The University of the State of New York

The State Education Department
State Review Officer
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No. 13-031

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:
Friedman & Moses, LLP, attorneys for petitioners, Alicia Abelli, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 for compensatory educational services as relief for the 2012-13 school year. The appeal must be sustained in part.

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

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.[2] The CSE convened on June 6, 2012, to formulate the student's IEP for the 2012-13 school year (see generally Parent Ex. E at pp. 1-15). The parents disagreed with the recommendations contained in the June 2012 IEP, and in a due process complaint notice, dated September 11, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).

On October 3, 2012, the parties proceeded to an impartial hearing, which concluded on January 9, 2013 after three days of proceedings (see Tr. pp. 1-257).[3] In a decision dated January 25, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 7-10). However, the IHO found that despite the district's failure to place the student in a 12:1+1 special class placement as recommended in the IEP, the student made "significant progress" during the 2012-13 school year while receiving special education and related services through the provision of integrated co-teaching (ICT) services (id. at pp. 3-4, 8-10). As relief, the IHO determined that since the parents did not request "any program," and the parents did not support or oppose the recommended 12:1+1 special class placement "or the current student's program of [an ICT] class" but instead requested "services," (i.e. 1:1 paraprofessional services and "at home" applied behavioral analysis (ABA)), the IHO

[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] 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.

[3] On January 23, 2013, the IHO issued an interim order regarding the student's pendency (stay-put) placement, which directed the district to provide the student with the following: 15 hours per week of after-school special education itinerant teacher (SEIT) services; a 1;1 classroom paraprofessional; two 30-minute sessions per week of individual speech-language therapy services; two 30-minute sessions per week of individual occupational therapy (OT) services; two 30-minute sessions per week of individual physical therapy (PT) services; special education transportation services; and a 12-month school year program (Interim IHO Decision at p. 2). In addition, the IHO indicated that the parties agreed to modify the student's pendency placement to include integrated co-teaching (ICT) services classroom (id.; see Tr. at pp.185-86, 240-46; see also IHO Decision at p. 2).

concluded that the appropriate relief was to remand the matter to the CSE to conduct an "appropriate IEP meeting and create an IEP with an appropriate recommendation" for the student (id. at pp. 4, 11).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the IHO erred in denying all of the parents' relief requested in the due process complaint notice and whether the IHO erred by not addressing all of the allegations asserted in the due process complaint notice in support of the parents' contention that the district failed to offer the student a FAPE for the 2012-13 school year (see Pet. ¶¶ 24-35).[4]

Initially, the parents affirmatively assert in the petition that they do not appeal the IHO's interim order on pendency, dated January 23, 2013, and they do not appeal the IHO's order to remand the matter to the CSE to conduct an "'appropriate IEP meeting and create an IEP with an appropriate recommendation'" for the student (Pet. ¶¶ 12-22). In addition, the district does not appeal the IHO's determination that it failed to offer the student a FAPE for the 2012-13 school year, and in fact, admitted in its answer that the district conceded that it failed to offer the student a FAPE for the 2012-13 school year after the conclusion of the impartial hearing (see Answer at p. 7 n.3). Therefore, these determinations have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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

[4] The parents submitted several documents with the petition as additional documentary evidence for consideration on appeal (see Pet. Exs. A-H). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024). In this instance, I will exercise my discretion and only accept the additional documentary evidence identified as exhibit D—the IHO's prehearing conference order, dated October 16, 2012—into the hearing record for the sake of completeness; otherwise, the parents' request to consider those documents identified as exhibits A through C, and E through H, is denied as the documents were available at the time of the impartial hearing and are not now necessary in order to render a decision in this matter.

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]).

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. IHO Conduct and the Impartial Hearing

Initially, the parents assert that the IHO violated their rights by requiring them to present their case via affidavit. In response, the district argues that the parents actually called two witnesses during the impartial hearing and further, that the IHO has the discretion to require testimony by affidavit in lieu of direct testimony.

As correctly noted in the IHO's prehearing order dated October 16, 2012, State regulation allows an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]; Pet. Ex. D at p. 2). In this case, the IHO's prehearing order also allowed for the presentation of "[a]dditional direct examination that [was] not repetitive or irrelevant" (Pet. Ex. D at p. 2).

Contrary to the parents' argument, a review of the hearing record does not support a conclusion that the IHO's prehearing order directing the use of affidavits for direct testimony violated either the IDEA or State regulation, or otherwise compromised the parents' ability to meaningfully participate in the impartial hearing. Moreover, based on the above, the evidence establishes that the IHO's prehearing order requiring the presentation of direct testimony by affidavit was within the sound discretion of the IHO, and did not violate the parents' due process rights. Contrary to the parents' assertion, if anything, the IHO's order providing for testimony by affidavit, in addition to live direct testimony if needed, only served to enhance the parents' opportunity to thoughtfully prepare testimony by affidavit outside the confines of an in-person hearing. In addition, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). An IHO is authorized to administer oaths and to issue subpoenas in connection with the administrative proceeding (8 NYCRR 200.5[j][3][iv]). An IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). The parents, school authorities, and their respective attorneys or representatives, shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the impartial hearing (8 NYCRR 200.5[j][3][xii]). The IHO may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]). Consequently, the parents' assertions must be dismissed.

Additionally, the parents allege that both the initial pendency order and the IHO's prehearing orders were confusing to the parties, remained unsigned, and were never entered into the hearing record as evidence. Although the hearing record reveals that the IHO did not enter these orders into evidence, both the interim order on pendency and a summary of the prehearing conference order were provided to this office as part of the administrative record. As a reminder to both parties and to the IHO, State regulation provides that the "record shall include copies of," among other things, "all written orders, rulings or decisions issued in the case" (see 8 NYCRR 200.5[j][5][vi][c]). Regardless, the parents do not allege any prejudice that resulted from this omission—nor is any prejudice discernible from the hearing record. Therefore, the parents' contention must be dismissed.

Finally, the parents argue that the IHO scheduled an impartial hearing date with full knowledge that the parents' counsel could not appear, and directed counsel to "get another attorney" (Tr. p 172). As the IHO correctly noted in the prehearing order, an IHO may permissibly deny the parties request for an extension in accordance with State regulations, which provide that, absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]; see Pet. Ex. D at pp. 2-3). The evidence in the hearing record demonstrates that the parents' attorney requested an extension because she would be "out of state" and did not otherwise provide any compelling reason to support her request for an extension (Tr. pp 172-73). Furthermore, the IHO indicated that the impartial hearing date had been selected in September 2012 and a final decision in this case must be issued in compliance with State and federal regulations (see Tr. p. 173). Ultimately, however, the IHO granted counsel's request for an extension (see IHO Decision p. 2). Consequently, the parents' contention must be dismissed.

Based upon the foregoing, the evidence in the hearing record does not support the parents' contentions that the IHO's conduct or the conduct of the impartial hearing infringed upon or deprived the parents' of the right to due process or otherwise hindered their ability to present evidence at the impartial hearing.

B. 2012-13 School Year and Relief

Upon careful review, the evidence in the hearing record reflects that although the district conceded that it failed to offer the student a FAPE for the 2012-13 school year after the conclusion of the impartial hearing, the IHO otherwise properly concluded in the decision that the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 7-11). In addition, the evidence in the hearing record also reflects that the IHO properly denied the parents' requested relief in the form of compensatory educational services and independent educational evaluations (IEEs) at public expense, and properly directed the CSE to convene to develop an IEP

for the student (see id. at pp. 2-3, 7-11).[5] In this case, the IHO accurately recounted the facts of the case, 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. 7-11). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported 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, the conclusions of the IHO are hereby adopted.[6]

In particular, a review of the hearing record shows that the IHO correctly determined that compensatory educational services or additional services was not an appropriate remedy in this case because the student made "significant progress" during the 2012-13 school year (IHO Decision at pp. 9-10). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory

[5] The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as an "individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district, unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]. If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district's criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. Here, the hearing record fails to include any evidence that the parents disagreed with any district evaluations of the student, or that based upon such disagreement, the parents requested IEEs at public expense (see Tr. pp. 1-257; Parent Exs. A-N). Instead, the parents asserted in the due process complaint notice that the June 2012 CSE failed to, among other things, conduct or rely upon sufficient evaluations of the student (see Parent Ex. A at pp. 1-8). Notably, however, the evidence in the hearing record reveals that the district most recently evaluated the student in spring 2012; thus, consistent with State regulation requiring districts to reevaluate students at least once every three years, it appears that the district will be required to reevaluate the student in spring 2015 (see Parent Exs. F; K; 8 NYCRR 200.4[b][4]). If at that time the parents disagree with the district's evaluations, the parents and the district are encouraged to follow the procedures outlined in State regulations (see 8 NYCRR 200.5[g][1]).

[6] Contrary to the parents' assertion, since the district conceded that it did not offer the student a FAPE for the 2012-13 school year, there is no need to address additional allegations upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year.

"additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

In this instance, based upon the evidence in the hearing record, an award of additional educational services to make up for services not provided to the student is not warranted given that, other than the placement of the student in an ICT setting as opposed to a 12:1+1 special class, he was otherwise provided with the special education and related services recommended in the June 2012 IEP (Tr. pp. 1-257; Parent Exs. A-N). Under the circumstances presented and given that the student attained educational benefits from his program during the 2012-13 school year, it is unclear how the parents' requested relief of compensatory or additional educational services would effectively or meaningfully serve the purpose of such relief.

However, based upon the evidence in the hearing record, it is undisputed that the district failed to provide the student with 1:1 paraprofessional services pursuant to pendency between September 11, 2012—the date of the due process complaint notice—and January 23, 2013—the

date of the IHO's interim order on pendency.[7] Therefore, since the student should have received the services of a 1:1 paraprofessional pursuant to the pendency provisions of the IDEA, the district is directed to provide the student with the 1:1 paraprofessional services he should have received as compensatory or additional educational services.

VII. Conclusion

In this case, the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and that the parents' were not entitled to an award of compensatory or additional educational services as relief. However, the evidence in the hearing record also supports a finding that the district failed to fully implement the student's pendency placement services—to wit, 1:1 paraprofessional services—for the period from September 11, 2012 through January 23, 2013, and thus, the student is entitled to compensatory or additional educational services as relief for the failure to provide such services. Finally, I have considered the parties' remaining contentions, and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall provide the student with 1:1 paraprofessional services for a period consistent with the district's failure to provide such pendency services to the student from September 11, 2012 through January 23, 2013.

Dated: **Albany, New York**
November 14, 2014

CAROL H. HAUGE
STATE REVIEW OFFICE

[7] As a point of clarification, the student's entitlement to a pendency placement existed in this matter for the period beginning on the date of the due process complaint notice (September 11, 2012) (see Application of a Student with a Disability, Appeal No. 13-126, citing Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526 [S.D.N.Y. 2011] [holding that the pendency provisions of the IDEA are triggered upon the filing of a due process complaint notice]). Moreover, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 CFR 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 CFR 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]).