The University of the State of New York

The State Education Department
State Review Officer
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No. 14-004

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:
Law Offices of Melvyn W. Hoffman, attorneys for petitioner, Melvyn W. Hoffman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the student's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determinations that Mary McDowell was appropriate and that equitable considerations supported the parent's claim. For the reasons set forth below, the matter must be remanded to the IHO for further administrative proceedings.

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

In this case, the student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). During the 2011-12 school year, the student attended Mary McDowell at district expense pursuant to a prior IHO Decision in the parent's favor (see Parent Ex. L at p. 12). The Commissioner of Education has not approved Mary McDowell as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On January 27, 2012, the parent signed an enrollment contract with Mary McDowell for the student's attendance during the 2012-13 school year (Parent Ex. D at pp. 1-2).

On April 4, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for 2012-13 school year (see Tr. p. 61; Parent Ex. B at p. 10). Finding the student eligible for special education as a student with a learning disability, the April 2012 CSE recommended integrated co-teaching (ICT) services in a general education setting for mathematics, English language arts (ELA), social studies, and science (Parent Ex. B at p. 6). In addition, the April 2012 CSE recommended related services comprised of three 30-minute sessions of 1:1 speech-language therapy per week and two 30-minute sessions of 1:1 occupational therapy (OT) per week (id. at p. 7). The April 2012 CSE also developed annual goals related to the student's auditory processing, fine motor, social pragmatic, expressive/receptive language, reading, writing, mathematics, and organizational skills and recommended testing accommodations, which included extended time, testing in a separate location, revised testing format, and the use of auditory amplification (id. at pp. 3-6, 8).

In a final notice of recommendation (FNR) dated August 3, 2012, the district summarized the ICT services, speech-language therapy, and OT recommended in the April 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. C).

In a letter dated August 22, 2012, the parent informed the district that the student needed "a small school [and] small class environment" with "an appropriate special education program and services," which the April 2012 IEP did not offer (Parent Ex. J at p. 1). Therefore, the parent advised the district that she "had no alternative but to unilaterally place the student" at Mary McDowell for the 2012-13 school year and seek reimbursement for the costs of the student's tuition, transportation, and related services (id.).

In a letter dated October 25, 2012, the parent also notified the district that she visited the assigned public school site and proposed classroom (Parent Ex. K). The parent indicated that, after encountering difficulty arranging a visit, she finally "took it upon" herself to visit the school (id.). As a result of the visit, the parent rejected the assigned public school site as not appropriate for the student because the observed classroom was too large and the student would not have been properly functionally grouped with the other students in the classroom (id.). The parent indicated that the student required a "small school [and] small class environment with multisensory teaching techniques" (id.). The parent concluded that she had "no alternative" but to continue the student's enrollment at Mary McDowell for the 2012-13 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 20, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see generally Parent Ex. A). Specifically, the parent alleged that the April 2012 CSE was not properly constituted (id. at p. 1). In addition, the parent alleged that annual goals contained in the April 2012 IEP were not appropriate for the student's needs and were too generalized and immeasurable (id.). Next, the parent asserted that the district failed to provide the FNR in a timely manner, which impeded the parent's ability to visit the assigned public school site and make an

informed decision about the appropriateness thereof (id.). The parent also alleged that the assigned public school site was not appropriate for the student because the student would not have been functionally grouped for instructional purposes in math and reading (id. at pp. 1-2). Furthermore, the parent asserted that the proposed classroom was too large for the student to receive educational benefit (id. at p. 2).

In addition, the parent alleged that the student's unilateral placement at Mary McDowell was appropriate and that equitable considerations weighed in favor of her request for relief (Parent Ex. A at p. 2). As relief, the parent requested that the IHO order the district to reimburse her for the costs of the student's tuition at Mary McDowell for the 2012-13 school year, as well as the cost of transportation and related services (id.).

B. Impartial Hearing Officer Decision

On September 11, 2013, an impartial hearing convened in this matter and concluded on November 7, 2014, after three days of proceedings (Tr. pp. 1-216).[1] In a decision dated December 3, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year, that Mary McDowell constituted an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 7-9).

Initially, the IHO determined that, because the parent rejected the April 2012 IEP in August 2012, the district was only required to establish the appropriateness of the April 2012 IEP and "possibly" that it had "a viable placement" at which to implement the IEP at the beginning of the school year (IHO Decision at p. 7). Thus, the IHO concluded that, although there was testimony that the proposed classroom was full, it was "unfair to hold this against [the district] where the parent[] rejected the placement offer in advance" (id. at p. 9). Next, the IHO concluded that the April 2012 IEP was "reasonably calculated to provide educational benefit," noting that it was developed with input from Mary McDowell staff (id. at p. 7). The IHO also noted testimony from the teacher of the proposed classroom that the curriculum was modified for a student's academic level and that an ICT classroom allowed for individualized instruction and access to regular education students (id.). As to the student's ability to function in such a large class setting, the IHO found that the student had previously functioned in larger groups without a problem and that, in any event, the student's distractibility could be addressed by an FM unit, such as that used at the assigned public school site (id. at p. 8). In addition, the IHO found that the "comments" of the parent and the Mary McDowell personnel that the student could not succeed with ICT services in a general education setting as "speculative" and "unconvincing" (id.). The IHO also found that a general education setting with ICT services constituted a less restrictive setting than the student's educational environment at Mary McDowell, where the student lacked exposure to typically developing peers (id. at p. 9).

The IHO concluded Mary McDowell was an appropriate unilateral placement for the student for the 2012-13 school year (IHO Decision at p. 9). Specifically, the IHO noted that, although it did not maximize the student's interaction with nondisabled peers, Mary McDowell

[1] On September 11, 2013, the IHO conducted a pre-hearing conference with the parties, which is commendable, but many of the issues discussed later in this decision should have been clarified at that point (Tr. pp. 1-7).

provided the student with "small classes, [an] appropriate curriculum, and standardized testing" (id.). With respect to equitable considerations, the IHO found that the parent appeared to be cooperative and, although she rejected the district's program, it appeared simply that she was seeking an appropriate program and placement for the student (id.). However, based on his finding that the district offered the student a FAPE, the IHO denied the parent's request for tuition reimbursement (id.)

IV. Appeal for State-Level Review

The parent appeals seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parent asserts that the IHO misidentified the August 2012 10-day notice letter as a rejection of the district's proposed program and, consequently, made his decision based only on the April 2012 IEP, ignoring the parent's claims with respect to the appropriateness of the assigned public school site. The parent also alleges that the IHO erred when he failed to give due weight to the testimony of the parent's witnesses that an ICT setting would not be appropriate for the student. Consequently, the parent seeks an order reversing the IHO's decision that the district offered the student a FAPE and directing the district to reimburse her for the costs of the student's tuition at Mary McDowell for the 2012-13 school year.

In an answer, the district responds to the parent's petition by denying the allegations and asserting that the IHO correctly determined that it offered the student a FAPE for the 2012-13 school year. The district also interposes a cross-appeal, seeking to overturn the IHO's determinations that Mary McDowell was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for relief. Countering the parent's argument with regard to the effect of her 10-day notice, the district asserts that the IHO correctly determined that the parent rejected the district's proposed program and placement in August 2012 and that, as a result, the district was not obligated to keep a seat in the proposed classroom available for the student. Furthermore, the district counters the parent's arguments regarding the timeliness of the FNR and asserts that any delay did not result in a denial of FAPE and did not prevent the parent from visiting the assigned public school site. Moreover, the district asserts that the IDEA does not guarantee a parent the right to visit an assigned public school site or to veto a district's efforts to implement an IEP. Therefore, the district asserts that the IHO correctly found that it was not obligated to demonstrate that it could implement the student's IEP at the assigned public school site and that it was only required to establish the appropriateness of the April 2012 IEP. Next, the district asserts that the IHO correctly determined that the April 2012 IEP was appropriate for the student. In particular, the district alleges that the April 2012 CSE's recommendation for ICT services in a general education setting was appropriate for the student.

The district alleges that the IHO erred in finding Mary McDowell to be an appropriate unilateral placement because the full-time special education setting was too restrictive for the student. In addition, the district asserts that Mary McDowell did not provide the student with OT or individual sessions of speech-language therapy and that all students enrolled at Mary McDowell received speech-language therapy as a "special" for one of the three terms and, therefore, it did not constitute specially designed instruction to meet the student's needs. With respect to equitable considerations, the district asserts that the parent never seriously intended to enroll the student in

a public school, as evidenced by her execution of an enrollment contract with Mary McDowell prior to the CSE meeting and the parent's own testimony.

V. Discussion—Scope of the Impartial Hearing

Before reaching the merits in this case, an inquiry must be made regarding which claims were properly before the IHO. The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see, e.g., K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]).

In this instance, a reading of the parent's due process complaint notice suggests that the parent disputed the student's program in a general education classroom with ICT services to the extent that such program would be implemented at the assigned public school site (Parent Ex. A at pp. 1-2). In contrast, there is no clear indication that the parent intended to challenge the inclusion of ICT services in a general education classroom for the student on the IEP, that is, a placement on the continuum of alternative placements and/or related services under the IDEA (id.; see 8 NYCRR 200.6[g]). For example, with regard to her allegation that an ICT classroom was not appropriate for the student, the parent referenced the functional levels of the other individual students in and the size of the particular classroom—allegations that are relevant to a challenge to an assigned public school site, but are not topics covered in an IEP (see Parent Ex. A at pp. 1-2). To further support this reading, I note that the due process complaint notice included much of the content and wording of the parent's October 25, 2012 letter to the district, which, in the chronology of events, followed shortly after the parent's visit to the assigned public school site and described her impressions thereof (compare Parent Ex. A at pp. 1-2, with Parent Ex. K at p. 1).

In addition, the IHO's decision left unaddressed the parent's allegations regarding the lack of CSE composition (membership) and deficiencies in IEP goals. Perhaps the parent intended to abandon these claims during the hearing, or perhaps the district did not put on sufficient evidence.

On appeal, the case has not improved. The district references goals in its answer and cross-appeal, but it is unclear whether they are asking for a finding that they are appropriate after the IHO did not rule on the issue. On the other hand, the district does not appear to address the parent's CSE composition claim at all. Prior to receiving district's relatively detailed cross-appeal challenging the IHO's decision regarding the appropriateness of Mary McDowell and equitable considerations, the parent, in conclusory fashion, argues in two paragraphs that the IHO's decision on those two aspects of the case should be upheld.[2] However, after service of the district's answer and cross-appeal, I have no record of an answer to that appeal filed by the parent. Under these

[2] Due to the fact that the cross-appeal had not been served at the time, those allegations obviously do not comport with State regulations for answering an appeal (8 NYCRR 279.5).

circumstances, the better course is to allow the parties to return to the IHO, who should have the opportunity to address the remaining prong I issues one way or the other.

Accordingly, the matter should be remanded to the IHO for a determination on the merits of the claims set forth in the parent's June 20, 2013 due process complaint notice (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]. As for the points to address on remand, the IHO shall clarify whether the CSE composition (including which member(s) the parent was referencing) and the IEP goal claims continue to be challenged and, if so, address them. Additionally the IHO shall clarify and/or determine whether "ICT placement," as used by the parties and the IHO, refers to the particular classroom at the assigned public school site or a placement on the continuum of special education services and, if the latter, the IHO shall determine whether the issue was properly raised in the parent's due process complaint notice in the first instance (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *8 [Mar. 4, 2014] [citing T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 and noting that "we have interpreted the term educational placement to refer to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the bricks and mortar of the specific school" [internal quotations omitted]).[3]

It is left to the sound discretion of the IHO to determine whether additional evidence or briefing is required in order to make the necessary findings of fact and conclusions of law relative to each of these issues. Furthermore, the IHO may find it appropriate to schedule another prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal should be addressed together at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

After the IHO addresses the parties' remaining FAPE arguments, this course of action will also provide the parties, should they decide to appeal again, an opportunity to reconsider the district's arguments in its cross-appeal that address the related services at Mary McDowell and its restrictiveness in light of the Second Circuit's decision issued yesterday, C.L. v. Scarsdale Union Free Sch. Dist., 2014 WL 928906 (2d Cir. Mar. 11, 2014).

[3] If the IHO determines such claim was not raised in the due process complaint, the parties should explain and the IHO should determine whether the issues nevertheless should be heard because this is a case in which the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).

VI. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the remaining first prong Burlington claims set forth in the parent's June 20, 2013 due process complaint notice.[4] I have considered the parties' remaining contentions and find that it is unnecessary to address them at this time in light of the determinations above.

IT IS ORDERED that the matter be remanded to the IHO to determine the merits of the claims set forth in the parent's June 20, 2013 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the December 2, 2013 decision is unavailable, another IHO shall be appointed in accordance with the rotational selection procedures.

Dated: **Albany, New York**
March 12, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] The IHO adeptly noted the authorities both for and against the parent's right to challenge implementation of a proposed IEP before the student actually attends an assigned public school site. Since his decision, the Second Circuit noted again that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3). The IHO, in his discretion, is not precluded from revisiting the issue if new legal authority arises that provides further guidance.