The University of the State of New York

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

No. 23-180

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 Brian J. Reimels, 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 for the 2021-22 and 2022-23 school years and ordered various forms of compensatory education relief. 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, the hearing record reflects that the student is non-verbal, exhibits global development delays, and has received diagnoses including cerebral palsy, seizure disorder, autism spectrum disorder, and intellectual disability (Parent Ex. E at pp. 2-3, 9).[1]

[1] The student has been the subject of a prior administrative proceeding (see Parent Ex. G ¶¶ 4-5; IHO Decision at pp. 3-4). The IHO in that matter ordered, among other things, that the district find a placement for the student at

According to the parent, due to the COVID-19 pandemic and subsequent school building closures, for the 2020-21 and 2021-22 school the student received remote instruction while enrolled in a district specialized school (Parent Ex. G ¶ 7). In May 2022, the student was approved for home instruction four hours per day, four days per week (id. ¶ 9).

On February 7, 2022, the CSE convened and developed the student's IEP, which recommended a 6:1+1 special class, three 60-minute sessions per week of occupational therapy (OT), five 30-minute sessions per week of physical therapy (PT), five 45-minute sessions per week of speech-language therapy, and parent counseling and training four times per year (Parent Ex. C at pp. 1, 15-16, 21). The February 2022 CSE also recommended a 1:1 paraprofessional to assist the student at school and on the bus and a speech-generating device to be utilized in school and at home (id. at p. 16).

On February 2, 2023, the CSE convened and continued the recommendations for a 6:1+1 special class with OT, PT, and speech-language therapy services, paraprofessional services, and provision of a speech generating device (compare Parent Ex. D at p. 16, with Parent Ex. C at pp. 15-16; see Parent Ex. D at p. 22).[2]

According to the parent, the district informed her of its intent "to phase out" the student's services as of his 21st birthday (Parent Ex. G ¶ 18). The student reached the age of 21 during the 2022-23 school year (see Parent Ex. D at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated May 1, 2023, the parent alleged that the district failed to offer the student with a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (Parent Ex. A at p. 1). Specifically, the parent asserted that the district denied her a meaningful opportunity to participate in the development of the student's education program; that the district failed to comprehensively evaluate the student; that the district failed to develop meaningful and measurable annual goals that addressed all the areas of the student's needs; that the district failed to implement the student's IEP for the 2022-23 school year; that the district failed to provide an appropriate program for the student; that the district failed to develop a transition plan for the student; and that the district failed to provide appropriate assistive technology (id. at pp. 3-5). For relief the parent requested an order finding the district denied the student a FAPE for the school years at issue in addition to an order for the district to fund compensatory education in the areas of applied behavior analysis (ABA) services, OT, PT, speech-language therapy and parent counseling and training, and an order directing the district to fund the cost of an appropriate assistive technology device for the student (id. at p. 5).

---

an approved non-public school (NPS) that provides applied behavior analysis (ABA) with Board Certified Behavior Analyst (BCBA) supervision in addition to a communication device (Parent Ex. C at p. 7). According to the parent, the district never offered the student a placement at an NPS, nor did it provide a communication device to the student (Parent Ex. G ¶ 6).

[2] The February 2023 CSE did not recommend parent counseling and training (see Parent Ex. D at p. 16).

B. Impartial Hearing Officer Decision

After a prehearing conference on June 2, 2023, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on July 7, 2023 (June 2, 2023 Tr. pp. 1-18; July 7, 2023 Tr. pp. 1-23).[3] By decision dated July 17, 2023, the IHO found that the district grossly denied the student a FAPE for the 2021-22 and 2022-23 school years and awarded the parent's requested relief of compensatory education in the areas of ABA services, OT, PT, speech-language therapy, and parent counseling and training (IHO Decision at pp. 2, 10-12). In addition to awarding the parent her requested relief, the IHO ordered the district to, within 35 days of the date of his decision, 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 the IDEA; the Second Circuit's decision in A.R. v. Connecticut State Board of Education, 5 F.4th 155 (2d Cir. 2021), and the New York State Education Department Office of Counsel's Formal Opinion 242, 8 NYCRR 200.4(d)(2)(ix)(a),[4] and comprehensive transition planning for students aging out of the school system (id. at p. 12). The IHO further ordered that the training 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 her authority by awarding impermissible relief. The district asserts that the IHO is not empowered to address matters pertaining 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 district's denial of a FAPE to the student 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 order related to the training of the student's CSE members be vacated.[5]

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

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

[4] Although the IHO cited 8 NYCRR 200.4(ix)(a), it is understood that she was referring to 8 NYCRR 200.4(d)(2)(ix)(a).

[5] The district does not appeal the IHO's determinations that the district failed to provide the student with a FAPE for the 2021-22 and 2022-23 school years or the IHO's ordered award for various compensatory education. 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]).

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. 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]).[6]

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 or which otherwise exceeds the IHO's jurisdictional limits. 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 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

[6] 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).

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 May 1, 2023 due process complaint notice reflects that the parent did not request training of district employees as relief nor did she set forth any facts or circumstances relating to the training of the district's CSE members and supervisors (see generally, Parent Ex. A). Review of the hearing record also does not include any facts or circumstances that would indicate any issues related to the district's lack of training of district employees or that the parent sought relief addressing such issue (see June 2, 2023 Tr. pp. 1-18; July 7, 2023 Tr. pp. 1-23; Parent Exs. A-H).

The IHO's decision is bereft of any rationale for the order for training. To the extent the IHO's intent in ordering such relief was to address a perceived systemic problem with training of staff, 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 direct changes or remedies to address to the district's policies and processes, including the training of district staff and employees, that affect all students.

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 order relief to address 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 her authority in this matter by ordering the district to, within 35 days of the date of her decision, 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. Accordingly, this portion of the IHO's decision must be reversed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 17, 2023 is modified by vacating the relief delineated in paragraph 12, which ordered specific training of district employees.

Dated: **Albany, New York**
September 27, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER