The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-161

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Littman Krooks, LLP, attorneys for petitioner, Lauren I. Mechaly, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 determined that the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for her son for the 2012-13 school year was appropriate. The district cross-appeals from that portion of the IHO's decision which ordered that the district implement the student's educational program in a barrier-free school. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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 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]).[1]

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the CSE convened annually on April 11, 2008, April 8, 2009, February 25, 2010, February 18, 2011, and March 2, 2012, to formulate the student's IEPs (see generally Parent Exs. A; B; O; Q; BB). The April 2008, April 2009, February 2010, and February 2011 IEPs recommended a general education class placement with integrated co-teaching (ICT) services, along with varying related services (see Parent Exs. A at pp. 1, 7, 9; B at pp. 1, 9, 11; O at pp. 1, 11, 13; Q at pp. 1, 15, 17). Finding the student remained eligible for special education as a student with an other-health impairment, the March 2012 IEP recommended a 12:1+1 special class placement in a community school, adaptive physical education, and weekly related services of speech-language therapy (two sessions in a group of 2), occupational therapy (OT) (2 sessions in a group of 3), and counseling (one session in a group of 3) (Parent Ex. BB at pp. 1, 6-7, 9).

In a due process complaint notice, dated April 16, 2012, the parents set forth various claims relating to the student's educational program recommended by each annual CSE, commencing with an April 2007 CSE through and including the March 2012 CSE, to support her allegation that the district failed to offer the student a free appropriate public education (FAPE) (see Parent Ex. CC at pp. 1-5). For relief, the parent requested that the IHO order the district to conduct an assistive technology evaluation, a physical therapy (PT) evaluation, and a functional behavioral assessment (FBA), and develop a behavioral intervention plan (BIP) for the student, if necessary (id. at p. 5). The parent also requested that the IHO order the district to reconvene and develop an appropriate IEP that: classifies the student as eligible for special education as a student with autism; recommends a 12-month school year program in a 12:1+1 special class with a 1:1 paraprofessional; includes services required by State regulations for students with autism; and mandates related services of speech-language therapy (with at least one individual session per week), OT (with an increased mandate and incorporation of a sensory gym or other sensory integration approach), counseling (with at least one additional session per week), and parent counseling and training, as well as 10-hours per week of home-based applied behavioral analysis (ABA) (id. at p. 6). In addition, the parent requested that the CSE locate an public school site for the student for the 2012-13 school year and, in particular that the student "be paced in a small structured classroom with a lower student to teacher ratio" (id. at p. 6).

An impartial hearing convened and concluded on June 26, 2012 (see Tr. pp. 1-166). In a decision dated July 10, 2012, the IHO determined that the district offered the student a FAPE but

[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).

indicated that the district should have offered the student a barrier-free school (see IHO Decision at pp. 10--14). As a consequence, the IHO denied the parent's requests for relief but ordered the district to implement the student's educational program recommended in the March 2012 IEP in a barrier-free school (id. at p. 15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition for review and the district's answer and cross-appeal is also presumed and will not be recited here in detail. Briefly, the parent narrows her claims to those relating to the student's March 2012 IEP, alleging that the district failed to offer the student a FAPE for the 2012-13 school year on the grounds that the district failed to conduct the evaluations and recommend the particular program specified in the parent's request for relief in her due process complaint notice. The district cross-appeals the IHO's determination that the district should have recommended the student's placement in a barrier-free school, arguing that such issue was outside the scope of impartial hearing and, in the alternative, that the student did not require a barrier-free school.

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).

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

Upon careful review, the hearing record reflects that the IHO correctly reached the conclusion that the district offered the student a FAPE for the 2012-13 school year and denied the parent's request for relief (see IHO Decision at pp. 10-14). The IHO accurately recounted the facts of the case, addressed specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 2-14). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence in reaching her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, except where otherwise indicated herein, the majority of the conclusions of the IHO are hereby adopted with the additional elaborations and modifications set forth below.

In particular, the IHO properly determined that the parent's request for a change in the student's eligibility classification was without merit for the reasons described by the IHO (IHO Decision at pp. 10-13) and also because the hearing record supported the eligibility of the student as a student with an other-health impairment, given the student's health concerns, including asthma and allergies (see Tr. pp. 10-111, 120, 131-132, 135, 151, 164; see Parent Exs. A at pp.1, 4; B at pp.1, 4; G at p. 1; K at p. 2; O at pp.1, 4; Q at pp. 1, 6; R at pp. 1, 4-5; S at pp. 1-3; see also 34 CFR 300.8[c][9][i]; 8 NYCRR 200.1[zz][10]), and given that some of the behaviors indicative of a diagnosis of autism, reported by the parent and referenced in the 2011 comprehensive psychological evaluation and/or the July 2011 comprehensive psychosocial evaluation, were inconsistent with reports of the student's teachers and the principal with respect to the 2011-12 school year (see Tr. pp. 30, 31, 63-64, 67-68, 129141-42; Parent Exs. G at pp. 1-3; H; O; R at pp. 1-2, 4-5; S at p. 2). Moreover, the IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA] decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that “the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs”]).

Moreover, while not squarely addressed by the IHO, the hearing record nevertheless shows that the parent's request that the district conduct the requested evaluations of the student is without merit, as the hearing record does not indicate that, prior to the due process complaint notice, the

parent ever requested such evaluations (see 34 CFR 300.303[a][2]; 300.324[a][ii]; 8 NYCRR 200.4[b][4], [d][2]) and the information available to the March 2012 CSE did not indicate a need for an assistive technology or PT evaluation of the student (see generally Parent Exs. M; R-S-X; Z-AA; see also Tr. pp. 80, 86-87, 93; Parent Ex. BB at pp. 1-3). The October 31, 2011 consultation notes of the student's physician recommended, without elaboration, "[a]n evaluation for technological assistance" (Parent Ex. T at p. 1). However, the physician also stated that the student's communication skills were "age-appropriate" and that the student's speech was "adequate for his age" (see id. at p. 2). Further, with respect to PT, the physician stated the student's gross motor function milestones were "age appropriate" (id.). In addition, review of the March 2012 IEP shows that it accurately described the student's gross motor needs and addressed the same by recommending a program of adapted physical education (Parent Ex. BB at pp. 2, 5, 6; see also Parent Exs. AA; V).

Next, review of the hearing record shows that the IHO correctly determined that the recommended 12:1+1 special class was appropriate for the student and he did not require the additional support of a 1:1 paraprofessional (see Tr. pp. 18, 20-22, 24, 42, 45, 69, 76, 86, 108; Parent Ex. R at p. 1). The October 2011 consultation notes, prepared by the student's physician, only recommended that a 1:1 paraprofessional be added to the student's current class—at the time, an ICT setting—until the student was placed in a smaller class (Parent Ex. T at p. 1; see Parent Ex. Q at pp. 1, 15). As to the parent's request that the IHO order the district to add the requested related services to the student's IEP, the hearing record supports the conclusion that the related services included on the March 2012 IEP were appropriate to meet the student's needs in the areas of speech-language (see Parent Ex. BB at pp. 1, 2, 5, 6; see also Tr. pp. 83, 89-92, 97), social/emotional (see Parent Ex. BB at pp. 2, 6, 7; see also Tr. pp. 21, 27, 62), and OT and sensory (see Parent Ex. BB at pp. 2, 4, 7; see also Tr. p. 62). In addition, to the extent that parent counseling and training should have been included on the March 2012 IEP, such omission did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The parent's request for home-based ABA services was also correctly denied, as the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Moreover, the hearing record does not indicate that the student exhibited the type of maladaptive behaviors, identified by the parent as occurring in the home, at school (compare Tr. pp. 30-31, 141-42, 157 with Parent Exs. V; W; X; Z; BB at pp. 1-2). For similar reasons, the hearing record supports the conclusion that the student did not require an FBA or a BIP. While there is some evidence that the student exhibited behavioral concerns, particularly in the home and during the student's first grade (see Tr. pp. 141-44; Parent Exs. G at pp. 1, 2, 3; H; O; R at pp. 3-5), it appears that such behaviors were not prevalent in school in the year leading up to the March 2012 CSE meeting (Tr. pp. 30-31, 34, 64, 67-68; Parent Exs. W at p. 2; Z at p. 1; BB at pp. 1-2). To the extent the parent argued that the

student required an FBA and a BIP due to his distractibility and attentional needs, the March 2012 IEP adequately identified and addressed the student's difficulties with focus and attention (see Parent Exs. V at p. 2; W at p. 1; X; BB at pp. 1, 2, 4, 6; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41[2d Cir. 2013]; R.E., 694 F.3d at 190-91, 193).

Finally, the IHO correctly declined to order the district to recommend a 12-month school year program for the student because, although there is some evidence that the student would benefit from an extended school year (Tr. pp. 57, 155-56), the hearing record does not indicate that such was necessary to prevent "substantial regression" during the summer months (8 NYCRR 200.1[aaa], 200.6[k][1]; see 34 CFR 300.106; see M.W., 725 F.3d at 147).

However, the evidence in the hearing record shows that the IHO erred in finding that the district should have recommended the student's placement in a barrier-free school because the parent did not raise the issue in her April 2012 due process complaint notice (Parent's Exc. CCC; see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see also R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint . . . ."]). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, the parent did not attempt to amend her due process complaint notice, and the district cannot be said to have expanded the scope of the impartial hearing by opening the door to the issue (see Tr. pp. 1-166; Dist. Ex. 13; Parent Exs. A-Z; AA-CC see M.H. v. New York City Dep't of Educ., 685 F.3d at 250-51).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2012-13 school year. However, to the extent that the IHO directed the district to provide the student's educational program in a barrier-free school, the IHO's order is reversed.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 10, 2012 is modified by reversing that portion that ordered the district to implement the student's March 2012 IEP in a barrier-free school.

Dated: **Albany, New York**
October 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER