The University of the State of New York

The State Education Department
State Review Officer
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No. 13-120

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for his son for the 2013-14 school year were appropriate. 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]).[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 February 6, 2013, to develop the student's IEP, which would be implemented from February 2013 through February 2014 (see generally Dist. Ex. D at pp. 1-15).[3] Finding that the student remained eligible for special education services as a student with autism, the February 2013 CSE recommended a 12-month school year program in an 8:1+1 special class placement at a specialized district school with the related service of two 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 8-9, 11).[4] The February 2013 IEP also included transition services, which further included measurable postsecondary goals and a coordinated set of transition activities (id. at pp. 3-4, 9-10). The parent disagreed with the recommendations in the February 2013 IEP, and in a due process complaint notice dated February 7, 2013, alleged that the IEP failed to include a recommendation for the services of a paraprofessional, and failed to include an appropriate number of speech-language therapy sessions (see Dist. Ex. A at pp. 1-2). As relief, the parent requested pendency (including 1:1 paraprofessional services), the services of a 1:1 paraprofessional, five days per week of speech-language therapy services, and "vocational programs" that incorporated music and art instruction in the IEP (id.).

On April 4, 2013, the parties proceeded to an impartial hearing, which concluded on April 30, 2013, after two days of proceedings (see Tr. pp. 1-172).[5] In a decision dated June 5, 2013, the IHO concluded that the evidence in the hearing record supported the district's decision to not recommend the services of a 1:1 health paraprofessional, and further, that the district was not required to include music or art instruction in the February 2013 IEP (see IHO Decision at pp. 3-5). With regard to speech-language therapy, the IHO found that, consistent with a July 2012 speech-language therapy evaluation, the student "require[d] one session daily of speech services, in a mix of 1:1 and small group settings" (id. at p. 5). In light of this finding and as relief, the IHO

[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 resolve the issues presented in this appeal.

[3] At the impartial hearing, the district explained that the February 2013 CSE specifically convened pursuant to an order arising from a previous impartial hearing (see Tr. pp. 20-21).

[4] The student's eligibility for special education and related services as a student with autism is not in dispute (34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

[5] On the first date of the impartial hearing, the parent and the district confirmed that the student was currently receiving pendency (stay-put) services (see Tr. pp. 1-2, 8-11).

ordered the district to revise the student's IEP to include a recommendation for daily speech-language therapy services consistent with the recommendations in the July 2012 speech-language evaluation (id. [citing Dist. Ex. C]).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition and the district's answer thereto is also presumed and will not be recited here.[6] The gravamen of the parties' dispute on appeal is whether the February 2013 CSE's decision to not recommend the services of a 1:1 health paraprofessional or music and art instruction in the IEP was appropriate.[7, 8]

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 free appropriate public education (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]).

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[6] While the parent does not appeal the IHO's order directing the CSE to reconvene to revise the frequency of the student's recommended speech-language therapy services, the parent requests clarification of the type and frequency of the speech-language therapy services, and how the services will be delivered. Similarly, the district does not appeal the IHO's order directing the CSE to reconvene to revise the frequency of the student's recommended speech-language therapy services; as such, the IHO's determination is final and binding upon the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Additionally, the district indicates upon information and belief that the CSE reconvened, and consistent with the IHO's decision, recommended five sessions per week of speech-language therapy sessions, which included two sessions per week of individual services and three sessions per week of small group sessions (Answer ¶ 55).

[7] As additional relief, the parent requests that the student be placed at a community school. However, as the district correctly asserts in its answer, the parent did not raise this as an issue in the due process complaint notice (see Dist. Ex. A at pp. 1-2). Therefore, as an issue raised for the first time on appeal, it is outside the permissible scope of review and will not be addressed herein.

[8] The parent submits additional documentary evidence, identified as exhibits 1 through 16, for consideration on appeal; the district does not object to the consideration of these documents.. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024). A review of the hearing record indicates that during the impartial hearing, the parent presented—and the IHO entered—16 exhibits into evidence (see Tr. p. 17). While neither the transcript nor the IHO decision described the parent's numbered exhibits, the documents are referenced in both the impartial hearing transcript and the IHO decision (see IHO Decision at pp. 7, 3-4; Tr. pp. 122-36). Thus, it appears that the additional documentary evidence submitted with the parent's petition are the same parent exhibits previously entered as evidence at the impartial hearing; as such, I will exercise my discretion and accept all 16 exhibits for consideration on appeal.

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).

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 evidence in the hearing record reflects that the IHO, in a well-reasoned and well supported decision, correctly reached the conclusions that the February 2013 CSE was not required to recommend the services of a 1:1 health paraprofessional or music and art instruction as part of the student's transition plan or vocational program, in order to offer the student a FAPE (see IHO Decision at pp. 3-5). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard, and applied that standard to the facts at hand (id.). 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 findings and conclusions of the IHO are hereby adopted.

In particular, a review of the hearing record demonstrates that the IHO correctly determined that the district was not required to recommend the services of a 1:1 health paraprofessional for the student (see IHO Decision at pp. 3-4). The evidence in the hearing record indicates that while

a 1:1 paraprofessional would be "optimal" for the student because it would enhance his understanding of classroom instruction, it is not necessary for health-related reasons or for the student to receive educational benefits (id.; Dist. Ex. F; Parent Exs. 10-11). With regard to the parent's request that the student receive music or art instruction as part of the student's transition plan or vocational training, the IHO correctly found that there was nothing in the hearing record to suggest that for this student, instruction in the arts was an essential component of a FAPE (see IHO Decision at p. 5).

VII. Conclusion

In this case, the evidence in the hearing record supports the IHO's determination that the district was not required to recommend the services of a 1:1 health paraprofessional or music and art instruction as part of the student's transition plan or vocational program in the February 2013 IEP.

THE APPEAL IS DISMISSED.

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

CAROL H. HAUGE
STATE REVIEW OFFICER