The University of the State of New York

The State Education Department
State Review Officer
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No. 15-026

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 [redacted]

Appearances:
Cuddy Law Firm, PC, attorneys for petitioner, Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied the parent's request for an independent educational evaluation (IEE) of the student at public expense. 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

A CSE convened in September 2014, determined the student was eligible for special education programs and related services as a student with an other health-impairment, and developed an IEP for the 2014-15 school year (Dist. Ex. 2). The September 2014 CSE recommended placement in a general education classroom with integrated co-teaching (ICT) services for English language arts, math, social studies, and science (id. at p. 8). The CSE also recommended related services consisting of one 30-minute counseling session per week in a group of three and a full time 1:1 crisis management paraprofessional (id.).

Contemporaneous with the CSE meeting, the parent obtained a private neuropsychological evaluation of the student (Parent Ex. A).[1] The neuropsychological evaluation report included a recommendation for the student to receive a speech-language evaluation "to clarify difficulties in both receptive and expressive language skills with particular attention paid to reasoning skills" (Parent Ex. A at p. 24). The district conducted a speech-language evaluation of the student on October 30, 2014 (Dist. Ex. 3).[2] On November 7, 2014, the parent notified the district that she disagreed with the district's October 2014 speech-language evaluation and requested an IEE in the area of speech-language (Dist. Ex. 1 at p. 2).

A. Due Process Complaint Notice

In response to the parent's request for an IEE in the area of speech-language therapy, the district filed a due process complaint notice dated November 12, 2014, asserting that the October 2014 speech-language evaluation was "comprehensive and provided an appropriate recommendation" (Dist. Ex. 1 at p. 2). The district also requested that the issue of the IEE be consolidated with another pending matter involving the same student (id.).

B. Impartial Hearing Officer Decision

In an interim decision dated November 21, 2014, the IHO decided against consolidating the two matters, but determined that issues related to speech-language would be addressed in this proceeding rather than in the other matter (Interim IHO Decision). An impartial hearing commenced on December 16, 2014, and concluded on January 6, 2015 (Tr. pp. 1-90). After completion of the hearing, the parties submitted post hearing briefs (IHO Exs. I-II), and the IHO issued a decision dated January 20, 2015 (IHO Decision). The IHO found that the October 2014 speech-language evaluation was "sufficiently comprehensive to determine the Student's speech and language needs in the classroom" and determined that the parent was not entitled to an IEE (id. at p. 6). The IHO further determined that the student did not require speech-language therapy services and ordered that the student's IEP be modified to remove such services (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision. Initially, the parent asserts that the IHO erred by exceeding the scope of the impartial hearing and ordering that the district remove speech-language therapy services from the student's IEP. The parent further contends that the

[1] The evaluation was conducted over two days in September 2014; however, the report was not completed until October 28, 2014 (Parent Ex. A at p. 1).

[2] The October 2014 speech-language evaluation was conducted at the request of the IHO as part of another pending impartial hearing (Dist. Ex. 3 at p. 1; see IHO Decision at p. 2). An IHO may request that a district provide an IEE at public expense as part of an impartial hearing (8 NYCRR 200.5[g][2]). However, the October 2014 speech-language evaluation was not an IEE, as the evaluator who conducted the evaluation was a district employee (Tr. p. 8) and an IEE must be "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]). If an IHO believes an evaluation is necessary for the resolution of an impartial hearing, the IHO is authorized to request an IEE at public expense (8 NYCRR 200.5[g][2]). Had the IHO taken that course of action in this instance, it may have resolved the need for this proceeding.

IHO erred in failing to order an IEE in the area of speech-language at public expense. The parent asserts that discrepancies in the student's scores between November 2013 and October 2014 "cast doubt on the validity of those evaluations." The parent further contends that the speech-language evaluation should have focused on "verbal reasoning issues" as identified in the private neuropsychological evaluation.

The district answers the parent's allegations and concedes that the removal of speech-language therapy services from the student's IEP was outside the scope of the impartial hearing. However, the district asserts that the IHO correctly determined that the October 2014 speech-language therapy evaluation was comprehensive and the district was not required to provide the parent with an IEE at public expense.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

VI. Discussion

A. Scope of Impartial Hearing

A review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte raising and addressing the student's need for speech-language therapy as there is nothing in the due process complaint notice, the hearing record, or the parties' post hearing briefs indicating that the student's need for speech-language therapy services was a subject of this proceeding (Tr. pp. 1-90; Dist. Ex. 1; IHO Exs. I-II). The only reference to the student's need for speech-language therapy as an issue to be resolved is the IHO's reference in her decision to her

decision awarding speech-language therapy services in a separate proceeding (IHO Decision at p. 6).

In a separate matter related to the student's educational placement for the 2012-13 and 2013-14 school years, the IHO issued a decision dated December 11, 2014, directing the CSE to amend the student's IEP to include two 30-minute sessions of speech-language therapy per week and awarding the parent compensatory education including 54 hours of speech-language therapy services (Answer Ex. 3 at p. 17).[3] The IHO's December 2014 decision also indicated that she would reconsider the inclusion of speech-language therapy services on the student's IEP as a part of this proceeding (id.).[4] The IHO's decision in this matter purports to overturn the direction that the student's IEP include speech-language therapy services (IHO Decision at p. 6). However, such an action was outside of the IHO's jurisdiction. An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties after a final decision has been rendered (see J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-096). Rather, an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The district concedes that the IHO's December 2014 decision was final and not appealed (Answer ¶¶ 12-14). The IHO's jurisdiction regarding the student's need for speech-language therapy ended when she issued a final decision in the other impartial hearing (see 20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[5] Accordingly, to the extent that the IHO ordered the district to remove speech-language therapy services from the

[3] The district submits additional evidence from the prior due process hearing on appeal; specifically, a June 2014 due process complaint notice, an interim order dated October 31, 2014, and a decision dated December 11, 2014 (Answer Exs. 1-3). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). However, in this instance, all of the documents submitted were available to the parties and were evidently relied on in part by the IHO in rendering her decision. Accordingly, they are utilized herein solely to clarify procedural aspects of the due process hearing.

[4] It is unclear why the IHO attempted to retain jurisdiction as to the student's need for speech-language therapy services as a part of this hearing (Answer Ex. 3 at p. 17). The October 2014 speech-language therapy evaluation was entered into evidence as an exhibit in the prior impartial hearing (Answer Ex. 3 at p. 21) and the IHO had ordered the district to conduct the October 2014 speech-language evaluation as a part of that hearing in order to determine "whether speech-language therapy was improperly terminated" (Answer Ex. 2 at p. 3). However, the IHO's December 2014 decision made no reference to the October 2014 speech-language evaluation (Answer Ex. 3). As the evaluation was available to the IHO, the parties and the student would have been better served if the IHO had reviewed the October 2014 speech-language evaluation and determined the student's need for speech-language therapy services prior to awarding such services without assessing the student's need for them and attempting to retain jurisdiction to remove them at a later date.

[5] The IHO was asked by the district to consolidate this matter with the other impartial hearing (Dist. Ex. 1); however, the IHO declined to consolidate the two hearings (Interim IHO Decision).

student's IEP, the IHO's decision was outside the scope of her jurisdiction and this hearing and is reversed.

B. October 2014 Speech-Language Therapy Evaluation

On appeal, the parent raises two arguments in support of her contention that the IHO erred in finding the October 2014 speech-language evaluation appropriate and denying the parent's request for an IEE at public expense. First, the parent asserts that a discrepancy between the results of the October 2014 evaluation and a November 2013 speech-language therapy progress report indicates that the results of the evaluations are "suspicious." Second, the parent asserts that the October 2014 speech-language evaluation did not focus on reasoning skills as was recommended in the privately-obtained October 2014 neuropsychological evaluation report.

Initially, the parent's first contention is not an objection to the October 2014 evaluation itself, but is rather an objection to the results of the evaluation. The parents do not challenge the manner in which the testing was conducted by the evaluator or the validity of the test administered. In fact, she does not challenge the results of the evaluation, admitting that an IEE "may not deliver any different results" (Parent Mem. of Law at p. 5). Instead, the parent speculates that the evaluation "may have been predetermined to support the [district]'s prior decision to terminate speech services" (id.). However, the parent's conjectures are contrary to the evidence in the hearing record.

As noted by the IHO, the hearing record supports a finding that the evaluation was conducted in accordance with federal and State regulations (see IHO Decision at pp. 5-6). The evaluator was certified as a speech-language pathologist by New York State (Tr. p. 43). The evaluation used a variety of assessments, including the full battery of the Clinical Evaluation of Language Fundamentals–5 (CELF-5), informal assessments and observations, and interviews with the student's teachers and former speech-language therapist (Tr. pp. 22-23; Dist. Ex. 3 at pp. 1-2). The October 2014 speech-language evaluation contains scores from an administration of the CELF-5 indicating that the student presented with overall receptive and expressive language skills within the average to high average range (Dist. Ex. 3 at p. 4-7). Accordingly, as determined by the IHO, the evaluation was comprehensive.

Additionally, the increase in the student's test scores from the November 2013 administration of the CELF-4 to the October 2014 administration of the CELF-5 can be reasonably explained.[6] The October 2014 speech-language evaluation indicated that while the two different editions of the CELF could not be directly compared, the results suggested that the difference in scores indicated that the student had "internalized strategies learned in speech and

[6] The October 2014 speech language evaluation reports that the student attained a core language score of 88 on the November 2013 administration of the CELF-4 and a core language score of 117 on the October 2014 administration of the CELF-5, noting it was a significant increase (Dist. Ex. 3 at p. 7). A comparison of the October 2014 speech language evaluation to the November 2013 speech language evaluation indicates that the student had improved in listening comprehension, summarizing, following multi-step directions, responding to directions, semantic development, and processing oral information (compare Dist. Ex. 4 at p. 3, with Dist. Ex. 3 at p. 2).

language therapy" and was applying those strategies in the classroom (Dist. Ex. 3 at p. 7).[7] The speech-language pathologist testified that the student may have learned "a lot more" in the time between third and fourth grade (Tr. p. 51). Additionally, while the October 2014 speech-language evaluation indicated that the student was "an eager participant throughout the assessment process" and the evaluator testified that the student was highly motivated during the evaluation and did a "very good job accessing language" (Tr. p. 19; Dist. Ex. 3 at p. 2), the November 2013 speech-language evaluation indicated that the student's "[o]verall performance [wa]s not consistent" and his behavior "continue[d] to interfere with his overall performance" (Dist. Ex. 4 at p. 3).[8] Furthermore, both evaluators agreed that the student did not require speech-language services, did not have difficulties with receptive or expressive language, and that the student's difficulties related to attention and behaviors which impacted his classroom performance (Tr. pp. 26-27; Dist. Exs. 3 at pp. 2, 4; 4 at pp. 3-4). Accordingly, rather than raising "suspicion," discrepancies in the test results between the October 2014 evaluation and the November 2013 update may be attributed to the student's inconsistent performance due to behaviors and an increase in the student's abilities.

The parent also challenges the October 2014 speech-language evaluation as not addressing all of the student's areas of need as identified in the October 2014 neuropsychological evaluation.[9] Specifically, the parent asserts that the speech-language evaluation did not address reasoning skills.[10] Although the October 2014 neuropsychological evaluation indicated that the student presented with deficits in his language skills (Parent Ex. A at pp. 23-25), it does not present a sufficient basis to question the comprehensiveness or the appropriateness of the October 2014 speech-language evaluation, as a review of the hearing record indicates that the speech-language evaluation addressed all of the student's areas of need. Overall, the October

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[7] The October 2014 speech-language evaluation contains descriptions of strategies and informal assessment observations, which indicate the student was utilizing strategies to help him use information and process responses to test items (Dist. Ex. 3 at pp. 3-7). For example, as commands on the "following directions" subtest became more challenging, the student used self-repetition as a rehearsal strategy for holding on to orally presented information and was able to complete the entire subtest, attaining a scaled score of 10 with a corresponding percentile rank of 50 (id. at pp. 3-4).

[8] The student also exhibited significant attentional and behavioral issues during the course of the October 2014 evaluation; however, he was responsive to redirection by the evaluator and it is unclear to what extent those issues may have affected his performance (Tr. pp. 31-33; Dist. Ex. 3 at pp. 2-7). Further indicating improvement, when compared to the November 2013 speech language evaluation, the student's pragmatic language was described in the October 2014 speech language evaluation as "appropriate throughout the evaluation," specifying that he maintained eye contact, engaged the evaluator in conversation, participated in turn taking and maintained the conversational topic (compare Dist. Ex. 4 at pp. 3-4, with Dist. Ex. 3 at p. 6).

[9] There is no indication in the hearing record as to whether the neuropsychological evaluation report, dated October 28, 2014, was provided to the district prior to the administration of the speech-language evaluation on October 30, 2014 (see Dist. Ex. 3; Parent Ex. A).

[10] The October 2014 neuropsychological evaluation report indicated that the student's verbal reasoning skills were in the low average range (Parent Ex. A at pp. 7, 10-11, 21). The evaluation report further recommended that a speech-language evaluation be conducted "to clarify difficulties in both receptive and expressive language skills with particular attention paid to reasoning skills" (Parent Ex. A at p. 24). However, the neuropsychologist did not testify during the hearing to explain what he meant by "reasoning skills" and the parent has not provided any indication as to what type of additional testing, if any, she believes would address the neuropsychologist's recommendation.

2014 speech-language evaluation report indicated the student demonstrated age appropriate expressive and receptive language skills, had improved in his pragmatic language skills, and was demonstrating higher level language skills (Dist. Ex. 3). The October 2014 speech-language evaluation report indicated that the student's expressive and receptive language skills were in the average to high average range (id. at pp. 6-7). The October 2014 speech language evaluation report further indicated that the student was able to follow multi-step directions, understand the relationship between words, interpret sentences of increasing length and complexity, appropriately respond to directions, answer "wh" questions, process orally presented information, "showed adequate knowledge of the word structure of the English language," easily formulated grammatical sentences, and recalled sentences of increasing length and complexity (id. at p. 2). The evaluator testified that the student's receptive and expressive language skills were in the average to high average range, that he was able to access language, and that "[i]t's not speech and language that he's struggling with" (Tr. pp. 19-20). Under these circumstances, the hearing record supports the IHO's determination that the October 2014 speech-language evaluation was appropriate and no further evaluations were required to determine the student's speech-language therapy needs.

VII. Conclusion

Based on the above, the hearing record does not provide a basis to depart from the IHO's determination that the district's October 2014 speech-language evaluation was appropriate and the parent is not entitled to an IEE at public expense. However, the IHO's direction that the district remove speech-language therapy from the student's IEP must be reversed as outside the scope of the impartial hearing.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 20, 2015, is modified, by reversing the portion of the decision directing the district to remove speech-language therapy services from the student's IEP.

Dated: **Albany, New York**
March 31, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER