



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-021

Application of a STUDENT WITH 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 Regina Skyer and Associates, attorneys for petitioners, Jaime Chlupsa, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Francesca J. Perkins, 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 their son's tuition costs at the Cooke Center Academy (Cooke) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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 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]).

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 will not be recited here. The committee on special education (CSE) convened on March 22, 2012, to conduct an annual review and to formulate the student's individualized education program (IEP) for the 2012-13 school year (Dist. Ex. 3). The parents disagreed with the recommendations contained in the March 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at Cooke (Dist. Ex. 10; Parent Ex. A). In a due process complaint notice, dated July 11, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1).

An impartial hearing convened on September 11, 2012 and concluded on December 14, 2012 after 4 days of proceedings (Tr. pp. 1-542). In a decision dated January 14, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition for review and the district's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the March 2012 CSE recommendation for a 6:1+1 special class placement in a specialized school was appropriate for the student. The parties additionally contest whether the CSE had sufficient evaluative material to identify the student's needs for an annual review; whether the goals developed at the March 2012 CSE meeting met the student's individual needs; and whether the lack of parent counseling and training as a related service on the IEP rose to the level of a denial of FAPE.

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 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 hearing record reflects that the IHO correctly reached the conclusion that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at p. 17). The IHO accurately recounted the facts of the case, addressed the core issues that were identified in the parents' due process complaint notice, 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. 3-17). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and supported her conclusions (id.). Furthermore, an independent review of the entire 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 (see 20 U.S.C. § 1415 [g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

A. March 2012 IEP

In particular, the evidence in the hearing record supports the IHO's determinations that the procedural and substantive defects asserted by the parents were either without merit or did not rise to the level of a denial of FAPE. Specifically, the evidence in the hearing record reveals that the March 2012 CSE availed itself to the input from the student's parents, Cooke staff and progress reports, which included standardized testing, all of which provided the CSE with an accurate assessment of the student's then-functioning levels, deficits and needs (Tr. pp. 25-29, 32-33, 36-37, 42, 45, 58, 90; Dist. Exs. 3-4; 9). Further, review of the evidence in the hearing record shows that the March 2012 IEP meeting was an annual review, which requires that the CSE consider the student's current IEP to determine if the student's annual goals are being achieved; and, additionally, that the CSE reviews other current information pertaining to the student's performance (8NYCRR 200.4 [f][1][i-iii] [v][vii]). Consistent with this regulation, the March 2012 CSE considered the student's strengths, parent concerns, academic, developmental, behavioral and functional needs, as well as the student's ability to participate in instructional programs in regular education, and in the least restrictive environment (Dist. Exs. 3; 4; 8NYCRR 200.4 [f][1][i-iii] [v][vii]). The district representative noted that the student's 2011-12 IEP was reviewed prior to the March 2012 CSE meeting; and the Cooke representative noted in her "IEP annual review" that the 18 environmental modifications and human and material resources needed to address the student's deficits were "the same" as the management needs from the 2011-12 IEP (compare Dist. Ex. 3 at pp. 1-2, with Parent Ex. B at p. 1).

The hearing record also shows that in addition to accurately representing the student's needs, the March 2012 IEP contains nine annual goals and their corresponding short-term objectives (Dist. Ex. 3 at pp. 2-7). Although the annual goals lack specificity, the majority of the goals contained at least five measureable short-term objectives that specifically addressed the student's needs (id.). In particular, although the March 2012 CSE did not include specific goals for adapted physical education, the March 2012 IEP made provisions for it as a direct service, as well as occupational therapy (OT) to address the student's physical and sensory deficits (Dist. Exs. 3 at pp. 1-2, 7-8, 10-11; 9 at pp. 15-16). Further, in addition to the IHO's finding regarding the student's social/emotional goals for anxiety or behavioral needs, I find the March 2012 IEP included a counseling annual goal and three short-term objectives which targeted the student's ability to resolve conflicts, explore his own thoughts and feelings, and make positive changes in his behavior (Dist. Ex. 3 at p. 6). Specifically, the March 2012 CSE addressed the student's needs to improve socialization skills, improve "back and forth conversation" skills, utilize established coping mechanisms for self-calming, and generate and verbalize "I feel" statements with corresponding facial expressions (Dist. Ex. 3 at pp. 6-7). Additionally, with regard to the student's behavioral needs, the student's then-current teacher testified, and the March 2012 IEP and Cooke report also stated, that the behaviors were occurring with less frequency and could be redirected (Tr. pp. 312-13; Dist. Exs. 3 at p. 1; 9 at p. 2). According to the district representative, the student's then-teacher and the district school psychologist established at the March 2012 CSE meeting that the student did not need a behavior plan and, further, that the behaviors could be managed in the classroom (Tr. pp. 78-79). In addition, the district representative testified that the student's sensory seeking behaviors were being addressed by the counseling goal and short-term objectives, as well as use of a sensory diet, which was adopted by the March 2012 CSE from the Cooke report (Tr. pp. 59-60; compare Dist. Ex. 3 at pp. 1-2, 6-7, with Dist. Ex. 9 at pp. 2, 13-14).

While it is undisputed that the March 2012 CSE did not recommend parent counseling and training as a related service in the student's March 2012 IEP, the IHO finding that this did not rise to the level of a denial of FAPE should also go undisturbed here (IHO Decision at p. 15).

B. 6:1+1 Class

Moreover, a review of the hearing record shows that the IHO correctly determined that the March 2012 CSE's recommendation for a 6:1+1 special class in a specialized school including related services provided appropriate functional grouping to address the student's academic, management, physical, behavioral and social needs (Tr. pp. 109-110, 113-14, 121-22, 133-34, 138-40, 143-44; IHO Decision at pp. 15-17). A 6:1+1 special class placement is designed for those students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Here the hearing record shows that consistent with this regulation, the student demonstrated intensive management needs such that he required extra support and accommodations including small group instruction, direct teacher modeling, one to one modeling, sensory breaks, sensory tools, directions read, re-read and rephrased, manipulatives, graphic organizers, charts, graphs, checklists, redirection to task, visual and auditory cues and aids, structured schedule, previewing, repetition and review of materials, coping strategies, sensory diet, exercise, OT, speech-language therapy and counseling services (Dist. Ex. 3 at pp. 1-2, 8, 11). The student was described by his then-current teacher as requiring "one to one instruction at least every five minutes"; and further, that the student's social needs were more intensive than the rest of his classmates (Tr. pp. 310, 320-21). In fact, testimony by the district school psychologist indicated that a 6:1+1 special class was chosen for the student based on the student being "quite academically delayed" (Tr. p. 491). Based upon the foregoing, the March 2012 CSE recommendation of a 6:1+1 special class was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year; and further provided the student with the necessary support without being overly restrictive.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Cooke was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 27, 2014**

**CAROL HAUGE
STATE REVIEW OFFICER**