The University of the State of New York

The State Education Department
State Review Officer
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No. 19-010

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his 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 Kimberly C. Tavares, attorneys for petitioner, by Kimberly C. Tavares, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

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 reimbursed their son's tuition costs at the Hyde School (Hyde) for the 2018-19 school year, rather than reimbursing them for their son's tuition costs at Hyde for the 2017-18 school year as requested in the due process complaint and at the impartial hearing. The 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*]).

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

Due to the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, based upon the available information in the hearing record, it appears that the student attended Hyde for the 2017-18 school year, from January 29, 2018 to June 30, 2018 (see Tr. p. 29; Parent Exs. A at pp. 2-3; L at pp. 1-3). According to the parents, they "wrote to the CSE on October 23, 2017 requesting" a free appropriate public education (FAPE), but the CSE did not convene a meeting or develop an IEP for the 2017-18 school year (Tr. p. 28; Parent Ex. A at p. 2). The parents wrote to the CSE again on January 22, 2018 to "indicate that they had not

been contacted" regarding the previous letter and that, as a result, they had no choice but to place the student at Hyde until a CSE meeting was convened and an appropriate placement was determined (Parent Ex. A at p. 2).

A. Due Process Complaint Notice

The parents initiated the instant administrative proceeding by filing a due process complaint notice dated February 28, 2018 (Parent Ex. A at p. 1). The parents raised concerns about the CSE's failure to meet and develop an IEP for the 2017-18 school year and asserted that the district failed to offer the student a FAPE for the 2017-18 school year (id. at p. 3). At the impartial hearing, the parents' attorney also identified that the student "was never certified for special education services," and so, in essence, the parents were raising an issue with respect to child find (see Tr. p. 14).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on May 14, 2018 and concluded the hearing on August 6, 2018, after three days of proceedings (see Tr. pp. 1-86). In a decision dated December 9, 2018, the IHO identified that the parents asserted that the student was denied a FAPE for the "2017-2018 and 2018-2019 school years," and that the parents sought relief in the form of reimbursement "from January 29, 2018 through June 30, 2018" (IHO Decision at pp. 1, 9). The IHO noted that the district "conceded and [did] not defend the school years at issue" (id. at p. 2).[1, 2] As a result, the IHO found that the district denied the student a FAPE for the 2017-18 and 2018-19 school years (id. at p. 10). Further, with respect to the parents' request for tuition reimbursement, the IHO found that the witnesses were credible and that it was evident from the record, which was uncontroverted, that "the private school is specially designed to meet the unique needs of the student and is permitting him to benefit from instruction" (id. at p. 13). Additionally, the IHO found that there was nothing in the record "to rebut the presumption that the [p]arent cooperated with" the district, so equitable considerations do not bar reimbursement in this instance (id.). The IHO ordered the district to reimburse the parents for "the student's attendance at [Hyde] during the student's 2018-2019 school year" (id.).

IV. Appeal for State-Level Review

On appeal, the parents argue that the IHO's order incorrectly directed tuition reimbursement for the 2018-19 school year and that the evidence submitted during the impartial hearing only

[1] During the impartial hearing, the IHO stated, and the district representative agreed, that the district was "not contesting the Child Find issue in this case, and that there is no question or no rebuttal to the presumption in the law that the parent has cooperated" with the district (see Tr. pp. 20-22, 82). Further, in its answer, the district identifies that it had "effectively conceded that it could not prove...it provided FAPE to the [s]tudent for the 2017-18" school year (Answer ¶ 3).

[2] As noted by the IHO, the district did not make an opening or closing statement, did not call any witnesses to testify, and did not submit any documents into evidence (IHO Decision at p. 2; Tr. pp. 22, 26, 30, 54-55, 81-82).

pertained to the 2017-18 school year. The parents request the IHO decision be changed or modified to properly reflect an order directing tuition reimbursement for the 2017-18 school year.

In an answer, the district agrees with the parents and requests that the IHO decision be modified to reflect that the parents be reimbursed for the student's placement at Hyde from January 29, 2018 through June 30, 2018 of the 2017-18 school year, not for the 2018-19 school year.[3, 4] The district further notes that the IHO does not have authority to "re-open an impartial hearing . . . to resolve future disputes between parties," but the SRO "has the authority to correct the IHO's error in this case" and to modify the IHO's order to remove references to the 2018-19 school year.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the

[3] Though, the district also indicates that it denies "the allegations set forth in Paragraphs 1, 2, 3 and 4 of the [request for review]" and refers to the IHO decision for a "complete and accurate statement of their contents" (Answer ¶ 1).

[4] The district also notes that the due process complaint notice only refers to the 2017-18 school year, not the 2018-19 school year (Answer ¶ 3).

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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[5]

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

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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).

VI. Discussion

The parents request that the IHO decision be changed to reflect an order directing tuition reimbursement for the 2017-18 school year. As the district essentially agrees with parents, it is unclear why the parties could not resolve this matter without resort to a formal appeal. The district asserts that while the IHO does not have the authority to correct the mistake as to the school year, the SRO can correct the IHO's mistake. Initially, the need for an SRO to intervene in this matter is questionable. An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 18-028; Application of the Dep't of Educ., Appeal No, 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; [k]). However, correction of a typographical error, that both parties agree to, is not necessarily impermissible (see Application of the Dep't of Educ., Appeal No, 17-009 [clarifying that the change in the decision was not a typographical mistake to which the parties agreed and noting that the "issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray"]).

Nevertheless, as noted above, both parties agree that an award for reimbursement for the 2017-18 school year was the relief requested during the hearing and would be appropriate. Moreover, the hearing record supports finding that relief awarded should have been for the 2017-18 school year (see Parent Ex. A). The parents' due process complaint notice asserted that the student was denied a FAPE for the 2017-18 school year and that tuition reimbursement from January 29, 2018 through June 30, 2018 (part of the 2017-18 school year) would be an appropriate remedy (see Parent Ex. A at pp. 2-3). The parents' attorney, during the impartial hearing, also noted that the parents "are seeking tuition reimbursement for the [2017-18] school year" from the district (Tr. pp. 26-27, 29-30). Furthermore, at two different times during the hearing the IHO confirmed that the parents' "claim [wa]s for the [2017-18] school year" (see Tr. pp. 3, 13-14).

Finally, the Hyde enrollment contract submitted into evidence reflects that the student attended Hyde from on or just before February 1, 2018 until June 30, 2018 (see Parent Ex. L at pp. 1-3).

VII. Conclusion

Based on the evidence in the hearing record and since both parties agree that an award of tuition reimbursement for the 2017-18 school year was an appropriate remedy for the student, I reverse the IHO's decision to the extent the IHO ordered the district to reimburse the parents for the student's tuition at Hyde for the 2018-19 school year, and I order the district to reimburse the parents for the student's tuition at Hyde for the 2017-18 school year, from January 29, 2018 to June 30, 2018.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 9, 2018 is modified to reflect that the parents are awarded reimbursement or direct payment for the student's attendance and related costs, including transportation, at Hyde for the 2017-18 school year, from January 29, 2018 to June 30, 2018, and not for the 2018-19 school year.

Dated: **Albany, New York**
February 19, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER