



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-180

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 New York City Department of Education

Appearances:

Law Offices of Neal H. Rosenberg, attorneys for petitioners, Karen Newman, Esq., of counsel

Courtenay Jackson-Chase, 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 the costs of the student's tuition at the Churchill School (Churchill) for the 2011-12 school year. The appeal must be dismissed.

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 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]).

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. The Committee on Special Education (CSE) convened on May 31, 2011, to formulate the student's individualized education program (IEP) for the 2011-12 school year (see generally Dist. Ex. 2 at pp. 1-16).¹ The parents disagreed with the recommendations contained in the May 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year, and as a result, notified the district of their intent to unilaterally place the student at Churchill (see Dist. Exs. 3; 4 at p. 6; 10). In a due process complaint notice, dated November 9, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Dist. Ex. 1).

An impartial hearing convened on April 3, 2012 and concluded on June 15, 2012 after four days of proceedings (Tr. pp. 1-582).² In a decision dated July 31, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 12-22).

IV. Appeal for State-Level Review

The parents present the following arguments on appeal which must be resolved by the decision in this case:

1. The IHO erred in determining that the May 2011 CSE was composed properly and a regular education teacher was not required.
2. The IHO erred in determining that the May 2011 IEP present levels of performance were sufficient to develop an appropriate IEP.
3. The district ignored the parents' request for an IEP meeting to review the results of a privately obtained speech-language evaluation.
4. The IHO erred in determining that the annual goals in the May 2011 IEP were appropriate to address the student's needs.

¹ On March 7, 2011, the parents executed an enrollment contract with Churchill for the student's attendance during the 2011-12 school year (see Dist. Ex. 6 at pp. 1-4).

² On February 9, 2012, the IHO conducted a prehearing conference; however, for reasons not explained in the hearing record, the district did not appear, and the IHO rescheduled the prehearing conference for February 17, 2012 (Tr. pp. 3-4). On April 3, 2012, a different IHO assumed the duties as IHO over the due process proceedings, and the district presented its case-in-chief (Tr. pp. 6, 241). The impartial hearing concluded on June 15, 2012, but on June 26, 2012, a third IHO was appointed to preside over the matter (IHO Decision at p. 3). Subsequent to the appointment of the third IHO, the parties twice jointly moved to extend the case compliance date in order to allow the newly appointed IHO adequate time to review the hearing record developed by the previous IHO (IHO Decision at p. 3; IHO Ex. I-II). On July 25, 2012, the hearing record was closed (IHO Ex. II).

5. The IHO erred in determining that the 12:1 special class placement at a community school was appropriate to address the student's needs.
6. The IHO erred in determining that the parents' claims that the student would not be functionally grouped at the assigned public school site and that the methodology utilized at the assigned public school site were speculative.

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 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 2011-12 school year (see IHO Decision at pp. 12-22). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and supported his 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, the conclusions of the IHO are hereby adopted.

In particular, the evidence in the hearing record supports the IHO's determination that the procedural and substantive defects asserted by the parents were either without merit or did not rise to the level of a denial of FAPE. Similarly, a review of the evidence in the hearing record shows that those claims the IHO did not reach would not result in a different outcome in this instance.³

As an initial matter, the evidence in the hearing record supports the IHO's determination that the May 2011 CSE was properly composed and the attendance of a regular education teacher was not required (Tr. pp. 43-45, 52-53, 57-58, 67, 93, 98-99, 169, 456-58; Dist. Exs. 1; 2 at pp. 2-3; 4 at pp. 3-4; 7-9; Parents Exs. C-D).⁴ Furthermore, although the district special education teacher would most likely not have been responsible for implementing the student's May 2011 IEP,

³ With regard to the parent's claim that the district did not establish whether the proposed classroom at the assigned public school site had an available seat for the student, it is clear from the testimony and documentary evidence in the hearing record that a seat was identified and that the parents were notified of such in a letter from the district dated August 8, 2011 (Tr. pp. 216-17; Dist. Ex. 3). Furthermore, the IDEA does not require districts to maintain classroom openings for students enrolled in private schools (E.H. v. Bd. of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 24, 2014] [finding that the parent's argument that the student was denied a FAPE because the proposed classroom did not have a space for the student was without merit and that the district public school was not obligated to hold a seat open for the student after the parent rejected the district's offered public school placement prior to the start of the school year]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *7 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 271 [S.D.N.Y. Mar. 27, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]). Here, the parent rejected the recommended placement by a letter to the district dated August 22, 2011 (Dist. Ex. 10), prior to the time the district became obligated to implement the May 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), and continued the student's enrollment in Churchill for the 2011-12 school year (Dist. Exs. 6; 10).

⁴ The district representative who attended the May 2011 CSE meeting was dually certified as a regular education and special education teacher (see Tr. pp. 44, 46-47).

assuming without deciding that this constituted a procedural error, the hearing record does not contain sufficient evidence to conclude that such procedural inadequacy 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 (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see also A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; Tr. pp. 44-50, 456-59; Dist. Ex. 4 at pp. 1-2, 6). Additionally, with regard to the parents' claim that the present levels of performance did not sufficiently describe the student's strengths and deficits, the evidence in the hearing record shows that the May 2011 IEP present levels of performance directly and accurately reflected the information available to and considered by the May 2011 CSE (compare Dist. Ex 2 at pp. 3-7, with Dist. Exs. 5; 7- 9; 17-18). In particular, the hearing record shows that the May 2011 CSE utilized input from the student's parents, Churchill staff, progress reports, as well as a January 2011 psychoeducational evaluation, all of which provided the CSE with an accurate assessment of the student's present levels of performance upon which an appropriate IEP could be developed (Tr. pp. 44-45, 51-53; Dist. Exs. 5; 7-9; 17-18).

With regard to the parents' request for an IEP meeting to review the results of a privately obtained speech-language evaluation, the parents allege that the district advised them to obtain the evaluation and that, upon receipt of the results, the district failed to reconvene pursuant to their request. The district conceded that it did not respond to the parents' request for a new IEP meeting; however, the district argues that its failure to do so did not rise to the level of a denial of FAPE. As indicated below, a review of the hearing record does not support a finding that the district's failure to respond to the parents' request for a new IEP meeting rises to the level of a denial of FAPE (see Tr. pp. 105, 108-10; 458-59, 464; Dist. Exs. 4; 6-7; 10-11). Specifically, the parents aver that during the May 2011 CSE meeting, it was suggested that the parents procure an updated speech-language evaluation; however, the district representative testified that she did not ask for an evaluation, nor does the hearing record contain any evidence reflecting such a request made by the district (Tr. pp. 105-06, 108-10, 458-59; Dist. Exs. 2; 4). Moreover, a review of the evidence in the hearing record indicates that the May 2011 CSE had available to it—and considered—a January 2011 speech-language progress report and that the student's speech-language therapist participated at the May 2011 CSE meeting (Tr. pp. 108-10; Dist. Exs. 2 at p. 2; 4 at pp. 4-5; 7). Additionally, the parents did not share a copy of the speech-language evaluation with the district until September 6, 2011—after the parents notified the district, in a letter dated August 22, 2011, of their intention to place the student at Churchill for the 2011-12 school year (compare Dist. Ex. 10, with Dist. Ex. 11). Thus, while in certain instances, the failure to hold a CSE meeting upon the parents' request and to review the results of a newly obtained evaluation can be construed as an effective cessation of the collaborative process between the district and the parents such that it significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, the facts and circumstances of this case do not warrant such a conclusion. In this case—and as argued by the district—the privately obtained speech-language evaluation revealed no new information about the student's needs, and as the parents had the opportunity to request that the CSE consider placing the student at Churchill at the May 2011 CSE meeting—and expressed their disagreement with the 12:1 special class placement at the May 2011 CSE meeting—the failure to hold a new IEP meeting to allow the parents an additional opportunity to re-present the same information and make the same request of the CSE

to place the student at Churchill did not significantly impede their ability to participate in the decision-making process (Tr. pp. 105-10; Dist. Exs. 4 at pp. 1-6; 10-14).⁵

With regard to the parents' claim that the May 2011 IEP did not include appropriate annual goals, the evidence in the hearing record does not support this assertion; rather, the evidence shows that the May 2011 IEP included appropriate and measurable annual goals, in accord with federal and State regulations (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]; 8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]), that addressed the student's needs in reading, writing, mathematics, listening, transitions, frustration tolerance, fine motor skills and speech-language skills (Dist. Ex. 2 at pp. 8-13). Moreover, the evidence in the hearing record demonstrates that the student's academic, behavioral, and social/emotional management needs did not interfere with the instructional process; however the student did require specialized instruction to address the aforementioned needs, which would be addressed within a 12:1 special class placement (see Dist. Exs. 4-5; 7-9; 17-18; see also 8 NYCRR 200.6[h][4]). Specifically, the January 2011 psychological evaluation report indicated that the student was motivated and cooperative, he was friendly, and he could interact appropriately one-on-one with peers and adults (Dist. Ex. 9 at pp. 1, 4-5). Additionally, the January 2011 counseling update described the student as "very bright, friendly and inquisitive;" he was an active participant in all group discussions and activities; and that he always followed group rules and procedures (Dist. Ex. 8).

With respect to the parents' claims related to the assigned public school site, similar to the reasons set forth in other decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' assertions are speculative and must be dismissed. The parent's claims regarding the functional grouping of the students at the assigned public school site and the appropriateness of the methodology used turn on how the May 2011 IEP would or would not have been implemented, and here, as it is undisputed that the student did not attend the district's assigned public school site (Dist. Exs. 6; 10-11; 13), the parents cannot prevail on such speculative claims (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]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Churchill was an appropriate unilateral placement or whether equitable considerations weighed in favor of the

⁵ As of the date of the September 6, 2011 letter, the parents had executed an enrollment contract with Churchill for the student's attendance during the 2011-12 school year and moreover, the parents had paid the student's tuition for the 2011-12 school year in full (see Dist. Exs. 6; 10-11).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 29, 2014**

**CAROL H. HAUGE
STATE REVIEW OFFICER**