



The University of the State of New York

The State Education Department
State Review Officer
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No. 13-216

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

Appearances:

Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Francesca J. Perkins, Esq., of counsel

DECISION

I. Introduction

Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) be directed to fund independent educational evaluations (IEEs) of the student. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters 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" (8 NYCRR 200.5[i][1]; *see* 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2],

300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). 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 subsequently 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]).

III. Facts and Procedural History

During the 2012-13 school year, the student attended an elementary school in the district (Parent Ex. J). By letter to the district dated January 25, 2013, the parent referred the student to the CSE for an initial evaluation to determine eligibility for special education due to the student's lack of academic progress (Dist. Ex. 3). In response to the parent's request, the district conducted an initial evaluation of the student, which included a social history in February 2013, a classroom observation in March 2013, a psychoeducational evaluation in April 2013, and a speech-language evaluation in May 2013 (Dist. Exs. 1-2; Parent Exs. D-E).

The CSE convened on May 29, 2013 to develop the student's IEP for the 2013-14 school year (Parent Ex. F). The CSE determined that the student was eligible for special education and related services as a student with a learning disability, and recommended a general education placement in a community school along with special education teacher support services (SETSS) three periods per week for English language arts (ELA), SETTS two periods per week for math, and one counseling session per week in a group (3:1) (Parent Ex. F at pp. 1, 7).¹ The CSE also

¹ The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

recommended testing accommodations of extended time and a separate location of not more than 12 students (id. at p. 8).

In a letter dated June 13, 2013, the principal of the student's elementary school notified the parent that the student had not yet met the performance standards in math and ELA required for promotion to the next grade (Parent Ex. N). The letter further indicated that the student had the opportunity to meet the promotion standards by receiving a particular proficiency level on math and ELA tests offered in August 2013 (id.).

By letter dated June 18, 2013, the parent requested neuropsychological and speech-language IEEs at district expense (Dist. Ex. 4). The parent indicated that she did not agree with the results of the district's evaluations and that the district failed to fully identify the "nature of the student's disability" or his educational needs (id.).

In response to the parent's June 2013 letter, the district contacted the parent in June and July 2013 and offered to conduct neuropsychological and speech-language evaluations of the student (Tr. pp. 197-200). The parent, however, rejected the district's offer on both occasions (Tr. p. 199).

A. Due Process Complaint Notice

In light of the parent's request for an IEE at public expense, the district filed a due process complaint notice dated July 3, 2013, asserting that the initial evaluation conducted by the district was appropriate and requesting an impartial hearing to defend its evaluation of the student (Dist. Ex. A at p. 1; see 34 CFR 300.502[b][2]).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 13, 2013 and concluded on October 4, 2013, after three days of proceedings (Tr. pp. 1-90, 111-267).² By decision dated October 18, 2013, the IHO denied the parent's request for neuropsychological and speech-language IEEs at district expense (IHO Decision at pp. 10-11).

Initially, the IHO found that the May 2013 CSE had adequate evaluative information of the student's functional, developmental, and academic needs upon which to premise its program recommendation for the student (IHO Decision at pp. 10-11). In addition, the IHO found that the district's evaluations of the student were sufficiently comprehensive to identify all of the student's special education and related service needs and develop measurable annual goals for the May 2013 IEP (id. at p. 11). Lastly, the IHO found that the district's failure to identify a specific diagnosis explaining the student's academic difficulties was not a fatal flaw in the district's evaluation of the student (id. at p. 12).

² At the conclusion of the first day of the impartial hearing, the parent's attorney made a motion on the record seeking recusal of the then presiding IHO, which was granted by the IHO (Tr. p. 89). A new IHO was appointed on August 26, 2013, who rendered the decision at issue in this appeal (IHO Decision at p. 3). On September 5, 2013, the parties held a prehearing conference to clarify issues and schedule hearing dates (Tr. pp. 92-110).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in denying her request for IEEs at district expense. More specifically, the parent asserts that the IHO erred in finding that the district's evaluations of the student were appropriate and that the May 2013 CSE had adequate information to develop a program that would allow the student to receive educational benefits. The parent also asserts that the IHO failed to assess whether the district's evaluations contained sufficient information to develop the student's May 2013 IEP and address his unique educational needs.

With respect to the psychoeducational and speech-language evaluations conducted by the district, the parent argues that the evaluations were insufficient because they failed to reveal the reasons for the student's academic struggles. The parent further argues that since the student was not making academic progress, the district's evaluations failed to provide the May 2013 CSE with adequate information regarding the student's cognitive and functional impairments. Additionally, the parent argues that the district's evaluations failed to identify the student's disability with the specificity required to allow the CSE to craft an educational program that would provide the student with meaningful educational benefit. Moreover, the parent contends that the district's evaluations were conflicted and vague.

Relative to the student's psychoeducational evaluation, the parent argues that the evaluation did not provide the May 2013 CSE with sufficient information to determine the student's needs. The parent further argues that the district failed to comply with its own "best practices" in administering the psychoeducational evaluation.

Finally, in relation to the district's offer to conduct additional evaluations of the student in June 2013, the parent purports that the district's "late offer" was not relevant to the issue of whether the CSE had sufficient evaluative data to develop the May 2013 IEP.

In an answer, the district asserts that the IHO properly denied the parent's request for neuropsychological and speech-language IEEs. The district maintains that the psychoeducational and speech-language evaluations conducted by the district were appropriate and that the evaluations identified the student's academic needs with the specificity required to allow the CSE to develop an educational program that would provide the student with educational benefits.

V. Applicable Standards

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 must conduct one 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]). An 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 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]). 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]).

New York State regulations require the CSE to "arrange for an appropriate reevaluation of each student with a disability if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation" (8 NYCRR 200.4[b][4]; see 20 U.S.C. § 1414[a][2][A]; 34 CFR 300.303[a]). Furthermore, if the district refuses to conduct evaluations of a student in response to a parental request, the district must provide the parent with prior written notice—consistent with State and federal regulations—including a description of the determination it made and the reasons for its determination (8 NYCRR 200.5[a], [a][4]; see 34 CFR 300.503). In addition to the parent's ability to request a reevaluation by the district, "[i]f the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an [IEE] at public expense" (8 NYCRR 200.5[g][1]; see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502[b]). IEEs are 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]). In addition to the generalized right to an IEE, parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district (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] ["a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]; *R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated the parent's claim for an IEE at public expense]). Once the parent has requested an IEE at public expense, the district must, "without unnecessary delay," either provide an IEE at public expense or file a due process complaint notice to defend its evaluation as appropriate at an impartial hearing (34 CFR 300.502[b][2]; 8 NYCRR 200.5[g][1]; see *C.W. v. Capistrano Unified Sch. Dist.*, 2012 WL 3217696, at *6 [C.D. Cal. Aug. 3, 2012] [finding that a request for an impartial hearing made 41 days after the parental request for an IEE did not constitute an unnecessary delay]; see also *Letter to Anonymous*, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]. If the school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

VI. Discussion

A. Preliminary Matters

Before addressing the merits of the parent's request for IEEs, the parent testified that she requested IEEs during the May 2013 CSE meeting based upon her disagreement with the district's evaluations of the student (Tr. pp. 180-81). The hearing record contains no evidence to rebut or contradict the parent's testimony in this instance. Additionally, the district's school psychologist testified that during the CSE meeting, the parent stated that she wanted a specific diagnosis for the student (Tr. p. 128). The district's school psychologist further testified that she advised the parent that she could not provide a diagnosis for the student as part of a psychoeducational evaluation (*id.*). However, it does not appear that the parent requested that the district conduct a neuropsychological evaluation of the student, in which case the district would have been obligated to provide the parent with prior written notice in the event that it refused the parental request to take action relating to an evaluation of the student (34 CFR 300.503[a]; 8 NYCRR 200.5[a][1]). In any event, although the district noted the parent's concerns regarding the sufficiency of the evaluative information available to the CSE on the student's IEP, I remind the district that it should have provided the parent with prior written notice addressing her concerns by completing the appropriate form prescribed by the Commissioner of Education.³

B. Speech-Language Evaluation

Turning next to the parent's request for a speech-language IEE, the hearing record indicates that the evaluator who conducted the May 2013 speech-language evaluation is licensed as a speech-language pathologist by the State of New York and is also certified by the American Speech-Language-Hearing Association (Tr. pp. 15-16). The hearing record further indicates that the speech-language pathologist conducted an evaluation of the student that included behavioral observations, an oral peripheral examination, observations of the student's voice, fluency and articulation skills, standardized language testing, and a narrative language sample (Dist. Ex. 2). Additionally, prior to conducting the evaluation, the speech-language pathologist reviewed available information including the student's social history, the student's psychological report, and information obtained when interviewing the parent (Tr. pp. 26-28).

The May 2013 speech-language evaluation indicated that the student was "quiet," but quickly established rapport with the examiner and responded appropriately to questions and statements (Dist. Ex. 2 at p. 1). The evaluation further indicated that the student's oral mechanism was adequate in function and structure to support speech production (*id.*). The student's voice, fluency and speech intelligibility were also noted to be within normal limits (*id.* at p. 2).

With respect to the student's receptive and expressive language skills, the speech-language pathologist administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) (Dist. Ex. 2 at p. 2). The student's core language score was in an average range (*id.*). To determine the overall core language score, the speech-language pathologist administered the following subtests: concepts and following directions; word structure; recalling sentences; formulated sentences; and word classes 2 (*id.* at pp. 2-3). The student's performance in the above average range on the word structure and recalling sentences subtests indicated his ability to use a variety of grammatical forms in a picture labeling task and his ability to recall and repeat oral

³ To be clear, I do not rely on the presence or absence of a prior written notice as a basis of this decision.

sentences of increasing length and complexity (id.). The student performed in the average range on the concepts/following directions, formulating sentences and word classes 2 subtests; indicating average ability to follow directions of increasing length and complexity, create semantically and syntactically correct sentences, and receptively identify which two of four auditorily presented words were semantically related and expressively explain why they were related (id.).

To further assess the student's expressive language skills, the speech-language pathologist completed a narrative language sample to examine the student's ability to tell a story with appropriate sequence and details (Dist. Ex. 2 at p. 3). The student's comprehension of stories was determined by having the student answer oral questions related to the story (id.). The speech-language pathologist reported that the student told the stories in complete, simple, compound, and complex sentences with correct grammar and sentence structure (id. at pp. 3-4). The report indicated that the student used appropriate vocabulary, independently retold the stories, and presented the information in a logical and sequential manner (id. at p. 4). The student correctly answered 7/8 questions, which reflected that he understood the questions and the information presented in the story (id.).

Based on the results of the formal testing and the narrative language sample, the speech-language pathologist reported that the student presented with age-appropriate speech, receptive language, and expressive language skills, which addressed the parent's concern regarding the presence of an expressive language disorder (Dist. Ex. 2 at p. 4). The speech-language pathologist further indicated that the student's "[o]verall receptive and expressive language abilities were within the average range" (id.). To the extent during the hearing the parent questioned why additional areas of concern were not assessed during the May 2013 speech-language evaluation, the speech-language pathologist testified that the evaluation did not evaluate reading and writing because the student was referred to her for a speech and language evaluation, not a reading and writing assessment (Tr. pp. 44-46). The speech-language pathologist further testified that she did not include an auditory processing assessment because that falls under the scope of practice of an audiologist (Tr. p. 46). Although the parent now asserts that the evaluation was deficient by not assessing the student's academic difficulties and his ability to "comprehend, process and focus," such testing was conducted previously as part of the April 2013 psychoeducational evaluation, which the speech-language pathologist reviewed prior to conducting her speech-language evaluation of the student (Tr. pp. 26-28; see Dist. Ex. 1).

Based on the foregoing, the evidence in the hearing record supports the conclusion that the district's May 2013 speech-language evaluation was appropriate and sufficiently comprehensive to assess whether the student exhibited speech and/or language needs and, furthermore, the results of the evaluation did not indicate a need for additional testing in related areas. As a result, I find that the parent is not entitled to a speech-language IEE at public expense under the circumstances of this case.

C. Psychoeducational Evaluation

I now turn to the April 2013 psychoeducational evaluation conducted by the district and whether the parent is entitled to a neuropsychological IEE. The parent contends that the district's April 2013 psychoeducational evaluation did not provide any information that could be used to determine the student's special education needs and that the district failed to comply with its own "best practices" in administering the evaluation, and therefore requests a neuropsychological IEE. However, in order to obtain an IEE at public expense the district must have conducted an

evaluation with which the parent disagrees (34 CFR 300.502[b][1], [2]). In the present case, the parent disagrees with the district's April 2013 psychoeducational evaluation; however, the parent did not request a psychoeducational IEE; rather, the parent is requesting a neuropsychological IEE at district expense.⁴ Because the district did not conduct a neuropsychological evaluation of the student with which the parent disagrees, the parent is unable to obtain a neuropsychological IEE at public expense on this basis.

Notwithstanding my determination in this matter, I will note several additional observations for the benefit of the student and the parties as they proceed forward with educational planning for the student. First, the hearing record reveals that the district's school psychologist who conducted the April 2013 psychoeducational evaluation of the student administered numerous assessments, including the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) and the Wechsler Individual Achievement Test-Second Edition (WIAT-II). A review of the psychoeducational evaluation reveals that the district's school psychologist indicated in the introduction and summary section that the student was 7 years 9 months of age at the time of testing when, in actuality, the student was 8 years 9 months (Dist. Ex. 1 at pp. 1, 6). Given that the WISC-IV and the WIAT-II are both age-based normative referenced assessment tools that rely on an accurate chronological age to derive composite and standard scores, the accuracy and reliability of the findings in the psychoeducational evaluation cannot be determined with certainty (see, e.g., Parent Ex. P at pp. 42, 56, 86-87).⁵ On this basis, had the parent requested a psychoeducational IEE, I would very likely have granted such a request, but to be clear, this is not a matter that is properly before me and therefore I cannot issue such a directive.

However, although the psychoeducational evaluation is inappropriate for improperly stating the student's age and not accounting for this discrepancy in the reported results, it also does not escape notice that the district continued to attempt to allay the parent's concern—the district's supervisor of psychologists testified that on two separate occasions the district offered to conduct a neuropsychological evaluation of the student using "different assessment tools" and exploring "entirely new" areas (Tr. pp. 198-200).⁶ The supervisor of psychologists further testified that on both occasions the parent declined the district's offer (*id.*).

As states previously, the parent is not entitled to a neuropsychological IEE at public expense at this time. However, based on the inadequacy of the district's April 2013 psychoeducational report and given that the district already offered to conduct a neuropsychological evaluation of the student, I suggest that both parties should strongly consider putting aside their differences for the benefit of the student by agreeing to conduct a neuropsychological evaluation of the student and may wish to consider assessing the student's abilities and needs in the areas of decoding, working memory, non-verbal processing, visual processing, phonemic awareness, visual-spatial skills, visual scanning, visual-motor precision, rapid naming, phonological and orthographic processing, verbal fluency, visual memory, and

⁴ The hearing record indicates that the IHO carefully questioned the parent's expert witness regarding the distinction between a psychoeducational evaluation and a neuropsychological evaluation (Tr. pp. 242-45).

⁵ Neither party referenced the age discrepancy in the April 2013 psychoeducational evaluation during the impartial hearing or on appeal.

⁶ I make no findings regarding the appropriateness of the assessments administered as part of the psychoeducational evaluation or the possible need for additional psychoeducational testing of the student.

executive functioning.⁷ In particular, upon consent by the parent, the district has the right to conduct its own evaluations of the student and it is appropriate that it be given the option in the first instance to do so (see, e.g., V.M. v. North Colonic Cent. Sch. Dist., 2013 WL 3187069, at *11 [N.D.N.Y. June 20, 2013] [noting that "[a] parent seeking special education services for their child under the IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation"]). Furthermore, although I am aware that the parent is concerned that the district has not provided a diagnosis for the student, because identification of a student's needs is the primary purpose of evaluation, "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial" so long as the IEP identifies and addresses the student's needs (Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]).

VI. Conclusion

Having found that the parent is not entitled to neuropsychological and speech-language IEEs at this juncture, it does not foreclose the possibility the parent may seek a neuropsychological IEE for the student in the future, if the parent disagrees with a neuropsychological evaluation conducted by the district.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 17, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁷ The district may arrange to have the neuropsychological evaluation conducted by district or contracted non-district personnel; the resulting evaluation will be considered a district evaluation, permitting the parent to request a neuropsychological IEE if she disagrees with the result of the evaluation.