The University of the State of New York

The State Education Department
State Review Officer
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No. 14-048

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, Jessica C. Darpino, 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 for 12-month school year services and to be reimbursed for the costs of a privately obtained Orton-Gillingham provider. 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. Briefly, the Committee on Special Education (CSE) convened in September 2012 to develop the student's individualized education program (IEP) for the 2012-13 school year (see Parent Exs. D at pp. 1-10). The CSE convened in September 2013 and October 2013 to develop the student's IEP for the 2013-14 school year (see generally Dist. Exs. 3 at pp. 1-2; 5 at pp. 1-2; Parent Exs. B at pp. 1-11; C at pp. 1-13). In a due process complaint notice dated November 18, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (see Parent Ex. A at pp. 1-9).

On February 11, 2014, the parties conducted the impartial hearing (see Tr. pp. 1-278; Dist. Exs. 2-3; 5; 11-12; Parent Exs. A-O).[2, 3] In a decision dated March 5, 2014, the IHO determined that the evidence presented "significant discrepancies in the student's testing scores," and therefore, due to these discrepancies it was "impossible to obtain meaningful levels" of the student's "reading and math" (IHO Decision at pp. 3-6). As a result, the IHO found that she could not "assess the student's disability and therefore address his needs" (id. at p. 6). Furthermore, the IHO found that the parent failed to sustain her burden to establish the student's need for three 90-minute sessions per week of "Orton-Gillingham SETSS," and further, that based upon the evidence in the hearing record, "both the Wilson methodology and the Orton-Gillingham program [were] fundamentally the same program" (id.). Next, the IHO determined that the parent failed to show that the student "regressed after June 2013," and as such, the IHO concluded that the student did not require a 12-month school year program consisting of speech-language therapy (id. at pp. 6-8). However, as

[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 (see, e.g., Application of the Dep't of Educ., Appeal No. 12-228; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 12-087; Application of the Dep't of Educ., Appeal No. 09-092).

[2] At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2013-14 school year because the October 2013 CSE recommended more than the total maximum allowable special education teacher support services (SETSS) for the student (see Tr. pp. 7-9). The district did not concede, however, that it failed to provide the student with the services recommended in the October 2013 IEP or that the student was entitled to compensatory educational services or reimbursement for services, as requested by the parent (see Tr. pp. 9-11). In addition, the parent withdrew her request for an assistive technology evaluation of the student at the impartial hearing because it had been completed, and the district agreed to provide the student with a laptop computer with "word to tech software" (Tr. pp. 10-12).

[3] At the impartial hearing, the parent amended the relief requested in the due process complaint notice to include the following: three 90-minute sessions per week of SETSS; two 30-minute sessions per week of speech-language therapy services as a 12-month school year service (summer); five 60-minute sessions per week of SETSS as a 12-month school year service (summer); and reimbursement for the costs of Orton-Gillingham services provided to the student (compare Tr. pp. 8-12, 267-77, and IHO Decision at p. 2, with Parent Ex. A at pp. 8-9).

relief, the IHO ordered the district to conduct an "educational evaluation, considering all the prior testing by the neuropsychologist and teachers within 30 days," and to reconvene a CSE meeting within 30 days after completion of the evaluation (id. at p. 9).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review in the parent's petition for review and the district's answer thereto is also presumed and will not be recited here.[4] The gravamen of the parties' dispute on appeal is whether the IHO erred in denying the parent's requested relief.[5]

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

[4] Since neither party appeals the IHO's order directing the district to conduct an "educational evaluation, considering all the prior testing by the neuropsychologist and teachers within 30 days" or the IHO's order directing the district to reconvene a CSE meeting within 30 days after the completion of the evaluation, these portions of the IHO's decision are final and binding upon both parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[5] The parent submits additional documentary evidence with the petition for consideration on appeal (see Pet. Exs. AA-LL). The district objects to consideration of the additional documentary evidence. 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. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this instance, a review of the additional documentary evidence reveals that the additional documentary evidence was either available at the time of the hearing, or is now not necessary to consider in order to render a decision; accordingly, I will exercise my discretion and decline to consider the additional evidence.

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).

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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

Initially, the parent asserts that the IHO violated her due process rights because she denied the parent's request to change the location of the impartial hearing. While State and federal regulations provide that the impartial hearing shall be conducted at a time and place which is reasonably convenient to the parent, they do not require that the impartial hearing must be held at a location closest to and most convenient for the parent (see 34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]). Furthermore, a review of the evidence in the hearing record indicates that while the parent's advocate indicated at the impartial hearing that she sent several emails to the district's impartial hearing office to request a change in the location of the impartial hearing, the IHO explained that she did not receive any requests to change the location of the impartial hearing until the Friday before the first scheduled impartial hearing date—at which time the IHO informed the case manager that any such request needed to be made by affidavit (see Tr. pp. 1-6). The IHO further explained that given the late notice that she received with respect to the request to change the location of the impartial hearing, the IHO accommodated the parent by delaying the start time of the impartial hearing and by advising the parent's advocate that the parent could appear at the impartial hearing by telephone (id.). Finally, the evidence in the hearing record indicates that the parent participated at the impartial hearing (see Tr. pp. 1-278; Dist. Exs. 2-3; 5; 11-12; Parent Exs. A-O).

Next the parent contends that the IHO was biased, and "demonstrated a lack of knowledge of special education, the public school system, and what related services addressed." It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (see, e.g., Application of a Student with a Disability, Appeal No. 12-064; Application of a Child with a Disability, Appeal No. 07-090).

A review of the evidence in the hearing record demonstrates that the IHO was not biased and observed the procedures of due process throughout the proceeding (see generally Tr. pp. 1-278). Furthermore, the evidence in the hearing record indicates that the IHO attempted on numerous occasions to assist the parent's advocate in questioning witnesses and in clarifying the issues for resolution (see Tr. pp. 10, 12-13, 39, 41, 45-47). Although the parent disagreed with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013). Based upon the foregoing, the evidence in the hearing record does not support the parent's contentions that the IHO's conduct at the impartial hearing infringed upon or deprived her of the right to due process or otherwise hindered the parent's ability to present evidence at the impartial hearing.

Turning to the merits of the parent's appeal, upon careful review the evidence in the hearing record reflects that the IHO, in a well-reasoned decision, properly denied the parent's requested relief (see IHO Decision at pp. 2-9). 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 standards, and applied those standards 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 she weighed the evidence and properly supported her conclusions (id.). Moreover, 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.

In particular, a review of the evidence in the hearing record supports the IHO's determination that the significant discrepancies among the various evaluations and reports of the student made it difficult to assess the student's disability, and therefore, appropriately address his needs (see IHO Decision at pp. 3-6). While the student's SETSS teacher testified that the student made significant progress in reading fluency and comprehension, the neuropsychologist testified that the student "made very little progress and need[ed] a different approach" (compare Tr. pp. 20-21, with Tr. p. 66). Given the contradictory evidence presented with respect to the student's needs related to reading, the IHO correctly determined that the parent did not meet her burden to establish the student's need for the privately obtained Orton-Gillingham service (see IHO Decision at p. 6). Additionally, the IHO correctly determined that the hearing record lacked evidence demonstrating that the student required a 12-month school year program consisting of speech-language therapy services (see IHO Decision at pp. 6-8). The evidence in the hearing record indicates that not only did the student not demonstrate substantial regression, but that the student made significant progress, which resulted in the October 2013 CSE reducing the frequency of the recommended speech-language therapy services from three sessions per week to two sessions per week (see Parent Ex. B at p. 6; see also Tr. pp. 139-40, 149, 151-52).[6]

[6] Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 31, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER