The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-135

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 for public funding of an independent educational evaluation (IEE) for her daughter. 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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on April 14, 2022 to formulate an IEP for the student (see generally Parent Ex. A). By email dated December 6, 2022, the parent requested that the district conduct a functional behavioral assessment (FBA) of the student (Parent Ex. B). In the email, the parent stated that the student's "behaviors [we]re directly affecting her right to be educated in the least restrictive environment" and noted her "academics [we]re above grade level and yet due to unaddressed behavioral needs she continue[d] to be recommended to an inappropriate setting" (id.) The district conducted an FBA of the student dated January 29, 2023 (Dist. Ex. 1). In an email to the district dated February 8, 2023, the parent requested "an independent educational evaluation in the form of a functional behavioral assessment as [she] disagree[d] with the evaluation conducted by the school" (Parent Ex. J). The district filed a due process complaint notice dated February 28, 2023

which asserted that it "reject[ed] the [parent's] request because . . . [it] conducted a detailed and appropriate FBA based on comprehensive data collection that established a hypothesis on the function of the behavior and baseline information to inform the development of a Behavior Intervention Plan (BIP)" and requested an impartial hearing (Dist. Ex. 10).

After a pre-hearing conference on March 23, 2023 (Mar. 23, 2023 Tr. pp. 1-16), an impartial hearing took place before the Office of Administrative Trials and Hearings (OATH) on May 2, 2023 (May 2, 2023 Tr. pp. 1-115). In a decision dated June 21, 2023, the IHO determined that the parent was not entitled to an independent FBA at public expense (IHO Decision).

IV. Appeal for State-Level Review

The sole issue presented on appeal that must be resolved in order to render a decision in this case is whether the IHO erred by finding that the parent was not entitled to an IEE at public expense based on her disagreement with the FBA conducted by the district.

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 Riv. 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]).[1]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) 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]). Additionally, 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 Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before

[1] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) 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 to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

VI. Discussion

The parent argues on appeal that the IHO erred by failing to determine whether or not the district's FBA was substantively inappropriate and instead finding that the Trumbull case precluded the award of public funding for an FBA because the parent was challenging the FBA as a stand-alone assessment and not disagreeing with either an initial evaluation or triennial evaluation of the student. The parent also argues that the IHO erred by finding that the holding in Trumbull was dispositive of the matter despite the district's substantive defense of its FBA at the impartial hearing and failure to raise the Trumbull case as a defense during the impartial hearing. The parent further asserts that the IHO improperly shifted the burden to her to prove that the district's FBA was inappropriate.

As the IHO noted, relevant to the parent's request for an FBA as an IEE, the Second Circuit Court of Appeals has discussed the idea of a comprehensive evaluation or re-evaluation of a student forming the basis of an publicly-funded IEE request, as opposed to a single assessment (i.e., an FBA) (see Trumbull, 975 F.3d at 170; see also T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, 1291 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). The Court in Trumbull held that parents may base a request for an IEE on the last full evaluation conducted by the district (975 F.3d at 169-70 ["Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated."]).

In her decision, after summarizing the evidence presented at the impartial hearing concerning the district's FBA, the IHO found that the Trumbull case was directly applicable to the relief sought by the parent (IHO Decision at pp. 4-5, 7). The IHO noted "the law . . . makes clear that an FBA, standing by itself, is not an evaluation for purposes of the parent's right to an IEE at public expense" and quoted the Trumbull Court's analysis of what constitutes a district evaluation for purposes of determining whether an IEE at public expense may be appropriate:

> The IDEA's mandatory evaluation process is set forth in Section 1414 . . . . [I]t discusses two types of evaluations: initial evaluations and reevaluations. See 20 U.S.C. § 1414(a)(1)-(2). That the statute does not expressly or impliedly mention a third category of evaluations comprised of limited or targeted assessments suggests that there is none

(id. at p. 7 quoting Trumbull, 975 F.3d at 162 [internal quotation marks omitted]).

The IHO went on to apply the Trumbull Court's holding that, while an FBA constituted an assessment tool or evaluative material, it was not in and of itself an evaluation for purposes of determining a parent's right to an IEE at public expense (IHO Decision at p. 7). As a result, the IHO found that, because the parent was seeking an independent FBA as a publicly-funded IEE, Trumbull was controlling authority, and she denied the parent's request (id.).

Upon my independent review of the hearing record, I find that the IHO in this matter conducted a well-reasoned analysis of the relevant evidence and controlling authority and, accordingly, adopt her findings of fact and conclusions of law as my own. While the parent is understandably frustrated that the implications of the Court's decision in Trumbull were not discussed during the impartial hearing, the IHO remained bound to apply mandatory authority within the Second Circuit.[2] Further, the parent has not pointed to any factual basis for distinguishing the Trumbull case from the current matter.

As noted above, the district conducted an FBA of the student in January 2023 (Dist. Ex. 1). Thereafter, the parent sent the district an email dated February 8, 2023 disagreeing with the FBA it had conducted and requesting an independent FBA at public expense (Parent Ex. J). The parent did not express any disagreement with a district evaluation or re-evaluation of the student but instead limited her disagreement to the district's FBA (id.). As a result, while the district filed a due process complaint notice defending its FBA and presented evidence during the impartial hearing to support its position that the FBA was properly conducted and sufficient, under the controlling authority of the Trumbull case, as found by the IHO, the FBA challenged by the parent, standing alone, constituted an assessment tool or evaluative material, and not an evaluation with which the parent could disagree as the basis for a request for an IEE at public expense. [3, 4] Absent the requisite disagreement with a district evaluation, as opposed to challenges raised with respect to a discrete assessment tool such as the FBA at issue here, the parent was not entitled to an IEE at public expense under the prevailing law. Accordingly, as previously stated, I adopt the IHO's denying the parent's request for an independent FBA at public expense.

[2] In the future, I would encourage the IHO to use the prehearing conference as an opportunity to discuss, among other things, mandatory authority that may be determinative of the issues raised (see 8 NYCRR 200.5[j][3][xi][a] [identifying one purpose of a prehearing conference as "simplifying and clarifying the issues"]).

[3] Contrary to the parent's position that the district waived the argument that Trumbull precluded the parent's request for an independent FBA at district expense, I note that, in Trumbull, the Second Circuit explicitly reversed the district court's finding that the school district had waived any argument that an FBA was not the kind of evaluation with which a parent could disagree in order to obtain an IEE at public expense (see Trumbull, 975 F.3d at 164, 165).

[4] I acknowledge that the Trumbull decision raises some questions, such as whether a stand-alone assessment such as an FBA could be deemed part of an evaluation or re-evaluation that occurs before or after the FBA and, if so, how close in time the assessment must occur in order to be deemed part of the evaluation or reevaluation (see Trumbull, 975 F.3d at 164 [acknowledging that an FBA can "contribute to a child's initial evaluation or triennial reevaluation]). Still, even if a parent disagreed with an FBA under circumstances where it could be deemed part of an evaluation, under the Court's reasoning in Trumbull, the parent would still have to have expressed disagreement with the evaluation to which it was tied, which is not present in the current matter.

The parent is not without recourse. Instead, as the Court described in Trumbull, the parent may request an IEE based on her disagreement with the student's last evaluation or she may request that the district conduct a reevaluation of the student and, if the parent disagrees with that reevaluation, she can at that point request an IEE at public expense to include an independent FBA (see Trumbull, 975 F.3d at 167-68).[5]

VII. Conclusion

Having found that the IHO correctly determined that the parent was not entitled to obtain an independent IEE at public expense based on her disagreement with the district's FBA the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 28, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[5] A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]).