



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-099

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 Board of Education of the Penfield Central School District

Appearances:

Joyce B. Berkowitz, Esq., attorney for petitioners

Harris Beach PLLC, attorneys for respondent, David W. Oakes, 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 a decision of an impartial hearing officer (IHO) which ordered a change in their son's placement to an interim alternative educational setting (IAES) following an expedited due process hearing wherein the IHO determined that maintaining the student's then-current placement was substantially likely to result in injury to the student or others. The appeal must be dismissed.

II. Overview—Administrative Procedures

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]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).¹

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.² The CSE convened on June 12, 2012 to determine the student's eligibility for special education and related services (Parent Ex. 1).³ The student has received a diagnosis with an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 26 at p. 1). Having found that the student was eligible to receive special education and related services as a student with an other health-impairment,⁴ the June CSE recommended that the student receive direct and indirect consult teacher services for one hour per school day and individual counseling once per week for 30 minutes (Parent Ex. 1 at pp. 1, 8).⁵

An expedited impartial hearing convened on May 8, 2013 and concluded on May 9, 2013 after two days of proceedings (Tr. pp. 1-425). In a decision dated May 16, 2013, the IHO determined that maintaining the current placement of the student was substantially likely to result in injury to the student or others (IHO Decision at pp. 3-7). The IHO ordered that the student be removed from his current placement to an IAES—consisting of three hours per day of home-based instruction and home-based counseling once per six-day school cycle for 30 minutes—for 45 days, commencing on May 20, 2013 (*id.* at p. 7). In the alternative, the IHO provided the parents the opportunity to send the student to an out-of-district public school program previously suggested for the student by the district (*id.*).

¹ The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

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

³ The IHO is encouraged in future to have the parties differentiate their exhibits by having one parties' labeled numerically and the opposing parties' labelled alphabetically.

⁴ The student's eligibility for special education and related services as a student with an other health-impairment are not in dispute in this proceeding (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁵ A functional behavior assessment (FBA) and behavior intervention plan were developed and implemented in April 2011, prior to the student's referral to the CSE (Dist. Exs. 29; 31).

IV. Appeal for State-Level Review

The parents appeal the IHO's determination that maintaining the student's current placement was substantially likely to result in injury to the student or others and request that an SRO order the student's immediate return to school. The district answers and asserts that the IHO properly determined that maintaining the student in his current placement created a substantial likelihood of injury to the student or others.

V. Applicable Standards

The procedure under the IDEA (20 U.S.C. §§ 1400-1482) relevant to this case involves the process by which school officials may seek a change in placement of a student with a disability to an appropriate IAES when maintaining the student in the current placement is substantially likely to result in injury to the student or others (20 U.S.C. § 1415[k][3]; Educ. Law § 3214[3][g][3][vii]; 34 CFR 300.532; 8 NYCRR 201.8, 201.11).

VI. Discussion

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that maintaining the student in his current placement was substantially likely to result in injury to the student or others (see IHO Decision at pp. 3-7). The IHO accurately recounted the facts of the case, addressed the issue identified in the district's due process complaint notice, set forth the proper legal standard to determine whether the district was entitled to an order changing the student's placement to a temporary IAES in a dangerous situation, and applied that standard to the facts at hand (id. at pp. 2-7). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his 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]). The conclusions of the IHO are hereby adopted.

A review of the hearing record shows that the IHO correctly determined that the district amply demonstrated that maintaining the student in his current placement was substantially likely to result in injury to the student or others, and in fact already had resulted in injuries to the student's teacher on two occasions during the 2012-13 school year (Tr. pp. 92-93, 100-01, 292-93; Dist. Exs. 12, 17).

The district presented evidence of more than 20 behavioral incidents, which occurred between September 6, 2012 and April 23, 2013 (Tr. pp. 18-21, 34-46, 64-106, 107-09, 145-56, 162-65, 216-17; Dist. Exs. 3-21, Parent Exs. 4; 9). At the start of the 2012-13 school year, the district continued the use of management strategies, which had been successful during the prior school year, such as offering the student the options of leaving his classroom to go to a separate location to bounce a basketball or kick a soccer ball, or going to a separate classroom to read or draw (Tr. pp. 60-61). The district also provided the parents with daily written reports that documented the student's activities and behavior throughout the day (Parent Exs. 4; 9). The

evidence in the hearing record also details the district's efforts throughout the school year to maintain the student in his current classroom through the systematic addition of supports.

The student was suspended from school for two days following a behavioral incident on November 14, 2012, and again for three days following an incident on November 20, 2012 (Dist. Exs. 3; 9-10). The record also reflects that the district convened a timely manifestation determination review (MDR) on November 29, 2012 (Dist. Ex. 22). After determining that the student's conduct was a manifestation of his disability, the student's IEP was revised to include additional supports and his BIP was revised to include additional management strategies, such as identifying specific adults the student should inform when he felt frustrated or angry who would listen to him "air his frustrations;" and also allowed for the use of restraint by trained district staff (Tr. pp. 110-12, 156-59, 200-03; Dist. Ex. 22).

The student was suspended from school for three days following a behavioral incident on December 3, 2012. The district convened a timely MDR on December 7, 2012, at which it was determined that the student's conduct was a manifestation of his disability (Dist. Ex. 23 at p. 1). The student's IEP was again revised to include access to a full-time 1:1 special education teacher to provide the student with the option to leave his classroom to "deescalate" in a separate location of the student's choosing at any time (Tr. pp. 113-16, 156-61, 204-08; Dist. Ex. 23). The 1:1 special education teacher was recommended in addition to the consultant teacher providing push-in services at specific times throughout the school day (Tr. pp. 115-16; Dist. Ex. 23 at pp. 7-8).

The hearing record also reflects behavioral incidents on December 14, 2012 and December 20, 2012, after which the district completed a "threat assessment" to determine whether the student posed an imminent threat to a classmate (Tr. pp. 165-66, Dist. Ex. 3 at p. 3). A meeting between the parents and the district's special education administrator was held on January 9, 2013 to discuss the threat assessment and the district's position that the student's management needs could not be addressed by the student's program and placement (Tr. pp. 212-15; Dist. Ex. 3 at p. 3). The district's special education administrator testified that he asked the parents to "explor[e] out-of-district placements" and made referrals to potential placements (Tr. pp. 212-15; Parent Ex. 3).

Following an incident on January 24, 2013, the student was "suspended" from riding the school bus until such time as the district could provide a full-time 1:1 aide to accompany the student during transportation (Tr. pp. 215-16). The district's special education administrator testified that he met with the parents and the district social worker on January 28, 2013, to discuss implementing a full-time 1:1 aide to accompany the student on the bus to "provide curb-to-curb support" to the student (Tr. p. 218). The district's special education administrator also testified that he advised the parents that the student would not be permitted on the school bus until the 1:1 aide could be implemented and further urged the family to consider other programs (Tr. pp. 218-19). The hearing record reflects that a 1:1 transportation aide began accompanying the student on February 1, 2013 (Tr. pp. 19, 216).

The hearing record documents additional behavioral incidents occurring on February 6, 2013, March 11, 2013, March 13, 2013, March 18, 2013, March 19, 2013, April 10, 2013 and April 23, 2013 (Dist. Exs. 14-20). On April 18, 2013, the district requested an expedited due process hearing (Dist. Ex. 1). Contrary to the parents' beliefs, the hearing record demonstrates that student's behaviors became more frequent and more serious over time.

VII. Conclusion

Therefore, consistent with the IHO's finding, the evidence in the hearing record supports a determination that maintaining the student in his current placement was substantially likely to result in injury to the student or others (see IHO Decision at pp. 4-7).⁶

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 November 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

⁶ To the extent the district asserts that the IAES placement was to last for 45 school days, this assertion is not supported by the plain language of the IHO's determination, which ordered the student removed from the district to an IAES "for 45 days" (IHO Decision at p. 7). However, as the removal has now expired by its own terms, I need not determine whether the IHO's determination should be interpreted as the district asserts.