The University of the State of New York

The State Education Department
State Review Officer
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No. 14-049

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 Department of Education

Appearances:
Law Office of Regina Skyer & Associates, attorneys for petitioners, Abbie Smith, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 Standing Tall School (Standing Tall) for the 2013-14 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]).[1]

III. Facts and Procedural History

I was appointed to conduct this review on November 5, 2014. 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. Briefly, the Committee on Special Education (CSE) convened on February 7, 2013 to formulate the student's individualized education program (IEP) for the 2013-14 school year (see generally Parent Ex. D). The parents disagreed with the recommendations contained in the February 2013 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2013-14 school year and, as a result, notified the district of their intent to unilaterally place the student at Standing Tall (see Parent Ex. A at pp. 1-2). In a due process complaint notice dated July 3, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. B at p. 2).

An impartial hearing convened on August 2, 2013 and concluded on January 15, 2014 after four days of proceedings (see Tr. pp. 1-299). In a decision dated March 3, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at p. 9). In addition, the IHO made alternative findings that Standing Tall was an appropriate unilateral placement but that equitable considerations did not weigh in favor of the parents' request for relief (id. at p. 12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer and cross-appeal is also presumed and will not be recited here in detail. Briefly, the parents assert that, contrary to the IHO's findings, the timing of the February 2013 IEP was such that it could only have been implemented during a portion of the 2013-14 school year, which was inadequate; the recommended 12:1+4 special class was inappropriate for the student; and the assigned public school site was inappropriate for the student. In addition, the parents assert that the IHO erred in finding that a multisensory approach was implicit in the recommended program, that the 1:1 nurse could have assumed the role of a paraprofessional, and that the provision for the student's use of the Dynavox on the IEP was sufficient. Finally, the parents assert that the IHO erred in her determination that equitable considerations did not support the parents' request for relief. In an answer, the district responds to

[1] The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

the parents' petition, denying the substantive allegations raised therein, and argues that various issues raised by the parents in the petition were not included in their due process complaint notice.[2]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New 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.

[2] The district submits additional documentary evidence with its answer consisting of the student's IEP developed on April 1, 2014 (see Answer Ex. A). In this instance, while not available at the time of the impartial hearing, the exhibit is not necessary to render a decision and, accordingly, will not be considered (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

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, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district did not deny the student a FAPE for the 2013-14 school year (see IHO Decision at pp. 10-12). The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2013-14 school year, and applied that standard to the facts at hand (id. at pp. 3-12).[3] The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

In particular, a review of the hearing record shows that, contrary to the parents' contention, the recommendations in the February 2013 IEP were consistent with the evaluative information

[3] While it does not alter the final determination in this instance, review of the parents' due process complaint notice and the IHO's decision does show that the IHO addressed some issues outside of the scope of the impartial hearing (IHO Decision at pp. 10-12; Parent Ex. B at pp. 6-7; see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see also R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]).

before the CSE.[4] State regulation indicates that a 12:1+4 special class placement is intended for "students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (8 NYCRR 200.6[h][4][iii]). Evaluative information considered by the February 2013 CSE revealed that the student exhibited multiple deficits associated with spastic cerebral palsy, microcephaly, dystonia, gastrointestinal disorder, bilateral congenital foot deformities, bilateral congenital dislocated hips, right eye amblioyopia, right facial palsy and global developmental delays (Dist. Ex. 9 at p. 1). The evaluative information further indicates that student was non-verbal, non-ambulatory, unable to eat on his own requiring a G-tube, and was significantly cognitively and physically impaired (Dist Exs. 9 at p. 1; 10 at p. 1; 16 at p. 1).[5] Based on administration of the Vineland Adaptive Behaviors Scales, Second Edition (Vineland-II), the psychologist who completed the November 2012 psychoeducational evaluation report concluded that the student was "functioning at a [l]ow adaptive level in all areas" (Dist. Ex. 9 at p. 2).

The February 2013 IEP identified supports for the student's management needs (assistance with all aspects of adaptive living skills, access to augmentative communication, G-tube monitoring and venting, drooling monitoring, change in position on at least an hourly basis to assure calm and maximum participation, and modeling for all aspects of academic and social functioning) and included annual goals and short-term objectives, some of which focused primarily on the student's habilitation and treatment (e.g., development of independence and self-help skills by maintaining a grip on a hairbrush or toothbrush and maintenance of his head in midline during feeding and while lying) (Parent Ex. D at pp. 2, 4-13). Thus, the student's needs were consistent with the regulatory definition of a 12:1+4 special class placement, as set forth above, and the CSE's recommendation was appropriate.

The parent cites information in the November 2012 psychoeducational evaluation report that, based on the student's medical, physical, and developmental challenges, the student continued to "need . . . individualized instruction with the use of a multisensory approach to enhance his chances of benefitting from the educational process" (Dist. Ex. 9 at p. 3). However, consistent with the evaluation report, the February 2013 IEP recommended the use of various multisensory strategies to aid the student in achieving his annual goals, including verbal and visual support and modeling with visual/auditory/tactile/kinesthetic strategies, along with teacher assistance (Parent

[4] The hearing record indicates that the February 2013 CSE relied upon the following documents in developing the student's IEP: an August 2010 private neurodevelopmental evaluation; information from the student's board of cooperative educational services (BOCES) placement from the 2011-12 school year, including an October 2011 psychological evaluation report, a November 2011 and a March 2012 student functioning report, and a November 2011 social history report; the student's IEP for the 2012-13 school year; evaluations and reports completed by the district, including a November 2012 psychoeducational evaluation report, November 2012 physical therapy and speech-language evaluation reports, a November 2012 social history report, and a December 2012 classroom observation report; and from Standing Tall, a December 2012 teacher report and draft goals (Tr. pp. 33-34, 37-38, 42, 45, 51; Parent Ex. D at pp. 1-2; see generally Dist. Exs. 2-6; 8-13; 16; Parent Ex. C). Review of the February 2013 IEP also indicates that the CSE reviewed medical documentation, as well as an occupational therapy evaluation report, which were not included in the hearing record (see Tr. p. 33-34, 38; Parent Ex. D at p. 2); however, two copies of a November 2012 physical therapy evaluation report were included in the hearing record (see Dist. Exs. 8; 16).

[5] The school psychologist who completed the November 2012 psychoeducational evaluation report noted that, prior to moving into the district, the student attended a 10:1+4 special class in a BOCES placement with related services and full-time 1:1 skilled nursing services (Dist. Ex. 9 at p. 1; see Parent Ex. C at pp. 1, 10-12).

Ex. D at pp. 4-13; see Tr. pp. 103-04). Based on the foregoing, the hearing record shows that the 12:1+4 special class placement with related services, full-time 1:1 nursing services, and annual goals targeted to address the student's communication, functional language, fine motor, academic, PT, and feeding needs, among others, was appropriate for the student (see id. at pp. 1-2, 4-15).

Moreover, as to the parents claims relating to the assigned public school site, including that the student would not have been functionally grouped, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find the parents' challenges to the assigned school to be without merit. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. A at pp. 1–2), the parents cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"']; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

In sum, the evidence in the hearing record supports the IHO's final determination that the district offered the student a FAPE for the 2013–14 school year. On the basis of this determination, it is not necessary to examine whether equitable considerations support the parents' request for tuition costs and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). The parties' remaining contentions have been considered and need not be examined in light of the determinations herein.

THE APPEAL IS DISMISSED.

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

THOMAS J. REILLY
STATE REVIEW OFFICER