The University of the State of New York

The State Education Department
State Review Officer
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No. 21-146

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:
Judy Nathan, Acting Interim General Counsel, attorneys for petitioner, by Brian Davenport, Esq.

Law Offices of Nancy Rothenberg, PLLC, attorneys for respondent, by Nancy Rothenberg, 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. 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) daughter and ordered it to fund and reimburse the parent for her daughter's tuition costs at the Cooke Lower School (Cooke) for the 2020-21 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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and, thus, they will not be recited here in detail. The CSE convened on May 6, 2020 to formulate the student's IEP for the 2020-21 school year (see generally Dist. Exs. 1-2). In a letter dated June 17, 2020, the parent notified the district of her intent to unilaterally place the student at Cooke for the 2020-21 school year, asserting in pertinent part, that the district had failed to develop an IEP for the student and had repeatedly failed to respond to the parent's request to be provided with the student's educational records (see Parent Ex. B). In a due process complaint notice, dated July 1, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year and requested pendency at Cooke (see Parent Ex. A). Additionally, the parent requested an order for the CSE to convene

and develop an IEP for the student, direct payment of tuition for Cooke for the 2020-21 school year, transportation to Cooke, compensatory related services, and a complete copy of the student's educational records as retained by the district from September 2019, among other relief (id.).[1]

An impartial hearing convened on December 15, 2020 and concluded on March 25, 2021 after three days of proceedings (Tr. pp. 1-153). In a decision dated May 21, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 9-14). As relief, the IHO ordered the district to reimburse the parent for the amount of the student's tuition at Cooke she had paid for the 2020-21 school year, ordered the district to directly fund the remainder of the tuition to Cooke, and ordered the district to provide special transportation to and from Cooke for the school year (id. at p. 14).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in addressing the parent's claim that she did not receive a copy of the student's IEP, a prior written notice, or a school location letter.

2. Whether the IHO erred in determining that the district failed to offer the student a FAPE by significantly impeding the parent's ability to participate meaningfully in the development of the student's educational program.

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,

[1] The parent's request for compensatory education was withdrawn during the impartial hearing (see Tr. p. 75).

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 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]).[2]

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).

VI. Discussion

A. Scope of Impartial Hearing

The district contends that the IHO erred in addressing the question of whether the parent received a copy of the student's IEP for the 2020-21 school year, arguing that the parent's due process complaint notice only alleged that no CSE meeting had occurred and no IEP had been created.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its 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[i][7][i][a]; [j][1][ii]), or the original 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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Under the IDEA, parents of a disabled student must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function (C.F. v. New York City Dep't of Educ., 746 F.3d 68 [2d Cir. 2014]), and it has greater importance in a jurisdiction like New York, which shifts the burden of production and

[2] 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).

persuasion to school districts to show procedural and substantive compliance with the IDEA (Educ. Law § 4404[1][c]).

The parent's due process complaint notice asserted both that the district had "not held a CSE meeting by June 2020" and that the district had "failed to develop a new IEP" for the student's 2020-21 school year (Parent Ex. A at pp. 9-10). Additionally, the due process complaint notice alleged that the parent had repeatedly requested that the district provide her with the student's educational records, yet the district had refused or failed to do so, which the parent alleged had significantly impeded the parent's ability to participate in educational decision-making, constituting a denial of a FAPE (id. at p. 10). Given that an IEP would be part of the student's educational record (see 34 CFR 600.611[b] [defining "education records" as "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution" with a number of exceptions]), and districts must ensure that the parents are provided with a copy of the IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]), the parent's claim that the district had not provided her with requested educational records put the district on notice that the parent had not been provided with a copy of the student's IEP for the 2020-21 school year. Accordingly, review of the parent's due process complaint notice does not support the district's contention that the IHO erred in reaching the question of the parent's receipt of a copy of the IEP in her decision.

B. Parent Participation - Receipt of Documents

The IHO determined that the district failed to meet its burden to prove that it provided the parents with a copy of the student's IEP, prior written notice, or a school location letter, or that it responded to the parent's multiple requests for access to the student's educational records, and that, as a result, the evidence in the hearing record (or the lack thereof) supported a finding that the district significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (IHO Decision at pp. 9-11). The district contends that the IHO erred because there is a rebuttable presumption of mailing and the fact that the district entered a copy of the IEP, prior written notice, CSE attendance page, and school location letter into the hearing record was sufficient proof that the parent received the documents.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Among the procedural requirements in State and federal regulations is the requirement that parents must be afforded "an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student" (8 NYCRR 200.5[d][6]; see 34 CFR 300.501; 300.613[a]).[3] In addition, a district must ensure that the parents of a student with a disability are provided with a copy of their child's IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]) and with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo];

[3] A district is only required to provide copies of education records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records" (34 CFR 300.613[b][2]).

200.5[a][1]). A failure to provide a copy of the IEP, the prior written notice, or other educational records is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). For example, evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

The parent testified, via an affidavit in lieu of in-hearing testimony, that although she had attended a CSE meeting in May 2020 remotely, she had not received a copy of the IEP or any other documents related to the district's recommended program for the 2020-21 school year (Parent Ex. X at p. 4). The district offered no evidence to rebut this testimony.

New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, the district offered no evidence with respect to the "standard office practice or procedure" concerning the mailing of the IEP, prior written notice, or any other correspondence or documents that the district sent to the parent. Accordingly, there is no testimony by one with personal knowledge of the regular course of business to support the legal presumption that the district attempts to rely upon. Additionally, the IHO noted the parent's unrebutted testimony that she did not receive copies of the documents in question, and pointed to other evidence in the

hearing record suggesting that the district's regular course of business may have been disrupted by the circumstances surrounding the COVID-19 pandemic and the attendant disruption to normal procedures, and other evidence in the hearing record suggesting that the parent's efforts to communicate with the district had been unsuccessful, leading the IHO to find the parent's claims on this point to be credible (IHO Decision at pp. 10-11). In light of the above, there is no basis to set aside the IHO's finding that the district failed to meet its burden to prove that it provided the parent with a copy of the student's IEP, among other documents.

Although the parent testified that she participated in the May 2020 CSE meeting and had reached the conclusion that the CSE was unlikely to recommend an IEP containing all of the features she believed were required for the student, she remained unaware of the CSE's actual recommended program for the 2020-21 school year until the district entered the IEP into the hearing record after the impartial hearing commenced (Parent Ex. X at p. 4). Moreover, the parent had previously visited assigned school locations in prior school years but was unable to do so for the 2020-21 school year because she had received no notice of the public school the district had assigned the student to attend for that school year (id. at pp. 3-4, 6). The IHO also noted that there had been an ongoing failure of the district to provide the parent with requested educational records or to communicate with the parent on other matters concerning the student, including the district's failure to respond to the parent's notice of unilateral placement, which alleged that there was no IEP for the student (IHO Decision at pp. 6, 11). These are the factors that the IHO pointed to in her determination that the parent had been prevented from meaningfully participating in the decision-making process for the student's educational program for the 2020-21 school year, and the district has not pointed to a sufficient reason to disturb the IHO's decision on this point.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determinations that the district failed to meet its burden to prove that it provided that parent with copies of the student's education records, including the student's IEP for the 2020-21 school year, and that, therefore, the hearing record supported a finding that the district significantly impeded the parent's right to participate in the decision-making process regarding the provision of a FAPE to the student. As the district has not appealed the IHO's findings that Cooke was an appropriate unilateral placement and that equitable considerations weighed in favor of the parent's request for relief, those determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Accordingly, the IHO's order requiring the district to fund the student's tuition at Cooke for the 2020-21 school year shall not be disturbed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 11, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER