The University of the State of New York

The State Education Department
State Review Officer
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No. 24-005

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:
Law Office of Lloyd Donders, attorneys for petitioner, by Lloyd Donders, Esq.

Liz Vladeck, General 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 for respondent (the district) to fund an independent educational evaluation (IEE) of her son. The appeal must be sustained in part and the matter remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be

obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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.

Because the student was home-schooled, a CSE convened on May 16, 2023 and formulated an IESP for the student with a projected implementation date of May 22, 2023 (see generally Dist. Ex. 1). The CSE reviewed a February 2023 assistive technology evaluation, a November 2022 social history update, a November 2022 teacher progress report, a November 2022 speech-language progress report, a November 2022 occupational therapy (OT) progress report, and an August 2021 psychoeducational evaluation (id. at pp. 1-2). The CSE recommended that the student receive five periods of direct individual special education teacher support services (SETSS) per week, five 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, two 30-minute session of individual physical therapy (PT) per week, and, for assistive technology, that he be provided with a speech generating device (id. at p. 19).

In a letter to the district dated September 5, 2023, the parent stated her disagreement with the evaluations "mentioned on [the student's] May 2023 IESP, including evaluations that were conducted in October and November 2022 and February and May 2023" (Parent Ex. B at p. 1). The parent indicated that she was in disagreement with the district's "evaluations because they failed to comprehensively evaluate" the student (id.). The parent requested an IEE at district expense to include: a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, an OT evaluation, and a PT evaluation, as well as a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) (id. at pp. 1-2). The parent noted that, if the district did not respond to the letter within ten calendar days, she would initiate a due process proceeding (id. at p. 2).[1]

In a due process complaint notice dated September 15, 2023, the parent asserted that she disagreed with the district's evaluations and that the district failed to respond to her request for IEEs (see Parent Ex. A). The parent again requested an IEE to include: a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, an OT evaluation, and a PT evaluation, as well as an FBA and a BIP (id. at p. 2).

The parties appeared before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) for a prehearing conference on October 19, 2023 and a status conference on November 8, 2023 (Tr. pp. 1-19). During the November 8, 2023 hearing, the parties agreed that, in lieu of a formal evidentiary hearing, they would submit briefs to the IHO setting forth their respective positions with documentary evidence as exhibits (Tr. pp. 15-16; see IHO Exs. I; II).

In a decision dated November 28, 2023, the IHO denied the parent's request for an IEE at public expense (IHO Decision at p. 7). Initially, the IHO found that it was irrelevant to the decision whether the district received the September 5, 2023 letter and declined to find that the parent's IEE request in the due process complaint was "procedurally improper" (id. at p. 5). However, the IHO determined that the parent's disagreement with the district's evaluations did not trigger her right to an IEE at public expense (id.). The IHO noted that the parent only registered disagreement with the assistive technology evaluation, progress reports, and the November 2022 social history and held that these did "not constitute a reevaluation under the IDEA" (id. at p. 6). The IHO found

[1] The parent listed the providers she was seeking to conduct the requested IEEs and the cost of those IEEs (Parent Ex. B at pp. 1-2).

that this was not a reevaluation because it was "not a comprehensive, multi-focused assessment of all areas of the child's disability" and the assistive technology evaluation would be best considered an "assessment tool," which "are not evaluations in their own right" (id.). Based on these findings, the IHO found that the parent had "not disagreed with a [district] evaluation that would trigger [her] right to an IEE at public expense" and, should the parent wish for a comprehensive evaluation of the student, she "c[ould] either obtain an IEE at [her] own expense or . . . request that the [district] reevaluate the student" (id. at p. 7). As such, the IHO denied the parent's request for an IEE and dismissed the due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parties' dispute on appeal is whether the parent is entitled to an IEE at public expense.

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]).[2]

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

[2] 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 dispute between the parties relates to the decision of the Second Circuit Court of Appeal in D.S. v. Trumbull Bd. of Educ., 975 F.3d 152 (2d Cir. 2020), which examined what constitutes an "evaluation" with which a parent may disagree in order to secure district funding for an IEE, and concluded that an evaluation was limited to a comprehensive assessment of the child conducted as part of the mandatory initial evaluation or reevaluation procedures set forth in the IDEA.

With respect to those procedures, federal and State regulations make clear that 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][2]; 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 otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In New York, State regulation specifies that an initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). However, when conducting a mandatory reevaluation, there is no specified assessments that must be conducted, and a CSE is not simply required to conduct all possible evaluations of a student. Instead federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student

with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5).

Here, the hearing record is not sufficiently developed regarding when the district's last reevaluation of the student took place. Aside from the parent's due process complaint notice, a copy of the parent's September 5, 2023 letter requesting that the district fund an IEE, and documents relating to the manner in which the letter was transmitted to the district, the only evidence in the hearing record is the May 2023 IESP and an excerpt from the special education student information system (SESIS), the district's events log (see Parent Exs. A-C; Dist. Exs. 1-4). The SESIS log only includes events between May 10, 2023 and October 26, 2023, and, therefore, does not encompass the period of time during which the last assessments of the student took place (Dist. Ex. 4). As noted above, the May 2023 IESP documented that the CSE had before it a February 2023 assistive technology evaluation, a November 2022 social history update, a November 2022 teacher progress report, a November 2022 speech-language progress report, a November 2022 OT progress report, and an August 2021 psychoeducational evaluation (Dist. Ex. 1 at pp. 1-2). The parent specifically disagreed with the evaluations conducted by the district, on which the CSE relied, noting particularly that she disagreed with assessments conducted in October and November 2022 and February and May 2023 (see Parent Exs. A at p. 2; B at p. 1). The parent stated that her disagreement was because the "evaluations . . . failed to comprehensively evaluate" the student (Parent Ex. B at p. 1). Therefore, the parent did not explicitly limit her disagreement to one assessment tool but instead challenged the evaluation of the student overall.

Taking into account that the parent did not zero in on the assistive technology evaluation in stating her disagreement, the evidence in the hearing record is insufficient to show that the parent's disagreement could not support her request for an IEE at district expense. Rather, more information is necessary regarding the circumstances surrounding the district's initiation of the more recent assessment(s) of the student. That is, if the district wishes to rely on the contention that the assistive technology assessment was not part a reevaluation with which the parent could disagree, it should submit evidence that the assessment was conducted outside of a reevaluation process. Relevant evidence may include, for example, the request for the assessment, whether that was from the parent or a teacher, and any prior written notice provided by the district to the parent concerning the evaluation. If the assistive technology evaluation was part of a reevaluation process under the IDEA and the implementing regulations, the evaluation would be vulnerable to the parent's claim that it was not sufficiently comprehensive, and the district would not be in a position to rely on Trumbull to avoid the parent's request for an IEE at public expense.

The method of record development permitted by the IHO—i.e., allowing the parties to submit written briefs with documentary exhibits—was premised on the idea that there was minimal factual disputes at issue in the matter (Tr. pp. 15-16; IHO Decision at p. 2); however, it has become evident that the parties do not agree on the facts that are essential to resolving this dispute, including the question of whether the last assessments of the student were conducted as part of a reevaluation process. To be sure, the IHO gave the parties further opportunity to submit rebuttal evidence. However, the circumstances of the district's last evaluation of the student was a matter

that the district had the burden to establish, and the documents presented by the district were insufficient to demonstrate whether the assistive technology evaluation was a " intermediary limited assessment" that took place outside of a comprehensive evaluation of the student (see Trumbull Bd. of Educ., 975 F.3d at 171) or whether it was part of a reevaluation of the student that was required to be sufficiently comprehensive to allow for the district to determine the student's continuing eligibility for special education and present levels of performance (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5]).

Because the hearing record is insufficiently developed, I find that it is appropriate to remand the matter to the IHO to take additional evidence and consider the parties' positions about the parent's request for an IEE at public expense (8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]). As the matter is remanded to the IHO, it is unnecessary to address the remaining issues and arguments raised by the parties on appeal. Thus, for example, it is unnecessary to consider the additional evidence submitted by the parent with her request for review, and the parent may offer the documents to the IHO for consideration on remand. On remand, the IHO should ensure that the hearing record is sufficiently developed to determine if the district conducted a reevaluation of the student with which the parent disagreed and, if so, whether the parent is entitled to an IEE at public expense.

VII. Conclusion

The hearing record is insufficiently developed to determine whether the district conducted a reevaluation of the student with which the parent could disagree for the purpose of requesting an IEE at public expense. Therefore, the matter is remanded to the IHO to receive additional evidence.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 28, 2023, is vacated;

IT IS FURTHER ORDERED that the matter is hereby remanded to the IHO to develop the hearing record and, based thereon, determine if the district conducted a reevaluation of the student with which the parent disagreed and, if so, whether the parent is entitled to an IEE at public expense.

Dated: **Albany, New York**
February 22, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER