



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-011

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Law Offices of Regina Skyer & Associates, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2012-13 school year. 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], [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 the present case, the student attended a non-public school from kindergarten through fifth grade (Tr. pp. 138-39). At the impartial hearing, the student's mother testified that after the student's third grade year, testing indicated she required more support than she had previously received and that from third grade through fifth grade the student received tutoring and "support services" for academic difficulties (id.). Upon completion of her fifth grade school year, the student attended Bay Ridge from sixth grade through the completion of twelfth grade following the 2012-13 school year (Tr. pp. 139-40, 181; Parent Exs. D; E; I; see Parent Ex. F).

On March 3, 2011, during the student's tenth grade school year, a New York State certified psychologist (evaluating psychologist) conducted a (triennial) reevaluation which resulted in a March 2011 psychoeducational report (Dist. Ex 3 at p. 1). The student's cognitive abilities were reported to be in the average range of intellectual functioning, and she exhibited weaknesses in reading comprehension and applied math problems (id. at pp. 2, 4). The evaluation report indicated that the student suffered from anxiety and developed self-esteem issues, which were associated with her learning delays and academic performance (id. at pp. 2, 5). The student presented with age-appropriate social skills and concerns (id. at p. 6).

On March 15, 2012, the CSE convened to review the educational needs of the student and to develop the student's IEP for the 2012-13 school year (Dist. Ex. 1 at p. 1; see Tr. pp. 11, 167). Meeting attendees included the student's mother, a special education teacher who also served as the district representative, a district school psychologist, and one of the student's then-current regular education teachers from Bay Ridge, who attended via telephone (Tr. pp. 10, 12, 170-71; Dist. Ex. 1 at p. 12). The attendance page of the March 2012 IEP stated that the attendance of an additional parent member was "waived," although there is no signed waiver in evidence accompanying this notation (Dis. Ex. 1 at p. 12).

At the March 2012 CSE meeting, the CSE determined that the student was eligible for special education and related services as a student with a learning disability (Dist. Ex. 1 at p. 1).¹ In the resultant March 2012 IEP, the CSE recommended the student receive a placement in a general education classroom with Special Education Teacher Support Services ("SETSS") 5 times per week in a separate location, with the related service of counseling one time per week for 30 minutes in a group no larger than 3 (Dist. Ex. 1 at p. 5). The student continued at Bay Ridge Prep for twelfth grade during the 2012-13 school year (Tr. p. 140; Parent Exs. D; E; I).

On April 21, 2012, the parents entered into an enrollment contract with Bay Ridge unilaterally placing the student at Bay Ridge for the 2012-13 school year (Parent Ex. D). By final notice of recommendation (FNR) dated August 10, 2012, the district summarized the special education and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 2). By letter dated August 22, 2012, the parents, through their attorney, gave notice to the district of their rejection of the program recommended in the March 2012 IEP and their intention to unilaterally place the student at Bay Ridge at public expense (Parent Ex. A). In a letter dated August 28, 2012, the parents informed the district that they had received the August 2012 FNR, and had been unable to contact the particular public school site identified in the FNR to schedule a visit, despite several attempts (Parent Ex. H).

In a letter dated September 24, 2012 the district referenced a September 24, 2012 letter from the parents to the district and stated that "[i]n that letter, you indicate that you disagree with the team's recommendations pursuant to an IEP meeting dated 3/15/2012 and request that the CSE reconvene to discuss your child's educational recommendation" (Parent Ex. C).² The district's

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

² The parents contended that they sent a letter to the district dated September 15, 2012, and that the district's September 24, 2012 letter was in response to it (see Parent Ex. B at p. 5). In any event, the hearing record does

letter also stated that "[i]n order for the CSE to address your concerns please advise the CSE if you have any updated materials regarding your child" (*id.*).

A. Due Process Complaint Notice

By due process complaint notice dated May 28, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school years (see Parent Ex. B at pp. 1-5). In particular, the parents asserted that the March 2012 CSE was improperly composed, the CSE predetermined its recommendation, the parents did not participate in the development of the annual goals contained in the March 2012 IEP, the evaluations before the CSE were out-of-date, the CSE failed to conduct a vocational evaluation, the annual goals on the March 2012 IEP were inappropriate, the transition services on the IEP were inappropriate, and the recommendation that the student receive SETSS would not have provided the student with enough support in the classroom (*id.* at pp. 1-4). The parents also raised a number of claims regarding the appropriateness of the particular public school site recommended for the student, and asserted that because the student's unilateral placement at Bay Ridge was appropriate and equitable considerations were in their favor, tuition reimbursement was the appropriate remedy (*id.* at pp. 1-5).

Most relevant to the instant matter is the parents' allegation that on September 15, 2012, they sent a letter to the district indicating their concerns with the program recommended in the March 2012 IEP and requesting a CSE meeting to discuss "an alternate appropriate program" (Parent Ex. B at p. 5). The parents asserted that they received a response from the district in the form of a letter dated September 24, 2012 "asking the parent to provide updated material to the CSE" and listing a particular district staff member as a contact person (*id.*). The parents alleged that they contacted that staff member, that the staff member advised them to "re-send their letter formally rejecting the program and the [CSE] would convene in February or March of 2013," and that the staff member did not inform them "of their right to an immediate CSE Review meeting" (*id.*).

B. Impartial Hearing Officer Decision

On August 21, 2013, the parties proceeded to an impartial hearing, which concluded on November 1, 2013 after four days of proceedings (see Tr. pp. 1-223). In a decision dated December 11, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Bay Ridge was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for reimbursement of the student's tuition costs at Bay Ridge (see IHO Decision at pp. 10-16). In her decision, although the IHO made no findings with respect to the allegations in the due process complaint notice concerning the particular school site identified by the district, she found in favor of the parents with respect to all of their challenges to the March 2012 IEP (see *id.* at pp. 11-15). However, the IHO made no findings of fact or conclusions of law with respect to the parents' allegation that they requested that the CSE reconvene in September 2012 to further discuss the student's recommended program and that such a meeting did not occur (see generally IHO Decision).

not contain a letter from the parents to the district dated either September 15, 2012 or September 24, 2012.

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in concluding that the district failed to offer the student a FAPE. In particular, the district asserts that the IHO erred in finding that the March 2012 CSE was improperly composed, that the parents' participation in the development of the student's IEP was significantly impeded, that the parents did not participate in the creation of the annual goals, that the evaluations before the CSE were inadequate, that the annual goals on the March 2012 IEP were inappropriate, the transition services on the IEP were inappropriate, and that the recommendation that the student receive SETSS would not have provided the student with enough support in the classroom. The district does not contest the IHO's finding that the parents' unilateral placement at Bay Ridge was appropriate, but asserts that equitable considerations did not favor reimbursement because the parents "never seriously considered" placing the student in a public school, pointing to factors in the hearing record supporting their contention including that the parents did not respond to the district's September 2012 request to provide the CSE with additional information "which could have formed the basis for a new CSE meeting" (Pet. ¶¶ 40-47).

In an answer, the parents respond to the district's allegations and argue in favor of the IHO's determinations that the district failed to offer the student a FAPE, that Bay Ridge was appropriate, and that equitable considerations weighed in favor of the parents' requested relief.

V. Discussion

A. Unaddressed Claims

In developing the student's March 2012 IEP the CSE considered the following: a March 2011 psychoeducational evaluation conducted by the district, the student's grades from Bay Ridge for the 2011-12 school year, and input from the student's mother and a Bay Ridge English teacher (Dist. Ex. 1 at pp. 1-2; see Tr. pp. 21-22; Dist. Ex. 3). As noted above, the March 2011 psychoeducational evaluation indicated that the student's intellectual functioning was in the average range but that the student demonstrated academic delays including in math fluency, reading fluency, and reading comprehension (Dist. Ex. 3 at pp. 3-5). While the psychoeducational evaluation indicated that the student demonstrated age-appropriate social skills, it also noted that she exhibited some anxiety with respect to her academic performance (id. at p. 6).

The IEP developed by the March 2012 CSE reflected the grade equivalent scores attained by the student on achievement testing conducted as part of the March 2011 psychoeducational evaluation (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at p. 4).³ Although the student's grade equivalent scores reflected academic delays, the student's report card grades, memorialized in the IEP, indicated that the student was doing well academically at the private school (Dist. Ex. 1 at p. 1). The IEP indicated that, based on parent report, the student received letter grades of "A" in AP calculus, honors history, and English, and letter grades of "B" in French and science on her then-

³ Although the student was in tenth grade when the March 2011 psychoeducational evaluation was conducted, the March 2012 IEP (while correctly noting the date of the evaluation) mistakenly states that the student was in ninth grade at the time (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 1; see Tr. pp. 21-23).

current report card (*id.*).⁴ The IEP further indicated that the student was in a mainstream program that was not modified and that she was "doing very well" (*id.*).⁵ The hearing record shows that the student passed Regents examinations, met the requirements to receive a high school Regents diploma, and is currently attending college (Tr. pp. 89, 93, 158-59, 213-14). The present levels of performance contained in the IEP highlighted writing skills, vocabulary, and expanding on details as areas being addressed; however, the student's math and reading skills were not described, despite her delays in those areas (Dist. Ex. 1 at p. 1-2).⁶ The student's age-appropriate social skills and academic-related anxiety were also noted in the IEP (Dist. Ex. 1 at p. 2).

The parties point to conflicting information in the hearing record regarding the impact on the parents' opportunity to meaningfully participate in the development of the student's educational program, of the composition of the CSE, the length and content of the discussion at the CSE, and the development of annual goals after the meeting (compare Pet. ¶¶ 26-30, 32, 35; Tr. pp. 9-14, 17-20, 22-24, 167-74, 177, 184-85, and Dist. Ex. 2 at p. 12, with Answer ¶¶ 7, 13-14, 16, 29-30, 32, 35; Tr. pp. 24, 167-69, 172-74, 185-86). Similarly, the parties point to conflicting information, and draw different conclusions from the same information in the hearing record, regarding the substantive adequacy of the IEP, most directly with regard to the adequacy of the annual goals and the appropriateness of the recommendation that the student receive SETSS (compare Pet. ¶¶ 13, 31, 33-34, 36-38; Tr. pp. 13-19, 24, 46-48, 63-65, 76, 172; Parent Exs. G at p. 1; J at p. 1; Dist. Exs. 1 at pp. 1-7; 3, with Answer ¶¶ 13, 30, 33, 36, 38; Tr. pp. 18, 21-24, 65-67, 167-75, 178, 184; Dist. Exs. 1; 3).

While there is some basis in the hearing record to support both the parents' contention that the IHO correctly held that the district failed to offer the student a FAPE, as well as the district's contention that it offered the student a FAPE, the hearing record does not appear to contain adequate information upon which to make a finding concerning the parents' claim that they requested the CSE reconvene in September 2012 to further discuss the student's recommended program, and that such a meeting did not occur.

Assuming for the sake of argument that I drew all inferences in favor of the district and concluded that the IHO incorrectly determined the at the district failed to offer the student a FAPE (which I have not done), this will nevertheless fail to resolve the parents challenge to whether the district offered the student a FAPE because the parents also advanced the claim that they requested the CSE to reconvene in both their due process complaint notice and in their post-hearing brief

⁴ Although a psychology class was indicated on the March 2012 IEP, a then-current grade was not listed on the IEP (Dist. Ex. 1 at p. 1).

⁵ Although the IEP stated that the student was in a mainstream program and that her curriculum was not modified, the hearing record shows that the student was enrolled in the "Achieve" program at Bay Ridge (Tr. pp. 140, 195; see Tr. pp. 63, 65; Parent Ex. D at p. 1). Bay Ridge described the Achieve program as "designed to allow students with learning differences to be integrated into mainstream classes, to the extent possible, with special education supports, curriculum, and workload modifications and accommodations" (Parent Ex. F at p. 1).

⁶ At the time the March 2012 IEP was developed the student was in 11th grade (Dist. Ex. 1 at p. 1). The summary page of the IEP indicated that the student performed at a 9th grade instructional/functional level for reading and a 10th grade instructional/functional level for math (*id.* at p. 10). This suggests that the student continued to exhibit delays in math and reading.

submitted to the IHO (Parent Ex. B at p. 5; IHO Ex. V at p. 13).⁷ It is not clear from the hearing record, or the IHO's decision, why the IHO did not address the parents' claim that they requested that the CSE reconvene (IHO Decision at p. 5; Tr. p. 149; Parent Exs. B at p. 5; C; IHO Ex. V at p. 13;).

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, the United States Department of Education has indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). State regulations further provide that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]). Aside from having the potential of being an *per se* denial of a FAPE in its own right, the outcome of the parents' claim regarding the district's failure to reconvene the CSE may have a bearing on the analysis of the other considerations raised in this matter (see C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *9 [2d Cir. Mar. 4, 2014] [indicating that "the presence or absence of procedural violations informs our determination of substantive adequacy]).

Accordingly, and notwithstanding the district's appeal of the IHO's decision, the matter is remanded to the IHO for a determination on the merits of the claim set forth in the parents' May 28, 2013 due process complaint notice regarding the district's failure to reconvene the CSE in response to the parents' apparent request, which has yet to be addressed by the IHO (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], quoting 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]). The hearing record does not contain a copy of the September 15, 2012 letter from the parents to the CSE that the parents allege requested the CSE to reconvene or any testimony explaining its contents, nor does the record contain any evidence that the district provided the parents with prior written notice of a determination that a CSE meeting was not required absent new information about the student and providing its rationale therefor. Accordingly, the hearing record contains inadequate evidence to determine whether the parents requested that the CSE reconvene or the district properly determined that such a reconvene was unnecessary. Nonetheless, because the parties may be permitted to offer stipulations to some or all of these facts to the IHO, it is left to the sound discretion of the IHO to

⁷ The parents continue to assert facts pertinent to this claim in their answer, albeit with respect to equitable considerations (see Answer ¶ 44).

determine the extent to which additional evidence is required in order to make the necessary findings of fact and of law relative to the unaddressed issue. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of the remaining points in the IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed 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]).

Lastly, upon remand to the IHO, if the district continues to hold the position that it was not necessary to reconvene the CSE in response to the parents' request, it should be prepared to provide the IHO with guidance and citation to relevant legal authority concerning when a CSE must reconvene at the request of the parents.⁸

VI. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the parents' claim—set forth in their May 28, 2013 due process complaint notice—that has yet to be addressed. 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 unaddressed claim set forth in the parents' May 28, 2013 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the December 11, 2013 decision is unavailable, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

⁸ Neither the district nor the parents have provided any authority for their respective positions on this issue. I have outlined several potentially relevant authorities; however, beginning with the district, the parties have the obligation to make it clear to the IHO whether they are relying on authority that is statutory, regulatory, judicial, or administrative guidance, or some combination thereof.