The University of the State of New York

The State Education Department
State Review Officer
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No. 19-094

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:
The Law Office of Steven Alizio, PLLC, attorneys for petitioner, by Steven J. Alizio, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

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 an independent educational evaluation (IEE). The appeal must be sustained.

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

Due to the nature of this appeal, a full recitation of the procedural history and the student's educational history is not required. In brief, the student has a history of speech and language impairments which impact the student's cognitive ability, academic performance, and social interactions (Parent Ex. AD at pp. 1-2, 11-13).

On May 26, 2016, the parent filed a due process complaint notice, wherein the parent requested that an IHO order the district to refer the student for a nonpublic school placement for the 2016-17 school year, award IEEs, and order compensatory services for an alleged deprivation of a free appropriate public education (FAPE) for the 2015-16 school year (Parent Ex. C at pp. 4-5). Following an impartial hearing, the IHO in that matter rendered a decision on August 11, 2016,

which directed the district to reconvene a CSE meeting for the purposes of recommending an interim placement for the student should the district not be able to place the student at an approved nonpublic school, fund a neuropsychological IEE, and provide the student with 18 hours of speech-language therapy during summer 2016 as a form of compensatory services (id. at p. 6).

In compliance with the August 2016 IHO decision a CSE reconvened on August 22, 2016 and, finding the student continued to be eligible for special education services as a student with a speech or language impairment, recommended a 12-month interim 12:1+1 special class placement pending a nonpublic school placement at a New York State approved nonpublic 12:1+1 day program (Parent Ex. B at pp. 8-9). The August 2016 CSE also recommended the student receive two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of group speech-language therapy not to exceed three students (Parent Ex. B at pp. 8-9). The student attended the interim placement in a public school for the entire 2016-17 school year (Parent Ex. B at pp. 12, 13; see Tr. p. 12).

The student subsequently attended a nonpublic school—Children's Academy—beginning in September 2017 (Parent Ex. AD at p. 2). His program at Children's Academy, as of February 2019, consisted of placement in a self-contained classroom with five total students, two teachers, and one speech-language pathologist (id.). The student also received services including speech-language and occupational therapy (OT) (id.).

A. Due Process Complaint Notice

In a July 18, 2018 due process complaint notice, the parent requested an impartial hearing, asserting that the district failed to offer the student a FAPE for the 2018-19 school year by neglecting to convene a CSE meeting and develop an IEP for the student since August 2016 and by failing to offer the student a physical school placement for the 2018-19 school year (Parent Ex. A at pp. 1, 4). The parent further asserted that she sent the district a "ten-day notice" on June 21, 2018 explaining her intent to re-enroll the student at Children's Academy for the 2018-19 school year and seek funding for the cost of tuition and transportation from the district (id. at p. 4). Finally, the parent asserted that the student's pendency placement was at Children's Academy (id.).

The parent amended the due process complaint notice on January 3, 2019 to include "a new claim and relief sought in the form of an independent evaluation" (Parent Ex. AB; see Parent Ex. E). In the amended due process complaint notice, the parent asserted that the CSE failed to sufficiently evaluate the student in all areas of suspected disability, specifically alleging that the June 20, 2017, psychoeducational evaluation did not include significant language testing, despite the student's speech-language deficits appearing to be the primary area of concern (Parent Ex. E at pp. 4-5).

For relief, the parent requested the IHO find that the student was denied a FAPE for the 2018-19 school year and that the district failed to thoroughly assess the student in all areas of his suspected disability (Parent Ex. E at p. 6). The parent requested a final order directing the district to pay the costs of the student's tuition, including transportation costs, at Children's Academy (id.). The parent also requested that the IHO order the district to fund a comprehensive neuropsychological IEE by her specified evaluator at a cost of $6,000, either as an IEE or as a form of equitable relief (id.).

Subsequent to filing the amended due process complaint notice, in February and March 2019, a private neuropsychological evaluation of the student was performed by the parent's chosen evaluator (Parent Ex. AD).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 15, 2018 and concluded on May 16, 2019 after five days of proceedings, during which the district did not present any witnesses or documentary evidence (Tr. pp. 1-151). In an October 4, 2018 interim decision, the IHO determined that the student's pendency placement was at the Children's Academy, since he had attended that school during the prior school year, and it provided "stability and consistency in the education of this student" (Interim IHO Decision at p. 2). The IHO ordered the district to continue to fund the student's tuition at the Children's Academy and to provide door-to-door special transportation during the pendency of the proceedings (id. at p. 4).

In a decision dated August 21, 2019, the IHO first noted the district's acknowledgement during the hearing that it had not convened an IEP meeting since August 2016, and that the district provided no explanation for its failure to do so (IHO Decision at p. 4). The IHO also noted that the district did not present any witnesses or documentary evidence and did not challenge the parent's assertion that it failed to provide the student with a FAPE for the 2018-2019 school year (id. at pp. 5, 9-10). The IHO then found that Children's Academy was an appropriate unilateral placement for the student during the 2018-19 school year (id. at p. 10). The IHO found the parent's witnesses' testimony compelling and persuasive, that the student made progress at Children's Academy, and that the program, including a small classroom with a special education teacher, a teacher assistant, and a speech therapist along with related services was appropriate (id.). The IHO further found that the hearing record did not support a finding that the parent did not cooperate with the CSE; and the district had not alleged any equitable factors that would limit or preclude an award of tuition reimbursement for the cost of the student's tuition at Children's Academy (id. at p. 11). The IHO ordered the district to fund or reimburse all costs associated with the student's attendance at the Children's Academy for the 2018-19 school year (id.).

With respect to the parent's request for a publicly-funded neuropsychological IEE at a cost of $6,000.00, the IHO addressed the district's contention that the parent was not entitled to an IEE because the request was not made to the CSE, but was rather made to the district's counsel (IHO Decision at pp. 11-12). The IHO noted that the parent made her request for an IEE "almost two years" after the evaluation she disagreed with, that she only made the request in writing to the district's counsel, thereby going outside of the collaborative CSE process without informing the district of her disagreement with the evaluation, and that the parent sought an IEE because the last IEP the district created was outdated and she wanted to determine the student's current weaknesses and strengths, not because she thought the prior evaluation was insufficient or that it contained any deficiencies (id.). The IHO found that under the circumstances the district was not obligated to initiate an impartial hearing to defend its evaluation and denied the parent's request for reimbursement of the IEE (id.).

IV. Appeal for State-Level Review

The parent appeals enumerating fifteen issues for review. These issues can be grouped into claims related to the IHO's conduct during the hearing (the IHO failed to develop the hearing record by refusing to allow the private evaluator to testify as to deficiencies with the district's evaluation and the IHO failed to admit the parties' closing statements as exhibits); procedural challenges to the IHO's decision (that the IHO decision was vague and did not include citations to legal authority; that the decision did not address all of the claims raised in the due process complaint notice; and that the IHO erred in failing to deem unrebutted factual allegations admitted, in not holding the district to its burden of proving the sufficiency of its evaluation, and in making findings that were unsupported by the hearing record); challenges to the IHO's factual findings (the IHO incorrectly found that the parent did not disagree with the district's evaluation); and challenges to the IHO's legal determinations (the IHO erred in finding that a request for an IEE must be made prior to filing a due process complaint notice and the request cannot be made within a due process complaint notice; in finding that the request could not be made to counsel for the district; and, in finding the parent's request was substantially delayed, the IHO erred by failing to apply the two-year statute of limitations to the parent's request). The parent requests that an SRO: "reverse all adverse findings and rulings"; admit the parent's post-hearing brief into the hearing record; issue declaratory and equitable relief as requested in the request for review and the parent's post-hearing brief; and order the district to reimburse the parent in the amount of $6,000 for the 2019 neuropsychological IEE.[1]

In its answer, the district responds with general admissions and denials, and admits that it did not conduct a CSE meeting or create an IEP for the student for the 2018-19 school year (Ans. at p. 3). The district also asserts that the SRO should not allow the submission of the exhibits and closing statements as requested by the parent, since those documents were included in the hearing record delivered to the Office of State Review. The district does request; however, that an email dated May 30, 2019 between the parent and the IHO be admitted into the hearing record as an additional exhibit, asserting that the email is necessary to respond to the parent's assertion that the IHO did not allow further testimony by the private evaluator. Finally, the district asserts that the IHO properly denied the parent's request for reimbursement for the neuropsychological IEE. The district reiterates the reasoning relied on by the IHO, in that the parent delayed requesting an IEE and did not raise the request for an IEE prior to the amended due process complaint notice, and further asserts that even if the parent did disagree with a district evaluation, that evaluation was a psychoeducational evaluation and the parent should not be entitled to an independent neuropsychological evaluation. The district requests that the SRO dismiss the parent's appeal with prejudice.

[1] The post-hearing briefs were submitted to the Office of State Review as a part of the hearing record in accordance with State regulation, which specifies that, in addition to exhibits and the transcript of the proceedings, the due process complaint notice, any briefs filed by the parties for consideration by the IHO, and "any other documentation deemed relevant and material by the [IHO]" are part of the hearing record (8 NYCRR 200.5[j][5[vi][a], [b], [e]-[g]). The IHO may want to consider identifying and admitting such documents as exhibits during the impartial hearing as a matter of administrative convenience and in order to streamline the compilation of the hearing record.

In a reply to the district's request that the SRO allow an additional email into evidence, the parent asserts that the request should be denied. Specifically, the parent asserts that, beyond stating that the document was necessary to decide an issue presented by this appeal, the district did not provide any further explanation. Further, the parent points to several factual and legal discrepancies with the district's choices of regulation and hand-picked section of a much larger email that would preclude the SRO from using the document. The parent requests that the SRO not accept the email into evidence; however, if the SRO should accept the email, the parent requests that the SRO accept the whole email chain for complete reference, which the parent attached to the reply.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

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).

VI. Discussion

In this matter, the district does not challenge the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year or the IHO's order directing the district to fund or reimburse all costs associated with the student's attendance at the Children's Academy for the 2018-2019 school year, and those decisions are final and binding upon both parties (34 CFR

300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, the parent's assertions related to the district's failure to offer the student a FAPE need not be further addressed on appeal as there is no further relief requested associated with those claims. The only issues involving a remedy that remain available for the parent are those assertions concerning reimbursement for the neuropsychological IEE—specifically, the IHO's misapplication of the legal standards in determining that the parent was not entitled to reimbursement for that evaluation.

The parent asserts that the IHO erred in denying her request for reimbursement for a 2019 neuropsychological IEE. The IHO determined that the parent improperly requested the IEE funding, namely by placing the request in the due process complaint notice, not providing specific reasons why the parent objected to the district's evaluation, and in waiting almost two years to do so. The parent also asserts that an SRO needs to decide that the district's psychological evaluation was deficient as such a determination is relevant for school years beyond the 2018-19 school year.

In order for an IEE to be provided at public expense, State and federal regulations only require that "the parent disagrees with an evaluation obtained by the public agency"; the regulations do not speak to how a parent must manifest this disagreement to the district (34 CFR 300.502[b][1];8 NYCRR 200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"]). In addition, federal guidance suggests that a district "may not require that a parent provide notification of the parent's intent to obtain an IEE at public expense as a precondition for public payment for an IEE" and that "a parent may obtain an IEE without providing prior notice to the public agency" (Letter to Saperstone, 21 IDELR 1127 [OSEP 1994]; see also Letter to Anonymous, [OSEP 2010] [it is inconsistent with federal regulations to require a parent to provide notice of a request for an IEE for consideration by the CSE]).

Contrary to the district's argument that a claim for an IEE cannot be raised for the first time in a due process complaint notice, a parent may file a due process complaint notice with respect to "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]). In this instance, the IEE sought by the parent is a remedy for her disagreement with the district's psychoeducational evaluation. Absent any requirement that the parent express her disagreement with the results of a district evaluation in a specific format, there is no reason why a due process complaint notice may not serve the function of expressing the parent's disagreement to the district. Given the regulatory requirements, the IHO improperly determined that the parent's choice of medium from which to challenge the district's evaluation was inappropriate.

Similar to the underlying facts in Application of a Student with a Disability, Appeal No. 19-092, which addressed the situation where a parent requested an IEE from the district and filed a due process complaint notice with the district on the same day, after receiving the parent's amended due process complaint notice in this matter, the district could have considered the parent's request and provided the parent with a response before proceeding to an impartial hearing. When a parent initiates a request for an impartial hearing by filing a due process complaint notice the IDEA provides for a resolution process that must be followed before a parentally requested hearing

can proceed (34 CFR 300.510[a]). The timeline for the resolution process begins again with the filing of an amended due process complaint notice (34 CFR 300.508[d][4]). The parent cannot unilaterally waive the resolution meeting because the regulation requires both parties to waive a resolution meeting (34 CFR 300.510[a][3]). Accordingly, the district was permitted up to 30 days to consider and resolve the parent's amended complaint, including her request for an IEE, before being required to proceed to an impartial hearing to defend its own evaluation of the student (see 34 CFR 300.510[b]). During that period, the district could have agreed to the parent's request for an IEE or sought further information from the parent. While the district cannot be faulted for any delay in commencing its own due process hearing as the parent's IEE request first became the subject of a due process proceeding pursuant to the parent's amended due process complaint notice, the district could have availed itself of the time allotted under the IDEA's resolution process to consider the parent's request, and the district was required to proceed and defend its own evaluation of the student after the conclusion of the 30-day resolution period if it did not reach a decision to grant the parent's request for a publicly funded IEE by the conclusion of the resolution period.

To the extent the IHO denied the request for an IEE because the amended due process complaint notice did not sufficiently allege a deficiency in the district's evaluation, which she concluded undermined the legitimacy of the request for the IEE (IHO Decision at pp. 10-11), federal regulations provide "[i]f a parent requests an independent educational evaluation at public expense, the district may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation. . . ." [emphasis added] (34 CFR 300.502[b][4]). Alone, the regulatory requirement does not provide a requirement for the parent to list out specific disagreements with the district's evaluation, and therefore, the IHO's reliance on the lack of a specific disagreement was improper. Regardless, a review of the amended due process complaint notice reveals that the parent specified that the district's evaluation did not include "significant language testing," which "appears to be the primary area of concern" (Parent Ex. E at p. 4). The parent also explicitly expressed disagreement with the thoroughness of the district's evaluation concerning the student's deficits in the executive functioning and social/emotional domains (id.).

With respect to that part of the IHO's analysis wherein the IHO found that the parent waited too long (almost two years) before formally disagreeing with the district's evaluation, the IDEA does not establish timelines regarding how long a parent can wait to request an IEE after receiving the results of a district evaluation; however, guidance suggests that a district would not have to defend an evaluation if a parent waited more than two years after the district conducted its evaluation (Letter to Thorne, 16 IDELR 606 [OSEP 1990]; but see, William S. Hart Union High Sch. Dist. v. Romero, 2014 WL 12493766, at *4 [C.D. Cal. Apr. 9, 2014]["is difficult to reconcile with the text of § 300.502(b), which states no limitation on when a parent can request an IEE, and appears to require an objecting district to present its defenses via a due process complaint and hearing"]). Additionally, there is some authority for the proposition that the statute of limitations applies to parental requests for IEEs at public expense and that a parent's claim may accrue in such cases as of the date of the disputed evaluation if the parent "knew or should have known" at such time about the harm underlying the request for the IEE (see D.S. v. Trumbull Bd. of Educ., 357 F.

Supp. 3d 166, 179 [D. Conn. 2019], appeal pending [applying IDEA's two-year statute of limitations to claim for IEE]).[2]

In this matter, as the IHO noted in her decision, and the district does not argue to the contrary, the student was evaluated by the district in June 2017, and the amended due process complaint notice which challenged the evaluation was dated January 2019, within two-years from the completion of the district evaluation (Parent Ex. E at p. 4; see IHO Decision at p. 11). Based on the above, to the extent that the IHO relied on the parent's "substantial delay" as a factor for denying the request for the IEE, that part of the IHO's decision is reversed.

Finally, having determined that the parent is entitled to the requested IEE, the parent is being provided all of the relief associated with her allegations regarding the sufficiency of the district's evaluation and I need not address those allegations. However, the district remains obligated to ensure that the student is appropriately assessed in all areas related to his suspected disability (see 20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]).

VII. Conclusion

In light of the foregoing, I find that the IHO erred in denying the parent's request for a neuropsychological IEE at public expense.

I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 21, 2019, is modified by reversing that portion which denied the parent's request for a neuropsychological independent educational evaluation; and

IT IS FURTHER ORDERED that within 30 days from the date of this decision, the district is to reimburse the parent for the cost of the private neuropsychological evaluation already conducted.

Dated: **Albany, New York**
November 20, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER

[2] The district does not assert the statute of limitations as a defense in this matter (see Dist. Post Hr'g Brief; Answer).