The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-101

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, Lisa R. Khandhar, Esq., of counsel

Wayne Rock, special education advocate for respondents

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 the student eligible for special education programs and related services as a student with an emotional disturbance and directed the district to place the student in an appropriate State-approved nonpublic school. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters 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" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). 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 subsequently 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]).

III. Facts and Procedural History

I was appointed to conduct this review on October 29, 2014. 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.[1] The CSE convened on February 5, 2013, to determine the student's initial eligibility for special education (see generally Dist. Ex. 14). In a due process complaint notice, dated February 6, 2013, and in an amended due process complaint notice, dated March 19, 2013, the

[1] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve the issues presented in this appeal.

parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Exs. D, E).

On March 18, 2013 the IHO conducted a prehearing conference, and on April 2, 2013, the parties proceeded to an impartial hearing, which concluded on April 26, 2013 after three days of proceedings (see Tr. pp. 1-369). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2012-13 school year (see Tr. pp. 350, 359). In a decision dated May 10, 2013, the IHO determined that the student qualified for special education and related services as a student with an emotional disturbance and that a 12-month school year program in a residential treatment center would provide the student with a FAPE in the least restrictive environment (LRE) (see IHO Decision at pp. 7-12). Consequently, the IHO directed the district to convene a CSE to develop an IEP recommending a 12-month school year program in a residential placement with integrated special education remedial and therapeutic services, and defer the student to the Central Based Support team (CBST) for the selection of an appropriate State-approved nonpublic school (id. at pp. 11-12).

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 gravamen of the parties' dispute on appeal is whether the IHO erred in ordering the CSE to reconvene to classify the student as a student with an emotional disturbance, to recommend a 12-month school year program in a residential treatment center with remedial and therapeutic special education services, and to place the student in a State-approved nonpublic school.

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 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, in a well-reasoned and well-supported decision, correctly ordered the CSE to reconvene to classify the student as a student with an emotional disturbance, to develop an IEP for the student recommending "a program of a full-day specialized self-contained residential educational environment with integrated special education remedial and therapeutic services on a [12-]month basis," and to refer the student's program to the CBST "for selection of an appropriate State-approved nonpublic school placement" (see IHO Decision at pp. 7-12). The IHO accurately recounted the facts of the case and addressed the majority of the specific issues identified in the parent's due process complaint notice (id. at pp. 2-12). 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]). Thus the conclusions of the IHO are hereby adopted.

In particular, a review of the hearing record shows that the IHO correctly determined that the student was eligible for special education programs and services as a student with an emotional disturbance (see Tr. pp. 45-46; Parent Exs. H at pp. 6, 18-25; I at pp. 1, 5; L at pp. 2-3; M at p. 2;

N at pp. 1-3; O; U at p. 2; V-X; KK-LL). Additionally, in support of the IHO's determination, the evaluator who conducted a March 2012 neuropsychological evaluation of the student testified that the student "engaged in some actions that are not appropriate and [that are] even in violation of law," due to the "pain that he experience[d]" (see Tr. pp. 64-65). The evaluator testified that he did not believe that the student engaged in the inappropriate behavior because he is "socially maladjusted" (id.). This case is unlike other cases where the student's academic decline was attributable to substance abuse or socially maladjusted behavior rather than a medical diagnosis or a disability (see N.C. v. Bedford Cent. Sch. Dist., 300 Fed. App'x 11, 13, 2008 WL 4874535 [2d Cir. Nov. 12, 2008] [finding that the private therapist determined that the student's substance abuse was the root cause of his problems in school]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 171-73 [S.D.N.Y. 2011] [finding that the psychoeducational evaluation indicated the origin of the student's academic problems was in the realm of social maladjustment rather than depression]; P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516, 526-31 [E.D.N.Y. 2011] [upholding the IHO's decision that the hearing record demonstrated that substance abuse rather than an emotional disability was behind the student's academic decline]). The district school psychologist, who attended the February 2013 CSE meeting, testified that the February 2013 CSE received the March 2012 neuropsychological evaluation prior to the February 2013 meeting but did not consider it in determining the student's eligibility for special education programs and related service (see Tr. pp. 293-94). However, the summary of the February 2013 CSE meeting indicated that the February 2013 CSE's determination that the student was not eligible for special education programs and related services was based on the March 2012 neuropsychological evaluation (see Dist. Ex. 14). Upon questioning by the IHO, the district school psychologist admitted that the February 2013 CSE did not consider whether the student met two of the conditions for eligibility as a student with an emotional disturbance—"(C) inappropriate types of behavior or feelings under normal circumstances; [and] (D) A general pervasive mood of unhappiness or depression" (see Tr. pp. 295-96; Parent Ex. H at p. 26; see also 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]). Additionally, the district school psychologist admitted that the February 2013 CSE did not consider the evaluator's diagnosis of a major depressive affective disorder, which was reported in the March 2012 neuropsychological evaluation (see Tr. p. 296; Parent Ex. H at pp. 25-26). The March 2012 neuropsychological evaluation contained more extensive testing in the area of social/emotional functioning with both the student and parents as reporters than the district's January 2012 psychoeducational evaluation and January 2013 educational evaluation (compare Parent Ex. H at pp. 18-25, with Parent Ex. I at p. 5, and Parent Ex. X at pp. 1-2).[2]

The IHO determined, based on the evaluator's testimony and analysis, that "a residential treatment center with a full-day specialized self-contained educational environment with integrated special education remedial and therapeutic services over a [12-]month period will provide the student with a [FAPE] in the [LRE]" (IHO Decision at pp. 11-12). A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-

[2] However, the "prevalent themes" in the personality testing in the January 2012 psychoeducational evaluation—feelings of helplessness and inadequacies; possible early trauma; paranoia; unwillingness to be involved in interpersonal give and take; remorse for past actions; and fear of losing friends and family—were consistent with the student's social/emotional functioning as reported in the March 2012 neuropsychological evaluation (compare Parent Ex. I at p. 5, with Parent Ex. H at pp. 19-24; see also Tr. pp. 277-78, 280-84).

22).[3] Although the IHO may have used an incorrect standard in evaluating the appropriateness of the residential placement, the hearing record supports the IHO's ultimate conclusion that a residential treatment center was necessary for the student.

VII. Conclusion

The hearing record supports the IHO's order directing the district to reconvene a CSE meeting to classify the student as a student with an emotional disturbance, to develop an IEP recommending a 12-month school year program in a full-day specialized self-contained residential educational environment with integrated special education remedial and therapeutic services, and to defer the student to the CBST for the selection of an appropriate State-approved nonpublic school. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 17, 2014

ANNA BINAU
STATE REVIEW OFFICER

[3] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).