The University of the State of New York

The State Education Department
State Review Officer
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No. 13-123

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:

Law Offices of Regina Skyer & Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Remels, 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 for 10 hours of applied behavior analysis (ABA) therapy, one hour of parent training, and one hour of team or supervisory meetings per week for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that it bears the burden of proof with respect to whether the equities do not favor an award of relief to the parent. The appeal must be dismissed. The cross-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 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 24, 2012, to formulate the student's IEP for the 2012-13 school year and recommended a 12 month program in a 12:1:3 special class in a state approved nonpublic school with the related services of speech-language therapy once individually and once on a small group (5:1) for 30 minutes per week and counseling in a small group (5:1) twice per week for 30 minutes (Dist. Ex. 1 at pp. 1-10). The parent agreed with the recommended placement contained in the April 2012 IEP; however, she disagreed with not including home based ABA, parent training or team or supervisory meetings, and, as a result, notified the district of her intent to obtain the aforementioned services (Tr. pp. 110, 130; Parent Exs. A; E). In a due process complaint notice, dated July 5, 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 Parent Ex. A).

An impartial hearing convened on August 27, 2012 and concluded on May 8, 2013 after 3 days of proceedings (Tr. pp. 1-214). In a decision dated June 3, 2013, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2012-13 school year, that the April 2012 IEP recommended an appropriate program and placement, and that the district established that it would provide the student personalized instruction with sufficient supporting services to permit the student to benefit educationally (IHO Decision at pp. 7-10).

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 district's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the student required 10 hours of home based ABA, one hour of parent training and one hour of team or supervisory meetings per week in order to provide the student a FAPE. The parties additionally argue the merits of certain claims that the IHO did not address, including the parent's claim that she was denied meaningful participation during the April 2012 CSE meeting. Furthermore, the parent also alleges that the IHO exhibited insufficient knowledge of the hearing record and that he failed to properly consider the evidence[1].

[1]With regard to the district's cross-appeal that the IHO erred in determining that the district bears the burden of establishing that equities do not favor an award of relief to the parent; this claim is not properly presented because the district was not aggrieved by any aspect of the IHO's decision. The IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012]). Here, the IHO's decision denied the parent's requested relief and resolved the appeal

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

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entirely in the district's favor (IHO Decision at pp. 5-6). Therefore, the district was not entitled to cross-appeal the IHO's decision in this instance (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). Even assuming for purposes of argument that it was permissible for the district to interpose a cross-appeal, it was not prejudiced by the IHO's allegedly inaccurate statement of the applicable burden of proof. The district's cross-appeal is, therefore, dismissed.

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 correctly reached the conclusion that the district offered the student a FAPE for the 2011-12 school year (see IHO Decision at p. 10). The IHO accurately recounted the facts of the case, addressed the core issues that were identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 3-10). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and 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.[2]

In particular, the evidence in the hearing record supports the IHO's determination that the substantive defects asserted by the parent did not rise to the level of denial of FAPE. Similarly, a review of the hearing record shows that those claims which the IHO did not reach would not result in a different outcome in this instance. In particular the evidence in the hearing record reveals that the April 2012 IEP was reasonably calculated to provide the student with educational benefit (Tr. pp. 38, 60-63, 132-33; Dist. Exs. 1; 2; Parent Ex. F). Moreover, the evidence in the hearing record shows that the student required specialized instruction to address his academic and language deficits that would be appropriately addressed by the April 2012 recommendations, as evidenced by testimony from the district representative and the student's then-current teacher, as well as 2011-12 SLCD IEP progress reports (Tr. pp. 38, 60-63; Dist. Ex. 2). Finally, the parent testified that she agreed with the recommended placement at SLCD and that she felt it was "the right educational placement" (Tr. pp. 110, 132).

[2] To the extent that the parent argues that the IHO exhibited insufficient knowledge of the hearing record, a review of the hearing record shows that the IHO appropriately cited to the hearing record in a well-reasoned, well-supported decision. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5 [j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1 [x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision. Upon review, I find that the IHO's decision substantially comports with the above regulations.

A. Additional Services

Nevertheless, the parent argues that home-based services were a necessary component of the student's educational program and that he could not receive a FAPE without them. However, in light of the above determination that the April 2012 IEP was reasonably calculated to provide educational benefit, the district was not required to maximize the student's potential by providing the student with additional services (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132; see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1155 [10th Cir. 2008] [holding that "[t]he Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program"]). Although the hearing record indicates that the home-based services were beneficial to the student, the IDEA does not require districts to provide "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [noting that "[w]hile the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"] [emphasis in original], citing N.K. v New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. Aug. 13, 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17-*18 [E.D.N.Y. Oct. 30, 2008] [finding that "while [the student] presented uncontradicted testimony that the ABA is helpful. . . testimony that [the student] would regress or make only trivial progress without the at-home services was speculative"]; see Grim, 346 F.3d at 379).

Furthermore, the hearing record does not support the parent's argument that because the student has received home-based ABA during the entire time he has attended SLCD, his progress is "inextricably linked" to both his placement at SLCD and his receipt of 10 hours of home-based ABA therapy. There is no evidence in the hearing record that suggests the student would not make progress or receive educational benefit without the home-based ABA therapy. To the extent that the parents argue that the student's slow progress indicates his need for additional support in the form of ABA therapy, the 2012 SLCD IEP progress reports reveal that the student had made progress on many of his annual goals, having achieved approximately five annual goals by February 2012, and that he was expected to achieve several other annual goals (Tr. pp. 38, 60-63; Dist. Ex. 2 at pp. 6-17).

With respect to the parent's claim that the home based ABA therapy was necessary because the student's goals need to be "consistently addressed across different environments and across different materials" (Pet ¶72) and to address the student's difficulties with generalization; several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist., 540 F.3d at 1151-53; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573-74 [11th Cir 1991]).

Accordingly, the hearing record supports the conclusion that the absence, in the IEP, of the home-based services requested by the parent did not deny the student a FAPE for the 2012-13 school year.

B. Parental Participation

Turning next to the parent's claim that she was denied meaningful participation, which the IHO did not address, I find that the parent's assertions are without merit. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

In particular, a review of the hearing record indicates that attendees at the April 2012 CSE meeting included a district school psychologist (who also served as the district representative); the student's classroom teacher, special education teacher, speech therapist and counselor from SLCD; and the student's parent (Tr. pp. 32-33, 128; Dist. Ex. 1 at p. 15). Further review of the hearing record shows that the parent sent a letter to the district representative along with a progress report from the student's ABA providers, requesting that the CSE consider the home ABA services (Tr. p. 130-31; Parent Exs. D; F). The parent testified that during the April 2012 CSE meeting, the district representative confirmed receiving the report, indicated to the parent that she thought it was a very thorough report; and that the parent again requested that the home ABA services be added to the April 2012 IEP (Tr. pp. 129-31; Parent Exs. D; F). Additionally, both the district representative and the parent recalled a discussion of the ABA home services during the April 2012 CSE meeting (Tr. pp. 48, 129). Additionally, the parent indicated that she again requested adding ABA home services to the student's 2012-13 IEP and indicted that the district representative then asked about the home ABA services (Tr. p. 48, 129). Furthermore, the parent testified that she responded by describing the home ABA services the length of time the student had been receiving them, and how the home ABA services were helping the student in school (Tr. p. 129). Moreover, the parent testified that while she agreed with the recommended placement; she did not agree with omitting home based ABA therapy and indicated that she voiced her concerns regarding the April 2012 CSE recommendations during the April 2012 CSE meeting (Tr. pp. 131-32).

Finally, the parent has not persuasively rebutted this evidence by citing to evidence in the hearing record that suggests she was precluded from participating fully in the meeting (see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333 [E.D.N.Y. 2012]). Moreover, although the district's obligation "to permit parental participation in the development of [the student's IEP] should not be trivialized . . ., the IDEA does not require school districts simply to accede to parents' [program] demands" (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir.

1999], citing Rowley, 458 U.S. at 205-06). Based upon the foregoing, the district did not significantly impede the parent from participating in the IEP development process (T.P., 554 F.3d at 253; see J.L., 2013 WL 625064, at *12; M.W., 869 F. Supp. 2d at 333-34; R.R. v. Scarsdale Union Free School Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered 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 ABA home services was appropriate or whether equitable considerations weighed in favor of the parents' request for relief.

I have considered any remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 12, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER