within the low average and average ranges, respectively; and noted that the student's written language and spelling standard scores fell within the borderline range (Dist. Ex. 1 at p. 3). The IEP further reflected the findings of the student's vocational assessment, indicating that the student felt that he interacted well with others but exhibited difficulty with reading (id. at pp. 3-4). With respect to social/emotional functioning, the IEP noted the student's age appropriate interests and concerns and indicated that he related "extremely well" with peers (id. at p. 4). The school psychologist testified that the November 2009 IEP's recommendations were based upon the evaluative information available to the CSE and verbal information received from Bay Ridge; the hearing record also reflects that both parents attended the November 2009 CSE meeting and that the student's resource teacher, literature teacher, and math teacher from Bay Ridge all participated in the meeting telephonically, and provided the CSE with information detailing the student's present levels of academic functioning and the social/emotional strategies employed by Bay Ridge staff for use with the student, which were ultimately incorporated into the November 2009 IEP (Tr. pp. 23-34, 42-44, 49-51, 65, 70; Dist. Exs. 1 at pp. 2-5; 8). The school psychologist further testified that none of the CSE members, including the parents and the student's teachers from Bay Ridge, objected to the program recommendations contained in the November 2009 IEP, although the CSE meeting minutes indicated that the parents "would like [the student] to remain in his present school" (Tr. pp. 31-32, 50-51; Dist. Ex. 8).

In consideration of the student's needs, as identified in the evaluative information available to the CSE, the November 2009 IEP recommended an ICT class and related services consisting of counseling once per week for 30 minutes per session in a 5:1 setting (Dist. Ex. 1 at pp. 1, 11; see Dist. Ex. 8). The special education teacher of the assigned ICT class testified that the assigned school typically employed one special education teacher and one regular education teacher in each ICT classroom; that "the two teachers meet and they collaborate on lessons and they address student needs;" and that the school day was broken down into 45-minute periods for English, math, and any additional core subjects each student had, based upon the recommendations contained in their particular education programs (Tr. pp. 102-04). The November 2009 IEP recommended placement of the student in a 12:1 ICT class, and, according to the special education teacher of the ICT class to which the student was assigned, the number

of students with disabilities in the ICT class was capped at a maximum of 12 in accordance with State regulations (Tr. pp. 107-09; Dist. Ex. 1 at p. 9; see 8 NYCRR 200.6[g][1]).

To further address the student's needs within the recommended ICT class setting, the November 2009 IEP offered accommodations and strategies specific to the student, including graphic organizers and outlines; frequent repetition of previously learned material; refocusing; redirection, and restructuring as needed; a multisensory teaching approach; frequent feedback; and positive feedback (Dist. Ex. 1 at pp. 4-5). In addition, the November 2009 IEP included a transition plan to assist the student with his post-secondary transition (id. at pp. 12-13).

The hearing record also indicates that the November 2009 CSE considered recommending a general education placement with no additional support, and a general education placement with special education teacher support services (SETSS), but ultimately rejected both of these options after determining that the student's "academic weaknesses warrant full time remediation" (Dist. Ex. 1 at p. 10). The IEP also reflected that the CSE considered recommending that the student be placed in a 12:1 special class, but ultimately rejected this option as "too restrictive currently" (id.).

The parents also assert that the recommended ICT class was too large for the student because of his distractibility and inattentiveness, and they support their view through the student's special education teacher at Bay Ridge who testified that in the recommended class, "[g]iven his intellectual difficulties, his ability or his difficulties with attention, and his necessity of a lot of individualized modification and mentoring," she didn't believe that the student "would be able to adequately function at his full potential," and added that in her opinion, the student would not "flourish" (Tr. pp. 131-32; Parent Ex. C). The hearing record reflects that in his English literature inclusion class at Bay Ridge, the student had demonstrated progress in the area of attention and readily participated in class, while being educated in a class with nine other students having similar learning needs (Dist. Ex. 3). The student's special education teacher from Bay Ridge also testified that the total number of students in the school's mainstream classes averaged in the low 20s, while the school's "bridge programs ...[were] even less than that," (Tr. pp. 132-33, 150-51).

The hearing record also contains evidence that supports a finding that the November 2009 CSE's recommendation of an ICT class was appropriate for the student. According to the October 29, 2009 student progress report from Bay Ridge, the student performed well both academically and socially (Dist. Ex. 3). The student also related well with peers and adults (id.). The progress report reflected that the student exhibited attention difficulties, but upon redirection he participated in class activities and assignments (id.). The progress report further indicated that the student had exhibited progress in his overall focus during class (id.). Overall, WISC-IV and WIAT-II results indicated the student demonstrated low average to average cognitive and academic skills (Dist. Ex. 5 at pp. 2, 4-6). While the Bay Ridge special education teacher may have provided significant reasons why the student was likely to progress at Bay Ridge, he also indicated that he had not visited an ICT setting and his testimony does not sufficiently refute the remaining evidence in the hearing record or reasonably lead to the conclusion that the student would fail to make progress or experience regression if placed in an ICT setting (see Tr. pp. 172-73).

In summary, and upon viewing the evidence in its totality, I am not persuaded by the parents' argument that it was inappropriate to place the student in an ICT class with the supports and related services recommended in the November 2009 IEP. I find that the hearing record shows that the November 2009 CSE's recommendation of an ICT class and counseling services was appropriate based on the student's needs, and that the November 2009 IEP addressed the student's academic and social/emotional needs as identified in the evaluative information available to the CSE. Based on the foregoing, and in view of the educational supports contained in the November 2009 IEP, I find that it was reasonably calculated to enable the student to receive educational benefits in the LRE and therefore, the parents' claims that the district denied the student a FAPE during the 2010-11 school year are without merit. Although I understand that the well-meaning parents in this case may have preferred a smaller educational setting for the student that more closely approximated his Bay Ridge setting, I find that the hearing record does not support a conclusion that the student would not have had the opportunity to receive educational benefits in the district's recommended ICT class. The district was obligated to offer the student an appropriate education rather than offer one that would maximize the student's potential (Rowley, 458 U.S. at 189), and it has met that obligation in this case.

VII. Conclusion

In summary, I find that the IHO correctly determined that the district offered the student a FAPE for the 2010-11 school year based upon the evidence contained in the hearing record.

Having reached this determination, it is not necessary to reach the issues of whether Bay Ridge was appropriate for the student or whether equitable considerations support the parents' claims and the necessary inquiry is at an end (Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 12-005; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not consider them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 24, 2012


JUSTYN P. BATES
STATE REVIEW OFFICER