The University of the State of New York

The State Education Department
State Review Officer
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No. 13-044

**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, Cynthia Sheps, Esq., of counsel

Law Office of Melvyn W. Hoffman, PLLC, attorneys for respondent, Melvyn W. Hoffman, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2011-12 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 may 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 CSE convened on May 24, 2011, to formulate the student's IEP for the 2011-12 school year (Dist. Ex. 1 at p. 1, 2). The parent disagreed with the recommendations contained in the May 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Tr. p. 29, 185; Parent Ex. L at p. 4; see Dist. Exs. 1; 4). In a letter dated August 23, 2011 the parent notified the district of her intent to unilaterally place the student at Bay Ridge and seek tuition reimbursement (Parent Ex. L at p. 4; see Dist. Exs. 1; 4). In a due process complaint notice, dated August 29, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at pp. 1-3). The parent further requested tuition reimbursement for Bay Ridge for the 2011-12 school year as well as provision of transportation and related services (Parent Ex. A at p. 2).

An impartial hearing convened on October 11, 2012 and concluded on January 24, 2013 after 4 days of proceedings (Tr. pp. 1-205). In a decision dated February 13, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Bay Ridge was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 11-13). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at Bay Ridge for the 2011-12 school year (IHO Decision at p. 13).

**IV. Appeal for State-Level Review**

The parties' familiarity with the particular issues for review on appeal in the district's petition and the parent's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the district's recommended placement of general education with special education teacher support services (SETSS) (8:1) would have adequately met the student's needs and, therefore, whether the district offered the student a FAPE for the 2011-12 school year.

**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 failed to offer the student a FAPE for the 2011-12 school year. 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. 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. 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 minor respects, the conclusions of the IHO are hereby adopted.

**A. Scope of Review**

The district does not appeal the IHO's adverse determination that Bay Ridge was an appropriate placement for the student (Pet. ¶¶ 3, 4). Therefore this determination is final and binding upon the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

**B. General Education Setting with SETSS**

Turning first to the issue of the recommended placement, for the reasons stated below I find that the evidence in the hearing record supports the IHO's determination that the district failed to prove that its recommendation of a general education classroom with SETSS provided the student with a FAPE.[1] As noted by the IHO, the student was diagnosed with an attention deficit hyperactivity disorder as well as an auditory processing disorder and the evaluative information available to the May 2011 CSE supported a recommendation that the student be placed in a "small class" for instruction (IHO Decision at p. 12; Dist. Exs. 7 at p. 2; 8 at pp. 1, 7; see Dist. Exs. 2; 3 at p. 3).

Notwithstanding that the school psychologist, who also served as the district representative at the May 2011 CSE meeting, opined that formal testing from the January 2011 psychoeducational evaluation "did not really" support the need for a more restrictive environment, the report, which was considered by the CSE, also included the parent's concerns, based upon information she received from the student's general education teachers, that the student was unable to focus, was constantly distracted by other students, always needed help getting started and needed directions repeated when the class was given individual work (Tr. p. 37; Dist. Ex. 3 at p. 3). In addition, the auditory processing re-evaluation available to the CSE indicated that the student continued to present with an auditory processing disorder and would have difficulty hearing the clarity of the message in a noisy classroom, sorting relevant from irrelevant material, filling in the missing

[1] As an initial matter, I note that "SETSS" is not specifically identified in State regulations describing the continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). However, the hearing record indicates that the May 2011 CSE recommended a general education setting with SETSS for the student, which would consist of the services of a special education teacher in a group of no more than eight students for one period each day (Tr. pp. 28-29, 69, 185; Dist. Ex. 1 at pp. 1, 11). This description is consistent with a view that SETSS in the instant case consists of a version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *2-*3 [S.D.N.Y. Mar. 31, 2014] [finding that SETSS "entailed removing [the student] from her general education classroom for one period of forty minutes each day and placing her with a special education teacher and a group of six students to address areas that [the student] needed the most help in"] [internal quotation marks omitted; alteration omitted]; B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 (S.D.N.Y. 2010); Valtchev v. City of New York, 2009 WL 2850689, at *2 [S.D.N.Y. Aug. 31, 2009] [noting in that particular case that a resource room was also referred to as pull-out SETSS and was described as a service whereby special education teachers provide assistance to students in their areas of weakness]). State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

pieces of a message, and integrating what she hears with both ears (Dist. Ex. 8 at p. 6). Accordingly, the re-evaluation included a recommendation that the student would benefit from a small class with a favorable student-to teacher ratio (id. at p. 7). Similarly, the school psychologist testified that a student with auditory processing issues would have a difficult time in a large class environment (Tr. p. 34).

Further supporting the IHO's determination, the May 2011 IEP included the following instructional levels for the student as of May 24, 2011; reading comprehension, mid fifth grade; decoding, high sixth grade; math calculation, late fifth grade; math applied problems, late fifth grade; and written expression, fourth grade (Dist. Ex. 1 at p. 3). Therefore, according to the May 2011 IEP, which was developed for the 2011-12 school year, the student was recommended for an eighth grade general education classroom although she was functioning at least two to three grade levels behind in all areas with the one exception of decoding (id.). Moreover, the student was identified as functioning at these levels after having attended a small class, consisting of no more than ten students, at Bay Ridge during the 2010-11 school year. Accordingly, the student's current instructional levels, as reflected in the May 2011 IEP, did not support placing the student in a larger and less supportive environment, such as the recommended general education classroom with group SETSS, for the 2011-12 school year.

Based on the above, I concur with the IHO's conclusion that the district failed to establish how the student's needs would have been adequately met in the proposed placement and how the student would have been provided with personalized instruction and sufficient support services to permit her to benefit from instruction (IHO Decision at p. 12).

**C. Assigned School**

Though not discussed by the IHO, on appeal, the district categorizes the parent's claims that the assigned school was "very large, overwhelming, distracting and with high noise levels" as speculative. I must agree. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

**D. Equitable Considerations**

The final criterion for a reimbursement award is that the parent's 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]).

In this case the district argued that the parent did not satisfy her burden in establishing favorable equities. Specifically the district opined that the parent re-enrolled the student at Bay Ridge two weeks before the May 2011 CSE meeting and that the parent's August 23, 2011 letter was insufficient because it did not state, except in general terms, the parent's concerns with the recommended program (see Parent Exs. C; L at p. 4).

Looking first at the August 23, 2011 letter to the district, the parent stated that the student needed a small school and a small class environment with an appropriate special education program and services to meet the needs of the student (Parent L at p. 4). The parent further stated that the CSE had not offered such a placement (id.).

Turning now to the enrollment contract, the hearing record affirms that the parent signed an enrollment contract with Bay Ridge prior to the May 2011 CSE meeting, (see Dist. Ex. 1 at p. 1; Parent Ex. C at p. 1). The parent opined that she had to "sign something" in order to hold a place at Bay Ridge (Tr. p. 191). In addition the parent indicated that at the May 2011 CSE meeting she stated that if the district found an appropriate program in Manhattan "closer to home," she would have preferred that to sending the student to Bay Ridge (Tr. p. 191). The Second Circuit has recently opined upon this issue, holding that where parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

The hearing record reveals that the parent did not block or otherwise prevent the district from being able to evaluate the student, attended the May 2011 IEP meeting, cooperated with the CSE, attempted to visit the recommended program, and in a timely manner notified the district that she was rejecting the recommended placement because it failed to offer the student a small class environment (Dist. Ex. 1 at p. 2; Parent Ex. L at pp. 1, 2, 4; see Dist. Exs. 2; 3; 6; 7). I must concur with the IHO that equitable considerations favor an award of tuition reimbursement.

## VII. Conclusion

Finding that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations favor the parent's request for relief, the necessary inquiry is at an end. 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**