The University of the State of New York

The State Education Department
State Review Officer
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No. 15-022

Application of a STUDENT WITH A DISABILITY, by his 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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice without prejudice. As explained more fully below, the matter must be remanded to an IHO for further administrative proceedings.

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

The hearing record contains no evidence as to the student's educational needs and, further, is missing crucial information pertaining to the underlying impartial due process proceedings, such as the due process complaint notice. The procedural history of this appeal, to the best it can be determined, is summarized below.

An impartial hearing convened on October 30, 2014 (see Tr. pp. 1-21). On this date, it appears from the hearing record that the parent presented a list of 16 items for relief, at least some of which were not included in the parent's due process complaint notice (Tr. p. 4). The IHO verbally summarized the relief sought in the parent's due process complaint notice, indicating that the parent sought to have the student removed from a public school operated by the district and receive direct services from a district provider at his home until such time as the district conducted

new evaluations of the student (Tr. pp. 4-5).[1] The IHO stated to the parent on the record that he could either order the district to conduct evaluations of the student and provide home instruction or allow the parent to file an amended due process complaint notice to include the new allegations presented at the hearing that were not contained in her due process complaint notice (Tr. pp. 4-7). It appears that the district did not contest the parent's request for home instruction and new evaluations (Tr. p. 7). After granting an extension requested by the parent, the IHO told the parent that she had until December 1, 2014, to decide whether she would like to proceed by pursuing the relief sought in her due process complaint notice or amending her due process complaint notice to include the additional allegations raised at the impartial hearing (Tr. pp. 9-10). In an interim decision, dated November 6, 2014, the IHO memorialized the options he articulated to the parent during the impartial hearing (Interim IHO Decision at pp. 2-3).

By final decision, dated December 24, 2014, the IHO indicated that he had not received any response from the parent by the December 1, 2014 deadline (IHO Decision at p. 3).[2] Therefore, the IHO concluded that the parent had abandoned her claims (id.). Nevertheless, based upon the fact that the district did not contest this portion of the parent's sought relief, the IHO ordered the district to provide immediate home instruction to the student because he was "non-attending" at the time of the impartial hearing (id.).[3] The IHO further ordered the district to fund a "comprehensive psychological/neuropsychological/psychiatric" evaluation for the student "at the district's standard rate" (id.). The IHO clarified that the district would have no responsibility to conduct or contract with an appropriate evaluator for this evaluation (id.). The IHO also dismissed the parent's other demands for relief without prejudice for failure to pursue them in a timely manner (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by dismissing her claims. The parent contends that she was unaware of the IHO's compliance deadline and, moreover, that the IHO did not contact her before dismissing her due process complaint notice. The parent also contends that the district failed to offer the student a FAPE for the 2013-14 school year. Given the disposition of this State-level appeal, it is unnecessary to summarize the parent's substantive claims in detail. The parent requests several remedies, including home instruction for the student until such time as he may be placed in a nonpublic school.

The district answers, denying the parent's material allegations and arguing that the IHO correctly dismissed the parent's due process complaint notice. The district additionally contends that several of the parent's sought remedies were not contained in her due process complaint notice and, thus, may not be considered on appeal. The district further avers that the relief requested by the parent is outside the scope of the IDEA's due process procedures. The district also clarifies

[1] It appears that the parent sought, as a result of these new evaluations, placement in a nonpublic school (see Tr. pp. 4-7).

[2] Although the IHO's final decision is dated December 24, 2014, this date appears to be in error, as, in the body of the decision, the IHO stated that he drafted it on January 1, 2015 (see IHO Decision p. 3).

[3] It appears that the IHO meant that the student was not currently attending a public school.

that it is not appealing the IHO's ordered relief and has attempted to implement this relief without success.

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, 180-83, 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

After reviewing the limited information in the hearing record and considering the parties' arguments on appeal, I find it necessary to vacate the IHO's order in its entirety and remand this matter to another IHO to develop a record and render a written decision in compliance with State regulations.

As a preliminary matter, the hearing record does not contain a copy of the parent's due process complaint notice. State regulation indicates that the hearing record "shall include copies of . . . the due process complaint notice and any response to the complaint" (8 NYCRR 200.5[j][5][vi][a]). This requirement is no mere formality: the due process complaint notice sets forth the issues a party wishes to resolve through the impartial hearing process. The complaint further facilitates clear issue identification at the outset of the proceeding because the complaining party may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see, e.g., B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59, 2014 WL 2748756 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]). Therefore, without knowing what issues the parent sought to resolve, it is impossible to know which issues were, or should have been, adjudicated during the impartial hearing. The parent's allegations in her petition cannot cure this deficiency; to accept these as a definitive statement of the contents of the due process complaint notice would defeat the entire purpose of the impartial hearing process.[4] Remand would be appropriate on this basis alone.

However, even assuming for purposes of argument that the absence of the due process complaint notice could be overlooked, the IHO's decision would not pass muster as a matter of law.[5] State regulations require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064). State regulations further provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The 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, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043).

Here, the IHO's decision fell short of these standards. In this case, there was no evidence submitted and no testimony taken, and the IHO's laconic decision reflects this lack of evidence. Without any testimonial or documentary evidence—most notably, the student's current IEP—the IHO had no hearing record upon which to base findings of fact and conclusions of law (see 8

[4] Similarly, the district's argument that the parent's requested relief is outside the scope of the impartial hearing process cannot be adjudicated without knowing what the parent requested in her due process complaint notice. Accordingly, this claim is dismissed.

[5] The proceedings that were held were also questionable in that, although it appeared that the parent's native language was other than English, no interpreter was provided and the parent, who appeared at the impartial hearing pro se, was not informed on the record of her right thereto (8 NYCRR 200.5[j][3][vi]).

NYCRR 200.5[j][5][v]). Therefore, the IHO's sparse treatment of the parent's claims and parties' arguments dictates vacatur in this instance.

The relief ordered by the IHO in these circumstances is additionally problematic. The IHO ordered an educational placement for the student (i.e. home instruction) as well as an evaluation at public expense for no other reason than the district's apparent accession to this form of relief (see IHO Decision at pp. 2-3).[6] The IHO ordered this relief outside of the CSE process and for an indefinite period without considering having the CSE reconvene (id.). Without a record, I am left with the concern that this could amount to a long term circumvention of the IDEA's IEP development procedures which would be inconsistent with the objective of the Act (see Polera v. Bd. of Educ., 288 F.3d 478, 481-82 [2d Cir. 2002] ["The IEP is the central mechanism by which public schools ensure that their disabled students receive [FAPE]"]). With specific respect to the ordered placement, home instruction is a restrictive placement that, while conceivably permissible for certain students, raises serious LRE concerns in the absence of any evidence whatsoever in the hearing record to support it (8 NYCRR 200.6[i]; see Educ. Law § 4402[2][a], [7][2]; 8 NYCRR 200.1[w], 200.6[a][1]).

Although the district does not appeal the relief awarded by the IHO (and, indeed, indicates that it has already attempted to implement this relief), this alone cannot compensate for the fact that the hearing process was conducted in a manner outside the norms of standard legal practice and inconsistent with the requirements of due process (34 C.F.R. 300.514[b][2][ii]). I will therefore vacate the IHO's decision, dated December 24, 2014, in its entirety and remand this matter to the another IHO in order to ensure that a record is properly and clearly developed at the impartial hearing, and to ensure that the resultant decision comports with State regulations at 8 NYCRR 200.5(j)(5)(v).[7]

VII. Conclusion

In light of the absence of a fully developed record, it is impossible to determine the nature of the parent's allegations, the appropriateness of the student's current IEP, or the suitability of the relief ordered by the IHO. Accordingly, the IHO's order is vacated in its entirety and this matter is remanded to another IHO to be selected in accordance with 8 NYCRR 200.5(j)(3)(i) to develop a record and issue a written decision in compliance with State regulations.

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[6] Parties, of course, remain free to reach private settlement agreements. However, once a parent has requested an impartial hearing, an IHO's decision "shall be made on substantive grounds based on a determination of whether the student received a [FAPE]" (8 NYCRR 200.5[j][4]; see 20 U.S.C. § 1415[f][3][E][i]).

[7] Similarly, with respect to the IHO's dismissal of the parent's other claims, although the use of summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA, they should be used with caution and are only appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018). In the instant case, in addition to the lack of evidence, there is no indication on the record that the district made any motion with respect to sufficiency of the parent's due process complaint notice. Therefore, given the above discussion, the IHO's dismissal of the parent's other claims is vacated.

At this time, it is therefore unnecessary to address the parties' remaining contentions.

IT IS ORDERED that the IHO's decision, dated December 24, 2014, is vacated in its entirety; and

IT IS FURTHER ORDERED that this matter be remanded to another IHO in order to conduct a new hearing, develop a record, and render a decision consistent with the requirements of due process.

Dated: **Albany, New York**
April 2, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER