The University of the State of New York

The State Education Department
State Review Officer
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No. 14-063

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, Neha Dewan, Esq., of counsel

The Law Office of Deborah A. Ezbitski, attorneys for respondents, Deborah A. Ezbitski, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional

evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

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 they will not be recited here. A Committee on Special Education (CSE) convened on April 16, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 1). The parents disagreed with the recommendations contained in the April 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at the Aaron School (see Parent Ex. C). In a due process complaint notice, dated August 15, 2013, the parents 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 November 7, 2013, and concluded on February 26, 2013, after three days of proceedings (Tr. pp. 1-463). In a decision dated March 28, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that the Aaron School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 3-28). As relief, the IHO ordered the district to pay for the cost of the student's tuition at the Aaron School for the 2012-13 school year (id. at p. 28).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised for review on appeal in the district's petition for review and the parents' answer thereto is presumed and they will not be recited here. The gravamen of the parties' dispute on appeal is whether a general education placement with integrated co-teaching (ICT) services was appropriate. The IHO made findings regarding the appropriateness of the CSE composition, management needs, annual goals, and the assigned public school site but neither party raises these issues on appeal. The evidence in the hearing record supports a finding, as set forth below, that the IHO erred in determining that the ICT services provided by the April 2012 IEP were not appropriate to address the student's needs.

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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion—ICT Services

With regard to the issue of whether the recommended ICT services were appropriate, the IHO erred for the reasons described below. Accordingly, the IHO's conclusion on this issue must be reversed.

The hearing record reflects that the student was attending the Aaron School at the time of the April 2012 CSE meeting (see Tr. p. 257; Dist. Ex. 2 at pp. 1-2). The documents considered by the April 2012 CSE included a February 2012 psychoeducational evaluation report, a February 2012 classroom observation report, and undated Aaron School student reporting system reports for the 2011-12 school year (Tr. p. 70; Dist. Exs. 2 at pp. 1; 4-7). The Aaron School teacher and the student's mother participated in the April 2012 CSE meeting and disagreed with the recommendation for ICT services, stating that the student required a small class (see Dist. Ex. 2 at pp. 1-2).

In her decision, the IHO held that ICT services were not appropriate because they would not adequately address the student's sensory, executive functioning, and attention needs (IHO Decision at pp. 23-24). The IHO agreed with testimony by the student's mother and Aaron School teacher that the student required "a smaller class" that could provide a greater level of support (id.). In addition, the IHO indicated that the district's assessment of the student's performance when previously attending a larger class was inaccurate and noted that the student received intensive instruction within a small class setting at the Aaron School (id. at p. 23).

Contrary to the IHO's finding, based on the hearing record, the ICT services recommended by the April 2012 CSE addressed the student's needs. The CSE recommended five sessions per week of ICT services for each of his math, English language arts, social studies, and science classes (Dist. Ex. 1 at pp. 7-8). The evaluative data before the April 2012 CSE reflected the student demonstrated both average cognitive abilities and academic skills in areas of math calculation, math reasoning, and letter-word identification (see Dist. Ex. 4 at pp. 3-4). Additionally, the student demonstrated low average reading comprehension and spelling skills and exhibited difficulties with executive functions including deficits in attention and organization (Dist. Exs. 4 at p. 4; 5 at p. 2; 6 at p. 8; 7 at p. 3). Notably, the school psychologist indicated that during the classroom observation—the class consisted of one teacher, a teacher assistant, and nine students despite the student's difficulties with attention—he focused, took notes, and responded to teacher questions, which supports the conclusion that the student could function within a larger general education placement with ICT services (Dist. Ex. 5 at p. 2). The February 2012 psychoeducational evaluation report that the April 2012 CSE reviewed did not indicate the student required a small class to exhibit progress (see Dist. Ex. 4). Additionally, according to the 2011-12 Aaron School student reporting system reports, the student performed well academically; however, the reports did not indicate that the student could not make progress in a larger class setting (see Dist. Exs. 6-7). Although the student's mother and Aaron School teacher indicated the student required a small class and the student's Aaron School class size in math and reading consisted of seven and four students respectively during the 2011-12 school year (Dist. Ex. 6 at p.1; 7 at p. 1), what constitutes a "small class" is not defined in the hearing record, and it is questionable whether or not small class size, in and of itself, constitutes special education (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; see also M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] ["That the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]).

The April 2012 IEP reflects the student's needs and the CSE recommended supports to address such needs. The April 2012 IEP present levels of performance, which are not in dispute, reflect, among other things, that given the student's cognitive and academic potential, he needed full access to the general education curriculum together with the supports provided in his IEP (Dist. Ex. 1 at p. 3). Supports for the student's management needs provided in the IEP included graphic organizers, use of outlines, verbal praise, encouragement, movement and sensory breaks, sensory tools, structured checklists to assist with project completion, preferential seating to reduce distraction, chunking of information, redirection, and prompting (id.). The April 2012 IEP also included annual goals to address the student's needs as identified in the present levels of performance, including goals to improve the student's organizational skills, study skills, reading comprehension, decoding, writing skills, spelling, editing skills, math problem solving skills,

executive functions, and attention (id. at pp. 4-6). The April 2012 CSE further recommended that the student receive one 40-minute session per week of counseling services and two 40-minute sessions per week of occupational therapy (OT) to assist the student develop coping skills and improve executive functions including attention and organization (see id. at pp. 6-8).

The testimony of the school psychologist, who attended the April 2012 CSE meeting, also supports that ICT services addressed the needs of the student. The school psychologist testified that the student's classroom skills were average and he could function in a class with mainstream peers based on his strengths, but the student also demonstrated certain weaknesses for which he required support; therefore, the April 2012 CSE recommended ICT services to provide the student the support of a special education teacher (see Tr. p. 74; Dist. Ex. 1 at p. 14). Specifically, the school psychologist testified that the student demonstrated average cognitive abilities with some difficulty with reading comprehension and spelling as indicated in the psychoeducational report which was discussed at the April 2012 CSE meeting (Tr. pp. 70-71; Dist. Ex. 4). The April 2012 CSE also discussed the reports from the Aaron School and the classroom observation that identified the student's difficulties with attention and organization (Tr. pp. 70-73; Dist. Exs. 5-7). According to the school psychologist, to address the student's difficulties with executive functioning, organization, distractibility, sensory needs, and emotional functioning, the April 2012 CSE recommended OT and counseling (Tr. pp. 75-77; see Dist. Ex. 1 at pp. 6-8). The school psychologist testified that although the student's mother and Aaron School teacher expressed disagreement with the recommendation for placement in a general education class with ICT services by indicating the student required a smaller class, not only would ICT services address the student's needs, but he would also have the opportunity to attend class with his nondisabled peers (Tr. pp. 77-78). Additionally, according to the hearing record, the April 2012 CSE considered other placement options for the student including special education teacher support services, which would not provide adequate support, and a special class, which was found not to be the least restrictive environment for the student (Tr. pp. 78-79).

Thus, given the student's overall average cognitive and academic abilities, along with the student's need for support in the areas of executive functioning and reading comprehension, the hearing record supports a finding that the April 2012 CSE's recommendation for ICT services, along with the other accommodations, annual goals, OT, and counseling services included on the IEP, was reasonably calculated to provide the student with educational benefit.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it 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 student's unilateral placement at the Aaron School was an appropriate placement or whether equitable considerations weighed in favor of the parents' request for tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my above determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 28, 2012, is modified, by reversing the portions which determined that the district failed to offer the student a FAPE for the 2012-13 school year and directed the district to pay for the costs of the student's tuition at the Aaron School for the 2012-13 school year.

Dated: **Albany, New York**
January 9, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER