



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-164

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, G. Christopher Harriss, Esq., of counsel

New York Legal Assistance Group, attorneys for respondent, Yisroel Schulman, Esq., Phyllis Brochstein, Esq., and Laura Davis, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

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]).

III. Facts and Procedural History

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see M.T. v. New York City Dep't of Educ., 2014 WL 4693753 [S.D.N.Y. Sept. 22, 2014]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in detail, as the parties' familiarity with the facts therein is presumed (Application of the Dep't of Educ., Appeal No. 12-115). Briefly, the hearing record indicates that the student has received diagnoses of Asperger's Syndrome and an attention deficit hyperactivity disorder (ADHD), and demonstrates delays in the areas of academics, social/emotional functioning, sensory regulation, fine motor skills, and language processing (Tr. pp. 44, 51, 53, 425, 430-33, 436, 562, 606-07, 663, 673; Dist. Exs. 4; 5; 8-10).¹ On May 27, 2010, a Committee on Special Education (CSE) convened to conduct the student's annual review and develop his individualized education program (IEP) for the 2010-11 school year (fourth grade) (Dist. Ex. 4 at p. 1).² The CSE recommended that the student be placed in a 10-month 12:1+1 special class in a community school and receive related services of one 30-minute session of counseling per week in a group of two, one 30-minute individual counseling session per week, two 30-minute sessions of individual occupational therapy (OT) per week, one 30-minute session of speech-language therapy per week in a group of three, two 30-minute sessions of individual speech-language therapy per week, and a full time 1:1 transitional paraprofessional for the first four months of the school year (id. at pp. 1, 16).

By letter dated August 25, 2010, the parent rejected the district's program and further advised that she intended to enroll the student at the Rebecca School for the 2010-11 school year and seek the costs of the student's tuition from the district as well as the provision of round trip transportation (Parent Ex. D).³ In a due process complaint notice dated July 26, 2011, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A).

In a decision dated April 24, 2012, an IHO determined that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was an appropriate placement, and that equitable considerations favored an award of tuition reimbursement (IHO Decision at pp. 19-20). In an appeal from the IHO's decision, an SRO reversed those portions of the IHO's decision which determined that the district failed to offer the student a FAPE for the

¹ District Exhibit 10 appears to be an incomplete version of, and contain substantially similar information to, District Exhibit 9 (see Dist. Ex. 10 at p. 1; compare Dist. Ex. 9, with Dist. Ex. 10).

² The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 4 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

2010-11 school year and ordered the district to reimburse the parents for the costs of the student's attendance at the Rebecca School (Application of the Dep't of Educ., Appeal No. 12-115).

The parent sought judicial review of the SRO decision and the Court found that the majority of the arguments raised by the parties were "either moot or without merit"; however, in light of the Second Circuit's holdings in R.E. v. New York City Dep't of Educ. (694 F.3d 167, 174[2d Cir. 2012]) and Reyes v. New York City Dep't of Educ. (760 F.3d 211 [2d Cir. 2014]), the Court concluded that the SRO had relied on improper evidence to support her decision that the district offered the student a FAPE (M.T., 2014 WL 4693753 at *8-*11). Specifically, the court found that the SRO's determination that the district could have extended the recommended 1:1 transitional paraprofessional support beyond the first four months of the school year specified in the IEP if needed in order for the student to receive educational benefits constituted consideration of "the type of retrospective adjustment of an IEP that is impermissible under R.E." (id. at *9-*10).

Accordingly the District Court remanded the case to the Office of State Review for further proceedings, noting that "[o]n administrative remand, the SRO may find persuasive the [district's] argument that the retrospective testimony constituted a small part of the overall record and that a FAPE was offered even without it. Or, it may conclude that the possibility of modification was a key support for its holding" (M.T., 2014 WL 4693753 at *11). Upon remand the SRO who heard the case previously was unavailable and the matter came before the undersigned. I reviewed the record of the impartial hearing proceedings, prior state-level submissions and administrative decision as well as the District Court's remand order. The parties were granted leave to file additional submissions with the Office of State Review', and both the district and the parents submitted memoranda presenting arguments related to the remaining issue as remanded by the Court.

IV. Arguments on Remand

In its submission on remand, the district argues that the SRO's determination that the recommendation for a transitional paraprofessional for the first four months of the school year was appropriate to meet the student's needs, regardless of the possibility of extension, was supported by non-retrospective evidence and should be reaffirmed. As relief, the district requests that the IHO's decision granting tuition reimbursement be overturned.

In her submission on remand, the parent contends that the district failed to offer the student a FAPE because the evidence in the hearing record does not support a finding that a 12:1+1 special class with a transitional paraprofessional for the first four months of the school year was appropriate for the student. As relief, the parent requests that the IHO's decision granting tuition reimbursement be affirmed.

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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 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

Based on the evidence in the hearing record, the May 2010 CSE's recommendation for a 12:1+1 special class, together with a 1:1 transitional paraprofessional for the first four months of the school year and in conjunction with related services and the recommended program accommodations and strategies, sufficiently addressed the student's needs. As noted above, the hearing record reflects the student demonstrated delays in the areas of academics, social/emotional functioning, sensory regulation, fine motor skills, and receptive, expressive, and pragmatic language (Tr. pp. 44, 51, 53, 425, 430-33, 436, 562, 663, 673; Dist. Exs. 5, 8-10). Specifically, the student demonstrated math and reading skills in the low range, writing skills in the very low range, and average verbal and nonverbal reasoning skills (Dist. Ex. 5 at pp. 4-5, 14-15).

State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Consistent with the student's needs and State regulations, the May 2010 CSE recommended a 10-month placement in a 12:1+1 special class in a community school together with a transitional paraprofessional for four months (Dist. Ex. 4 at pp. 1, 16). In addition, to address the student's needs in the areas of language processing, fine motor skills, and social/emotional functioning, the CSE recommended related services of one 30-minute session per week of speech-language therapy in a small group (3:1), two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of counseling in a small group (2:1), and one 30-minute session per week of individual counseling (Tr. pp. 72, 83; Dist. Ex. 4 at pp. 1, 3-5, 16). The May 2010 IEP contained specific information regarding accommodations and strategies for the student including redirection, repetition, visual cues, visual support, verbal prompts, a weighted vest, teacher reiteration and explanation of social situations, and additional time to process information (Dist. Ex. 4 at pp. 3-5). The district asserted that a 12:1+1 special class in a community school was appropriate for the student based on his average cognitive abilities and his overall strengths and weaknesses (Tr. pp. 78, 122, 666, 668, 671-72).

The IDEA does not require "transition plans" as a general matter whenever a student moves from a private school to public school environment (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195; see also Dep't of Educ. v. C.B., 2012 WL 1537454, at *5-*6 [D. Haw. May 1, 2012]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280 [E.D.N.Y. 2010]). Rather, a district may be required to provide transitional support services, defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd] [emphasis added]).⁴ The hearing record does not support the IHO's finding that the student required 1:1 support beyond the four-month period provided by the May 2010 IEP.

The evidence in the hearing record supports that the May 2010 CSE's recommendation of a transitional paraprofessional for four months was appropriate. The May 2010 CSE recommended that the student receive a transitional paraprofessional for four months to ensure an adequate transition from a smaller class setting at the Rebecca School (8:1+4) to the recommended district program (12:1+1) (Tr. pp. 43, 106-07; Dist. Ex. 9 at p. 1). The district special education teacher who attended the May 2010 CSE meeting testified that the CSE recommended a transitional paraprofessional for the student for the first four months of the school year because

⁴ State and federal regulations do require the development of a coordinated set of activities, including postsecondary goals and services, to assist students with disabilities in transitioning from school to post-school activities (34 CFR 300.43; 300.320[b]; 8 NYCRR 200.1[fff]; 200.4[d][2][ix]).

the student did not exhibit behaviors that warranted the support of a 1:1 paraprofessional beyond the four months (Tr. pp. 42, 103).

The evaluative information that the May 2010 CSE considered, including a May 2010 psychoeducational evaluation and a May 2010 Rebecca School progress report, also support the recommendation for a transitional paraprofessional for a duration of four months. The May 2010 Rebecca School progress report indicated that during the "past few months" the student's ability to self-regulate had improved, including less moments of dysregulation and an increased ability to "calm himself down faster with minimal adult support" (Dist. Ex. 9 at p. 1). According to the report, the student verbalized his emotional state even when extremely frustrated and angry (*id.* at p. 4). The progress report described the student as self-reliant, including use of sensory supports and strategies to increase self-regulation, and indicated that he had demonstrated progress regarding communication of his feelings when overwhelmed (*id.* at pp. 7, 13). According to the Rebecca School report, the student demonstrated an increased awareness of his own sensory needs and increased his use of seeking appropriate input (*id.* at p. 2). Additionally, the student enjoyed interacting with peers especially during preferred play activities (*id.*).

Consistent with the May 2010 CSE's determination that the student required the transitional paraprofessional for four months, the IEP annual goal that included the support of the transitional paraprofessional had a target completion date of four months (*see* Dist. Ex. 4 at p. 13).⁵ The May 2010 Rebecca School psychoeducational evaluation and progress reports considered by the May 2010 CSE showed that the student demonstrated progress within an 8:1+4 classroom without the support of a 1:1 paraprofessional (Dist. Exs. 5 at pp. 1, 3-4, 8-12; 9 at pp. 1-13).

In summary, the hearing record indicates that the May 2010 CSE appropriately determined that the student required the services of a 1:1 transitional paraprofessional only as it pertained to the student's transition from the Rebecca School to a 12:1+1 special class in a district public school setting, but that he did not otherwise require the services of a 1:1 paraprofessional based on his strengths and needs. Furthermore, the hearing record shows that the student demonstrated an ability to function within a classroom in relation to academics and socialization without the services of a 1:1 paraprofessional. Accordingly, the May 2010 CSE's recommendation for a 12:1+1 special class together with a transitional paraprofessional for the first four months of the school year, in conjunction with related services and the recommended program accommodations, appropriately addressed the student's needs without consideration of the CSE's authority to reconvene.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request

⁵ The annual goal, which included the support of the transitional paraprofessional, related to social skills and following school routines (Dist. Ex. 4 at p. 13). The IEP also included other annual goals related to these areas of need (*id.* at pp. 9-10, 12-13).

for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 24, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to fund the student's tuition costs at the Rebecca School for the 2010-11 school year.

Dated: **Albany, New York**
 January 9, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER