The University of the State of New York

The State Education Department
State Review Officer
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No. 13-106

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Friedman & Moses, LLP, attorneys for petitioner, Alicia Abelli, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Cooke Academy School (Cooke) 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]).[1]

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. Briefly, the Committee on Special Education (CSE) convened on January 19, 2011 to formulate the student's individualized education program (IEP) for the 2011-12 school year (see Dist. Ex. 3). The parent disagreed with the recommendations in the January 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 and, as a result, notified the district of her intent to unilaterally place the student at Cooke (Parent Ex. A at pp. 2-3). In a due process complaint notice dated August 14, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Dist. Ex. 1).[2]

An impartial hearing convened on October 2, 2012 and concluded on March 23, 2013 after eight days of proceedings (Tr. pp. 1-743). In a decision dated May 8, 2013, the IHO held that the district offered the student a free appropriate public education (FAPE) for the 2011-12 school year (IHO Decision at pp. 20-21).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition for review, the district's answer, and the parent's reply is also presumed and will not be recited here in detail. Briefly, the parent asserts that, contrary to the IHO's findings: (1) the district utilized blanket policies and predetermined the student's educational placement, which discriminated against the student and violated the IDEA and section 504 of the of the Americans with Disabilities Act (section 504); (2) the January 2011 IEP was flawed in that it was not based on sufficient evaluative data and did not adequately describe the student or his needs; (3) the annual goals were inadequate; (4) the level of special education services and supports were inadequate in that they did not mirror those offered by Cooke; (5) the transition services and plan were vague and inappropriate; (6) the CSE failed to provide the parent with prior written notice; (7) the district failed to establish that it could have implemented the student's IEP during the 2011-12 school year; and (8) the IHO failed to consider the cumulative effect of the alleged deficiencies, which the

[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] The due process complaint notice contained a myriad of assertions, some plainly delineated and others vaguely referenced in the context of factual statements and conclusions (Dist. Ex. 1 at pp. 2-8; see Tr. pp. 706-07). The IHO was able to narrow the focus of the parent's contentions to 24 enumerated issues during the March 26, 2013 hearing date and listed those 24 issues within his decision (IHO Decision at pp. 4-6; see Tr. pp. 703-728).

parent argues amount to a denial of a FAPE.[3] The parent also asserts that Cooke was an appropriate unilateral placement for the student and that equitable considerations weigh in favor of an award of tuition reimbursement. In an answer, the district denies the parent's material allegations and asserts that: (1) the SRO lacks jurisdiction to review section 504 claims; (2) the district offered the student a FAPE; (3) challenges to the assigned public school site and implementation of the IEP are speculative; (4) Cooke was an inappropriate unilateral placement; and (5) equitable considerations did not favor the parent's request for tuition reimbursement.

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.

[3] The parent does not appeal the IHO's determinations with respect to the composition of the CSE, the due consideration of other programs, Jose P. claims, methodology, or class size ratio; therefore, these determinations are final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][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, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district did not deny the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 20-21). The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice and further refined by the parties during the impartial hearing, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2011-12 school year, and applied that standard to the facts at hand (id. at pp. 4-20). 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, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.[4]

In particular, a review of the hearing record shows that, contrary to the parents' contention, the January 2011 CSE had before it sufficient evaluative information, consisting of an October 2010 classroom observation, a May 2010 private assistive technology assessment, an April 2010 private neuropsychological evaluation, a December 2010 Cooke progress report, as well as input from the parent and from the student's teacher at Cooke, the Cooke assistant head of school, and the Cooke CSE chair (Dist. Exs. 3 at p. 2; 4 at p. 2; 7-10). Further, a review of the January 2011 IEP shows that the evaluative data is accurately reflected therein (compare Dist. Ex. 3, with Dist. Exs. 7-10). For example, the January 2011 IEP reflects the Cooke progress report, which showed that the student used reading strategies to comprehend and discuss texts and when reading a journal and was engaged in class read-alouds and participated through discussion and small group interactions (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 10 at p. 2). The January 2011 IEP and the Cooke progress report also showed that, in math, the student had difficulty with regrouping, addition, subtraction, multiplication, division, using "mental math," rounding up, and solving

[4] As the district argues, the parent's claims pursuant to section 504 are outside the scope of my jurisdiction (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, I do not adopt the IHO's findings on such claims.

problems that contained new vocabulary words (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 10 at p. 4). Further, the January 2011 IEP directly reflects the results of the April 2010 private neuropsychological evaluation with respect to academic achievement (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 10). With respect to the student's management needs, the January 2011 IEP identified the following supports: small group instruction; one-to-one re-teaching of math concepts; scaffolding; directions repeated and rephrased, as needed; graphic organizers, graphs, and charts; verbal and visual cues; teacher redirection to task; direct modeling; and positive reinforcement (Dist. Ex. 3 at pp. 3, 5-6). In addition, the January 2011 CSE utilized the goals found on the Cooke progress report and adopted many of them as IEP annual goals and short-term objectives (compare Dist. Ex. 3 at pp. 8-11, with Dist. Ex. 10 at pp. 2-7).

Moreover, the January 2011 IEP reflects many other recommendations found within the Cooke progress report, the private neuropsychological evaluation, and the private assistive technology evaluation. For example, the CSE recommended a laptop and software for math, writing, and reading as part of an overall recommendation for assistive technology, while the assistive technology evaluator recommended specific items such as a Macintosh laptop, as well as specific software for math, writing, and reading, and subscriptions to online resources (compare Dist. Ex. 3 at p. 7, with Dist. Ex. 8 at pp. 6-8). The January 2011 IEP also recommended that the student be placed in a 12:1+1 special class with social travel and activities of daily living (ADL) skills training with post-secondary goals directed toward ADL skills, including employment, while the private neuropsychological evaluation report recommended a small, narrowly tailored program that emphasized both academic improvement and the development of ADL skills, such as independent living, social, travel, and employment readiness skills (compare Dist. Ex. 3 at pp. 3, 5, 15-16, with Dist. Ex. 9 at pp. 7-8). Finally, the January 2011 IEP recommended the related services of counseling and speech-language therapy, as did the private neuropsychological evaluation report (compare Dist. Ex. 3 at pp. 14, with Dist. Ex. 9 at p. 7).

While, as the parent argues, the district failed to provide the parent with prior written notice (34 CFR 300.503[a]; 8 NYCRR 200.5[a]), the IHO correctly concluded that the hearing record did not indicate that this omission (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]; see IHO Decision at p. 19).

Finally, with respect to the assigned public school site, for reasons similar to those set forth in other State-level administrative decisions resolving similar disputes (see, 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), I agree with the IHO's determinations to the extent that he found the parent's claims in this regard to be speculative (see IHO Decision at pp. 17-19). The parent's claims regarding the availability of a seat at the assigned school, the school's ability to implement the student's mandated related services, and the functional grouping of the students in the proposed classroom (see Dist. Ex. 1 at p. 5; Parent Exs. A at p. 2; B at pp. 2-3) turn on how the January 2011 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. A; B), 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. June 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 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

Based on the foregoing, I find that the district offered the student a FAPE for the 2011-12 school year. Having found that the district offered the student a FAPE, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 30, 2014

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ALAN FITZPATRICK
STATE REVIEW OFFICER