The University of the State of New York

The State Education Department
State Review Officer
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No. 12-214

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, Neha Dewan, 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 denied her request for relief related to the delivery of related services to her son for the 2012-13 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

With regard to the student's educational history in this case, the student continuously attended a State-approved nonpublic school since May 2007 (see Dist. Ex. 3 at p. 1). The CSE convened on April 5, 2012 in order to develop the student's IEP for the student's 2012-13 school year (Parent Ex. B at p. 11). Finding the student eligible for special education as a student with autism, the April 2012 CSE recommended placement in a 12-month program in an 8:1+4 special class at the State-approved nonpublic school that the student had been attending (id. at pp. 10-12). In addition, the April 2012 CSE recommended related services of five 30-minute sessions per week of individual speech-language therapy and three 30-minute sessions per week of individual OT (id. at pp. 11-12).

By final notice of recommendation to the parent dated April 5, 2012, the district summarized the recommendations in the April 5, 2012 IEP and identified the particular State-

approved nonpublic school to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 2).

A. Due Process Complaint Notice

The hearing record indicates that the parent filed a due process complaint notice on or about June 27, 2012, but a copy was not included in the hearing record. However, the IHO recited the following from the parent's due process complaint notice into the hearing record and, again, in his final decision: "On April 27, 2012 at annual IEP meeting it was agreed upon that [the student] continue to receive via RSA services for speech and OT. This agreement was violated as services were rescinded. Reinstate services as stated on IEP." (IHO Decision at p. 2; see Tr. p. 4).[1, 2] The parties do not dispute the date or content of the due process complaint notice as articulated by the IHO.

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 24, 2012 and concluded on September 25, 2012 after three days of proceedings (Tr. pp. 1-70). As a result of the proceedings on July 24, 2012, the IHO issued a July 26, 2012 interim order on pendency, wherein the IHO noted the district's agreement that the March 2011 IEP was the last agreed upon IEP for the student and determined that the student was entitled to pendency consisting of five 30-minute sessions of individual speech-language therapy per week and three 30-minute sessions of individual OT per week (Interim IHO Decision at p. 2). The IHO ordered the district to provide those related services not already provided by the nonpublic school up to the levels mandated on the student's March 2011 IEP (id.). As a result of proceedings on August 15, 2012, the IHO issued an August 16, 2012 second interim decision, in which the IHO determined that correspondence from the principal of the nonpublic school that the student was "currently receiving all related services" indicated that, at some point in time, the student had not been receiving services (Second Interim IHO Decision at p. 3). The IHO determined that the district failed to show that the student received his related services for the period of July 5, 2012 through July 26, 2012 (three weeks), and ordered the district to provide related services authorizations (RSAs) to compensate for such days, consisting of speech-language therapy (fifteen 30-minute sessions) and OT (nine 30-minute sessions) (id.).

In a final decision dated October 2, 2012, the IHO first noted that the parent acknowledged that the student received (and continued to receive) his mandated speech-language therapy at the nonpublic school and that the only remaining issue to resolve was a claim that the student had not received his mandated OT services (IHO Decision at p. 2). The IHO found that the testimony of the principal from the nonpublic school with regard to the particular dates on which the student received OT services credible and noted that the parent did not offer any evidence to rebut the

[1] The IEP entered into the hearing record shows that the CSE meeting occurred on April 5, 2012, not April 27, 2012 (see Parent Ex. B at p. 11; see also Dist. Ex. 2). However, the April 2012 IEP indicates that it was to be implemented beginning on April 27, 2012 (Parent Ex. B at p. 11; see Tr. pp. 26-27).

[2] Although not defined in the hearing record, RSA is a common acronym for "related service authorization," which "allows a family to secure an independent provider paid for by the [district]" and "is issued only when a contracted agency cannot provide the service" for the district (see F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 507 n.4 [S.D.N.Y. 2013] [citing a document published by the district]).

principal's testimony (id. at p. 5). With respect to the summer session of the 12-month school year, the IHO determined that the student received 14 OT sessions out of the 18 mandated by the student's April 2012 IEP for the six week time period (id. at p. 4-5). The IHO also determined that the student did not receive his OT sessions during the academic portion of the 12-month school year, which commenced on September 6, 2012, until September 24, 2012 and, therefore, that the student missed an additional eight sessions of OT for this time period (id.). Therefore, the IHO determined that the student missed a total of 12 individual 30-minute OT sessions and ordered the district to provide the parent RSAs for such sessions (id.).[3] However, the IHO declined to order the district to provide RSAs for OT for the full school year, finding the delay in provision of OT services insufficient to warrant such relief (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in refusing to order the district to provide RSAs for OT services for the student's entire 2012-13 school year. Initially, the parent alleges that, although the principal of the nonpublic school received subpoenas prior to the impartial hearing, she failed to produce the documents requested therein. The parent asserts that the IHO erred in his determination as to when the student began receiving his mandated OT at the nonpublic school. The parent asserts that the testimony of the principal from the nonpublic school, which consisted of her reading the schedules of the occupational therapists employed by the school, may have indicated that the therapists were in the school building, but did not prove that they delivered the student his mandated OT sessions on those days. The parent alleges that the principal's testimony, absent any documentary evidence, was insufficient to satisfy the district's burden of proof. The parent also questions the IHO's final decision to the extent the IHO's findings overlapped with his second interim order by focusing, in part, on the summer portion of the 12-month school year. The parent makes additional factual allegations relating to occurrences that took place after the completion of the impartial hearing and attach additional evidence to their petition.

In an answer, the district responds to the parent's petition by denying the material allegations raised and asserting that the IHO correctly determined that the student received his mandated OT sessions as of September 24, 2012. The district does not cross-appeal the IHO's award of RSAs for twelve 30-minute sessions of OT. The district asserts that the petition should be dismissed for failure to follow the regulatory requirement to have numbered paragraphs and citations to the IHO decision, transcript, and documentary evidence. The district also asserts that exhibits B and C to the parent's petition should not be considered by the SRO because the parent had the opportunity to introduce them at the impartial hearing and, to allow such documents, would deprive the district of the ability to challenge the content.

[3] The relief ordered by the IHO in both the second interim order and the final decision is properly viewed as an order for additional services (see IHO Decision at p. 5; Second Interim IHO Decision at p. 3). When a school district deprives a disabled child of a FAPE in violation of the IDEA, the IDEA allows "appropriate" relief to be awarded, which includes compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005]; accord P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008]).

In a reply to the procedural defenses interposed by the district, the parent contends that the petition should not be dismissed since she followed State web site instructions when she drafted the petition. In addition, the parent asserts that the petition did contain cites to the IHO's decision, transcript, and exhibits. The parent also asserts that the exhibits attached to the petition were subpoenaed but that the district failed to produce them at the impartial hearing and, therefore, they should be considered.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received

consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

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

A. Preliminary Matters

1. Form Requirements for Pleadings

The district asks that the petition be dismissed because it lacks paragraph numbers and cites to the IHO decision, transcript, and documentary evidence. State regulations require that pleadings "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]).

In this case, a review of the petition shows that, while the paragraphs are not numbered, the parent's petition does include citations to transcript pages, exhibits, and the IHO's decision, as well as an adequate statement of their reasons for challenging the IHO's decision and their request for relief (see 8 NYCRR 279.4[a]). State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]). However, in this instance, given that the district was able to formulate an answer to the parent's allegations, I decline to exercise my discretion to dismiss the parent's pleading in this instance.[4]

2. Additional Evidence

The parent offers additional evidence with their petition, to which the district objects on the basis that, among other things, the parent could have introduced them at the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]

[4] However, the parent's defense that the website of the Office of State Review failed to include instructions regarding the proper form for pleadings is not persuasive. The website explicitly directs parties to the relevant practice relations and further informs parties that their pleadings are subject to dismissal for noncompliance with 8 NYCRR 279.1 et seq.

[holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, the additional evidence proffered by the parent was available at the time of the impartial hearing and is not necessary in order to render a decision in this case. Specifically, while the district does not challenge Exhibit A to the parent's petition, it is a duplicate copy of the April 2012 IEP that is already included in the hearing record and, therefore, unnecessary (see Parent Ex. A). Exhibit B included with the parent's petition consists of a copy of a series of e-mails discussing, among other things, an assistive technology assessment, which are dated prior to the impartial hearing, and, therefore, were available to the parent and could have been offered as evidence during the impartial hearing. Moreover, since the parent is one of the parties corresponding in the email, the documents must have been available to the parent at the time of the impartial hearing.

Finally, it appears that the parent offers the subpoenas and the email correspondence relating thereto as Exhibit C to the petition in order to show the district's failure to comply with the subpoenas. During the impartial hearing, the IHO indicated that the parent presented subpoenas for his signature but that they "were late," the IHO "couldn't get them out" in time for the impartial hearing, and he didn't "know if [the parent] got a response" (Tr. p. 50). The parent responded that the subpoenas had been timely served but that she did not received a response (Tr. pp. 50-51). No further discussion appears in the hearing record regarding the subpoenas. The parent does not specifically claim any error with respect to the IHO's determination to proceed with the hearing when the parent was of the view that there was less than full compliance with subpoenas. To the extent that the parent intended to appeal this ruling, there is no basis in the hearing record to disturb the IHO's decision to proceed in this regard, since the hearing record was otherwise adequate for the limited issue ultimately addressed by the parties, discussed below, and, in any event, the time for discovery had elapsed (see 34 CFR 300.512[a][3], [b][1]; 8 NYCRR 200.5[j][3][xii][a]) and there was no evidence that the parent had taken action to enforce the subpoenas either at that point in time or since that point.[5] Based on the foregoing, Exhibit C to the petition is also not necessary for my determination in this case.

B. Scope of the Impartial Hearing

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As noted above, the district does not appeal the portion of the IHO's decision finding that the district failed to implement particular sessions of the student's OT mandate during the 2012-13 school year or any of the relief awarded by the IHO (see IHO Decision at pp. 4-5). Accordingly, the IHO's determinations, which were adverse to the district, and the relief granted by the IHO have become final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Next, review of the IHO's description of the due process complaint notice (since the document itself was not included in the hearing record), to which the parties do not object, reveals that it was dated June 27, 2012 and alleged that, although the April 2012 CSE agreed that the

[5] The date set forth on the subpoena for compliance with the document production directives was September 24, 2012, the day prior to the final date of the impartial hearing (see Tr. p. 44; Pet. Ex. C).

student should continue to receive speech-language therapy and OT services via RSA, "[t]his agreement was violated" and "[s]ervices were rescinded" (see IHO Decision at p. 2; Tr. p. 4) . Initially, there is nothing in the hearing record to indicate that, during prior school years, the student received related services at school through RSAs and the April 2012 IEP does not state that OT should be delivered via an RSA (see generally Parent Ex. B).

It is unclear at this juncture why the parties and the IHO did not address the matter raised in the June 27, 2012 due process complaint which appears to have been the parent's allegation that the district failed to implement the related services mandates of the April 2012 IEP for a period of approximately two months: from the intended implementation date of the IEP, April 27, 2012 until the date of the due process complaint notice, June 27, 2012 (see id.; see also Parent Ex. B at p. 12). However, on appeal it is clear that the parent has not advanced any arguments covering the months from April through June 2012, instead arguing that "the school failed to fulfill the mandated services listed on 2012/2013 IEP regarding [OT] at or beginning September 24th 2012" and noting that "RSA ordered at pendency covered missed sessions up to this date" (Pet. at p. 4).[6]

C. Implementation of OT Services - 2012-13 School Year

The only relief now sought by the parent is an order directing the school district to have provided RSAs for the remainder of the 2012-13. This form of equitable relief is not appropriate in this case. The evidence in the hearing record does not indicate that the student would have been deprived of OT services for the remainder of the 2012-13 school year (see Tr. pp. 56, 59; see also Catalan, 478 F. Supp. 2d at 75-76). The parent contests the IHO's sole reliance on one witness' testimony, which the IHO found credible, to determine that the student was receiving his OT services as of September 24, 2012 (see IHO Decision at p. 5; Tr. pp. 56-57). An SRO will ordinarily give due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or, when the hearing record read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). The hearing record contains no documentary evidence contrary to the testimony of the principal and there is nothing else in the hearing record that would place the credibility of the witness into question. Therefore, contrary to the parent's assertion, the IHO's finding that the student began receiving OT services as of September 24, 2012 should not be disturbed.

In light of the foregoing, there is no evidence in the hearing record to support a finding, beyond the nonpublic school's failure to deliver the particular sessions of the student's OT mandate (for which the IHO ordered equitable relief in the form of additional services), that, after September 24, 2012 the district deviated from a substantial or significant provision of the student's April 2012 IEP in a material way (see Rowley, 458 U.S. at 206-07; A.P., 370 Fed. App'x at 205;

[6] The IHO's approach to the case was instead consistent with the parent's presentation during the impartial hearing which was limited to the delivery of the student's OT services from the period of July 2012 through September 2012, and no one mentioned or indicated any concern over a failure to implement OT services during the period of April 2012 through June 2012 (see Tr. pp. 66-68).

Cerra, 427 F.3d at 192; see also Van Duyn, 502 F.3d at 821-22; Houston Independent School District, 200 F.3d at 349; Catalan, 478 F. Supp.2d at 75-76).[7, 8]

VII. Conclusion

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] To the extent the district failed to comply with the student's IEP after the conclusion of the impartial hearing, the parent would remain entitled to commence another due process proceeding and demand compensatory education services.

[8] While it is unnecessary to address the parent's requested remedy in light of this determination, it is questionable whether or not an RSA for the school year would have been an appropriate remedy in any event, as opposed to an order that the district comply with the mandates in the student's IEP.