The University of the State of New York

The State Education Department
State Review Officer
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No. 14-134

Application of a STUDENT WITH A DISABILITY, by her parents, 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 Lauren A. Baum, PC, attorneys for petitioners, Richard A. Liese, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Cooke Center Academy (Cooke) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it was responsible for the cost of providing a full-time registered nurse to the student during the school day at Cooke and during transportation to and from Cooke. The appeal must be dismissed. The cross-appeal must be sustained.

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*]). 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]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration of the period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 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 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

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and they will not be recited at length here.[1] The CSE convened on January 5, 2012, to develop the student's IEP for the 2012-13 school year (see Dist. Ex. 1). The parents disagreed with the recommendations contained in the January 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at Cooke (see Dist. Ex. 2; Parent Ex. C). In a due process complaint notice, dated March 20, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).

An impartial hearing convened on November 1, 2013 and concluded on May 16, 2014 after two days of proceedings (Tr. pp. 7-402).[2] In a decision dated July 17, 2014, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2012-13 school year, and that equitable considerations did not weigh in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 12-13). However, finding that the district "recognized the need of the student to be furnished with a full-time nurse throughout the day as well as on the bus," the IHO, notwithstanding the determination that the district offered the student

[1] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

[2] A prehearing conference was held on May 17, 2013 (Tr. pp. 1-6).

a FAPE, nevertheless ordered the district to fund the costs of the services of a full-time nurse to monitor the student during the school day and during school-related transportation as "an equitable remedy" (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues presented for review on appeal in the parent's petition for review and the district's answer and cross-appeal is presumed and will not be recited here. The parties' claims on appeal essentially distill to whether the January 2012 CSE's recommendation for a 12:1+1 special class in a specialized school was appropriate for the student. The district also alleges that, despite holding that the district offered the student a FAPE, the IHO erred in finding that equitable considerations required the district to reimburse the parents for the cost of nursing services.

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. 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]).

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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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 decision, correctly reached the conclusion that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 8-14). 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 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 2-14). 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, with the exception set forth below.

I agree with the IHO that the evidence does not support the parent's claims relative to the development of the January 2012 IEP. The hearing record reflects that the January 2012 CSE relied primarily on a December 2011 Cooke progress report,[3] however the CSE also considered and the January 2012 IEP incorporated information derived from a number of sources including the student's physician, previous evaluations, and the members of the January 2012 CSE (Tr. pp. 48-49, 57-58; see Dist. Exs. 1; 3; 5-7; Supp. Ex. 1). The record also reflects that the student's medical condition was considered by the CSE and the January 2012 IEP included a recommendation for a 1:1 nurse to monitor the student's medical needs during the school day and during school-related transportation (Dist. Ex. 1 at pp. 2, 10). The January 2012 IEP also reflected information contained in a September 2011 comprehensive psychological evaluation (compare Dist. Ex. 3 at pp. 2, 4 with Dist. Ex. 1 at p. 1).

The IHO also found that the district's failure to conduct a vocational assessment of the student was a procedural violation that did not rise to the level of a denial of FAPE because the information provided by Cooke was the most current available to the January 2012 CSE and was sufficient to identify the student's adaptive living skills needs and overall vocational abilities (IHO Decision at pp. 12-13). The record reflects that the January 2012 CSE incorporated the Cooke postsecondary goals and coordinated set of transition activities into the student's January 2012 IEP, which were designed to facilitate the student's movement from school to post-school activities (Dist. Ex. 1 at pp. 3-4, 11-12).

With regard to the appropriateness of the recommended program, the IHO found that the student's annual goals were not vague and addressed the student's needs (IHO Decision at pp. 9-10). The record indicates that the student was reportedly reading at a second grade level, her social skills were at a third grade level, and her math skills were at a pre-k level (Tr. pp. 31-32). In addition, the student had difficulty with balance, basic self-care and conversation skills (Tr. p. 39). To address those deficiencies the student's January 2012 IEP contained approximately 10 annual goals and 33 short term objectives to address the student's needs in the areas of independent self-care skills, physical endurance, coping and frustration tolerance, balance and motor planning, organization and hand writing, functional reading skills (e.g. reading want ads, filling out job applications), conversation skills, and basic math skills (Tr. p. 34; Dist. Ex. 1 at pp. 4-8). In addition, a review of the annual goals reveals that, contrary to the parent's contention, all of the annual goals included the required evaluative criteria (i.e., 60 percent accuracy, three out of five trials), evaluation procedures (i.e., teacher observation, checklists, teacher-made materials), and schedules to be used to measure progress (i.e., three times per year, one time per quarter) (Dist. Ex. 1 at pp. 4-8). The record further reflects that the goals were discussed during the January 2012 CSE meeting (Tr. pp. 36-37). The parent acknowledged that she participated in the discussion, did not disagree with the goals that were developed, and conceded that the goals were taken from Cooke progress reports (Tr. pp. 358-62, 369-70).

[3] The December 2011 Cooke progress report that the parents contend was relied upon by the January 2012 CSE was not entered into evidence at the impartial hearing. The Office of State Review requested that the parties submit an agreed upon copy of the progress report as additional evidence (see 8 NYCRR 279.10[b]). The district thereafter provided the December 2011 Cooke progress report, which is referred to herein as Supplemental Exhibit 1 (see Supp. Ex. 1).

The hearing record further reflects that the parents did not object to the 12:1+1 classroom ratio itself, but, rather the parent's objections were relative to her concerns over how the 12:1+1 classrooms were operated in practice at the assigned public school site (Tr. pp. 391-92). The parents claims regarding the functional grouping of the students in the proposed classroom, and the length of time the student would be in a self-contained classroom or at a work site, went beyond the written IEP plan and turn on how successful the district would have been in implementing the January 2012 IEP had the student attended the assigned public school site and, as it is undisputed that parents rejected the IEP and the student did not attend the assigned public school site (see Parent Ex. C), the parents cannot prevail in their appeal on such speculative claims (R.E., 694 F.3d at 186-88; see R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 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]).

With regard to the cross-appeal and issue of equitable relief of reimbursement for nursing services at the unilateral placement, I am constrained to depart from the IHO's decision to reimburse the parents for their unilaterally obtained nursing services. Having found that the district offered the student a FAPE, the IHO lacked a basis upon which to predicate an award of public funding for services unilaterally obtained by the parents (see 20 U.S.C. § 1412[a][10][C][i]; 34 CFR 300.148[a]). As indicated above, the January 2012 CSE recommended a full-time 1:1 registered nurse to assist the student throughout the day (Dist. Ex. 1 at pp. 2, 10). Although I deeply sympathize with situation that the parents and their daughter face in this case, as I am sure the IHO did, when the parents rejected the district's recommended program and placement for the 2012-13 school year and unilaterally placed the student, that choice also required them to bear the financial risk of doing so in the event that they were unsuccessful in their claim that the district failed to offer the student a FAPE (see generally Burlington, 471 U.S. at 373-74). I lack the authority to hold otherwise. Furthermore, I have searched the hearing record and the evidence therein does not include information that suggests to me that the district was otherwise required to fund the 1:1 nursing services that that the student received at Cooke (see, e.g., Educ. Law § 3602-c[2][a], [b]), thus I find no basis to direct the district to reimburse the parents for them.

VII. Conclusion

The hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2012-13 school year. I must also find that the IHO erred in determining that equitable considerations weighed in favor of awarding the parents reimbursement for the cost of a full-time 1:1 registered nurse. I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO's decision dated July 15, 2014, is modified by reversing that portion which ordered the district to fund the costs of the nursing services provided to the student.

Dated: **Albany, New York**
November 10, 2014

JUSTYN BATES
STATE REVIEW OFFICER