The University of the State of New York

The State Education Department
State Review Officer
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No. 23-284

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 Gauthier, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Jesse Cutler, Esq. and Linda A. Goldman, 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 respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2022-23 school year. 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, a January 2018 neuropsychological evaluation was conducted over several dates in December 2017 and one date in January 2018 (Dist. Ex. 12 at p. 1).[1] The evaluation report indicated that the student was referred for an evaluation by his parents (id.). The report noted that, at the time of the evaluation, the student was attending a pre-kindergarten program, was classified as a preschool student with a disability, and was receiving 10 hours of special education itinerant teacher (SEIT) services per week, two 45-minute sessions of occupational therapy (OT) per week, and three 45-minute sessions of speech-language therapy per week (id.). The January 2018 neuropsychological evaluation report included a number of educational recommendations for the student (id. at pp. 7-9). In particular, the evaluator recommended that the student be placed in a "small, specialized classroom within a small, special education, supportive school," indicating that the student's profile of needs warranted full-time specialized support in a class with a small student to teacher ratio where the student would be provided with structure, scaffolding, and specialized instruction and intervention (id. at p. 7). The evaluator also recommended that the student receive SEIT services for the remainder of the 2017-18 school year, speech-language therapy and OT services at the frequencies recommended by his providers, as well as a number of management needs, supports and accommodations, and other classroom strategies (id. at pp. 7-9). Further, the report included recommendations for regular communication among the student's parents, teachers, and service providers, help to carryover skills at home, and a social skills group (id. at p. 9).

A May 2018 addendum to the neuropsychological evaluation indicated that an updated evaluation was conducted in April and May 2018 (Dist. Ex. 8 at p. 1).[2] While the January 2018 neuropsychological evaluation report noted that the student was accompanied by his SEIT for parts of the testing sessions, the student was not accompanied by his 1:1 SEIT teacher during the May 2018 evaluation update (Dist. Exs. 8 at p. 1; 12 at p. 2). According to the neuropsychological evaluator who conducted both evaluations, the student presented with significant difficulties in attention and activity level to the extent that he required "moment-to-moment redirection" despite the provision of "a high degree of prompting and support to engage in evaluation tasks" (Dist. Ex. 8 at p. 1). Specifically, the neuropsychological addendum noted that the student exhibited self-directed behaviors through the evaluation which was administered in a highly structured 1:1 setting; as a result, the neuropsychological evaluator opined that the student's difficulties "would be even more pronounced in a large classroom setting" (id.).

The hearing record contains little information regarding the next several school years. The CSE convened on April 12, 2022, to formulate the student's IEP with an implementation date of April 26, 2022 (see generally Dist. Ex. 1). The CSE indicated that it reviewed a mid-year academic report from the 2021-22 school year, a mid-year speech-language report from the 2021-22 school year, a mid-year OT report from the 2021-22 school year, and cognitive testing scores from the January 2018 neuropsychological evaluation (Dist. Ex. 1 at p. 1). The April 2022 CSE

[1] The individuals conducting the evaluation failed to provide the date they completed the resulting evaluation report, but facsimile headers on the exhibit suggest it was sometime on or before February 6, 2018 (see Dist. Ex. 12).

[2] Again, the individuals completing the update took care to note the session dates for conducting the addendum during April and May 2018, but omit the date they completed the evaluation report. The facsimile headers on this exhibit bear a November 2018 date (see Dist. Ex. 8).

recommended that the student receive five periods of direct, group Special Education Teacher Support Services (SETSS) in core subjects per week; 10 periods of integrated co-teaching (ICT) services in English language art (ELA) per week; 10 periods of ICT services in math per week; five periods of ICT services in social studies per week; five periods of ICT services in sciences per week; and related services of two 30-minute sessions of individual OT per week, one 30-minute session of individual speech-language therapy per week, and two 30-minute sessions of group speech-language therapy per week (id. at pp. 19-20).

The district sent the parents a prior written notice of its recommendations, dated April 14, 2022, and a school location letter dated the same day (Dist. Exs. 4; 5). The district then sent the parents a second school location letter, dated June 28, 2022, identifying the public school that the student was assigned to attend for the 2022-23 school year and a second prior written notice, also dated June 28, 2022 (Dist. Exs. 6; 7).

In a letter dated August 23, 2022, the parents notified the district that they were rejecting the district's educational programming for the 2022-23 school year and that they intended to unilaterally place the student at Stephen Gaynor for the 2022-23 school year at district expense (Parent Ex. B).

In a due process complaint notice, dated April 5, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parents raised claims regarding CSE process, the evaluative information relied on by the April 2022 CSE, the student's present levels of performance, recommended management needs, recommended annual goals, the appropriateness of the recommended program, and whether the assigned public school site could implement the April 2022 IEP as written (id.). For relief, the parents requested funding for the student's placement at Stephen Gaynor for the 2022-23 school year (id. at p. 3).

After a prehearing conference on May 8, 2023, the parties proceeded to an impartial hearing on June 21, 2023, which concluded on October 11, 2023 after six total days of proceedings (see Tr. pp. 1-92). In a decision dated November 2, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that Stephen Gaynor was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 7-8, 12-16).[3]

[3] It is noted that the initial IHO decision was dated November 1, 2023, an amended decision was also dated November 1, 2023, and the November 2, 2023 decision was the second amended decision and will be cited to throughout this decision as the final IHO decision. Notably, it appears that the IHO removed some language from the body of the decision describing why he rejected the district's arguments raised in its closing brief (IHO Decision at pp. 12-13). Generally, an IHO lacks the authority to retain jurisdiction and materially alter a final decision (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Nevertheless, the request for review was timely served 40 days from the initial November 1, 2023 IHO Decision and any changes to the IHO decision do not impact on the results reached in this decision.

Specifically, the IHO held that the without a witness, he was "constrained to find that the District has conceded that it did not conduct an appropriate review, that it failed to conduct relevant evaluations, failed to develop an appropriate IEP, and/or did not offer the Student an appropriate placement for the 2022-2023 school year" (id. at p. 6).[4] The IHO determined that the district had not conducted any evaluation of the student in over five years and that this was "a profound failure of the District to meet its obligations" (id. at p. 7). Therefore, the IHO found that the student was denied a FAPE (id.). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition in the amount of $75,730.00 at Stephen Gaynor for the 2022-23 school year and to conduct a reevaluation of the student in all areas of suspected disability (id. at p. 17).

IV. Appeal for State-Level Review

The district appeals. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and, therefore, the allegations and arguments will not be repeated in detail. The core of the parties' dispute on appeal is whether the district sufficiently demonstrated that it offered the student a FAPE for the 2022-23 school year.

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. 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"

[4] The IHO found that without a district witness, there was no evidence to explain why the IEP disregarded the recommendations contained in the student's 2018 neuropsychological evaluation (IHO Decision at pp. 6, 12).

(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]).[5]

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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

Initially, it is noted that the IHO directed the district to reevaluate the student in all areas of suspected disability and reconvene the CSE upon completion of those evaluations (IHO Decision at p. 16). The district did not challenge that aspect of the IHO's decision, and as such, the order remains in place. Furthermore, the district did not appeal the findings of the IHO that Stephen Gaynor was an appropriate unilateral placement and that equitable considerations favored the parents. As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[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]).

The district, in the request for review, argues that the IHO erred by finding the district failed to offer the student a FAPE for the 2022-23 school year. Specifically, the district contends that the IHO erred by finding the district was required to call a witness and that the failure to conduct evaluations resulted in a denial of FAPE. The district asserts that the student's present levels of performance were accurate, that the management needs and annual goals addressed the student's deficits, and that the program recommendations were appropriate to enable to the student to make meaningful progress. In response, the parents contend that the district failed to present any witnesses to explain or justify the IEP program recommendations. The parents assert that the district failed to conduct evaluations or sufficiently defend its recommendations.

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

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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).

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]).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

Here, the district has the burden of proof to demonstrate that the IEP it created was appropriate to meet the student's special education needs. While that burden does not require the district to call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations.

The Supreme Court held in Endrew F., the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" and the "nature of the IEP process [] ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement" (Endrew F., 580 U.S. at p. 404). Lastly, the Supreme Court held that the "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (id.).

The evidence shows that during the impartial hearing the district failed to present "a cogent and responsive explanation" to support the April 2022 CSE's recommendations. In this specific case, the district created the student's educational program during the April 2022 CSE meeting (see Dist. Ex. 1). The meeting minutes indicated that the April 2022 CSE received the student's 2021-22 mid-year teacher, speech-language, and OT reports (Dist. Ex. 3 at p. 1). The April 2022 IEP indicated that the CSE reviewed the 2021-22 mid-year academic, speech-language, and OT reports, and results of a cognitive assessment administered to the student as part of the January 2018 neuropsychological evaluation (Dist. Ex. 1 at p. 1). The April 14, 2022 prior written notice indicated that the CSE reviewed school reports dated April 11, 2022 (Dist. Ex. 4 at p. 2). The June 28, 2022 prior written notice indicated that the CSE reviewed the April 2018 neuropsychological, a June 30, 2020 OT progress report, an April 5, 2018 speech-language progress report, and an April 5, 2018 teacher report (Dist. Ex. 6 at p. 2). The IEP meeting minutes noted that the parent informed the CSE that the student underwent a privately obtained neuropsychological evaluation a week prior to the CSE meeting; however, the results were not available yet (Dist. Ex. 3 at p. 1). The minutes also noted that the parents and Stephen Gaynor school staff had concerns with the size of a general education class with the support of ICT services (id. at pp. 1, 5).

The April 2022 IEP, as well as both prior written notices, indicated that the CSE considered other options for the student including general education with related services only; however, the CSE rejected those options as it determined that the student required "more academic intervention support" (see Dist. Exs. 1 at p. 26; 4 at p. 2; 6 at p. 2). However, there was no evidence in the hearing record showing how the CSE addressed the concerns that the parent and Stephen Gaynor staff raised during the CSE meeting regarding the size of the class where the recommended ICT services would be implemented, or how the CSE addressed the recommendations included in the neuropsychological evaluation report that the student receive instruction in "a small specialized classroom" or the neuropsychological addendum recommendation for a "full-time small, supportive, and structured special education classroom (<12 students) in a special education school" (see Dist. Exs. 3 at p. 5; 8 at p. 3; 12 at p. 7).

One way that a school district can show how it addressed concerns raised by parents, private evaluators, and private school staff during a CSE meeting is to call witnesses who participated in the meeting. At the impartial hearing held on June 21, 2023, the district indicated that it intended to call a witness to support its April 2022 IEP (Tr. pp. 6, 10-11, 18-19). However, at the next hearing held on July 18, 2023, the district informed the IHO that its witness was not available (Tr. pp. 26-28). The IHO adjourned the case to allow the district one more opportunity to present its witness or provide an affidavit and noted that if the witness was not available again, the hearing would proceed without the witness (Tr. p. 29). At the August 15, 2023 hearing, the district again informed the IHO that its witness was not ready to testify (Tr. pp. 33-34). The IHO then set the case for the next hearing in order for the parent to present its case, a decision that the district did not object to (Tr. pp. 34-36).

Here, the district argues that it was not required to present a witness and that the CSE had enough information to make appropriate recommendations for the student. This is despite the fact that the documentary evidence in the hearing record demonstrates that the last time the student was evaluated was in 2018 with the January 2018 neuropsychological evaluation and May 2018 addendum to it (see Dist. Exs. 8; 12). Further, as described above, review of the remaining documentary evidence, including the April 2022 CSE meeting minutes, IEP, and prior written

notices, does not provide a clear indication regarding what documents the CSE used to develop the student's April 2022 IEP (see Dist. Exs. 1 at p. 1; 3 at p. 1; 4 at p. 2; 6 at p. 2). While the district is correct that it was not required to call a witness to meet its burden of proof, in this case, the lack of either a witness or adequate documentary evidence left a dearth of information in the hearing record regarding what evaluative information the CSE relied on when it made its recommendations, an explanation regarding why the district had not evaluated the student since 2018, why the CSE did not wait or reconvene to consider the results of the updated neuropsychological evaluation obtained by the parents, and why the district believed it had sufficient information regarding how the student could be expected to make progress given the CSE's program recommendation in light of the recommendations contained in the January 2018 neuropsychological evaluation report and the May 2018 neuropsychological addendum.[6] If a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). The IHO mischaracterized the district's case at two points in his decision, which was error. The IHO found that the district failed to present a "Prong 1" case (IHO Decision at p. 12), which is a factual error, because the district presented 13 exhibits consisting of relevant, probative information related to the parent's claims. That the evidence is ultimately unpersuasive does not mean that no case was presented. Second, the IHO indicated that in the absence of a witness, the district "conceded" that a proper review had not been conducted (id. at p. 6), but that is not an accurate statement of the district's position because the district did not concede that it failed to evaluate the student or develop an appropriate IEP in this proceeding. However, for the reasons described above, these two errors are not sufficient grounds to disturb the IHO's decision that the district failed to offer the student a FAPE.

Therefore, the hearing record supports the IHO's decision that the district failed to offer the student a FAPE for the 2022-23 school year as the district failed to meet its burden of proof. The district was unable to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (Endrew F., 580 U.S. at p. 388).

[6] The May 2018 addendum recommended a full-time small, supportive and structured special education classroom of no more than 12 students (Dist. Ex. 8 at p. 3). This is the only evaluative information in the hearing record that recommends a specific class size; however, there was no evidence or argument presented by the district to demonstrate why the April 2022 CSE departed from this recommendation. This is notable considering that both prior written notices indicate that the CSE failed to consider a special class placement and that the parent and Stephen Gaynor staff vocalized concern with the student's ability to learn in a large class, specifically noting concerns with the recommendation for ICT services (Dist. Exs. 3 at p. 5; 4 at p. 2; 6 at p. 2). While it is possible that the district would not have been obligated to implement the type of services preferred by the parent, it was obligated to consider the parent's input and address the parent's concerns and, upon disagreeing with the parent's view, provide the parent with the reasons the CSE refused to place the student in a special class setting.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 year, the necessary inquiry is at an end. The hearing record supports the IHO's order directing the district to reimburse and/or fund the cost of the student's 2022-23 placement at Stephen Gaynor in the amount of $75,730.00.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 5, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER