



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-142

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:

Callahan and Fusco, LLC, attorneys for petitioners, Beth A. Callahan, Esq., and Lucinda J. McLaughlin, 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 to be reimbursed for their son's tuition costs at the Windward School (Windward) 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 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 18, 2012 to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 2). The May 2012 CSE recommended that the student be placed in a general education classroom and receive related services of individual speech-language therapy and individual occupational therapy (OT) (Dist. Ex. 2 at p. 4). The parents disagreed with the recommendations made at the May 2012 CSE meeting and, at the end of the meeting, informed the district of their intent to unilaterally place the student at Windward (Tr. p. 106).¹ In a due process complaint notice dated December 18, 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 generally Dist. Ex. 1).

On February 26, 2013, the IHO conducted a pre-hearing conference, and, on May 13, 2013, the parties proceeded to an impartial hearing, which concluded on May 20, 2013 after two nonconsecutive days of proceedings (see Tr. pp. 1-367). In a decision dated June 24, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year, that Windward was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parents' request for an award of tuition reimbursement (IHO Decision at p. 9).

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 May 2012 IEP included supports sufficient to address the student's reading difficulties in light of information regarding the student's receipt of a diagnosis of dyslexia.

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]).

¹ In an undated email to the student's mother that appears to have been written prior to the May 18, 2012 CSE meeting, the CSE "teacher assigned" recounted a conversation in which the parent indicated that the student would be attending Windward the upcoming school year (Dist. Ex. 8; see Tr. pp. 192-93). The teacher assigned informed the parent that, in case she was seeking a public school placement, the CSE would develop an IEP at the annual review meeting, instead of an IESP, which the student had at the time (Dist. Ex. 8).

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 2012-13 school year (see IHO Decision pp. 6-9). The IHO correctly recounted the facts of the case, addressed the specific issue identified in the parents' 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. 2-9). In addition, the hearing record 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, the conclusions of the hearing officer are hereby adopted.

Briefly, a review of the hearing record shows that the IHO correctly determined that the recommendations in the May 2012 IEP for a general education class placement with related services of speech-language and OT were appropriate for the student (see IHO Decision at pp. 6-9). According to the hearing record, the May 2012 CSE considered the student's then-current private school report cards, May 2012 OT and speech-language therapy progress reports, a November 2010 educational records bureau (ERB) report, and a January 2011 language evaluation (Tr. pp. 56-58; Dist. Ex. 3 at p. 1; see generally Dist. Exs. 4-7; Parent Exs. A; L).² Further, the student's current private school staff participated in the CSE meeting and provided input regarding the student's functioning (Tr. pp. 59-62).

The January 2011 language evaluation report considered by the CSE offered a diagnosis of "dyslexia" (Parent Ex. A at p. 4; see Tr. pp. 133-34).³ The school psychologist reported that during the CSE meeting there was extensive discussion regarding the diagnosis of dyslexia (Tr. p. 75). Although staff from the student's private school indicated that they did not have any concerns regarding the student's ability to read, and opined that the student was too young to be diagnosed with dyslexia, the student's mother strongly disagreed with the private school's assessment of the student, was firm in her belief that the student had dyslexia, and indicated that she had a report from Windward that included a dyslexia diagnosis (Tr. pp. 75-76, 85; Dist. Ex. 3). Following the departure of private school staff from the CSE meeting, the parent contacted Windward and a staff person from the school conversed with the remaining CSE members via speaker phone (Tr. p. 86). The Windward staff person, who was familiar with the evaluation of the student conducted there, characterized the student's difficulty on a rapid naming task as a "red flag" (Tr. pp. 86-87; see Tr. p. 198). While the school psychologist interpreted Windward's findings as indicating the student had "soft signs" of dyslexia, the student's mother testified that the school provided a "very hard," "emphatic" dyslexia diagnosis (Tr. pp. 88-90, 105, 119, 153-54, 194-201, 210-11; Dist. Ex. 3 at p. 1).

The hearing record shows that, at the time of the May 2012 CSE meeting, the student knew all of his letters and sounds, could identify sight words, and demonstrated good critical thinking skills (Dist. Ex. 3 at p. 1). Contrary to the parents contention that the student was "struggling" at the private school during the 2011-12 school year (Petition at ¶ 17), the private school progress reports stated that the student had made "great progress," and the CSE meeting minutes indicated that the private school teacher who participated in the CSE meeting had "nothing but positive

² The ERB indicates that the student obtained a full scale score of the 96th percentile rank on the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) in November 2010 (see Parent Ex. L).

³ The student was four years old at the time of the January 2011 language evaluation (Parent Ex. A at p. 1). The evaluating psychologist indicated that she diagnosed the student as having dyslexia based on his family history and pattern of scores (*id.* at p. 4). She noted that the while the student scored in the "average" range on language processing tasks, his scores were "considerably" lower than would be predicted by his "remarkable" intellect (*id.*).

things to say" about the student (Dist. Exs. 3 at p. 1; 4; 5). The May 2012 IEP's present levels of performance included information from the student's private school teacher, who averred that the student had made "tremendous progress," had met all grade expectations and readiness skills, and was ready to move on to first grade (Tr. pp. 71-72; Dist. Ex. 2 at p. 1). In addition, the school psychologist stated that, at the May 2012 CSE meeting, the student's kindergarten teacher was "very clear that he was able to follow the curricular expectations of general education students" (Tr. p. 83). While I can understand that the parents are concerned with the student's reading potential, particularly in light of their family history and the diagnosis offered by their private evaluators (Tr. pp. 74, 76, 85-86, 197; see Parent Ex. A), the IHO was required to resolve these conflicting educational viewpoints regarding the student's performance and I find, as did the IHO, that regardless of any diagnosis the student may have received, his teachers nevertheless reported that he was making progress in the general education curriculum and had the requisite skills necessary to continue forward in first grade (Tr. pp. 75, 83; Dist. Ex. 3 at p. 1; see Dist. Ex. 5). Although the private school personnel working with the student and district personnel were of a different opinion than the Windward personnel and the parents, "[a] professional disagreement is not an IDEA violation" (P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383). The obligation to offer the student a FAPE is satisfied if the district offers the student meaningful access to an education, even if it cannot guarantee totally successful results (Bryant v. New York State Educ. Dept., 692 F.3d 202, 215 [2d Cir. 2012] cert. denied, 133 S. Ct. 2022 [2013]). The evidence sufficiently supports the IHO's conclusion that the district offered the student a FAPE for the 2012-13 school year, and sufficient grounds to disturb it are not present in this case.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Windward was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.⁴ I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 5, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁴ While unnecessary to reach, I note that the legal standards that I would have applied would differ from those relied upon in the IHO's alternative findings relating to the unilateral placement and equitable considerations (see IHO Decision at p. 9). Specifically, the restrictiveness of the unilateral placement, without more, would unlikely form a sufficient basis in this case for a finding that Windward was not appropriate (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]). In addition, as to the IHO's determination that the equitable considerations did not weigh in favor of the parents' request for relief, because the parents decided to unilaterally place the student at Windward prior to the May 2012 CSE meeting, the Second Circuit has recently explained that, so long as parents cooperate with the CSE, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L., 744 F.3d at 840).