The University of the State of New York

The State Education Department
State Review Officer
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No. 24-142

Application of a STUDENT SUSPECTED OF HAVING 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:
The Harel Law Firm, PC, attorneys for petitioner, by Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Samantha Labossiere, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's programming at Big N Little: Tiferet Torah Program (Tiferet Torah) for the 2023-24 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

In a letter dated July 29, 2022, the parent informed the district that the student's needs could no longer be met in a general education classroom, and requested that the district evaluate the student and provide him with a full-time special education classroom placement for the 2022-23 school year or the parent would unilaterally place the student in a private special education program and seek tuition reimbursement/direct funding (Parent Ex. J at p. 2). On August 23, 2022 the district conducted an occupational therapy (OT) evaluation of the student and a speech-language evaluation of the student was conducted on August 24, 2022 (Parent Exs. B; L). At the time of the evaluations, the student was entering tenth grade at Tiferet Torah in a special education

classroom of 12 students (Parent Exs. B at p. 1; L at p. 1).[1] On or about November 29, 2022, the parent again notified the district of the student's need for evaluations and district placement, and advised that she was continuing the student's unilateral placement at Tiferet Torah and intending to commence proceedings seeking tuition funding/reimbursement from the district (Parent Ex. K at p. 2). The hearing record does not contain evidence reflecting whether the district responded to the parent's November 2022 letter (see Tr. pp. 1-149; Parent Exs. A-J).

In an August 31, 2023 letter to the district, the parent requested that the district evaluate the student and place him in a full-time special education classroom for the 2023-24 school year (Parent Ex. H at p. 2). On October 30, 2023, the parent sent the district a second letter titled "FOLLOW UP TEN DAY NOTICE," advising the district that to date, it had not evaluated the student or offered him a placement (Parent Ex. I). The parent requested that the district evaluate the student, develop an IEP, and recommend a placement in a special education classroom (id. at p. 2). The parent's October 30, 2023 letter informed the district that if it failed to evaluate and place the student, the parent would continue to unilaterally place the student at Tiferet Torah and seek tuition funding/reimbursement for the 2023-24 school year (id.). The hearing record does not contain evidence that the district responded to the parent's August or October 2023 letters, or that a CSE has determined that the student was eligible for special education programming (see Tr. pp. 1-149; Parent Exs. A-J).

A. Due Process Complaint Notice

In a due process complaint notice dated November 10, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent alleged facts related to her requests for the CSE to evaluate the student and offer special education services in August and October 2023 (Parent Ex A at p. 4).[2] As relief, the parent requested "direct tuition funding of the full amount of tuition charged" by Tiferet Torah for the 2023-23 school year (id. at p. 4).

B. Impartial Hearing Officer Decision

On December 14, 2023, a prehearing conference convened before the Office of Administrative Trials and Hearings (OATH), and an impartial hearing convened on January 18, 2024 and concluded on February 5, 2024 after three days of proceedings (Tr. pp. 1-149). During the impartial hearing, the district conceded it failed to provide the student a FAPE for the 2023-24 school year (Tr. pp. 30-31). In a decision dated March 24, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, and that the parent had not met her burden to show that Tiferet Torah was an appropriate unilateral placement for the student (IHO Decision at pp. 7, 14-15).

[1] The Commissioner of Education has not approved Tiferet Torah as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] At the time of the due process complaint notice, the parent alleged that another due process proceeding regarding the 2022-23 school year was already pending (Parent Ex. A at p. 3).

The IHO went on to state in the alterative that if she had found Tiferet Torah to be an appropriate unilateral placement, equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement, but with a reduction of 1/5 of the total tuition amount sought (IHO Decision at pp. 15, 17, 18). Specifically, the parent requested a total tuition amount of $115,000 to be paid to Tiferet Torah, but the IHO found that because the parent's ten-day notice was dated August 31, 2023, the district was not given ample opportunity to evaluate and recommend services before the commencement of the private services for the 2023-24 school year and therefore, had the parent met her burden of proof that the unilateral placement was appropriate, the IHO would have reduced the tuition award to $92,000 (id. at pp. 17-18). The IHO ultimately denied the parent's requested relief (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent failed to meet her burden with respect to the appropriateness of the unilateral placement, the specifics of which are further described below. The parent further argues that the IHO erred in her equities analysis given her finding that the parent's first notice of unilateral placement to the district for the 2023-24 school year was on August 31, 2023. The parent requests reversal of the IHO's findings that the unilateral placement was not appropriate and equitable considerations would have supported a reduced award, and an order directing the district to directly fund the student's full tuition to Tiferet Torah in the amount of $115,000.00 for the 2023-24 school year.

In an answer, the district asserts that the IHO's decision should be affirmed. The parent files a reply which reiterates that the IHO's decision should be reversed.

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" (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]).[3]

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

The district has not appealed the IHO's determination that it denied the student a FAPE for the 2023-24 school year (see Answer). Accordingly, this adverse finding has 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]).

Turning to the parent's appeal of the IHO's finding that the unilateral placement of the student at Tiferet Torah was not appropriate, the IHO agreed with two of the district's arguments set forth in opposition to the unilateral placement, specifically, the district's arguments that it was "not clear whether [the s]tudent's class ha[d] adequate supports to be safe for [the s]tudent and his classmates," and that Tiferet Torah did "not include adequate measures of progress" (IHO Decision at pp. 7, 14).

With regard to her challenges to the IHO's decision parent specifies in her request for review that "[t]he IHO incorrectly based her determination on the following two issues: '(1) it is not clear whether Student's class has adequate support to be safe for Student and his classmates, and (2) the Private Program does not include adequate measures of progress.'" The parent then provides numerous arguments in support of overturning the IHO on those two particular reasons for finding Tiferet Torah inappropriate.

With regard to the first issue of whether Tiferet Torah provided adequate supports for the student to be "safe," review of the student's August 2023 functional behavioral assessment (FBA) and September 2023 behavioral intervention plan (BIP) shows that Tiferet Torah identified the student's interfering behaviors and numerous replacement behaviors/strategies to use with him (Parent Ex. G at pp. 2-7, 9-13).

As to the IHO's determination that Tiferet Torah failed to show adequate measures of progress, implied within this finding is that the parent was required to show that the student made progress at the unilateral placement, without which the parent's case would fail. However, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in

[3] 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).

determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Therefore, the evidence in the hearing record does not support the IHO's findings on the two particular issues challenged by the parent as reasons for finding Tiferet Torah inappropriate.

However, in the answer, the district argues that the parent's appeal "focuses on only two of the many aspects of the IHO's ruling on the appropriateness of the unilateral placement" and asserts that "the IHO took into consideration much more" than those two findings. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Careful review of the IHO's decision supports the district's assertion. Specifically, the IHO reviewed the evaluative information in the hearing record and determined that the speech-language evaluation findings were "contradictory," and there was a lack of evidence regarding the student's cognitive skills and the grade levels on which he was functioning (IHO Decision at pp. 9-11, 14). According to the IHO, given this lack of evaluative information it was "impossible to identify [the s]tudent's precise needs and potential" (id. at p. 14). Regarding the evaluative information that was in the hearing record, the IHO found that it did "not include any quantitative data that would enable objective tracking of [the student's] goals," as such, the student's Tiferet Torah treatment plan "lack[ed] any meaningful or objective baseline information" (id. at pp. 10-11, 14). Next, the IHO held that while testifying during the hearing, the Tiferet Torah supervisor "avoided giving a direct answer," and responded in a "cursory and narrative way" to the IHO's questions (id. at pp.

11-12). Given the Tiferet Torah supervisor's "lack of meaningful detail under questioning, her imprecise responses regarding [the s]tudent and his program and her (in some instances) conclusory responses" the IHO found the witness "to be of limited credibility and must accord her testimony diminished weight" (id. at p. 12). The IHO also determined that the evidence in the hearing record "lack[ed] details of some critical aspects of [the s]tudent's program," including that there was "no meaningful detail about the identity, qualifications, training and experience" of any of the staff who worked with the student, and there was "minimal detail about the makeup of [the s]tudent's class" including the other students' needs (id. at p. 14).[4]

Therefore, the district is correct that the parent has failed to properly appeal from all of the IHO's adverse findings with respect to the appropriateness of the student's unilateral placement at Tiferet Torah for the 2023-24 school year. Furthermore, even in her reply, the parent does not address district's defense on appeal that the parent failed to challenge numerous adverse findings of the IHO in the request for review and the parent primarily recites testimonial evidence from the hearing record while ignores the fact that the IHO discounted it as unpersuasive. The unappealed adverse findings of the IHO were substantial and as such, there is an inadequate basis upon which to overturn the IHO's finding that the parent failed to establish that Tiferet Torah was an appropriate unilateral placement for the student for the 2023-24 school year.

As a final note, the parent has requested that the district conduct an initial evaluation of the student and recommend special education programming; however, the evidence in the hearing record does not show that this has occurred (Parent Exs. J at p. 2; K at p. 2; H at p. 2; I). Accordingly, the district should convene the CSE for this purpose, unless it has already done so.

VII. Conclusion

As the parent has failed to appeal from significant adverse findings of the IHO regarding the appropriateness of the student's unilateral placement and there is inadequate basis to overturn the IHO's decision as a result, the necessary inquiry is at an end and do not reach the IHO's alternative determinations regarding equitable considerations.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 20, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] The IHO also held that it "appear[ed] that [the s]tudent [wa]s not progressing at all in the area of behavior" as the teacher reported that he did not listen to teachers or follow classroom rules, he was not able to complete work, and he had made "no progress" with the interventions tried with him (IHO Decision at p. 14). Although the parent did not mention this finding specifically, it is arguably related to the BIP and progress issues that the parent did appeal and were determined in the parent's favor.