The University of the State of New York

The State Education Department
State Review Officer
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No. 14-165

Application of a STUDENT WITH A DISABILITY, by her parent, 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 Sergio Villaverde, PLLC, attorneys for petitioner, Sergio Villaverde, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Second Nature Blue Ridge program and at the Discovery Ranch for the 2013-14 school year. The appeal must be dismissed.

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

During the 2012-13 school year, the student—eligible for special education and related services as a student with a learning disability—attended a parochial high school and was recommended to receive special education teacher support services (SETSS) through an individualized education services plan (IESP) (see Tr. pp. 27-28, 35-36; Dist. Exs. 6 at p. 1; 7 at p. 1). The CSE convened in May 2013 and developed an IESP for the student for the 2013-14

school year; by letter dated June 17, 2013, the parent requested reevaluations of the student, and the district completed the same in July 2013 (see Dist. Exs. 3 at pp. 1-8; 6-9; 15).[1]

On or about August 8, 2013, the parent enrolled the student at the Second Nature Blue Ridge wilderness therapy program (Wilderness program) (see Parent Ex. I at pp. 1, 7, 12; see also Parent Ex. J at pp. 1-22).[2] By letter dated September 7, 2013, the parent notified the district of the student's acceptance at the Discovery Ranch for Girls, and requested that the district "re-open[]" the student's case (Dist. Ex. 12; see Dist. Ex. 11 at pp. 1-2).[3] On September 9, 2013, the Wilderness program discharged the student (see Parent Ex. I at pp. 1, 7, 12; see also Parent Ex. J at pp. 1-22).[4] On September 9, 2013, the parent executed an enrollment contract with the Discovery Ranch for a four-month initial enrollment period for the student, which commenced on September 9, 2013, and continued thereafter on a month-to-month basis (see Parent Ex. M at pp. 1-7).[5] It appears that the parent transferred the student directly from the Wilderness program to the Discovery Ranch on or about September 9, 2013 (compares Parent Ex. I at pp. 1, 12, with Parent Ex. M at p. 1, and Parent Ex. N at p. 1).

On September 30, 2013 the CSE reconvened and developed an IEP for the 2013-14 school year (see Dist. Ex. 4 at pp. 1, 13). Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the September 2013 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a State-approved nonpublic residential school with related services consisting of one 30-minute session per week of individual counseling and two 30-minute sessions per week of counseling in a small group (id. at pp. 1, 9-10, 13-15).[6] In addition, the September 2013 CSE created annual goals and recommended strategies to address the student's management needs (id. at pp. 4-9). The September 2013 IEP also included a coordinated set of transition activities and measureable postsecondary goals (id. at pp. 5, 11-12). Finally, the September 2013 CSE deferred the consideration of a State-approved nonpublic residential school to the Central Based Support Team (CBST) (id. at pp. 9, 13-15).

Following the September 2013 CSE meeting, the district referred the student and parent to several residential programs (see generally Tr. pp. 42-46; Dist. Ex. 14 at pp. 1-8; Parent Ex. P at

[1] The district scheduled a CSE meeting for July 29, 2013 (see Tr. pp. 37-40; Dist. Ex. 2 at pp. 1-2).

[2] The Commissioner of Education has not approved the Second Nature Blue Ridge wilderness therapy program as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200,7).

[3] The hearing record refers to the student's placement as both the Discovery Ranch for Girls and as the Discovery Ranch (see Parent Exs. N at p. 1; Q at p. 1).

[4] The CSE reconvened on August 13, 2013 (see Dist. Ex. 1 at pp. 1-9).

[5] The Commissioner of Education has not approved the Discovery Ranch for Girls as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200,7).

[6] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

pp. 1-28). By letter dated December 9, 2013, the student was accepted into a State-approved nonpublic residential school (see Tr. pp. 44-50; Dist. Exs. 14 at p. 8; 16 at pp. 1-4).

A. Due Process Complaint Notice

By due process complaint notice dated January 9, 2014, the parent alleged that the State-approved schools provided by the CSE and the CBST were not appropriate based upon the parent's "personal visits and research" (see IHO Ex. I at pp. 1, 3). The parent also alleged that as a result of the district's failure to conduct the student's triennial evaluation, she privately obtained a neuropsychological evaluation of the student (id. at pp. 3-4). As relief, the parent requested that the student "[s]tay put" at the Discovery Ranch for Girls, and in addition, requested reimbursement for the costs of the privately obtained neuropsychological evaluation, transportation, and reimbursement for the costs of the Wilderness program and the Discovery Ranch for Girls incurred by the parent (id. at p. 4).

B. Events Post-Dating the Due Process Complaint Notice

On January 27, 2014 the CSE reconvened to finalize the student's IEP for the 2013-14 school year (see Dist. Ex. 5 at pp. 1, 14). The January 2014 CSE continued to recommend a 12-month school year program in a State-approved nonpublic residential school, but recommended the following modifications to the September 2013 IEP: a 6:1+1 special class placement with related services consisting of two 50-minute sessions per week of individual counseling, three 50-minute sessions per week of counseling in a small group, and one 50-minute session per week of family counseling (compare Dist. Ex. 5 at pp. 1, 10, 14-15, with Dist. Ex. 4 at pp. 1, 9-10, 13-15). In addition, the January 2014 CSE created additional annual goals to address the student's needs (compare Dist. Ex. 5 at pp. 5-9, with Dist. Ex. 4 at pp. 5-9).

By letter to the parent dated January 28, 2014, the district identified the school location where the services recommended in the student's January 2014 IEP would be provided (see Parent Ex. O at pp. 49-50).

C. Impartial Hearing Officer Decision

On July 29, 2014, the parties proceeded to an impartial hearing, which concluded on August 27, 2014 after two days of proceedings (see Tr. pp. 1-282). In a decision dated September 30, 2014, the IHO found that the district offered the student a free appropriate public education (FAPE) for the 2013-14 school year (see IHO Decision at pp. 4-11). Specifically, the IHO found that the September 2013 CSE reviewed and considered "all evaluations" of the student, and based upon that information, recommended a 12:1+1 special class placement and deferred the matter to the CBST for an "appropriate residential facility capable of meeting [the student's] needs" (id. at pp. 8-9). In addition, the IHO determined that after the State-approved nonpublic residential school accepted the student, the January 2014 CSE reconvened and modified the student's previous IEP (id. at pp. 9-10). Next, having reviewed both the testimony of the intake coordinator from the State-approved nonpublic residential school and the parent's testimony regarding her visit to the same, the IHO found the parent's concerns were not sufficient to "impact the sufficiency of the program" (id. at pp. 10-11). Thus, the IHO concluded that the district sustained its burden to establish that the State-approved nonpublic residential school was "reasonably calculated to

provide [the] [s]tudent with meaningful educational benefit" (id.). Moreover, the IHO also found that, consistent with the parent's concerns, the State-approved nonpublic residential school offered the student a single sex program with "appropriate therapeutic and academic resources"—which the parent desired (id.). However, the IHO found that the parent's concerns with an urban setting were "at best, speculative" (id.). Having determined that the district offered the student a FAPE, the IHO indicated that it was unnecessary to review the appropriateness of the parent's unilateral placement of the student at the "Discovery Ranch or of any of the intervening placements, or of the equitable considerations" (id. at p. 11). The IHO did, however, conclude that the parent was entitled to full reimbursement for the costs of the privately obtained neuropsychological evaluation of the student (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO acted arbitrarily and capriciously by failing to wait until October 13, 2014 for the receipt of the parties' written closing arguments before issuing the decision. As a result, the parent argues that she was not able to "fully submit arguments that would have been in the summation." Without the written closing arguments, the parent asserts that the IHO erroneously decided the case without a full hearing record, which "imping[ed]" on the student's due process rights. As relief, the parent seeks to overturn the IHO decision because it was based upon an "incomplete record," for the student to remain at the Discovery Ranch for Girls, and for an award of reimbursement for the costs of transportation and the student's tuition at the Wilderness program and at the Discovery Ranch for Girls.[7]

In an answer, the district responds to the parent's allegations, and argues that even if the IHO should have waited for the parties' written closing arguments, the IHO did not commit reversible error by issuing the decision prior to receiving the same. In particular, the district asserts that the parent did not allege any actual harm by the IHO's actions, and moreover, the parent had a full opportunity to submit documentary and testimonial evidence in this matter, which the IHO relied upon in rendering the decision. Alternatively, the district argues that if the IHO's actions constituted reversible error, remanding the case to the IHO for the sole purpose of considering written closing arguments would be futile given the IHO's decision addressed the only issue raised in the parent's due process complaint notice, which the parent did not appeal.[8]

V. Discussion

The parent argues that the IHO's decision violated the student's due process rights because it was issued before receiving the parties' written closing arguments. Here, on the final day of the impartial hearing held on August 27, 2014, the IHO indicated that the parties' post-hearing briefs (i.e., written closing arguments) would be due on "October 13, 2014" (see Tr. pp. 280-81). Additionally, the district requested an extension of the compliance date in the case, which the IHO

[7] The parent does not appeal the IHO's determinations that the district offered the student a FAPE for the 2013-14 school year; as such, the IHO's finding is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[8] The district does not appeal the IHO's determination to award the parent full reimbursement for the costs of the May 2013 neuropsychological evaluation; as such, the IHO's finding is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

granted (see Tr. p. 281). According to the IHO's decision, on September 14, 2014 the IHO closed the record and the IHO issued the decision on September 30, 2014 (see IHO Decision at pp. 2, 12). Thus, while the IHO did not wait to receive the parties' written closing argument or post-hearing briefs—which, pursuant to State regulations, may be included as part of a hearing record—an IHO's receipt of the same is discretionary under State regulations (see 8 NYCRR 200.5[j][5][[vi], [j][3][xii][g]). Furthermore, State regulations provide that the "decision of the [IHO] shall be based solely upon the record of the proceeding before the [IHO], and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]). In addition, the IHO's decision "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, transcript pages and relevant exhibit numbers should be cited with specificity, which is more properly done by setting forth citations to the actual documentary or testimonial evidence to support findings of fact (see 8 NYCRR 200.5[j][5][v]). In this case, it is unclear what harm arose to either the parent or student because the IHO did not consider a summary of the parent's arguments that would have been proffered in a written closing statement. Indeed, the parent did not allege any such harm in the petition, nor did the parent allege any factual or legal errors within the IHO's decision that would have been addressed differently had the IHO received a written closing argument. As noted by the district, the evidence in the hearing record indicates that the parent had the opportunity at the impartial hearing to fully present her case by submitting both testimonial and documentary evidence (see Tr. pp. 1-282; Parent Exs. A-U). Moreover, the IHO accurately and adequately cited to transcript pages and exhibits in the decision to support the factual determinations as required by State regulations (see IHO Decision at pp. 2-12). Consequently, the IHO's failure to wait for the parties' written closing arguments did not infringe upon or otherwise violate either the parent's or the student's due process rights, and the parent's appeal must be dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 23, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER