The University of the State of New York

The State Education Department
State Review Officer
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No. 13-207

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

Educational Advocacy Services, attorneys for respondent, Jennifer A. Tazzi, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at Reach for the Stars Learning Center (RFTS) for the 2012-13 school year. For the reasons set forth below, the matter must be remanded to the IHO for further administrative proceedings.

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

The CSE convened on February 8, 2012 to conduct the student's annual review and to develop the student's IEP for the 2012-13 school year (see Dist. Ex. 1 at pp. 1, 16). Finding the student eligible for special education as a student with multiple disabilities, the February 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement (see id. at pp. 11-13).[1] The February 2012 CSE also recommended that the student be provided with related services of five 60-minute sessions per week of individual speech-language therapy, five 60-minute sessions per week of individual physical therapy (PT), and five 60-minute sessions per week of individual occupational therapy (OT) (id. at p. 12). Additionally, the February 2012 CSE recommended that the student be provided with a full time 1:1 health paraprofessional as well as individual assistance from a registered nurse during 20 percent of the school day (id. at pp. 11-12).

[1] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The February 2012 CSE also conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) (Tr. pp. 139-40, 143-44; see Parent Ex. D at pp. 17-19).

In a final notice of recommendation (FNR) dated June 8, 2012, the district summarized the special education and related services recommended by the February 2012 CSE and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 7).

Thereafter, the parent and the student's teacher from RFTS visited the assigned public school site (Tr. pp. 51, 276, 342-43). By correspondence dated June 18, 2012, the parent rejected the assigned public school site as not appropriate for the student and notified the district of her intention to place the student at RFTS for the 2012-13 school year and seek public funding for the cost of the student's tuition (see Parent Ex. F at p. 1).[2] The parent indicated that she visited the assigned public school site and that it was not appropriate for a number of reasons, including that "[m]any of the questions asked were met with very vague answers" and that the visitors "could not get an understanding" regarding: the sorts of enforcement methods used by the school; whether the teachers were trained in applied behavioral analysis (ABA) therapy and, if so, how ABA was incorporated into the TEACCH program utilized by the school; whether the school collected data; and the basis upon which it was expected that the health paraprofessional would provide the student with the 1:1 teaching she required (id.).[3] The parent additionally stated that the student was "very verbal" and "highly social" unlike all but one of the observed students, that it did not appear that the assigned school would be able to fulfill the student's related services mandate, and that "the therapy rooms were surrounded by many rowdy" regular education students, whose presence would "ignite" the student's "anxiety" (id.). In a handwritten notation on the FNR dated June 19, 2012, the parent reiterated that the assigned public school site was not appropriate and again indicated that the student would be attending RFTS (Parent Ex. E at p. 1).

On June 21, 2012, the parent executed an enrollment contract for the student's attendance at RFTS for the 12-month school year commencing July 1, 2012 and ending June 30, 2013 (see Parent Ex. G at pp. 1, 3).

A. Due Process Complaint Notice

In a due process complaint notice dated November 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 (Parent Ex. A at pp. 1-2). The parent contended that the February 2012 CSE was not properly composed, that the February 2012 CSE predetermined the student's placement, that the district did not provide a copy of the IEP to the parent when the February 2012 CSE meeting was completed, and that the district did not provide the parent with a copy of the minutes of the February 2012 CSE meeting (id. at pp. 2-3). Next, the parent contended that the district "failed to consider the information provided by [the student's] teacher concerning" the student's need for 1:1 teaching and instruction utilizing ABA (id. at p. 2). The parent also asserted that the district "failed to indicate how the health para[professional] would be properly trained to ensure [the student's] safety when eating" (id.). Furthermore, the parent asserted that the district failed to draft

[2] The Commissioner of Education has not approved RFTS as a school with which school districts may contract to instruct students with disabilities (Parent Ex. I at p. 1; see 8 NYCRR 200.1[d], 200.7).

[3] "TEACCH" refers to a structured learning methodology for students with autism known as Treatment and Education of Autistic and Communication related handicapped Children.

"appropriate" annual goals related to the recommendations in the February 2012 IEP for a 1:1 health paraprofessional and speech-language therapy or concerning the student's "significant delays in oral motor control" (id.). The parent also alleged that the district failed to conduct an appropriate FBA and draft an appropriate BIP (id.).

Regarding the assigned public school site, the parent contended that the district "failed to provide the parent with an opportunity to discuss" the public school site alternatives with district personnel, the assigned public school site could not implement the student's speech-language therapy mandate, and the assigned public school site did not utilize and the teachers were not appropriately trained to administer ABA (id. at pp. 2-3). As relief, the parent requested that the district pay the costs of the student's tuition at RFTS for the 2012-13 school year and provide school bus transportation to and from RFTS (id. at p. 3). Lastly, the parent requested a determination of the student's pendency placement (id. at p. 4).

B. Impartial Hearing Officer Decision

The impartial hearing convened on November 30, 2012 and concluded on August 9, 2013, after six days of proceedings (see Tr. pp. 1-373). In an interim decision dated December 19, 2012, the IHO memorialized the parties' agreement that the student's pendency placement for the 2012-13 school year was RTFS, effective November 5, 2012 (IHO Exhibit I at p. 3; see Tr. pp. 5-7). By decision dated September 24, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, concluding that, while it was "possible" that the student may have achieved success in the special education program recommended by the February 2012 CSE, it "[did] not appear" that the district met its burden to show that the February 2012 IEP was reasonably calculated to meet the student's educational needs (IHO Decision at pp. 9-10, 11). In reaching that conclusion, the IHO noted that the classroom observation reflected the student's consistent need for teacher assistance while participating in a group and cited testimony that the student was "not able to learn concepts in a group" (id. at p. 10). The IHO also found that there were no evaluations or testimony from any professional who knew or who worked with the student that supported the February 2012 CSE's recommendations (id.). The IHO also indicated that the district "did not conduct new testing" of the student before developing the February 2012 IEP (id. at p. 8). With respect to the assigned public school site, the IHO referenced testimony that the student would have been inappropriately placed with students who were less verbal (id. at p. 10). Additionally, the IHO concluded that "it was not clear that ABA," a technique which had been "proven effective" for the student, "could be fully and appropriately implemented" at the assigned public school site and noted that the methodology used by the district ("TEACCH") was "visual" and that "such approaches [had] not been effective" for the student (id.). The IHO further concluded that the "individualization" that the student required would have been provided by a paraprofessional at the assigned public school site, whereas, the IHO noted, the student received 1:1 instruction from a certified teacher at RFTS (id.).

The IHO also found that the parent satisfied her burden to establish that RTFS was an appropriate unilateral placement for the student for the 2012-13 school year (IHO Decision at p. 9). The IHO further concluded that neither equitable considerations, nor the fact that the student's daily schedule included "arrival prayers," warranted a reduction in an award of tuition reimbursement (id. at pp. 11-12). As a result of his findings, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at RFTS for the 2012-13 school year (id. at pp. 11, 13).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to offer the student a FAPE and that equitable considerations favored the parent's request for relief. The district does not appeal the IHO's finding that the parent's unilateral placement of the student at RFTS addressed the student's needs and was appropriate.

In an answer, the parent responds to the district's petition by denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE and that equitable considerations favored the parent's request for relief. In response to the district's assertion that the IHO's decision went beyond the scope of the impartial hearing, the parent asserts that the IHO did not make a finding that any lack of new testing resulted in a denial of a FAPE to the student.[4] The parent also disputes the district's assertion that the IHO conflated the legal analysis of the special education program recommended by the February 2012 CSE with that of the appropriateness of the parent's unilateral placement. Next, the parent asserts that the recommended 6:1+1 special class placement was not appropriate for the student and that the recommended 1:1 health paraprofessional was insufficient to address the 1:1 academic instruction required by the student. The parent also asserts that the IHO's findings relating to the assigned public school site were not speculative but were based on the testimony of the district teacher at the assigned public school site and the student's head teacher from RFTS who visited the assigned public school site with the parent. With respect to equitable considerations, the parent asserts that the IHO made a credibility determination in the parent's favor, which should not be disturbed.

V. Discussion

A. Unaddressed Claims

A review of the hearing record reveals that the IHO did not address a number of issues that the parent raised in her November 5, 2012 due process complaint notice. In particular, the IHO did not address the parent's contentions that there was a denial of a FAPE due to the process by which the IEP was developed—that the February 2012 CSE was not properly composed; that the student's placement was predetermined and that the district failed to provide the parent with copy of the CSE meeting minutes.[5] The IHO also did not address significant claims regarding alleged

[4] I agree that the IHO decision does not contain a finding that the district inadequately evaluated the student, but merely states the background context and what appears to be an undisputed fact—that the CSE did not conduct new standardized testing of the student prior to the February 2012 CSE meeting. The district is also correct in that there is no claim in the due process complaint that the February 2012 CSE failed to conduct or obtain a sufficient evaluation of the student, except for the lack of an appropriate FBA, an unaddressed claim that is in the due process complaint (see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942 at *9-*10 [S.D.N.Y. Aug. 5, 2013] [distinguishing claims regarding the "adequacy" of the evaluation of a student from a CSE's duty to "consider" the information available to it]).

[5] While no authority has been proffered by the parent suggesting that the failure to produce CSE meeting minutes constitutes a violation of the IDEA, given the remaining claims regarding the FBA and consideration of information before the CSE, it would not be inappropriate for the IHO to question the parties regarding whether a prior written notice was prepared in conformity with federal and State regulation, and, if so, to direct the district to produce it for completeness of the hearing record (see 34 CFR 300.503; 8 NYCRR 200.5[a]; 200.5[j][3][vii]). Among other things, such notice "must include" (1) "[a] description of the action proposed or refused by the [district]," (2) "[a]n explanation of why the [district] proposes or refuses to take the action," (3) "[a] description of each evaluation procedure, assessment, record, or report the [district] used as a basis for the proposed or refused action," and (4) "[a] description of other options that the [CSE] considered and the reasons why those options were rejected" (see 34 CFR 503[b]; 8 NYCRR 200.5[a][3]).

defects in the IEP— that the district did not draft appropriate annual goals with respect to the health paraprofessional, the student's speech-language therapy, or the student's oral motor control delays; that the district failed to conduct an appropriate FBA or to draft an appropriate BIP; and that the district did not provide the parent with a copy of the student's IEP after the February 8, 2012 CSE meeting (see IHO Decision at pp. 3-13; see also Parent Ex. A at pp. 2-3). Further, with respect to the student's assigned public school site, the IHO did not address the parent's claims that the district did not provide the parent with an opportunity to discuss the student's placement with district personnel familiar with available 6:1+1 placements or that the assigned public school site could not provide the student with appropriate speech-language therapy (see id.). The outcome of some of these claims may have bearing on the analysis of whether a 6:1+1 special class placement with a 1:1 paraprofessional is appropriate and should have been addressed.

Accordingly, and notwithstanding the district's appeal of the IHO's decision, the matter should be remanded to the IHO for a determination on the merits of the claims set forth in the parent's November 5, 2012 due process complaint notice which have yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]. It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to each of the unaddressed issues. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of the IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

B. Pendency

Finally, the hearing record reflects that, notwithstanding the parties' agreement that RFTS constituted the student's pendency placement, subsequent to the effective date of pendency, the district did not make direct payment to RFTS for the costs of the student's tuition for the 2012-13 school year but, instead, reimbursed the parent for payments that she made to the unilateral placement (see Tr. pp. 350-52, 363, 366-67). Pendency has the effect of an automatic injunction (Zvi D. v Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Further, until such time as the student's pendency placement is changed "'by either an actual agreement between the parent[] and the [d]istrict or by an administrative decision upholding the [d]istrict's proposed placement which [the parent] choose[s] not to appeal, or by a court, the [d]istrict remains financially responsible'" for the student's pendency placement (Bd. of Educ. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002], quoting Murphy v. Arlington Cent. Sch. Dist., 86 F.Supp.2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]). As such, when pendency is in effect, the district is required to directly pay the tuition costs of the student's tuition at RFTS, absent another agreement between the parties (see Schutz, 290 F.3d at 485; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 198-99, 200-201 [2d Cir. 2002]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F.Supp.2d 403, 424, 424 n.14 [S.D.N.Y. 2011] [noting similar instances in which districts are required to pay the costs of tuition during the course of a proceeding]).

VI. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the claims set forth in the parent's November 5, 2012 due process complaint notice which have yet to be addressed. I have considered the parties' remaining contentions and find that it is unnecessary to address them at this time in light of the determinations above.

IT IS ORDERED that the matter be remanded to the IHO to determine the merits of the unaddressed claims set forth in the parent's November 5, 2012 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the September 24, 2013 decision is unavailable, another IHO shall be appointed in accordance with the rotational selection procedures; and

IT IS FURTHER ORDERED that from the filing date of the parent's due process complaint and until such time as the requirement to provide the student with a pendency placement lapses by operation of law, the district shall provide direct payment of the costs of the student's tuition at RFTS.

Dated: **Albany, New York**
December 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER