The University of the State of New York

The State Education Department
State Review Officer
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No. 14-104

Application of the BOARD OF EDUCATION OF THE GREENE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hogan, Sarzynski, Lynch, DeWind & Gregory, LLP, attorneys for petitioner, Wendy K. DeWind, Esq., of counsel

Law Office of Ronald R. Benjamin, attorneys for respondents, Ronald R. Benjamin, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son was not appropriate and ordered it to, among other things, develop an IEP and "acknowledge the [student's] need" for a particular type of residential placement. The appeal must be sustained in part.

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

This matter involves a student who, at the time that the parents filed their amended due process complaint notice, was 16 years old (IHO Ex. V at p. 1; Dist. Ex. 13 at p. 1). The student, who was adopted by his parents in 2000 at the age of three after "abuse and neglect by his biological parents," has a history including malnourishment, stunted growth, failure to thrive, impulsivity, suicidal behavior, elopement, unfounded child abuse allegations against his adoptive parents, significant trauma, and eating disturbances (Dist. Exs. 27 at pp. 1-2; 35 at pp. 1-2).

Although the student demonstrates many academic and language skills in the average or low-average range, he demonstrates difficulties with math calculation and problem solving skills, and becomes outwardly frustrated if he does not understand a concept quickly or performs poorly on an assessment (Dist. Ex. 13 at pp. 3-5). The student attended public school and received special education services in his school district of residence—a school district other than the district at issue here—until his eighth grade year (Dist. Ex. 14 at pp 1-2).

In August 2012 the student was admitted to the child and adolescent unit of a health center operated by the New York State Office of Mental Health due to impulsivity and suicidal behavior (Dist. Ex. 27 at p. 1). A psychological assessment was completed on October 22, 2012 resulting in a recommendation that, among other things, the student be placed in a residential treatment facility for children and youth (RTF) (id. at p. 11).[1] As a result, the student was admitted to an RTF located in respondent's district (the in-district RTF) in October 2012, and the facility developed a comprehensive treatment plan to address the student's clinical symptoms, which were "interrelated in a very complex manner" stemming from the student's diagnoses of a rumination disorder, an eating disorder not otherwise specified (NOS), a parent-child relational problem, a bipolar disorder NOS, hypopituitary dwarfism, and "problems with primary support groups" identified in the plan (Dist. Ex. 35; see Tr. pp. 149, 204).

The record reflects that when the student was placed at the in-district RTF he initially attended a private education day program affiliated with that RTF, but that he began attending a public high school in respondent's district in January 2013 (Tr. pp. 204-205, 367; Dist. Ex. 14 at p. 2). In March 2013, the district conducted an evaluation of the student that included an academic achievement assessment (Dist. Exs. 8; 14 at pp. 2),[2] and on March 26, 2013, a CSE convened to develop an IEP for him (Dist. Exs. 9; 12; 13).[3] Finding the student eligible for special education as a student with an other health-impairment, the March 2013 CSE recommended placement in a district public high school with resource room services and program modifications and accommodations (Dist. Ex. 13 at pp. 9-10).[4] The student was educated pursuant to this March

[1] The Mental Hygiene Law defines a residential treatment facility for children and youth as an inpatient psychiatric facility which provides active treatment under the direction of a physician for individuals who are under twenty-one years of age (Mental Hygiene Law § 1.03[33]). The commissioner of the Department of Mental Hygiene may authorize the operation of residential treatment facilities for children and youth and prescribe regulations governing their operation (Mental Hygiene Law § 31.26).

[2] The district's March 2013 psychological and educational evaluation did not include assessments of the student's cognitive ability or his social/emotional needs, but reflected the results of a cognitive assessment conducted in 2012 (see Dist. Exs. 14 at p. 2; 27 at pp. 3-4).

[3] The district's responsibility for developing the student's IEP is not contested in this matter and is consistent with guidance issued by the New York State Education Department (see "Education Responsibilities for School-Age Children in Residential Care," at p. 7, Office for Special Educ. Servs. [Jan. 2000], available at http://www.p12.nysed.gov/specialed/publications/EducResponsSchoolAgeResidence.pdf).

[4] The student's classification as a student with an other health-impairment was in flux during the time period at issue in this proceeding. The student was initially classified by a CSE as having an other health-impairment; however, the hearing record shows that a subsequent CSE considered classifying the student as a student with an emotional disturbance (Tr. pp. 114-15; see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]; see also 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]). In any event the student's eligibility classification under the March 2013 IEP is not at issue in this proceeding.

2013 IEP from March 2013 through January 2014, when the CSE met at the parents' request to consider changing the student's classification and consider a recommendation that the student attend an out-of-state residential program (see Tr. pp. 114-15, 589-90, 602).[5] The CSE did not reach a consensus regarding the student's program and no IEP resulted from this meeting (Tr. pp. 114-15, 145-46). However, the CSE met again in February 2014 and reviewed additional information from the in-district RTF, but again did not make a determination regarding a recommended placement and did not develop an IEP (Tr. p. 117-18).

The record indicates that beginning in approximately December 2013, the in-district RTF began a process to have the student discharged from its facility (Tr. pp. 229, 366-67, 705-06; Dist. Exs. 47 at p. 4; 53 at p. 1-2). The parents opposed this proposed discharge and contended that the student was not ready to be placed in a setting with less intense therapy and supervision options (Dist. Ex. 53 at pp. 1-2). The parents opined that the student required a residential placement that could address his psychological needs, and that the student should remain in a residential treatment facility until a transition to a more appropriate residential program could be accomplished (id.; see Dist. Exs. 55 at p. 1; 57 at pp. 1-2).

A. Amended Due Process Complaint Notice

The parents initiated this proceeding by filing a due process complaint notice on February 12, 2014 (IHO Ex. I). By amended due process complaint notice dated February 21, 2014, the parents requested an impartial hearing and alleged that the student required a residential placement that could address the student's needs related to his diagnosis of a reactive attachment disorder and an eating disorder (IHO Ex. V; see IHO Exs. VI; X).[6] In particular, and for relief, the parents contended that the CSE should have placed the student at CALO Institute (CALO), an out-of-state residential treatment facility that specializes in treating reactive attachment disorders (IHO Ex. V).[7]

B. Impartial Hearing Officer Decision

On March 31, 2014, an impartial hearing was convened and after four days of proceedings, concluded on May 6, 2014 (Tr. pp. 1-729). In a decision dated June 13, 2014, an IHO found, as pertinent to this matter, that the district failed to offer the student a FAPE and ordered the district to convene a CSE and develop an IEP for the student that reflected the IHO's findings that the student required a residential placement, other than the in-district RTF, with expertise to address

[5] During the time period between March 2013 and January 2014, the student resided at the RTF and attended the district public high school (Tr. pp. 107, 460-65; see generally Dist. Exs. 19; 35-36). The hearing record contains a large amount of evidence concerning the student's behaviors, response to treatment, and progress, or lack thereof, at both the district high school and the in-district RTF during this time period (see generally Dist. Exs. 17; 19-26; 28-30; 35-36; 57 at pp. 6-8).

[6] The district challenged the sufficiency of the parents' February 12, 2014 due process complaint notice and, on February 24, 2014, the IHO in this matter found that this notice was insufficient on its face (IHO Ex. IV). The IHO, however, granted the parents leave to amend their due process complainant notice which ultimately resulted in the filing of the amended due process complaint notice described above.

[7] The record reflects that CALO originally stood for Change Academy Lake of the Ozarks, but is now known just as CALO (Tr. p 332).

the student's reactive attachment disorder (IHO Decision at pp. 30-39). In reaching her conclusion, the IHO determined that the district's failure to produce an IEP after the January and February 2014 CSE meetings denied the student a FAPE, that the district failed to adequately assess the student's special education needs and instead relied upon the in-district RTF for its placement recommendation, and that the March 2013 IEP failed to offer the student a FAPE in that it did not adequately address the student's social/emotional and behavioral needs (id. at pp. 30, 33-36). The IHO also determined that the hearing record demonstrated that the student required a residential placement that could address the student's diagnosis with a reactive attachment disorder, and credited the testimony and documentary evidence obtained in relation to two different evaluations (id. at p. 38). However, the IHO found that as of the date of her decision, the student had not yet been discharged from the in-district RTF, and that she did not have the authority to have the student discharged from this facility which was "a necessary prerequisite to placement elsewhere by any appropriate authority" (id. at pp. 36-38). In addition, the IHO found that there was insufficient evidence concerning the appropriateness of CALO, or the student's acceptance therein (id. at p. 38). Accordingly, and in light of "the small window of opportunity remaining to deal with and ameliorate this child's difficulties," the IHO ordered the district to, among other things, convene a CSE, develop an IEP, and "acknowledge the [student's] need for a residential placement other than the [in-district] RTF" (id. at pp. 38-39).

IV. Appeal for State-Level Review

The district appeals. In its appeal the district contends, among other things, that the IHO erred in finding that the district failed to offer the student a FAPE, erred in finding that the district had the authority to place the student in another residential facility when the student was placed at the in-district RTF by the Office of Mental Health, and erred in ordering the district to consider residential placement options for the student. The district also contends that the student has been discharged from the in-district RTF, and that it is therefore no longer responsible for the student's education. In support of this latter contention, the district submits additional evidence in the form of a New York State Supreme Court decision and requests that I consider it.

In an answer the parents respond to the district's petition by denying some of the material allegations raised by the district. In addition, the parents assert that the IHO correctly found that the district failed to offer the student a FAPE and correctly ordered the district to convene a CSE and develop an IEP that reflected the IHO's findings. The parents, therefore, request that the IHO's order be affirmed. The parents also request that I decline to consider the additional evidence submitted by the district with its petition.[8]

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

[8] The answer was not verified as required by State regulation (8 NYCRR 279.7); however, as the district does not object I have considered it and remind counsel for the parents to conform with State regulations governing practice before the Office of State Review in the future.

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. 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).

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

A. Preliminary Matters—Additional Evidence

The district submits a decision of the Supreme Court as additional evidence (Pet. Ex. 2), which the parents oppose, arguing that the decision is not relevant to this matter (Answer ¶ 7). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; see also 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]). The decision indicates that in March 2014 the Mental Hygiene Legal Service initiated an action in Supreme Court for a determination as to the suitability and willingness of the student to remain at the in-district RTF (Pet. Ex. 2 at p. 1). A decision in that matter—which ordered that the student be discharged from the RTF on or before July 11, 2014 pursuant to Mental Hygiene Law § 9.25(c)—was issued on July 3, 2014, after the IHO's decision under review herein (id. at p. 3). In this case, the additional evidence proffered by

the district was not available at the time of the impartial hearing and is necessary in order for a fully informed decision in this matter to be rendered. I therefore accept the proffered evidence annexed to the district's petition.

B. Availability of a Residential Placement

As noted above, one of the district's arguments on appeal is that the IHO erred in ordering the district to convene a CSE and develop an IEP for the student that reflected the IHO's findings that the student required a residential placement other than the in-district RTF. For the reasons set forth below, I agree and find that the IHO's order, to the extent that it required the CSE to develop an IEP that included a residential placement, must be reversed.

Typically, a board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). In this case, however, the student is not a resident of respondent's district. Rather, the record reflects (and it is not disputed) that the student was attending respondent's schools by virtue of his placement at the in-district RTF, and that the district's only connection to this student (and the source of its obligations to him) was his placement at this RTF. Under the Education Law, an RTF falls under the definition of a "child care institution" (Educ. Law § 4001[2]), and children between the ages of five and twenty-one who reside in a child care institution, and who have not graduated from high school, are "entitled to receive a free and appropriate education in the least restrictive environment" (id. at § 4002[1]). Importantly, the statute provides that each child "shall be provided suitable educational services in the least restrictive environment which can be provided by one of the day programs listed below," and then goes on to list a spectrum of potential day program placements available for such children (id. at § 4002[2] [emphasis added]). According to the statute, possible day programs include a program in the public schools of the district where the child care institution is located or a neighboring district, a program of the board of cooperative education services (BOCES) of the district where the institution is located, a special act school district, an approved private school operated by the child care institution, a private non-residential school approved by the state education department, a state or state-supported school, contracts with the state university at Binghamton for non-residential special services or programs at the children's unit for treatment and evaluation which have been approved by the Commissioner of Education, related services, hospital instruction, or other programs approved by the Commissioner (id. at § 4002[2][a-i]).

There is no dispute in this matter that while the student remained at the in-district RTF, the student was entitled to attend the district's schools (Pet. ¶¶ 7-9; Answer ¶ 1). In addition, the record reflects that while the student was at the RTF, the district assumed the responsibility for developing his IEP. However, the district contends, and I concur, that by virtue of the student's placement at an RTF, he was entitled to a placement in a day program pursuant to Education Law § 4002. Not only is this consistent with the clear language of the statute, but the statutory scheme itself logically entitles a student to a placement in a day program when he or she has already been placed in a residential setting by a third party (in this case the student's parents in conjunction with the Office

of Mental Health).[9] This is also consistent with guidance provided to the district by the New York State Education Department's Special Education Quality Assurance Nondistrict Unit on March 24, 2014 (IHO Ex. XVI at p. 2). Thus, the IHO's order that the district develop an IEP and essentially consider alternative residential placements (including other RTFs) was error and must be reversed.[10]

C. Provision of FAPE

Having found that the IHO's order must be reversed to the extent it ordered the district to consider a residential placement other than the in-district RTF for the student, the question regarding whether the district provided the student with a FAPE remains. In this regard the IHO essentially found that the student was denied a FAPE both because an IEP was not developed for the student in March 2014 (IHO Dec. at p. 30), and because the March 2013 IEP was developed without the district having adequately assessed the student's special education needs (id. at p. 39). I need not address the IHO's latter finding at this time since the only relief sought by the parents is essentially a prospective residential placement (thus making consideration of the sufficiency of the March 2013 IEP an academic issue), and it is clear from the impartial hearing record that the CSE did not develop an IEP for the student after its January or February 2014 CSE meetings (Tr. pp. 114-18, 145-46; see IHO Ex. XXI at p. 1). According to its own terms, the March 2013 IEP went into effect on March 26, 2013 and the IEP would require an annual review within one year, or before March 26, 2014 (Dist. Ex. 13 at p. 1). Accordingly, I agree with the IHO that the student was denied a FAPE by the failure of the CSE to develop an IEP for the student In March 2014.[11]

Given the facts of this case, I would normally remand this matter back to the CSE to develop an appropriate IEP for the student. However, complicating matters is that the district contends that the student has been discharged from the in-district RTF and is no longer in the district. To the extent that this is correct, this matter would be moot and a remand would be

[9] Notably, the New York State Mental Hygiene Law limits admissions into residential treatment facilities to people who are "certified as suitable for such admission" by a "pre-admission certification committee" designated by the Commissioner of Mental Health (Mental Hygiene Law § 9.51[c], [d][3]; see also 14 NYCRR 583.5–583.9; 584.7–584.8).

[10] As an aside, applications for admission to RTFs may only be made by certain entities and/or individuals prescribed by regulation (see 14 NYCRR 583.9). Accordingly, even if the district could have considered other residential placements for the student, it is not clear how, if at all, the District could have considered other RTFs for the student.

[11] The district contends that no IEP was generated by its CSE because the parents requested a due process hearing immediately after the February 2014 CSE meeting (Pet. ¶ 35). While the record reflects that the parents' original due process complaint notice is dated the same day as the February 2014 CSE meeting was held (IHO Exs. I; XXII at p. 4), and further while I understand that there was a dispute between the parents and the district concerning whether the student required a residential placement (and in particular a placement at CALO), these reasons alone are not sufficient to justify not developing an IEP for the student. The district is reminded that, regardless of the actions taken by the parents, the failure to develop an IEP for a student who is entitled to one is a sufficient basis on which to conclude that the school district did not offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer, 546 U.S. at 51; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 363; Application of a Student with a Disability, Appeal No. 12-001; Application of the Bd. of Educ., Appeal No. 11-142; Application of a Child with a Disability, Appeal No. 06-030; Applications of the Board of Educ. and a Child with a Disability, Appeal Nos. 00-091 and 01-018).

unnecessary. However, while the district submits a New York State Supreme Court decision indicating that the student has, in fact, been discharged from the in-district RTF (see Pet. Ex. 2), the parents deny the district's allegations, and the order itself does not specify where the student is currently placed. Rather, it indicates that a "Single Point of Access (SPOA) Committee" concluded that a residential treatment facility was no longer an appropriate placement for the student, and that it approved "access to a Community Residence" where a "slot is currently being held for [the student]" (id. at pp. 2-3). The order does not identify the location of the community residence, nor do the parties indicate such in their pleadings on appeal herein. Nor is it clear from the order whether the student is, in fact, in a community residence at this time. Accordingly, I cannot tell from the record before me whether the district may continue to be obligated to the student by virtue of a residential placement in respondent's district, and am unable to dismiss the matter as moot for this reason. Accordingly, I will remand this matter to the district for further consideration consistent with my order below.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's Decision and order dated June 13, 2014 is reversed to the extent that it ordered the district to consider a residential placement other than the in-district RTF for the student; and

IT IS FURTHER ORDERED that the matter be remanded to the district's CSE to determine if the district retains programmatic responsibility for the student's education consistent with this decision; and

IT IS FURTHER ORDERED that if the district's CSE determines that it retains programmatic responsibility, the CSE will develop an appropriate IEP for the student within 15 days of this order.

Dated: **Albany, New York**
August 15, 2014

HOWARD BEYER
STATE REVIEW OFFICER