



The University of the State of New York

The State Education Department State Review Officer

No. 07-052

Application of a CHILD WITH A DISABILITY, by his parents, 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:

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which determined that the educational program respondent's Committee on Special Education (CSE) had recommended for their son for the 2006-07 school year was appropriate and which denied their request for an order directing that a specific instructional methodology be identified on the child's 2006-07 individualized education program (IEP). The appeal must be dismissed.

At the commencement of the impartial hearing on September 27, 2006, the child was 5 years old and receiving 40 hours per week of home instruction using verbal behavior applied behavior analysis (verbal behavior ABA), as well as the related services of speech therapy, feeding therapy, occupational therapy, physical therapy and counseling at home (Tr. pp. 123, 340; Parent Ex. FF). The child's eligibility for special education programs and services and his classification as a child with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

The child was born prematurely and began receiving early intervention services at five months of age (Tr. p. 326). The child's mother reported that her son was initially diagnosed as having a pervasive developmental disorder and later autism (Tr. pp. 309, 326; Parent Ex. T at p. 1). When the child was eighteen months old he began receiving instruction through the use of verbal behavior ABA (Tr. p. 327). Respondent's Committee on Preschool Special Education (CPSE) classified the child as a preschool child with a disability and in September 2004, the child entered an 8:1+2 special preschool class in a specialized school in respondent's district at P.S. 37 (Tr. pp. 331-32; Parent Ex. B at p. 1). Respondent created the special preschool class at P.S. 37 specifically for petitioners' child (Tr. pp. 332, 387). The child's IEP for the 2004-05

school year indicated that he required verbal behavior ABA and the child was assigned to a classroom in which the teacher was trained in verbal behavior (Tr. pp. 328, 602-03, 610-11, 613). The child remained in the 8:1+2 special class for the 2004-05 and 2005-06 school years (Tr. pp. 340, 611-12). His IEP continued to indicate that he required instruction using verbal behavior ABA (Tr. pp. 328, 333, 366-67).

During the 2005-06 school year, petitioners sought numerous evaluations of the child in order to obtain input regarding his educational programming. Between January and March 2006 the student underwent two psychological evaluations (Parent Exs. T; S), a developmental evaluation (Parent Ex. Q), a behavioral consult (Parent Ex. P), a behavioral reevaluation (Parent Exs. V; U), a psychiatric follow-up (Parent Ex. R), a speech, language, oral motor, and feeding skills evaluation (Parent Ex. O), a school functional assessment (Parent Ex. C1), and an occupational therapy evaluation (Parent Ex. K). In addition, progress reports from the child's teachers (Parent Exs. B; L), clinical psychologist (Parent Ex. M) speech therapists (Parent Exs. E; H; N), occupational therapist (Parent Ex. D), physical therapist (Parent Ex. C) and counselor (Parent Ex. F) were completed.

Information from the various evaluators and service providers revealed that the child had significant attending difficulties in addition to severe cognitive deficits (Parent Exs. B at p. 1; E at p. 1; T at pp. 2-3, 4; W). The child also demonstrated significantly delayed readiness skills, as well as language delays and difficulty completing activities for daily living (Parent Ex. B at pp. 1, 2). He was described as being easily agitated and demonstrating a low tolerance for frustration (*id.* at p. 1). The child required continuous redirection for self-stimulatory behaviors (*id.*). He was able to articulate phrases and sentences with intact clarity; however, his ability to use speech for functional purposes and to understand language was significantly decreased (Parent Ex. O at p. 1). He exhibited feeding difficulties (Parent Ex. O). The child had significant delays in fine motor, visual motor, and sensory processing skills (Parent Ex. K at pp. 2, 3). He was diagnosed by a psychiatrist as having an autistic disorder, a mood regulation disorder, and pica (Parent Ex. R at p. 2). The child was described as "hyperactive" and exhibiting a high frequency of repetitive behaviors and delayed echolalia (Parent Ex. L at p. 1). The child protested when given difficult tasks and his protests sometimes included aggression (*id.*). The child's play was described as repetitive (*id.*). He exhibited poor eye contact, exhibited a number of stereotypes, and engaged in tantrums (Parent Ex. M at p. 4).

The professionals who evaluated and worked with the child made numerous recommendations regarding the child's educational program. These included maintaining a program and therapies similar to the child's preschool program as he transitioned to kindergarten (Parent Exs. Q at p. 3; S at p. 3); providing the child with 1:1 instruction using ABA and discrete trial teaching (Parent Exs. L at p. 2; M at p. 5; R at p. 2; U at p. 4); providing the child instruction using a verbal behavior approach (Parent Ex. W); and incorporating a picture exchange communication system (PECS) (Parent Ex. O at p. 13), visual schedules (Parent Exs. M at p. 5; O at p. 14; U at p. 4), and sensory diet activities into the child's daily program (Parent Ex. K). Additional recommendations included maintaining a medication regimen (Parent Exs. R; W), employing the Links to Language program (Parent Ex. O at pp. 12, 13), and incorporating looser training strategies into the child's program, such as natural environment teaching (NET), to facilitate the child's generalization of skills (Parent Ex. M at p. 6).

On April 4, 2006, the CPSE met for the child's annual review (Parent Ex. EE). The resultant preschool IEP included a dual recommendation for special education and related services to be delivered both in school and outside the school setting, through August 31, 2006 (id. at pp. 1, 2, 47). The CPSE recommended the child's continued classification as a preschool child with a disability and placement in an 8:1+2 special class with a 1:1 paraprofessional (id. at p. 1). Related services recommendations included individual speech-language therapy five times weekly, individual occupational therapy five times weekly, individual physical therapy five times weekly and individual counseling two times weekly (id. at pp. 47, 49). In addition, the CPSE's dual recommendation included that the child receive 15 hours per week of special education itinerant teacher (SEIT) services, individual speech-language therapy five times per week, individual occupational therapy two times per week, individual speech-language therapy for feeding four times per week, individual speech-language therapy for augmentative communication two times per week and individual counseling once per week (id. at pp. 47, 50). Under academic management needs, the child's IEP stated that he required instruction using a verbal behavior ABA approach (id. at p. 3). The IEP also recommended the use of PECS and sensory diet activities to address his management needs (id. at pp. 4, 5, 10).

On April 12, 2006, respondent's CSE convened to conduct the child's "turning 5" conference in anticipation of the child transitioning from preschool to kindergarten and to develop the child's IEP for the 2006-07 school year (Parent Ex. GG; see Tr. pp. 437, 448). Participants in the meeting included petitioners; respondent's school psychologist who also served as the district representative; a parent member; and the child's preschool teacher, SEIT, speech therapist and occupational therapist (Tr. pp. 349-50, 963; Parent Ex. GG at p. 2). The CSE meeting lasted four hours and the resultant IEP consists of 47 pages (Tr. pp. 405-06; Parent Ex. GG). The CSE recommended that the child be classified as having autism and receive services both in school and outside the school setting (Parent Ex. GG at pp. 1, 37, 38). With regard to the school based program, the CSE recommended that the child be placed in a 6:1+1 special class in a specialized school and be assigned a 1:1 crisis management paraprofessional (id. at pp. 1, 35, 37). Related services recommendations included individual speech-language therapy five times weekly, individual occupational therapy five times weekly, individual physical therapy three times weekly, and individual counseling twice weekly (id. at p. 37). Recommended services for outside the school setting included special education teacher support services (SETSS) 15 hours per week, speech-language therapy five times weekly, speech-language therapy (feeding) twice weekly, speech-language therapy (augmentative communication) twice weekly, occupational therapy twice weekly, counseling once weekly and nursing services (Tr. pp. 956-57; Parent Ex. GG at pp. 1, 38). Unlike the child's April 4, 2006 IEP developed by the CPSE, the April 12, 2006 IEP did not specify that the child required instruction using verbal behavior ABA methodology (Tr. p. 544; compare Parent Ex. GG at p. 3, with Parent Ex. EE at p. 3). On June 19, 2006, respondent issued a Final Notice of Recommendation placing the child at P.S. 37 (Dist. Ex. 2).

According to the child's mother, respondent was unable to find a teacher trained in verbal behavior ABA to deliver the child's summer 2006 school based program (Tr. pp. 333-34). As a result, the CPSE reconvened on June 30, 2006 and developed an interim service plan (ISP) for the child (Parent Ex. FF).

By due process complaint notice dated August 11, 2006, petitioners requested an impartial hearing and alleged that the April 12, 2006 IEP did not offer their son a free appropriate public education (FAPE) or educational benefit because it did not provide "[s]cientific [r]esearch [b]ased instructional practices based on peer reviewed research" (IHO Ex. I at p. 3). Specifically, petitioners asserted that the child's IEP should reflect verbal behavior ABA, which includes a discrete trial teaching component, as the appropriate teaching methodology for the child (id.). According to petitioners, verbal behavior ABA had proven to be the only strategy that provided the child with educational benefit and the child's need for verbal behavior ABA had always been stated on his IEP (id.). In addition to requesting that a specific methodology be listed on the child's IEP, petitioners requested that the child's recommended program be amended to include parent training, staff training, time for the team coordinator to do paperwork, monthly team meetings, consultation by a board certified behavioral analyst (BCBA), and the use of token economies and PECS (id. at p. 4). As a proposed solution, petitioners recommended that respondent provide the child with 40 hours per week of home instruction using verbal behavior ABA and related services for the child in his home or at private therapy centers (id. at p. 8). As an alternative solution, petitioners proposed that respondent provide a school setting where the child would receive at a minimum three hours of verbal behavior ABA instruction utilizing 1:1 discrete trial teaching each day (id.).

Petitioners invoked pendency to continue home instruction and related services for the child in his home during the 2006-07 school year as outlined in the child's June 30, 2006 ISP (see IHO Decision at p. 6; IHO Ex. I at p. 3).¹

The impartial hearing began on September 27, 2006 and concluded on March 8, 2007, after six days of testimony (Tr. pp. 1, 985). The primary issue in dispute was whether respondent was required to include a statement of educational methodology in the child's IEP (IHO Decision at p. 7; see Tr. pp. 365-67). Both parties presented documentary and testimonial evidence (Tr. pp. 1-1087; Parent Exs. A-PP; Dist. Exs. 1-7). Petitioners presented testimony from the child's various home based providers and some of the child's private evaluators who opined that the child requires instruction through verbal behavior ABA and that he has made progress by using this approach (see, e.g., Tr. pp. 48-50, 52-54, 78, 80, 86-88, 152, 169, 190, 273, 275-76, 284, 311, 313-14). Respondent argued at the impartial hearing that including a statement of a particular methodology on the child's IEP might unnecessarily "tie the teacher's hands" by compelling the teacher to use a particular methodology to the exclusion of other methodologies (see, e.g., Tr. pp. 25-26, 474-75, 486, 490, 496-97, 547, 1065-66). Respondent also asserted that it offered the student a FAPE (Tr. pp. 27, 1062).

The impartial hearing officer rendered his decision on April 5, 2007. He concluded that respondent offered the child a FAPE for the 2006-07 school year and that the April 12, 2006 IEP

¹ The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a child remain in his or her then current placement, unless the child's parents and the school district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the child (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; see 34 C.F.R. § 300.518[a]). The child's pendency placement is not in dispute in the instant appeal.

offered the child an appropriate program despite petitioners' contention that it did not specify instruction utilizing the verbal behavior ABA methodology (IHO Decision at p. 10). The impartial hearing officer found that petitioners did not demonstrate that verbal behavior ABA is the only way in which the child can be taught and still receive educational benefit, and therefore, did not show that the IEP must include a particular teaching methodology in order for the child to receive a FAPE (id. at p. 9). To the extent that petitioners sought to raise procedural violations in the formulation of the IEP, the impartial hearing officer concluded that none rose to the level of a denial of a FAPE (id. at p. 10).

Petitioners appeal from the impartial hearing officer's decision. They assert that the impartial hearing officer did not consider the child's needs and that he erroneously concluded that the child's IEP does not need to specify verbal behavior ABA. Petitioners argue that the impartial hearing officer's decision precludes a teacher from using a verbal behavior ABA approach to instruct the child. They request that the impartial hearing officer's decision be annulled, and that respondent be ordered to "reinstate" the 1:1 verbal behavior ABA on the child's IEP and provide 40 hours of 1:1 ABA by a qualified special education teacher.

Respondent contends that the impartial hearing officer's decision should be upheld in its entirety and requests that the petition be dismissed. Respondent asserts that a school district is not required to place a specific methodology on an IEP and that petitioners failed to sustain their burden of demonstrating that respondent did not offer a FAPE.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];² see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).³

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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir.

² The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

³ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 child, or (c) caused a deprivation of education benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; see Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensure 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 Perricelli, 2007 WL 465211, at *15). 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 Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 07-028; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

Although an IEP must provide for specialized instruction in the child's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a child's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of the Bd. of Educ., Appeal No. 02-047; Application of a Child with a Disability, Appeal No. 02-022; Application of a Child with a Disability, Appeal No. 94-26;

Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S.Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Based upon my review of the record and the thorough and well-reasoned decision of the impartial hearing officer, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process (34 C.F.R. §§ 300.511-13; Educ. Law § 4404[2]). I find that the impartial hearing officer carefully reviewed the evidence in the record and petitioners' allegations, and applied a proper legal analysis. I therefore adopt the impartial hearing officer's decision and order of dismissal. In brief summary, I concur that the April 12, 2006 IEP offered the child an appropriate program and that petitioners have not demonstrated that the omission of verbal behavior ABA on the child's IEP has denied the child a FAPE. Although witnesses for both parties testified that the child benefited from ABA instruction using a verbal behavior component (Tr. pp. 52, 152, 310, 497-98, 691-92), the impartial hearing officer concluded that the evidence did not show that the child only learns from verbal behavior ABA. In reaching this conclusion, he referred to evidence that the child experienced regression even when provided with verbal behavior ABA, that a March 2006 consultation report referenced concerns about the child's "slow rate of progress, his low motivation, his frequent escape behaviors and high rate of vocal behaviors" (see Parent Ex. P); and that the child's preschool teacher testified that she used other methodologies in addition to the required verbal behavior ABA (see Tr. p. 684).

As a final note, the record does not support petitioners' contention that the child's teachers and home based providers are precluded from using verbal behavior ABA as a teaching methodology. The CSE chairperson testified that verbal behavior ABA was removed from the child's IEP to allow his teachers greater flexibility (Tr. pp. 474, 486, 490, 496-97, 547, 559, 979) and further indicated that not including the methodology on the child's IEP did not preclude its use (Tr. pp. 489, 551, 970). The record indicates that the student would continue to receive instruction utilizing a verbal behavior ABA approach in respondent's recommended placement (Tr. pp. 507, 913-14, 923). Under these circumstances, I concur with the impartial hearing officer that the CSE's decision not to designate a specific teaching methodology in the April 12, 2006 IEP does not render the IEP inappropriate or result in a denial of a FAPE. Accordingly, petitioners' request that the child's IEP include a specific teaching methodology is denied.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 11, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**