The University of the State of New York

The State Education Department
State Review Officer
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No. 13-037

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Friedman & Moses LLP, attorneys for respondents, Elisa Hyman, 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 district) appeals from that part of the decision of an impartial hearing officer (IHO) which directed the district to provide the parents' daughter with home services for the 2012-13 school year. Respondents (the parents) cross-appeal from the IHO's determination that the district offered the student a free appropriate public education (FAPE) and denied their request for tuition reimbursement and costs for Imagine Academy.[1] The appeal must be sustained. The cross-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]).

[1] Both the student's mother and father are captioned as parties in this appeal; however, the due process complaint notice was filed "on behalf of the mother" of the student (Parent Ex. A). For clarity, unless otherwise indicated, references to the singular "parent" in this decision, refer to the student's mother.

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 student was the subject of a prior State-level appeal (Application of a Student with a Disability, Appeal No. 12-236). The CSE convened on May 18, 2012, to formulate the student's IEP for the 2012-13 school year, and reconvened on June 21, 2012 to amend the May 2012 IEP recommendation for 12-month programming to include the name of the State-approved summer camp program requested by the parent (Tr. pp. 33-34, 107, 110-11; see generally Dist. Exs. 9; 10).[2] In a letter of 10-day notice through their educational advocate on or about June14, 2012, the parent acknowledged the district conducted an IEP meeting for the student, but indicated the district did not send the parent a final notice of recommendation (FNR), and notified the district of her intent to unilaterally place the student at Imagine Academy for the 2012-13 school year (Dist. Ex. 8; Parent Ex. K).[3]

In a due process complaint notice dated June 29, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year and requested the district reimburse her and/or pay directly the student's tuition to Imagine Academy for said school year, as well as award the student with home-based special education teacher support services (SETSS) and related services (see Parent Ex. A).

[2] There are a number of duplicate exhibits in the hearing record. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). I also remind the IHO of her obligation to exclude from the hearing record what she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Unless otherwise specified, where exhibits are duplicated, I have cited to the corresponding district exhibit.

[3] In a final notice of recommendation (FNR) to the parent dated June 6, 2012, the district summarized the district's recommendation in the May 2012 IEP and notified the parent of the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 8). However, the district did not mail the FNR to the parent's correct address and the parent did not receive the FNR at that time (Tr. p. 297).The hearing record indicated the FNR was addressed to Imagine Academy instead of the parent's home (Tr. pp. 278-80, 297; Dist. Ex. 8). The hearing record further noted that although the student did not attend Imagine Academy during summer 2012, the private school was open but did not forward the FNR to the parent upon receiving it (Tr. p. 297, 300). After the student had already attended the State-approved summer camp program requested by the parent, the parent received the FNR in the mail from the district on August 31, 2012, along with a copy of the June 21, 2012 IEP, whereupon she notified her advocate about her receipt of those documents (Tr. p. 299; Dist. Ex. 1). The parent did not visit the proposed school because it was in a different borough from the one in which she lived and she thought the recommendation was a mistake (Tr. pp. 299-300). I note that the Imagine Academy is located in the same borough in which the district's recommended program is located (see Tr. pp. 115, 185; Dist. Ex. 8).

An impartial hearing convened on August 1, 2012 and concluded on January 7, 2013 after six days of proceedings (Tr. pp. 1-365). On the first day of the impartial hearing, the IHO issued an order addressing pendency whereby during the course of the proceedings the student would receive one 30-minute small group speech-language therapy session, and three individual 30-minute speech-language therapy sessions, two 60-minute individual speech-language therapy sessions at home through a Related Services Authorization (RSA), and eight hours per week of home-based special education teacher support services (SETSS) (IHO Interim Decision at p. 3). In a decision dated January 30, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 17, 19-20). The IHO further determined that the student required a home program to be combined with any school setting and program, that Imagine Academy was an appropriate unilateral placement, and that had tuition been awarded for the private placement, it would have been reduced based on the equities (IHO Decision at pp. 18-19). As relief, the IHO ordered the district to provide eight hours per week of home-based special education teacher support services (SETSS) at a rate not to exceed the then-current "enhanced rate," and one home-based 60-minute individual speech-language therapy session per week through a Related Services Authorization (RSA) for the 2012-13 school year (IHO Decision at p. 19).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer thereto is also presumed and will not be recited here. The crux of the parties' dispute on appeal is whether the IHO correctly concluded that the district provided the student with a FAPE for the 2012-13 school year and whether IHO should have granted relief to the student in the form of home-based services after determining that the district offered the student a 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

A. FAPE

Turning first to the parents' cross-appeal that the district did not offer the student a FAPE for the 2012-13 school year, 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 pp. 16, 18). The IHO accurately recounted the facts of the case and addressed the core issues that were identified in the parent's due process complaint notice, (id. at pp. 4-16, 18. 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. at pp. 1-19). 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 specific to her FAPE analysis (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with regard to whether the district offered the student a FAPE for the 2012-13 school year are hereby adopted

I also note that the May 2012 CSE had available to it ample information in the form of a March 2012 classroom observation report, an undated social history report, a March 2012 functional behavior assessment report and an April 2012 positive behavior support plan, both from Imagine Academy, an April 27, 2012 Imagine Academy annual review report written by the student's teachers and related service providers, and a private April 30, 2012 psychiatric evaluation report, from which to determine the student's present levels of performance, and that based on her needs, the CSE created measurable annual goals to assess the student's progress, and recommended a 6:1+1 special class placement in a special school, a 1:1 crisis management paraprofessional, numerous related services, and special transportation accommodations of door to door transportation not to exceed 60 minutes (Tr. pp. 24, 30, 46-47; Dist. Exs. 1-7; see IHO Decision at p. 15). A review of the evidence in the hearing record demonstrates that the student exhibited global delays across all domains including expressive and receptive language, adaptive daily living skills, and social and emotional development, and that the May 2012 IEP reflected information (sometimes verbatim) about the student consistent with the aforementioned documentary evidence (Dist. Exs. 1-7; 9). The hearing record indicates the June 2012 CSE met to amend the May 2012 IEP for the purpose of adding the name of the State-approved summer camp program that the parent requested for the student, that no other changes were made to the May 2012 IEP, that the parent did not disagree with the recommendations contained in the May 2012 IEP or the June 2012 IEP, and that the parent did not request any other changes be made to either IEP during either of the CSE meetings (Tr. pp. 73, 108-09, 302-03; see generally Dist. Exs. 1; 9). Testimony by the parent indicated that during the May 2012 CSE meeting she had the opportunity to discuss the student's classification, goals and related services (Tr. p. 292-93). She indicated she agreed with the student's classification of autism (Tr. p. 293-94). She indicated the May 2012 CSE discussed her desire for a particular summer camp program, that the CSE was unable to add the camp program to the May 2012 IEP at that time, but that the CSE met again in June 2012 for the sole purpose of adding the requested camp to the student's IEP (Tr. p. 294-96). On the same day as the June 2012 CSE, the parent provided signed consent for the student to attend the recommended State-approved summer camp program (Tr. p. 277; Dist. Ex. 10 at p. 2).

In regard to recommended related services included in the student's May 2012 and June 2012 IEPs, the parent indicated she was surprised when the May 2012 CSE recommended an increase in speech-language therapy, occupational therapy (OT), and physical therapy (PT) for the student, because she did not request any increase in related services (Tr. pp. 301-02). The parent noted she did not oppose the increase in related services, and by not expressing disagreement with them, in essence she agreed with the CSE's related services recommendations (Tr. pp. 301-03). Furthermore, the parent testified that she felt the CSE recommendation for counseling was at an appropriate level for the student (Tr. p. 303).

As a final matter, in regard to the district's appeal alleging that the IHO erred in awarding home-based services to the student, the IHO's decision to grant relief of in the form of home-based services is inconsistent with her determination that the district's recommended program offered the student a FAPE for the 2012-13 school year since it is well settled that an award of further services than those proposed by the district must be predicated upon a finding that the student was denied a FAPE (see 34 CFR 300.148[a]; see also Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). "Should parents believe that the [district] has not provided their child with a FAPE, they may unilaterally place their child in a private school at their own financial

risk and seek tuition reimbursement" (M.L., 2014 WL 1301957 at *1 [emphasis added] [citing M.W. v. New York City Dep't. of Educ., 725 F.3d 131, 135 [2d Cir. 2013]). Therefore, the IHO's award of eight hours per week of 1:1 home-based SETSS and one hour per week of individual home-based speech-language therapy must be reversed. However, this reversal will have little practical effect on the parties as 2012-13 school year has long since ended and the district must meet the requirement of maintaining the student's home-based services for the duration of the impartial hearing and this appeal under the principle of pendency (see IHO Interim Decision; Pet. ¶ 20).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination 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 Imagine Academy 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 SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated January 3, 2013 is modified by reversing that portion which ordered the district to provide the student with home-based SETSS and speech-language services for the 2012-13 school year.

Dated: **Albany, New York**
October 23, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER