



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-030

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, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, 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 its Committee on Special Education (CSE) failed to offer an appropriate educational program to respondents' (the parents') daughter for the 2012-13 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 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]).

III. Facts and Procedural History

The parties' familiarity with the factual and procedural history of the case, the IHO's decision, and the particular issues for review on appeal are presumed and will not be recited here in elaborate detail.¹ The CSE convened on March 27, 2012, to formulate the student's IEP for the 2012-13 school year (Dist. Ex. 1). The parents disagreed with the recommendations contained therein, and as a result, notified the district and requested that the CSE reconvene to discuss other options for September, 2012 (Parent Ex. C). A parent advocate filed a due process complaint notice on behalf of the parents on September 5, 2012 (Parent Ex. A). Relevant to this instant appeal, the parents asserted in their due process complaint that the CSE was not properly composed, current evaluative information was lacking, the student's classification was inappropriate, the recommended program of five hours of special education teacher support services (SETSS) with related services was not reasonably calculated to offer educational benefit, and a 10-month program would likely cause the student to regress (Parent Ex. A at pp. 2-3).² The parents requested an order of pendency retroactive to the first day of school in September 2012, authorizations to obtain psychoeducational and neuropsychological evaluations to be conducted at the district's expense, and a new CSE meeting upon completion of the evaluations to develop a new IEP that was academically, socially and emotionally appropriate for the student (id. at pp. 3-4).

An impartial hearing was convened on October 22, 2012 to address the student's pendency services. In an interim decision dated October 23, 2012, the IHO directed the district to provide the student's pendency placement as of September 5, 2012 as follows: 25 weekly hours of special education itinerant teacher (SEIT) services, three 30 minute sessions per week of individual speech-language therapy, and two 30 minute sessions per week of individual occupational therapy (OT) (IHO Interim Decision at pp. 6-7). The district was also ordered to issue assessment authorizations to allow the parent to obtain psychoeducational and neuropsychological evaluations (id. at p. 7).

The impartial hearing continued on January 7, 2013 and concluded on January 9, 2013 after two additional days of hearing (Tr. pp. 25, 163, 226). In a decision dated January 25, 2013, the IHO determined that the March 27, 2012 CSE failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, therefore the August 10, 2011 IEP was to remain in place with SEIT (now SETSS) and related services to continue until a properly composed and conducted IEP meeting took place (IHO Decision at p. 22). The IHO found that equitable considerations favored the parents (id.). As relief, the IHO ordered the district to provide services in the student's general education classroom for the 2012-13 school year (id. at p. 23).

With respect to whether the March 2012 had appropriate evaluative information with which to make IEP recommendations, the IHO determined that the CSE did not consider or have available the results of the initial or most recent evaluation of the student (id. at p. 21). The IHO found there

¹ 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.

² In this case, SETSS, which is not defined in State regulation or the IDEA, was described in the following way: "That usually works as a pullout program, where there's group service. There's no more than eight students in a group and the SETSS teacher meets individually with the students -- with the small group" (Tr. p. 80).

was a lack of explanation based upon data or evaluation in determining the student's classification as learning disabled (*id.* at p. 20).

With respect to the recommended placement in a ten month program consisting of five periods of SETSS with related services of speech and language therapy, OT, and counseling, the IHO found that the March 2012 IEP developed by the CSE was not reasonably calculated to enable the student to receive educational benefits (*id.* at p. 22).³

In addition, the IHO surmised that the March 2012 IEP was pre-determined as it appeared that no consideration was given to parent or school participants at the meeting and a lack of consideration was given to alternate programs for the student (IHO Decision at pp. 15-17). In addition, the IHO found that there was no testimony to reflect how or when goals were developed (*id.* at p. 22).

IV. Appeal for State-Level Review

The district asserts that the IHO erred in his determination that the district failed to offer the student a FAPE for the 2012-13 school year. Specifically, the district asserts that the IHO erred in finding that (1) the parents were not afforded meaningful participation; (2) the CSE was not duly constituted; (3) the evaluative information was insufficient; (4) the classification of learning disability was inappropriate to describe the student's primary weaknesses; and finally, (5) the IEP should have recommended 12-month services. In addition, the district asserts that the IHO erred in addressing two issues that the parents did not raise in their due process complaint, including: (1) the IEP was predetermined; and (2) that the goals were inappropriate, vague, and immeasurable (IHO Decision at 15, 20-21).

With respect to the IHO's determination that equitable considerations favored the parents, the district appeals that finding and asserts that the parents did not disagree that a general education program was appropriate for the student and enrolled her in a private school general education program.⁴

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

³ However, the IHO stated that documents and testimony did not serve to clarify or justify the need for 12-month related services (IHO Decision at p. 22).

⁴ However, the parents did not request tuition reimbursement in this case.

(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][iii]; 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

A. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]).

On appeal, the district alleges that the IHO erred in addressing two issues that were not raised in the due process complaint by the parents, including (1) that the IEP was predetermined and (2) the goals were inappropriate, vague, and immeasurable. After reviewing the due process complaint notice and for the reasons stated above, the IHO erred in reaching these issues as a basis for finding a denial of FAPE. I find that these issues are not properly before me on appeal and I will not consider them.

B. March 2012 IEP

1. Evaluative Information & Educational Placement

The crux of this appeal is whether the recommended general education classroom with SETSS and related services was an appropriate educational placement for the student. The parents alleged that new testing of the student was not completed prior to the 2012 IEP meeting, the last evaluation was conducted in 2010, and the absence of current evaluative information resulted in denial of a FAPE (Parent Ex. A at p. 2). In addition, the parents did not believe that a learning disability classification addressed their daughter's needs or that a general education placement with five hours of SETSS and related services was reasonably calculated to help her learn and progress (*id.* at p. 3).

Although the parents disagreed with the disability classification, the parties did not dispute that the student was eligible for special education services. Resolving the parties' classification dispute in this case does not assist in reaching an outcome, because a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Therefore the question is whether the district has demonstrated whether it properly identified all of the student's special education needs, not whether it listed an appropriate disability classification on the student's IEP.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for

a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In developing the student's March 2012 IEP the CSE considered verbal reports from teachers, a March 2012 social history update, a March 2012 classroom observation, a February 2012 speech therapy report, a January 2012 OT report, and a May 2011 SEIT report (Tr. pp. 69, 70, 73, 83). The district representative testified that he did not recall any seeing any medical or psychoeducational reports at the meeting and, although an updated SEIT report was requested, it had not been received at the time of the CSE meeting (Tr. pp. 69, 100-01, 113). Information regarding the student's academic and social development on the March 2012 IEP, to a large extent, came directly from the May 2011 SEIT report which was 10 months old at the time (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4).⁵ The district representative testified that he believed the student had a diagnosis of an attention deficit hyperactivity disorder (ADHD) and that her former IEP mentioned a diagnosis of an oppositional defiant disorder (ODD) (Tr. p. 101). Social and language concerns were discussed at the CSE meeting, but no concerns were raised regarding the student being diagnosed with an autism spectrum disorder (Tr. pp. 101-03).⁶ The district representative conducted a brief classroom observation on the day of the CSE meeting; however, due to the nature of the lesson, the student was not observed interacting with peers and the observation report yielded little information regarding her level of academic functioning (Tr. pp. 70-71; Dist Ex 3). The district representative testified that making the program recommendation of going from 25 hours of SEIT to five hours of SETSS was based upon integrating the student into a general education classroom and "weaning her off excessive SETSS" (Tr. p. 92). When he was asked why he believed she would be able to function in a general education classroom with five periods of SETSS, the district representative admitted in generalities that it was based on "clinical judgment" and upon the observations of "other" students. The district representative did not respond in a way that suggested that the decision was based on this student's unique needs (Tr. pp. 116-17).

In view of the forgoing evidence, I concur with the IHO that the current evaluative information in this case was insufficient to develop an appropriate IEP and that the district did not establish that a general education placement with SETSS and related services was sufficient to confer educational benefit, thus denying the student a FAPE.

VII. Conclusion

The evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year. The district did not appeal the IHO's

⁵ Although in and of itself a 10-month old report would not constitute improper use evaluative information, it is noted that in this case the May 2011 SEIT report was generated prior to the development of the August 2011 IEP and therefore did not address the student's progress or lack thereof under the August 2011 IEP (compare Dist. Ex. 4, with Parent Ex. B). An assessment of the student's progress under the more recent August 2011 IEP would have had greater relevance to the dispute over the development of the March 2012 IEP.

⁶ However, the August, 2011 IEP also indicated that the student had a diagnosis of pervasive developmental disorder (PDD), selective mutism, and social phobia (Parent Ex. B at pp. 5, 17).

order to conduct new evaluations of the student and as such, this has become final and binding. As during the 2012-13 school year the student received the services the parents sought in their due process complaint pursuant to pendency, I find no further equitable relief warranted in this instance. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

IT IS ORDERED that unless the parties otherwise agree, the district shall conduct a psychoeducational and a neuropsychological evaluation of the student within 45 days from the date of this decision, and the CSE shall reconvene within 10 days thereafter to formulate an appropriate IEP for this student.

**Dated: Albany, New York
October 10, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**