



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-239

Application of a STUDENT WITH A DISABILITY, by her 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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Windsor School (Windsor) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer the student an appropriate educational program for the 2012-13 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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]).¹

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.² The CSE convened on March 19, 2012, to develop the student's IEP for the 2012-13 school year (see generally Dist. Ex. 1 at pp. 1-11). In a due process complaint notice, dated August 10, 2012, and in an amended due process complaint notice, dated August 13, 2012, the parents indicated that the student had not been "adequately served by special education program" and had been placed in "inappropriate classes," and, therefore, the parents notified the district of their intentions to send the student to a nonpublic school—Windsor—and to seek tuition reimbursement (see Parent Exs. M-N; Answer Ex. 1 at pp. 1-2).

On October 3, 2012, the parties proceeded to an impartial hearing, which concluded on October 9, 2012 after two days of proceedings (see Tr. pp. 1-191). In a decision dated November 20, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Windsor was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parents' request for an award of tuition reimbursement (see IHO Decision at pp. 10-18). Consequently, the IHO denied the parents' request for an award of tuition reimbursement for the student's unilateral placement at Windsor for the 2012-13 school year (*id.* at p. 18).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer and cross-appeal thereto is also presumed and will not be recited here.³ The gravamen of the parties' dispute on appeal is whether the IHO exceeded her jurisdiction in relying upon the district's failure to recommend the student for alternate assessment in the March 2012 IEP as a basis upon which to conclude that the district failed to offer the student

¹ The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

² Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

³ The district attached additional documentary evidence to its answer and cross-appeal for consideration (Answer Ex. 1 at pp. 1-2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024). In this instance, I will exercise my discretion and accept the additional documentary evidence—here, the parents' amended due process complaint notice, dated August 13, 2012—into the hearing record for the sake of completeness.

a FAPE for the 2012-13 school year and whether Windsor was an appropriate unilateral placement. Further, the parents also allege that the IHO erred in finding that equitable considerations did not weigh in favor of the requested relief.

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]). "[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).

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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the

IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district failed to offer the student a FAPE for the 2012-13 school year and that Windsor was not an appropriate unilateral placement for the student; however, the evidence in the hearing record does not support the IHO's finding that equitable considerations did not weigh in favor of the parents' request for relief (see IHO Decision at pp. 10-18). The IHO accurately recounted the facts of the case, addressed the issues identified in the parents' due process complaint notices or otherwise raised by the district at the impartial hearing,⁴ set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 2-18). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire

⁴ To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]). In this instance, the district initially elicited testimonial evidence regarding whether the March 2012 CSE failed to recommend the student for alternate assessment in the March 2012 IEP on its direct examination of its own witness (see, e.g., Tr. pp. 56-59, 65-72, 76-84). Consequently, the IHO did not exceed her jurisdiction in relying upon this issue as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year.

hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO regarding the district's failure to provide a FAPE to the student and the inappropriateness of Windsor as a unilateral placement (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with respect to these issues are hereby adopted. With respect to the IHO's incorrect finding that equitable considerations did not weigh in favor of the parents' request for relief, however, the IHO's decision must be reversed as further discussed herein.

With respect to the IHO's FAPE determination, a review of the hearing record shows that the IHO correctly determined that the March 2012 CSE's recommended 15:1 special class placement at a community school was not appropriate for the student, and further, that the March 2012 CSE's failure to recommend the student for alternate assessment was not appropriate (see IHO Decision at pp. 10-15). The evidence in the hearing record indicates that the district's sole witness at the impartial hearing—who attended the March 2012 CSE meeting as the district representative—admitted in testimony that the student "should be in alternate assessment" because she was "very low" functioning and had not passed "one state exam" or, alternatively, any of the Regents Competency Tests (RCTs) administered to the student since 2010 (Tr. pp. 58, 64-67; see Dist. Exs. 1 at pp. 1, 8; 2). The district representative further testified that for the "past two years," the student's teachers "expressed their concern" about the student remaining as a "diploma bound student" as opposed to "alternate assessment" (Tr. pp. 66-67). The district representative explained that although the CSE discussed whether alternate assessment should be recommended for the student, the parents never agreed (see Tr. pp. 67-68). Moreover, the district representative testified that the student was not making "academic gains under her IEP program" because the student had not passed "any of the exams," and she was also not making progress toward the annual goals in the IEP (Tr. pp. 68-69). According to the district representative, the "current academic program" recommended in the March 2012 IEP was "not supportive" of the student's needs because the IEP failed to address the student's "[p]articipation in alternate assessment" (Tr. pp. 79-80).

With respect to whether Windsor was an appropriate unilateral placement, the scant evidence in the hearing record also supports the IHO's determination. Here, the IHO properly concluded that Windsor did not provide the student with a "special education program" or "instruction designed to meet the [student's] unique special education needs" or related services (IHO Decision at pp. 15-17; see Tr. pp. 124-25, 128-32, 135). As further indicated by the IHO, the evidence in the hearing record demonstrated that Windsor taught the same "Regents curriculum" the parents objected to the student receiving at the district's public school, and while the student was "presently passing her classes," she had not passed exams in English or algebra during the first semester (IHO Decision at p. 16; see Tr. pp. 109, 111-17, 121-23). In addition, the IHO accurately noted that based upon the evidence, the "one benefit" offered to the student at Windsor was the ability to "receive a diploma" that would give the student the "opportunity to go on to college, if she passe[d] her classes" (IHO Decision at p. 16; see 125-26, 128-35). Notwithstanding this opportunity, however, the IHO properly found that the evidence in the hearing record did not support a conclusion that Windsor was an appropriate unilateral placement for the student (see IHO Decision at pp. 16-17).

Finally, the IHO's determination with regard to equitable considerations must be reversed. While the IHO found that the parents failed to cooperate with the district in obtaining a new evaluation of the student in order to consider recommending an alternate assessment program,

neither the IHO nor the district points to any authority that required the district to reevaluate the student prior to making this recommendation. Moreover, the parents indicate in their petition that the district administered reevaluations of the student—or triennial evaluations of the student—in 2004, 2007, and most recently, in 2010, such that at the time of the March 2012 CSE meeting, the district was not required to conduct another triennial evaluation (Pet. ¶ 25).⁵ Consequently, the IHO improperly relied upon the parents' alleged failure to consent to a new evaluation of the student as a basis upon which to conclude that equitable considerations did not weigh in favor of the parents' requested relief.

VII. Conclusion

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and that Windsor was not an appropriate unilateral placement for the student. However, the IHO improperly concluded that equitable considerations did not weigh in favor of the parents' request for relief. I have considered the parties' remaining contentions, including the district's claim of predetermination, and find that they are without merit.⁶

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 20, 2012, is hereby modified by reversing that portion which found that equitable considerations did not weigh in favor of the parents' requested relief.

**Dated: Albany, New York
October 28, 2014**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

⁵ Based upon the same rationale, the district's argument that the parents' refusal to consent to a new evaluation of the student prevented the March 2012 CSE from recommending an appropriate program is wholly unpersuasive.

⁶ In a letter dated June 19, 2014, the parents advised that the student graduated from Windsor in June 2014 and received a "Windsor School Diploma;" in addition, the parents indicated that they received an award of tuition reimbursement for the costs of the student's attendance at Windsor for the 2013-14 school year.