The University of the State of New York

The State Education Department
State Review Officer
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No. 12-158

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Richard A. Liese, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent and/or directly pay for the costs of the student's tuition at the Cooke Center Academy (Cooke) for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).[1]

III. Facts and Procedural History

This is the first of two companion cases, decided today, regarding the student's special education services for both the 2010-11 school year and the 2011-12 school year.[2] The parties' familiarity with the facts and procedural history of this case and the IHO's decision regarding the 2010-11 school year is presumed and will not be recited herein detail.[3] Briefly, the committee on special education (CSE) convened on January 7, 2010 to formulate the student's IEP for the 2010-11 school year (see generally Dist. Ex. 4). On that same day, the parents consented to defer the student's placement until July 1, 2010 (Dist. Ex. 7). On June 16, 2010, the parents wrote the district notifying it that they had not yet received the final notice of recommendation (FNR) for the student's placement and that, in the interim, they intended to enroll the student at Cooke at public expense (Parent Ex. B). In an FNR to the parents dated June 30, 2010, the district summarized the recommendation in the June 2010 IEP and notified the parents of the particular public school site to which the district assigned the student to attend for the 2010-11 school year (Dist. Ex. 6).[4] In a corrected due process complaint notice, dated September 19, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (see Dist. Ex. 2).

An impartial hearing convened on December 12, 2011 and concluded on May 4, 2012 after four days of proceedings (Tr. pp. 1-525). In a decision dated July 3, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2010-11 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 20-26). As relief, the IHO ordered the district to reimburse the parents for and/or directly fund the cost of the student's tuition at Cooke for the 2010-11 school year (IHO Decision at p. 27).

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[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] The second impartial hearing involving the student and a similar tuition reimbursement claim for Cooke for the 2011-12 school was conducted at the same time before a different IHO who found that the district offered the student a FAPE (see Application of a Student with a Disability, Appeal No. 12-146).

[3] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

[4] The parents asserted that they did not receive a finalized copy of the January 2010 IEP or the FNR.

IV. Appeal for State-Level Review

Initially, the district does not appeal the IHO's adverse determination that Cooke was an appropriate unilateral placement for the student. Additionally, while the parents toward, the end of their answer, request that their "cross-appeal" be sustained and the district protectively filed an answer to the purported cross appeal, the parents do not actually identify the IHO's adverse determinations with which they disagree related to parental participation, notice of placement, evaluative information, present levels of performance, annual goals, management needs, transition plan, and a transition support plan. The parties also offer their respective commentary regarding merits of issues identified in the due process complaint notice that were addressed by the IHO, but such findings of the IHO are not clearly appealed or cross-appealed as erroneous determinations by the IHO. Instead, the IHO's analysis, which was considerable, was largely ignored by the parents, who instead focus on purported failures of the CSE and district personnel rather than error by the IHO in his analysis of the evidence presented by both sides. Therefore, with few if any allegations asserting why the IHO's reasoning was incorrect, these determinations have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The gravamen of the parties' remaining dispute on appeal is (a) whether the January 2010 CSE's recommendation for a 12:1+1 special class in a specialized school with related services of occupational therapy (OT) and counseling was appropriate for the student, and (b) whether the student required, in addition, a 1:1 paraprofessional. The district appeals the IHO's determination that equitable considerations favored the parents' request for tuition reimbursement.

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. 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 least restrictive environment (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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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. New York City Bd. 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; 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

Although I have disallowed the parents' allegations that may have been intended to be a cross-appeal, assuming for the sake of argument that I had jurisdiction over such unappealed

findings, after careful review of the evidence in the hearing record, I would nevertheless agree, in the alternative, with the IHO that those procedural defects, as well as most of the substantive defects asserted by the parents were either without merit or did not rise to the level of a denial of FAPE. I also find that the IHO correctly ruled that the parents' claim that the assigned public school site could not properly implement the student's IEP was a speculative claim and he properly rejected it. Moreover, while not necessary given the disposition of this decision, I find that the IHO's determination that equitable considerations favored the parents' request for tuition reimbursement was proper and there is no basis for disturbing it (IHO Decision at pp. 20-26). As such, I adopt those findings of fact and conclusions of law.

However, I do not agree with the reasoning articulated by the IHO for his decision that the district ultimately failed to offer the student an appropriate placement on the continuum of educational services, and that the student required the support of a 1:1 paraprofessional. The IHO determined that, because the district teacher, who testified regarding the manner in which the student's IEP would be implemented at the assigned public school site during the summer portion of the recommended 12-month school year class, was not able to testify as to the same relative to the remaining 10-month portion of the school year, she lacked credibility as to the issue of whether the district would have offered the student a structured, vocationally oriented program where the student could improve her functional academic and independent living skills (IHO Decision at pp. 20-21). Further, the IHO noted that the district offered no other evidence that it offered the student personalized instruction from which she could receive meaningful educational benefit (id. at p. 21).

First, the IHO's analysis appears, on its face, to rely on the fact that no one from the district testified as to the particulars of how the district would have implemented the student's IEP, which contrasts with the IHO's ultimate decision to reject such claims as speculative (IHO Decision at p. 18-20; R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

In any event, contrary to the IHO's findings, the evidence in the hearing record shows that the student's January 2010 IEP was designed, with information provided, in part, by the student's teachers and providers at Cooke, to offer personalized instruction with sufficient support services to permit the student to receive educational benefit (Tr. pp. 75-80, 98, 106; Dist. Exs. 4; 5; see Dist. Exs. 9 at pp. 2, 5; 11 at pp. 1-4, 6-11). In particular, the evidence in the hearing record reflects that the student's overall cognitive functioning fell within the moderate range of mental retardation, she exhibited a relative strength in conceptual and concrete reasoning, but demonstrated significant delays in all areas of verbal comprehension and processing of visual spatial information (Dist. Ex. 9 at p. 2). The evaluator, who conducted the January 2009 psychoeducational evaluation, recommended that the student would benefit from a small class setting to address her academic and social/emotional needs (id. at p. 5). Overall, during the student's classes at Cooke, the student completed homework in a timely manner, followed directions and rules, participated in class, and managed her materials for class (Dist. Ex. 11 pp. 1-4, 6-11). The hearing record indicates that the

student interacted well with peers and adults and, when needed, resolved conflicts with support (id.). Thus, the evidence in the hearing record shows that the student required specialized instruction to address her deficits that would be addressed within a 12:1+1 special class setting and that her management needs interfered with the instructional process but could not be characterized as intensive or requiring of a significant degree of individualized attention and intervention (see Dist. Ex. 4 at pp. 3-4; Tr. pp. 86-91; see also 8 NYCRR 200.6[h][4]). Further, the hearing record indicates that, the student attended a classroom setting at Cooke that included 15 students and 3 adults—a ratio not so different from that recommended on the January 2010 IEP, which the parents contested was too large (Tr. pp. 304, 315; Parent Ex. 2).

With respect to the parties' contentions and the IHO's determination regarding the 1:1 paraprofessional, review of the parents' due process complaint notice shows that the parents' allegation in this regard focused on the student's need for such support as a result of her mobility limitations, not based on concerns related to safety or the student's unsafe behaviors, which was the apparent basis for recommendation the 1:1 paraprofessional in the student's IEP from the 2007-08 school year, as described in the January 2008 psychoeducational assessment report (IHO Decision at p. 21; see Dist. Exs. 2 at p. 3; 9 at p. 1). A review of the hearing record demonstrates that the issue of the student's need for a 1:1 paraprofessional was not raised at the CSE meeting, the student was not assigned a paraprofessional at Cooke, and the evaluative information before the CSE and the student's Cooke teachers did not report any mobility limitations (Tr. pp. 96-97; see Dist. Exs. 5; 11; see also Parent Ex. F). As such, the IHO's finding that the district failed to offer the student a FAPE must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end. However, a review of the evidence in the hearing record supports the remainder of the IHO's determinations and, in particular, his conclusion that equitable considerations weighed in favor of the parents' request for relief. I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 3, 2012 IHO decision is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2010-11 school year.

Dated: **Albany, New York**
September 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER