The University of the State of New York

The State Education Department
State Review Officer
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No. 14-166

Application of a STUDENT WITH A DISABILITY, by her 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:
The Law Offices of Neal H. Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 dismissed the parent's due process complaint notice with prejudice. The appeal must be dismissed.

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

On April 17, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Dist. Ex. 2 at p. 6). Finding the student eligible for special education and related services as a student with a speech or language impairment, the April 2013 CSE recommended a general education placement with integrated co-teaching (ICT) services for math, English language arts, social studies, and sciences (id. at pp. 1, 3).[1] In addition, the CSE recommended one 30-minute

[1] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

session of small group and one 30-minute session of individual speech-language therapy per week (id. p. 3).

In a final notice of recommendation (FNR) dated August 1, 2013, the district summarized the general education class placement with ICT and speech-language therapy recommended in the April 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Dist. Ex. 3). It appears from the hearing record that the parent unilaterally placed the student at a nonpublic preschool for the 2013-14 school year, where she received special education itinerant teacher (SEIT) services and speech-language therapy (see Tr. pp. 15-16; Dist. Ex. A at p. 1).

At some point during the 2013-14 school year, it appears from the hearing record that, when the parent attempted to enroll the student in a kindergarten class for the 2014-15 school year, she became aware of the district's intention to, instead, enroll the student in a first grade classroom (see Tr. pp. 16-17).

A. Due Process Complaint Notice

In a due process complaint notice dated June 17, 2014, the parent contended that the district's intention to enroll the student in a first grade classroom instead of a kindergarten classroom for the upcoming 2014-15 school year violated the IDEA (Dist. Ex. 1 at pp. 1-4). The parent argued that enrolling the student in a first grade classroom would be inappropriate for the student given her developmental level, which was "out of sync" with her "chronological age and academic abilities" (id. at p. 1). As a remedy for this alleged violation, the parent sought a "[k]indergarten placement in [a] community school for the 2014-2015 school year" (id. at p. 4).

B. Events Post-Dating the Due Process Complaint Notice

On August 14, 2014, the CSE convened to develop the student's IEP for the 2014-15 school year (Dist. Ex. 4 at p. 6). Finding the student eligible for special education and related services as a student with a speech or language impairment, the August 2014 CSE recommended a general education placement in a community school (id. at pp. 1, 6). The CSE also recommended one 30-minute session of small group speech-language therapy per week and one 30-minute session of individual speech-language therapy per week (id. at p. 4).

In a school location letter dated August 14, 2014, the district summarized the general education class placement and related services recommended in the August 2014 IEP and identified the particular public school site to which the district assigned the student to attend for the 2014-15 school year (Dist. Ex. 5 at p. 1).[2]

[2] The evidence in the hearing record indicates that the school location letter is functionally equivalent to the aforementioned FNR (see Dist. Ex. 6 at p. 2, n.1).

On September 11, 2014, the district submitted a motion to dismiss the parent's due process complaint notice (see Dist. Ex. 6 at pp. 1-4).[3] The district asserted that the parent's due process complaint notice must be dismissed because the parent's allegations pertaining to the grade level of the student's classroom did not concern the identification, evaluation, or educational placement of the student or the provision of FAPE to the student under the IDEA (id. at pp. 2-4). Thus, the district argued that an impartial hearing pursuant to the IDEA's due process procedures was an "improper forum" for the parent's complaint (id. at p. 3).

C. Impartial Hearing Officer Decision

An impartial hearing was conducted on September 12, 2014 (Tr. pp. 1-46). In a decision dated September 29, 2014, the IHO dismissed the parent's claim with prejudice (IHO Decision at p. 3). After reviewing the evidence in the hearing record, the IHO concluded that the student's "[g]rade placement . . . [wa]s not properly the subject of a due process complaint under the IDEA" (id.).[4]

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by dismissing the parent's complaint with prejudice. First, the parent contends that the IHO's granting of the district's motion to dismiss improperly relieved the district of its burden to demonstrate that it offered the student a FAPE for the 2014-15 school year. Second, the parent avers that the August 2014 IEP was inappropriate because it did not indicate that the student should attend kindergarten. In this regard, the parent contends that the August 2014 CSE failed to consider pertinent information submitted by the parent. Third, the parent contends that the district inappropriately applied a municipal regulation governing the assignment of students to particular grades when it determined that the student would attend a first grade classroom. As a remedy, the parent requests that the IHO's order be reversed and that the matter be remanded to the IHO. The parent also requests an interim order that would permit the student to "attend a kindergarten class in her local[ ] . . . school."

In an answer, the district denies the parent's material assertions and argues that the IHO correctly dismissed the parent's due process complaint notice with prejudice. Additionally, the district argues that the parent is precluded from challenging the provision of FAPE to the student for the 2014-15 school year as she did not include this claim in her due process complaint notice.

V. Discussion

First, with regard to the scope of this appeal, I agree with the district that the parent's due process complaint notice may not be reasonably read to include a challenge to the provision of a FAPE for the 2014-15 school year. A party requesting an impartial hearing may not raise issues

[3] Although the motion to dismiss is undated, the district represented at the impartial hearing that it was submitted to the IHO on September 11, 2014 and the IHO confirmed that she received the motion to dismiss on this date (Tr. pp. 8, 12).

[4] The IHO also noted that the parties conferred as to the issue of the student's grade level placement and, as a result, the student was "placed in a kindergarten-first grade bridge class" for the 2014-15 school year (IHO Decision at p. 4).

at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013] Therefore, this claim was not identified as an issue the parent sought to resolve through the impartial hearing process and will not be considered.[5]

Turning to the parent's claim regarding the student's grade level, the IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR § 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). In this case, as the IHO correctly found, the allegations in the parent's due process complaint notice—which relate to the appropriateness of a particular grade level classroom for the student—do not constitute matters relating to the identification, evaluation or educational placement of the student, or the provision of a FAPE to the student (IHO Decision at p. 3; see Education Law § 1709[3] [authorizing a board of education "[t]o prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17, 2013 WL 5614113 [2d Cir. 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955]).[6] While it may be possible in certain cases that the assignment of a student to a particular grade level may give rise to an inference of a possible functional or age range grouping violation (see 8 NYCRR 200.6[h]), no permissible inference to that effect may be drawn from the facts alleged by the parent in this case.

Accordingly, neither the IHO, nor the SRO, has jurisdiction over the allegations set forth in the due process complaint notice.[7]

[5] Additionally, the district did not raise this issue in the first instance at the impartial hearing "in support of an affirmative, substantive argument" (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; see also M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).

[6] Further, neither the IDEA nor State law require a district to specify a student's grade level on his or her IEP and a district is not required to go above and beyond its legal responsibilities in designing a student's IEP (20 U.S.C. § 1414[d][1][A][ii]); see Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 427 [8th Cir. 2010]; Dep't of Educ. v. C.B., 2012 WL 220517, at *8 [D. Haw. Jan. 24, 2012]; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 200 [1982]).

[7] Although I have not relied upon this information as a basis for my determination, it appears from the hearing record that, as the IHO observed, the student is attending a "bridge" classroom consisting of students in both kindergarten and first grade for the 2014-15 school year (Tr. pp. 20, 21, 23-24, 28). Thus even if there was jurisdiction over the matter of concern to the parent, it is difficult to see how the parent could prevail.

VI. Conclusion

In summary, the IHO properly found that she had no jurisdiction with respect to the issues raised in the parent's due process complaint notice; thus, there is no reason to disturb the IHO's decision dismissing the parent's due process complaint notice with prejudice.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER