The University of the State of New York

The State Education Department
State Review Officer
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No. 13-064

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, 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. 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 for the Jump Start program at York Preparatory School (York Prep) for the 2012-13 school year. The appeal must be sustained.

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 April 18, 2012, to develop the student's IEP for the 2012-13 school year (see generally Dist. Ex. 2). The parent disagreed with the recommendations contained in the April 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 her intent to unilaterally place the student at York Prep (Parent Ex. C). In a due process complaint notice dated October 15, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1).

Following prehearing conferences, an impartial hearing convened on January 14, 2013 and concluded on February 25, 2013 after two days of proceedings (Tr. pp. 1-281). In a decision dated March 20, 2013, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that the Jump Start program at York Prep 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 p. 13). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition for the Jump Start program at York Prep for the 2012-13 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 for review 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 a general education placement with integrated co-teaching (ICT) services was appropriate for the student.[1]

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]).

[1] For clarity, this decision will refer to this placement on the continuum of services as a classroom providing integrated co-teaching (ICT) services, the term specified in State regulation, although the hearing record refers to this setting as a "collaborative team teaching" (CTT) classroom (see Tr. pp. 83, 186, 219, 233, 234, 237, 239). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom with ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a policy guidance document which provides more information about these services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

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. ICT Services

Turning the parties' arguments regarding whether ICT services were appropriate for the student, the hearing record shows that the student had been attending York Prep and participated in the Jump Start program at the time of the April 2012 CSE meeting (see e.g., Dist. Exs. 5 at p. 2; 6). According to a "review rationale" of the CSE dated April 18, 2012, the documents

considered by the April 2012 CSE included a June 2011 social history update, a June 2011 vocational assessment with both the parent and student, a June 2011 psychoeducational evaluation report, a May 2011 observation of the student, a report of the student's teacher provided by the parent, and the student's report card. The Jump Start teacher participated in the April 2012 CSE meeting, but did not specifically remember whether the appropriateness of ICT services in a public school setting for the student was discussed (Tr. pp. 65, 68, 220).

In her decision, the IHO ruled that an ICT was not appropriate due to a statement in the student's June 2011 psychoeducational evaluation report that the student's cognitive difficulties "may cause more difficulty in a larger class room setting, with the normal distractions of a classroom" (IHO Decision at p. 10; see Tr. pp. 60-62; Dist. Ex. 4 at p. 10). In addition, the IHO cited the parent's conclusion that the student's progress was a direct result of the services and small classes she received in the unilateral placement and that the student was doing well because of the support she received in the Jump Start program (IHO Decision at p. 10; see Tr. pp. 238, 260). The IHO further reasoned that the student had previously been placed in a larger class in another private school and had not made progress, and that placing her in the proposed class setting with ICT services would have the same result (IHO Decision at p. 10).[2]

However, according to the June 2011 psychoeducational evaluation report, the student's overall cognitive and academic abilities ranged from the high average range for reasoning abilities on verbal tasks, to the extremely low range in processing speed, but in the average range in overall reading and math abilities (Dist. Ex. 10 at p. 4). Further, the evaluator opined that, although the student exhibited some inattention during the evaluation, she attempted to complete all tasks presented, worked appropriately during the assessment and generally responded quickly to most tasks (Dist. Ex. 10 at p. 2). Although the June 2011 psychoeducational evaluation stated that a large classroom setting may cause the student difficulties, and the parent asserted that the student required a smaller class than the recommended general education setting with ICT services, what constitutes a "small class" is not defined in the hearing record, and it is questionable whether or not small class size, in and of itself, constitutes special education (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]).

The April 2012 IEP present levels of performance, which are not in dispute, reflect, among other things, that the student's decoding, vocabulary, and basic math skills were age/grade appropriate, and that she experienced some difficulty with and benefitted from teacher support for higher level reading comprehension tasks, consistent use of active reading strategies, paragraph development, editing and proofreading during the writing process, and multistep and word mathematics problems (Dist. Ex. 2 at p. 1). The April 2012 IEP also indicated that the student took "medication at home for attention and focusing" (id. at p. 2).

The district special education teacher who participated in the April 2012 meeting stated that the CSE determined the student could make progress with the support of ICT services because

[2] The IHO improperly compared the student's previous progress in a general education class setting with one teacher, which was larger than the student's current class, with the ICT services within a general education class that would have two teachers, one of whom is special education certified and limited to student load in the ICT capped at 12 students (see IHO Decision at p. 10).

she was functioning at her grade level and should be doing general education work along with her nondisabled peers (Tr. pp. 83, 136). The special education teacher also stated that the IEP incorporated management needs and test accommodations to address, for example, the student's slow processing speed (Tr. p. 123, see Dist. Ex. 2 at pp. 2, 9). Supports for the student's management needs provided for in the IEP included preferential seating, reminders to use activie reading strategies, refocusing and redirection, repetition of concepts, breaking down the writing process, graphic organizers, editing checklist, use of a highlighter for salient information, use of an index card to track when reading, mathematics reference materials such as a procedure card with mathematical steps outlined, and monitoring task completion (as the student could become overwhelmed) (Dist. Ex. 2 at p. 2; see Tr. pp. 70-71). The IEP also included the following testing accommodations: extended time (double time), separate location, described as a small group with minimal distractions, directions repeated, and allowing the student to mark up the test booklet (at pp. 9-10; see Tr. pp. 72-73). The April 2012 IEP also included annual goals to address the student's needs identified in the present levels of performance, including goals to improve the student's ability to use the writing process in multistep stages, develop strategies to use writing tools such as graphic organizers, expand her vocabulary and word relationships, improve her coping skills and reduce anxiety, and solve multistep mathematical problems (Dist. Ex. 2 at pp. 3-8). The hearing record reflects that the April 2012 CSE rejected special education teacher support services (SETSS) as inadequate for the student, who "benefit[ed] from the support of a special education teacher in the classroom to monitor her progress with the work load" (Dist. Ex. 2 at p. 13; see Tr. p. 142). Finally, the special education teacher opined that, in contrast to the student's Jump Start program, ICT services would provide support to the student from a special education teacher for the entire day (Tr. p. 142). The April 2012 CSE further recommended that the student receive counseling services to help the student develop coping skills (Dist. Ex. 2 at p. 8).

Thus, given the student's relative cognitive and academic strengths, the hearing record supports a finding that the April 2012 IEP's recommendation for ICT services, along with the other accommodations, modifications, annual goals, and counseling services, was reasonably calculated to provide the student with educational benefit in the LRE.

B. Challenges to the Assigned Public School Site

As to the IHO's findings regarding the class size at the assigned public school site, as well her observation that it would have been "helpful" to have a district "ICT teacher" at the CSE meeting to explain how the student's IEP would be implemented and how the student's needs would be would be met in a larger classroom setting (IHO Decision at p. 10), in this instance, similar to the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the IHO's determinations must be reversed. The parents' claims turn on how the April 2012 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. C at p. 1; E), the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; 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] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in

the IEP were not provided in practice"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having determined that the evidence in the hearing record refutes the IHO's determination that the district did not offer 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 the Jump Start program at York Prep 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.

IT IS ORDERED that the IHO's decision dated March 20, 2013 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER