The University of the State of New York

The State Education Department
State Review Officer
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No. 23-155

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:
Liz Vladeck, General Counsel, attorneys for petitioner, by Gil Auslander, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Big N Little: Tiferet Torah Program (Big N Little) for the 2022-23 school year. 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

Given the limited issues raised on appeal, a full recitation of the student's educational history is not necessary. Briefly, however, a CSE convened on June 25, 2021 to recommend an individualized education services program (IESP) for the student for the 2021-22 school year (Parent Ex. B at p. 1). The June 2021 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended five periods per week of direct, group service of special education teacher support services (SETSS) in English,

and two 30-minute sessions per week of individual speech-language therapy in English (id. at pp. 1, 9).[1, 2]

On August 17, 2022, the parent signed a contract with Big N Little to enroll the student from September 2022 through June 2023 (Parent Ex. C at pp. 1, 3).[3]

By letter dated November 25, 2022, the parent wrote to the CSE chairperson requesting a reevaluation, an IEP, and a public placement for the student for the 2022-23 school year (Parent Ex. J at p. 2). The parent also stated that she could not wait for the district to conduct an evaluation and offer a placement; instead, she indicated that she would unilaterally enroll the student at Big N Little for the 2022-23 school year and seek direct funding and/or tuition reimbursement from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated March 8, 2023, the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) (Parent Ex. A at p. 2). Specifically, the parent asserted that the district failed to provide an evaluation, an IEP, and an appropriate program and placement for the student for the 2022-23 school year (id.). As a result, the parent argued that she unilaterally enrolled the student at Big N Little, where the student was receiving an appropriate special education (id.). Additionally, the parent argued that due to the district's failure to evaluate the student, she obtained a private evaluation (id.). As relief, the parent sought direct funding and/or tuition reimbursement for the cost of the student's attendance at Big N Little, prospective funding for the remainder of the 2022-23 school year, and direct funding and/or reimbursement for the cost of the private evaluation (id.).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on April 18, 2023 (Apr. 18, 2023 Tr. pp. 1-22).[4] The parties reconvened for an impartial hearing on May 18, 2023 (May 18, 2023 Tr. pp. 1-77). By decision dated June 20, 2023, the IHO found that the district denied the student a FAPE for the 2022-23 school year, that Big N Little was an appropriate unilateral placement, and that equitable considerations favored an award of direct funding of tuition for the 2022-23 school year

[1] The student's eligibility for special education 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]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] Big N Little has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] The transcripts were not paginated consecutively. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

(IHO Decision at pp. 2, 4-10).[5] In addition to awarding the parent her requested relief, the IHO ordered the district to, within 35 days of the date of his decision, assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parent regarding the implementation of the order (IHO Decision at p. 10). The IHO further ordered that the contact person was required to provide his/her name, direct phone number, and email address to the parent and the parent's attorney within 35 days of the date of the order (id.). The IHO also ordered that the contact person was to respond to any inquiry by the parent (or her attorney) concerning the implementation of the order within two business days (id.). The IHO also ordered that, within 20 days of the date of his decision, the district was required to ensure that all employees of the district who were assigned to participate in the student's CSE meeting, their direct supervisors, and the CSE chairperson attend two hours of training regarding Education Law § 3602-c and the IDEA, the interplay between the two statutes, and the procedures related to scheduling an IEP meeting and developing an IEP (id.). The IHO further ordered the training to be conducted by a person with specific qualifications and that the person be jointly selected by the parent and the district (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO exceeded his authority by awarding impermissible relief. The district asserts that the IHO is not empowered to address matters pertaining to implementation, to consider issues relating to purported systemic violations, or to penalize, punish, or sanction parties in an IDEA administrative proceeding. In addition, the district contends that the IHO's order that the CSE members receive training bears no direct relationship to remedying the student's denial of a FAPE, and either addresses a perceived systemic violation or is intended to sanction the district for denying the student a FAPE. As relief, the district requests that the IHO's orders related to the Impartial Hearing Order Implementation Unit and training of the student's CSE members be vacated.[6]

The parent did not interpose an answer to the district's request for review.

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.

[5] The parent withdrew her request for reimbursement of the private evaluation during the impartial hearing (May 18, 2023 Tr. pp. 21-22).

[6] The district does not appeal the IHO's determinations that the district failed to provide the student with a FAPE for the 2022-23 school year, that Big N Little was an appropriate unilateral placement, and that equitable considerations favored an award of direct funding of tuition. Accordingly, the IHO's determinations have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). 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]). 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 Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[7]

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).

VI. Discussion

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO may not use this authority to order relief to remedy an issue that was not raised. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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[i][7][i][a]; [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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

Review of the parent's March 8, 2023 due process complaint notice reflects that the parent did not set forth any facts or circumstances relating to the district's implementation unit nor did the parent request any relief related to the district's implementation unit (see generally, Parent Ex. A). In addition, the due process complaint notice did not allege any lack of training on the part of any district employee, nor did the parent request training of district employees as relief (id.). Review of the hearing record also does not include any facts or circumstances that would indicate any issues related to the district's implementation unit, lack of training of district employees, or that the parent sought relief addressing those issues (see Apr. 18, 2023 Tr. pp. 1-22; May 18, 2023 Tr. pp. 1-77; Parent Exs. A-J).

To the extent the IHO's intent in ordering such relief was to address a perceived systemic problem with training of staff or implementation of IHO orders in the district, generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the district implementation policies and processes that affect all students.

The IHO's directives relating to the implementation of the order tends to intrude on the district's discretion to follow an administrative process to comply with the order (cf. Abrams v. Carranza, 2020 WL 6048785, at *2 [S.D.N.Y. Oct. 13, 2020] [discussing the district's "reasonable documentation requirements" prior to funding pendency and declining to order injunctive relief "mandating immediate payment"], aff'd sub nom., Abrams v. Porter, 2021 WL 5829762 [2d Cir. Dec. 9, 2021]).[8] Further, in a class action lawsuit relating to the district's failure to implement

[8] In addition, the IHO's additional requirements for the implementation of the order do tend to resemble an attempt to direct enforcement of the primary order for tuition funding before the district has lapsed or failed in its implementation. In this regard, the district correctly argues that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). In the event that the district did not implement the IHO's order requiring it to fund the student's tuition, the parent could seek enforcement, which she could do by filing a State complaint against the district through the State complaint process or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y.

final IHO orders, the district and the class members entered into a stipulation to target the district's timely implementation of orders and the court appointed a special master to bring the district into compliance with its obligations under the stipulation (see LV v. New York City Dep't of Educ., 2021 WL 663718, at *3 [S.D.N.Y. Feb. 18, 2021]; see Order with Respect to Motion for Appointment of a Special Master, L.V. v. New York City Dep't of Educ., 03-cv-09917 [S.D.N.Y. filed Dec. 12, 2003]). Insofar as the IHO's order places additional requirements related to the district's implementation of the order, it has the potential to interfere with the processes being implemented pursuant to the stipulation and under the guidance of the special master.

Based on the foregoing, as there is no evidence that the IHO's award addressed issues raised in the present matter and as it was beyond the IHO's jurisdiction to cure any perceived systemic violations of the IDEA, the challenged aspects of the IHO's order shall be vacated.

VII. Conclusion

For all of the reasons outlined above, the IHO exceeded his authority in this matter by ordering the district to (1) assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parent regarding the implementation of his decision within 35 days of the decision, (2) provide the contact person's name, direct phone number, and email address to the parent and the parent's attorney within 35 days of the date of his decision, and (3) require the contact person to respond to any inquiry by the parent or her attorney concerning the implementation of his decision within two business days. The IHO further exceeded his authority in this matter by ordering the district to fund and to ensure that all district employees assigned to participate in the student's CSE meeting, their direct supervisors, and the CSE chairperson attend two hours of training regarding Education Law § 3602-c, the IDEA, and procedures related to developing an IEP within 20 days of the day of the decision. Accordingly, these portions of the IHO's decision must be reversed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 20, 2023 is modified by vacating those portions delineated as paragraphs one and four, which ordered the district to provide a contact person from the district's implementation unit to assist the parent, and further required specific training of district employees.

Dated: **Albany, New York**
August 31, 2023

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STATE REVIEW OFFICER

July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).