



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-034

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] School District

Appearances:

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for respondent, Kenneth S. Ritzenberg, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational services that respondent's (the district's) Committee on Special Education (CSE) had recommended for his daughter for the 2008-09 school year were appropriate. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending kindergarten at the Rockland Institute for Special Education (RISE), which has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 92-93; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with mental retardation is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][6]; 8 NYCRR 200.1[zz][7]). By the age of 3.4 years, the student had received a diagnosis of Down syndrome (Dist. Ex. 4 at p. 1) and exhibited cognitive abilities in the extremely low range (Dist. Ex. 5 at pp. 2-4), as well as deficits in gross and fine motor and speech-language skills (Dist. Exs. 5 at pp. 3-4; 6 at pp. 1-3; 7 at pp. 1-2). The student was first classified in preschool, and received preschool special education services during the 2006-07 and 2007-08 school years while enrolled at the Hebrew Academy for Special Children (HASC) (Tr. pp. 27-29; Dist. Exs. 3; 8).

On August 1, 2006, the Committee on Preschool Special Education (CPSE) convened and developed a preschool individualized education program (IEP) for the student's 2006-07 school year (Dist. Ex. 3). The student was enrolled in an 8:1+2 special class and received related

services consisting of feeding therapy once per week for 30 minutes per session in a 1:1 setting, occupational therapy (OT) once per week for 30 minutes per session in a 2:1 setting and twice per week for 30 minutes per session in a 1:1 setting, physical therapy (PT) twice per week for 30 minutes per session in a 1:1 setting, speech-language therapy three times per week for 30 minutes per session in a 1:1 setting, and parent counseling and training once per month for 30 minutes per session in a 1:1 setting (id. at pp. 1-2).

The August 1, 2006 preschool IEP noted that Yiddish was the student's native language, although she did not require a Yiddish interpreter, and that she "aspirates thin liquids" (Dist. Ex. 3 at p. 1). The CPSE also noted a delay in the student's overall feeding skills, and commented that she "is on a full oral diet of puree foods, dissolvable soft solids and nectar thick liquids. Thin liquids may be provided under supervision" (id. at p. 4).

On December 27, 2006, HASC completed the student's bilingual speech-language evaluation (Dist. Ex. 4). The evaluators confirmed the student's aspiration of thin liquids, and observed "[s]he ate in an up-and-down munching motion, with uncoordinated tongue movement evident as well as poor disassociation of [her] tongue/jaw" (id. at p. 3). The evaluators observed weakness in the student's "ability to jaw grade appropriately to the amount of food being presented" and surmised that she "seemed to be using lips in a compensatory manner for weak tongue control" (id.). She demonstrated a lack of fluidity in her drinking pattern when consuming juice from an open cup, and her lip seal around the cup did not prevent the escape of some liquid (id.). The evaluators recommended continued feeding therapy to address these concerns (id.).

On February 6, 2007, the CPSE convened and developed a preschool IEP for the student's 2007-08 school year (Dist. Ex. 8). The CPSE continued the student's placement in the 8:1+2 special class at HASC, and recommended related services consisting of feeding therapy once per week for 30 minutes per session in a 1:1 setting, OT once per week for 30 minutes per session in a 5:1 setting and twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session in a 1:1 setting, speech-language therapy once per week for 30 minutes per session in a 5:1 setting and twice per week for 30 minutes per session in a 1:1 setting, and parent counseling and training once per month for 30 minutes per session in a 1:1 setting, and a program modification consisting of a positive reinforcement plan as needed (id. at p. 2). The preschool IEP also provided for an extended school year (ESY) program and OT, PT, and speech-language services during summer 2007 (id.).

The February 6, 2007 preschool IEP exhibited the same notation regarding the student's tendency to aspirate thin liquids as its predecessor preschool IEP of August 1, 2006, but did not contain any specific comments describing her feeding skills (compare Dist. Ex. 3 at pp. 1, 4, with Dist. Ex. 8 at pp. 1, 4-5). The February 6, 2007 preschool IEP also noted that the student "is Yiddish speaking and is beginning to understand some English. [She] has demonstrated significant progress this year" (Dist. Ex. 8 at p. 4). It also listed as a speech-language annual goal that the student "will use accurate bite and chewing patterns on various food textures to lateralize (move side to side), clean oral cavity and grind food for the purposes of digestion" (id. at p. 6). The annual goal contained evaluation criteria of 80 percent success over two weeks, and indicated that the evaluation procedure was recorded observations (id.). The annual goal

also indicated that the evaluation schedule was "by the end of the school year," and the responsibility for addressing this goal was placed upon the speech-language therapist (id.). The February 2007 preschool IEP also established short term objectives of 60 percent success toward this goal by November 2007 and 75 percent success by March 2008 (id.).

On January 25, 2008, HASC completed the student's speech-language annual review (Dist. Ex. 11). The report listed her feeding goals at that time as "strengthening her oral musculature," "improving ability to perform specific oral motor movements on demand," and "improving bite and chewing patterns" (id. at p. 1). The examining speech-language pathologist observed that the student "can round her lips adequately for speech and feeding purposes," but continued to experience "aspiration of thin liquids due to reduced laryngeal elevation and closure of the laryngeal vestibule" (id. at p. 2). Although able to successfully handle small amounts of thin liquids and to feed herself a variety of food types, the student occasionally "stuffs her food," according to the examining speech pathologist (id.). The examining speech pathologist further commented that the student "can move a bolus across midline to transfer it from one side of her mouth to the other, although she does not always do so" (id.). While acknowledging the student's progress in her pacing while eating and her level of awareness as to whether her mouth was empty or not, the examining speech pathologist remarked that the student's "chewing and oral transit are slow" (id.). The evaluator concluded that the student exhibited delays in her feeding abilities, and recommended that she continue receiving feeding therapy to address them (id. at p. 3).

On March 11, 2008, in preparation for the student's transition into kindergarten, the CSE convened to develop an IEP for the student's 2008-09 school year (Dist. Ex. 14). Attendees at the meeting included the CSE chairperson, a district speech therapist and secretary, two special education teachers, an additional parent member, a school psychologist, a regular education teacher, and the student's mother, father, and grandmother (id. at p. 4). As did the student's preschool IEPs, the March 11, 2009 IEP noted Yiddish as the student's native language, denied a need for a Yiddish interpreter, and reiterated the student's tendency to aspirate thin liquids (compare Dist. Exs. 3 at p. 1, and 8 at p. 1, with Dist. Ex. 14 at p. 1). The CSE recommended a special class in a 12:1+2 setting, related services consisting of OT twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy twice per week for 30 minutes per session in a 3:1 setting and once per week for 30 minutes per session in a 1:1 setting, and a program modification consisting of a positive reinforcement plan, as needed (Dist. Ex. 14 at pp. 1-2). The March 11, 2008 IEP also set as an annual speech-language goal for the student "to use accurate bite and chewing patterns on various food textures to lateralize (move side to side), clean oral cavity and grind food for the purposes of digestion," a goal that was identical to the annual goal included in the February 6, 2007 preschool IEP (compare Dist. Ex. 8 at p. 6, with Dist. Ex. 14 at p. 5).

On July 8, 2008, the district received correspondence from the parent purporting to memorialize a June 24, 2008 telephone conversation between him and the district's director of special student services (director) pertaining to the provision of feeding therapy in the March 11, 2008 IEP (Dist. Ex. 15). The parent alleged that the district's director informed him that "the school district would not want to provide Feeding Therapy due to potential risk of choking," and that "Once [the student] turns [five], certain things are no longer permitted. Therefore Feeding

Therapy cannot be provided. The most [the district] could offer is Oral Motor therapy and I can try to obtain Feeding Therapy from my insurance company" (id.).

In his July 2008 letter, the parent imparted his desire for his daughter to receive feeding therapy in a school setting, similar to that which she received at HASC, which he characterized as producing "huge progress" in his daughter (Dist. Ex. 15). He maintained that the district's director informed him that sending the student to a school offering feeding therapy would be an option, but at the parent's expense, because "Feeding Therapy would have to be provided at home and the school district would not be responsible for a medically related issue" (id.). He added that the director apprised him that the recommended district placement "would be the least restrictive environment [LRE] since the school is not just for disabled [students]," and that the student "would have [PT] with [non-disabled students] as well as lunch, recess, art, music and other projects," and that "[t]he special education class would not sit [at] a separate table at lunch. They would participate in any special program or assembly that is going on in school and even go on the bus with [non-disabled students]" (id.). The parent concluded his correspondence with a request that "If any of the above is not accurate, please respond to me" at his provided mailing address (id.). The hearing record contains no district response.

On August 8, 2008, the parent filed his due process complaint notice (Dist. Ex. 1).¹ Although the parent stated that he and the CSE "discussed several issues," the only issue specifically identified in the due process complaint notice was "feeding therapy," which he alleged that his daughter "has been getting in EI [early intervention] and Pre-school based on her Therapist's and Parent's concerns and Doctor's extensive evaluation and recommendation," but which he contended "is not available at [the recommended public placement] due to safety concerns ..." (id. at p. 2). The parent proposed placement of his daughter at RISE, which he deemed "extremely appropriate for [the student's] needs," suggesting that such placement "would resolve the above issue as well as many others which are not listed in this notice due to legal reasons" (id.).

On August 21, 2008, the student's mother forwarded to the district a "waiver" of the student's public school placement for the 2008-09 school year, advised the district that she would place the student at RISE for the upcoming school year, and stated that "I want the related services to be given at R.I.S.E." (Dist. Ex. 17 at p. 4).² On October 5, 2008, pursuant to 34 C.F.R. § 300.324(a)(4), the parent waived his right to a further CSE meeting and consented to proposed amendments to the student's March 11, 2008 IEP, waiving the special class placement for the 2008-09 school year and directing the district to provide the student's related services recommended in the March 11, 2008 IEP on-site at RISE (id. at p. 3).

¹ The due process complaint notice contained in the hearing record does not contain a date stamp indicating when the district received it (see Dist. Ex. 1). In its exhibit list, the district claims that it received the due process complaint notice on October 8, 2008.

² According to the hearing record, the parent stated that he sent the waiver that had been executed by the student's mother to the district via facsimile on August 21, 2008, but because the waiver was not date stamped indicating the date of receipt by the district, the district's CSE chairperson explained that she could not ascertain the specific date upon which the district received it (see Tr. pp. 130-32). The hearing record does not contain any evidence indicating that the document was faxed (see Dist. Ex. 17 at p. 4).

Also on October 5, 2008, the district generated an individualized education services program (IESP) (Dist. Ex. 16) noting the parents' waiver of the recommended special class and recommending that the related services and program modification contained in the March 11, 2008 IEP be implemented on-site at RISE "contingent upon the appropriate teaching and learning environment" (compare Dist. Ex. 14 at pp. 1-2, with Dist. Ex. 16 at pp. 1-2, 4). The October 5, 2008 IESP also prescribed the same speech-language annual goal, for the student to "use accurate bite and chewing patterns on various food textures to lateralize (move side to side), clean oral cavity and grind food for the purposes of digestion," the same evaluation criteria, evaluation procedure, evaluation schedule, and delegation of primary responsibility to the speech-language therapist as found in the February 6, 2007 preschool IEP and March 11, 2008 IEP (compare Dist. Exs. 8 at p. 6, and 14 at p. 5, with Dist. Ex. 16 at p. 5).

On October 23, 2008, the district, through its counsel, responded to the parent's due process complaint notice (Dist. Ex. 2) and argued that the March 11, 2008 IEP was reasonably calculated to confer educational benefits upon the student (*id.* at p. 2). The district also specifically addressed the feeding therapy issue, maintaining that the CSE considered and evaluated the parents' request for feeding therapy and found it unnecessary because the district's proposed IEP offered the student "speech-language therapy in which a Certified [therapist] will work on oral motor skills" and "explicitly work on a Speech-Language goal which states that [the student] 'will use accurate bite and chewing patterns on various food textures to lateralize ..., clean oral cavity and grind food for the purposes of digestion'" (*id.*). Finally, the district alleged that "[b]ecause [the student] can eat and receive nutrition from such ingestion of food, any feeding therapy beyond the oral motor therapy and [the] goal proposed by the [d]istrict is unnecessary for [the student's] education" (*id.*). The district maintained that its personnel "have met on numerous occasions with the Parents, and thoroughly reviewed each and every one of [the student's] special education needs," that "the proposed program and related services are expansive and specifically tailored to meet [the student's] unique needs," and that in view of the foregoing, the student "does not need a placement in a private program, the RISE program" (*id.*). The district concluded its response by asserting that: "Proposed solutions recommended by the Parents would not afford [the student] a FAPE in the LRE" (*id.*).

An impartial hearing convened on December 4, 2008 and concluded on December 9, 2008, after two days of testimony. In his decision dated January 27, 2009,³ the impartial hearing officer determined that: (1) the due process violations alleged by the parent did not deprive the student of a free appropriate public education (FAPE); (2) the district offered the student a FAPE for the 2008-09 school year; and (3) the parent offered no evidence establishing that RISE provided an appropriate educational program for the student, and he dismissed the parent's due process complaint in its entirety (IHO Decision at pp. 2-3).^{4,5}

³ The impartial hearing officer's decision is erroneously dated November 27, 2009 (IHO Decision at p. 3). By letter dated April 20, 2009, the impartial hearing officer confirmed that the correct date of the decision was January 27, 2009.

⁴ The impartial hearing officer's decision is devoid of any specific cites to transcript pages or exhibit numbers, as well as any statutory, regulatory or case law to support his conclusions. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit

The parent, proceeding pro se, appeals from the impartial hearing officer's decision, and adduces five principal arguments. First, he submits that the district's alleged failure to provide the student with feeding therapy at the recommended placement deprived the student of a FAPE. He alleges that per the recommendation of the student's medical team, she required food-related therapy involving eating, chewing, and swallowing foods and liquids; yet, he contends that when he visited the recommended placement in April 2008, school staff allegedly told him that the placement would not have provided such therapy, due in part to "safety concerns." Second, he maintains that the district's placement would not have provided the student with staff who understands Yiddish. Third, he alleges that the district's alleged failure to furnish a timely response to the due process complaint notice in violation of 20 U.S.C. § 1415(c)(2)(B)(i)(I) significantly interfered with the parents' opportunity to participate in the decision making process, thereby depriving the student of a FAPE. He further alleges that the impartial hearing officer's determination that the parents "fully participated" in the decision making process is not supported by the hearing record (IHO Decision at p. 2). Fourth, the parent posits that the impartial hearing officer's determination that the "parents have offered no evidence to establish in the record that would indicate or show that RISE is providing an appropriate educational program" is not supported by the hearing record (id. at p. 3). Finally, he asserts that the district engaged in various "stall tactics" for the purpose of delaying the impartial hearing. The parent seeks: (1) annulment of the impartial hearing officer's decision; (2) retroactive placement of the student at RISE effective September 2008 for the 2008-09 school year; and (3) reimbursement of reasonable attorney's fees.⁶

The district answers, countering that: (1) the proposed program as contained in the March 11, 2008 IEP offered the student a FAPE; (2) even though the district provided speech-language therapy services at RISE, it had no legally enforceable obligation to do so; (3) the parent failed to adduce any evidence that RISE, in and of itself, was an appropriate placement for the student; (4) even if a State Review Officer determined that the district did not offer the student a FAPE and that RISE was an appropriate placement, the petition should still be dismissed based upon equitable considerations because the parent failed to provide requisite notice to the district of his rejection of the recommended placement pursuant to 34 C.F.R. § 300.148(d)(1); and (5) the petition should be dismissed because of the parent's failure to comply with 8 NYCRR 275.8(a)

numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision. I note also that the failure to cite with specificity facts in the hearing record and law on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists to appeal, a deficiency which is magnified in the instant appeal in which the parent is proceeding pro se. The impartial hearing officer is encouraged to comply with State regulations, cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts, referencing specific sections of applicable law in support of his conclusions.

⁵ State regulations provide that "[t]he impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer did not attach an exhibit list to his decision. I caution the impartial hearing officer to ensure compliance with this regulation in the future.

⁶ Although the parent is proceeding pro se, he seeks reimbursement for "legal consultations" associated with the appeal, the particulars of which were not provided in either the hearing record or the petition (see Pet. at p. 7).

by personally serving his notice of intention to seek review and his petition upon the president of the district's board of education, and by his failure to include numbered allegations and paragraphs in the petition in violation of 8 NYCRR 279.8(a)(3).

The district also raises four affirmative defenses, namely, that the parent failed to state a claim upon which relief can be granted; that the appeal was not commenced within the applicable statute of limitations; and reiterations of the improper service and failure to include numbered allegations and paragraphs in his petition under 8 NYCRR 275.8(a) and 8 NYCRR 279.8(a)(3) as referenced above. The parent submitted a reply.

At the outset, I will address several procedural matters arising on appeal. First, the district argues that the service of the petition is invalid because of the parent's alleged failure to comply with 8 NYCRR 275.8(a), which requires personal service upon a district by delivering the petition "to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service." The affidavit of service attached to the petition indicates that personal service was effectuated upon an individual identified as the district's "board president" (see Pet'r Aff. of Service). As the district furnished no evidence establishing that the individual served by the parent was not authorized to accept service under the State regulations, I decline to dismiss the petition on that basis.

Although the district correctly states that the parent failed to number the allegations in his petition for review (see 8 NYCRR 279.8[a][3]), consonant with the discretion afforded me by the State regulations, I decline to dismiss the petition on this ground (see Application of a Student with a Disability, Appeal No. 08-048; Application of a Child with a Disability, Appeal No. 07-099).

Next, by letter dated April 3, 2009, the district submits that I should reject the parent's reply because it exceeds the permissible scope of a reply under the State regulations. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the district did not serve any additional evidence with its answer. Accordingly, I will accept and consider the amended reply only to the extent that it responded to procedural defenses interposed by the district (see Application of a Student with a Disability, Appeal No. 08-036; Application of a Student with a Disability, Appeal No. 08-031; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002).

The district also contends that I should not consider the parent's argument that the district deprived the student of a FAPE because it failed to provide staff who understood Yiddish, because the parent failed to raise this allegation in the due process complaint notice. 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 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission

given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.507[d][3][ii]; see Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; see also A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 215-216 [D. Conn. 2006] aff'd, 2007 WL 3037346 [2d Cir. October 18, 2007]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065).

In the case at bar, the parent did not raise this allegation in the due process complaint notice (see Dist. Ex. 1 at p. 2). However, the hearing record demonstrates that not only did the district's counsel himself raise this issue during the impartial hearing, he explored this issue during his examination of the parent and another witness (see Tr. pp. 83-84, 238-39, 242-43). Therefore, under these circumstances, I will consider the issue of bilingual Yiddish instruction (see Application of the Dep't of Educ., Appeal No. 08-037).

Two purposes of the Individuals with Disabilities Education Act (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 Bd. of Educ. 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]). The 2004 amendments to the IDEA placed limits on an impartial hearing officer's authority to render decisions when reviewing claims of violations of IDEA procedures (20 U.S.C. § 1415[f][3][E]). 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 student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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 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). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 and is applicable here (see Application of the Bd. of Educ., Appeal No. 08-016).

The parent argues that the district committed two due process violations that effectively deprived the student of a FAPE, namely, the failure to timely respond to the due process complaint notice pursuant to 20 U.S.C. § 1415(c)(2)(B)(i)(I) (see 8 NYCRR 200.5[i][4]); and the failure to inform the parent in writing of the availability of low-cost legal services available in the area (see 34 C.F.R. § 300.507[b]; 8 NYCRR 200.5[j][1][iii]). With respect to the former

allegation, the hearing record reveals that the district responded to the parent's due process complaint notice, although not within the timelines specified by 8 NYCRR 200.5(i)(4). However, the parent has not shown how the belated response by the district deprived the student of a FAPE and the district's response that was eventually transmitted to the parent meets the substantive requirements of the State regulations. With regard to the latter allegation, the hearing record is devoid of any evidence that the district informed the parent of low-cost legal services available in the area.⁷ However, I also note that there is no indication in the hearing record that the parent requested an adjournment of the impartial hearing in order to secure representation, nor did the parent cite the inability to obtain low-cost legal services when he voluntarily waived his right to counsel on the first day of the impartial hearing (see Tr. pp. 3-4). I also note that although not formally represented by counsel, the parent admittedly received "legal consultation" services in connection with the instant appeal, for which he now seeks reimbursement (see Pet. at p. 7). In consideration of the above, I conclude that the hearing record does not support the parent's argument that the district's procedural violations as enumerated above significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

I now turn to the appropriateness of the district's recommended program. During the impartial hearing, the district produced as a witness the CSE chairperson who presided over the development of the August 1, 2006 and February 6, 2007 preschool IEPs, both of which were consented to by the parent, and the March 11, 2008 IEP, which the parent challenged (see Tr. pp. 24-97; Dist. Exs. 3 at p. 3; 8 at p. 4; 14 at p. 4). The August 1, 2006 CPSE recommended one 30-minute session per week of a service entitled "feeding therapy," based on the student's needs identified in a previous evaluation (Tr. pp. 34-35, 37; see Dist. Ex. 3 at p. 4).⁸ The CSE chairperson testified that the feeding therapy provided by speech-language therapists was "... broad. In [the student's] case it was a lot of chewing and she stuffed her mouth, things like that that we were going to address" (Tr. p. 35). She characterized it as "more oral motor. It was chewing and biting....watching her... giving her either very small quantities of thin liquids or thickening them" (Tr. pp. 35, 49-50). According to the CSE chairperson, the preschool program provided the student with the services recommended pursuant to the 2006-07 IEP, and she opined that it was an appropriate placement for the student because the student "was making progress" (Tr. pp. 44-46).

For the 2007-08 school year, the student's preschool speech therapists and the February 6, 2007 CPSE recommended that the student continue to receive feeding therapy (Tr. pp. 49-50, 55; Dist. Exs. 4 at p. 3; 8 at p. 2). The February 6, 2007 IEP contained one annual goal and two corresponding short-term objectives related to improving her bite and chewing patterns, which

⁷ The hearing record reveals that in its October 2, 2008 letter to the student's parents, the district stated: "Previously you have received a Procedural Safeguards Notice that explains your rights regarding the special education process, but if you need an additional copy, please contact our office" (Dist. Ex. 17 at p. 1).

⁸ The hearing record indicates that the recommendations contained in the August 1, 2006 preschool IEP were based upon a social history, an observation, and psychological, vision, OT, PT, educational, speech-language, and medical evaluations that were conducted in June and July 2006, the reports of which were not included in the hearing record (Dist. Ex. 3 at p. 4).

arose out of the feeding therapy recommendation (Tr. pp. 56-57; Dist. Ex. 8 at p. 6).⁹ The CSE chairperson explained that a speech-language therapist provided the feeding therapy to the student, and addressed the student's oral motor goals as part of the student's speech-language therapy (Tr. pp. 56-57, 60).

In preparation for the development of the 2008-09 IEP, in addition to other information, the CSE reviewed and discussed the January 25, 2008 speech-language annual review report performed by HASC (Tr. pp. 58-59, 61; Dist. Ex. 11). According to the CSE chairperson, the CSE discussed the student's oral-motor functional levels, noted that the student continued to manifest needs related to her biting and chewing skills, and acknowledged that the student's preschool service providers at HASC recommended continuation of the student's oral motor goals (Tr. pp. 59-62).

A comparison of the February 6, 2007 preschool IEP and the March 11, 2008 IEP reveals that the March 2008 IEP no longer specifically referenced "feeding therapy" as a separate category (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 14 at pp. 1-2). The CSE chairperson explained that the CSE believed that the student's difficulties were "more oral motor," had been addressed during the 2006-07 and 2007-08 school years as an oral-motor problem, and that they could be addressed during the course of speech-language therapy rather than in a separate, distinct feeding therapy session (Tr. pp. 67, 94-96). The March 11, 2008 IEP retained the same annual goal relating to oral-motor skills from the February 6, 2007 preschool IEP (Tr. pp. 67-68; compare Dist. Ex. 8 at p. 6, with Dist. Ex. 14 at p. 5),¹⁰ and the CSE chairperson testified that the student's "feeding issues" would continue to be addressed by the speech-language therapy services recommended by the district in the March 11, 2008 IEP (Tr. pp. 67-68, 96-97; see Dist. Ex. 14 at pp. 1, 5).¹¹

The district also produced as a witness the district's speech-language pathologist who provided speech-language therapy services to the student at RISE during the 2008-09 school year (Tr. pp. 72-74; see Tr. p. 128). She explained that during the 2008-09 school year, she provided

⁹ The recommendations contained in the February 6, 2007 preschool IEP were based upon HASC's bilingual speech-language evaluation dated December 27, 2006 (Dist. Ex. 4), educational evaluation dated December 28, 2006 (Dist. Ex. 5), PT evaluation dated January 2, 2007 (Dist. Ex. 6), and OT evaluation dated January 8, 2007 (Dist. Ex. 7; see Dist. Ex. 8 at p. 5). The hearing record also indicates that the February 6, 2007 CPSE considered a social history, psychological evaluation, vision evaluation, and observation that were conducted in July 2007, and a medical evaluation that was conducted in June 2006, none of which are included in the hearing record (id.).

¹⁰ The recommendations contained in the March 11, 2008 IEP were based upon HASC's PT annual review dated January 17, 2008 (Dist. Ex. 10), speech-language annual review dated January 25, 2008 (Dist. Ex. 11), annual educational review dated January 29, 2008 (Dist. Ex. 12), and OT annual review dated February 5, 2008 (Dist. Ex. 13; see Dist. Ex. 14 at p. 4). The hearing record also indicates that the March 11, 2008 CSE considered a social history, observation, and psychological and vision evaluations that were conducted in July 2007, and a medical evaluation that was conducted in November 2007, none of which are included in the hearing record (id.).

¹¹ I note that the annual goal pertaining to oral-motor skills on both the February 6, 2007 preschool IEP and the March 11, 2008 IEP were both listed under the heading of "Speech-Language" annual goals (compare Dist. Ex. 8 at p. 6, with Dist. Ex. 14 at p. 5).

three sessions per week of speech-language therapy to the student, and did not believe that the student received any additional speech-language or "eating or swallowing" therapy at RISE aside from the services she provided (Tr. pp. 74-77). Her testimony revealed that in order to address the student's oral-motor annual goal,¹² she utilized foods that the parents sent to school specifically for the student to develop her biting and chewing skills (Tr. pp. 78-79). The speech-language pathologist described how she controlled the amount of food placed in the student's mouth, provided visual and tactile cues to help the student chew and lateralize food from one side of her mouth to the other, and monitored the timing of the next bite of food (Tr. pp. 79-81). Additionally, the speech-language pathologist commented that she also addressed the student's goals as recommended by HASC's January 25, 2008 speech-language annual review report, specifically by strengthening the student's oral musculature and improving both her ability to exhibit specific oral-motor movements upon request and her chewing patterns (Tr. pp. 81-82; Dist. Ex. 11 at p. 1). She agreed with the characterization of her services provided to the student as "feeding therapy" and opined that not only was the student "progressing very nicely" toward her feeding goal, but also that the student's progress in this regard exceeded her performance relative to any of her other speech-language goals (Tr. pp. 82, 85).

During the impartial hearing, the special education teacher of the recommended district placement described the opportunities for oral-motor activities in the classroom as "above and beyond what's provided as a related service" (Tr. pp. 99-101). Examples of such activities included blowing bubbles, whistling, and practicing specific tongue and lip movements (Tr. pp. 101-02). She advised that students in the recommended placement ate breakfast in the morning, and maintained that she followed "all dietary needs. Whatever the parents send in that's what we give" (Tr. p. 113). The special education teacher further noted her prior experience with students requiring thickened liquids (Tr. p. 112), and confirmed that the therapists in the recommended placement "absolutely" address chewing and swallowing needs (Tr. p. 114).

The director testified that in July 2008¹³ she and the district's speech-language chairperson discussed with the parent via telephone the speech-language services that would be provided at the recommended placement (Tr. pp. 176-78, 230). The director testified that she informed the parent that she believed many of the student's IEP goals to be oral-motor in nature, and assured him that the student would receive appropriate services at the recommended placement (Tr. p. 177). She asserted that during the telephone conversation, the district's speech-language chairperson explained to the parent the specific services that would be offered to the student (Tr. p. 178). The director testified that after reading the student's evaluation reports, she understood the student's "feeding therapy" needs to include working on chewing, tongue movements, swallowing, and the need to cut up her food (Tr. pp. 178-79). She added that she and the district's speech-language chairperson concurred that the student's speech-language

¹² After the parent challenged the March 11, 2008 IEP, the district provided speech-language therapy services to the student on-site at RISE pursuant to the October 5, 2008 IESP, which adopted the same oral-motor annual goal as was contained in the March 11, 2008 IEP (compare Dist. Ex. 14 at p. 5, with Dist. Ex. 16 at p. 5).

¹³ In his letter to the district, received on July 8, 2008, the parent alleged that on June 24, 2008, he had a telephone conference call with the director and the speech-language chairperson with respect to the student's 2008-09 school year (Dist. Ex. 15). During direct examination of the director, the district's counsel erroneously characterized this document as alleging that the telephone conversation occurred "sometime in July of 2008" (Tr. pp. 176-77).

annual goal related to biting, chewing, and "utilization of various food patterns to lateralize" as adduced in the March 11, 2008 IEP constituted "feeding therapy" (Tr. p. 179), and she expressed her belief that this goal could "definitely" be addressed by the recommended placement (Tr. p. 180).

The parent testified at the impartial hearing that the oral-motor speech language goals contained in the February 6, 2007 preschool IEP, which he consented to, and the March 11, 2008 IEP, which he challenged, were the same (Tr. p. 235; compare Dist. Ex. 8 at p. 6, with Dist. Ex. 14 at p. 5). Furthermore, he conceded that he was informed by the CSE chairperson that the district

...wanted to eliminate the phrase feeding therapy. And the reason why they wanted to do that is because we technically want the same therapist to do both feeding and speech therapy and it would be easier for the therapist to switch between the goals in the same session if it's not being written as a separate phrase as feeding therapy. So they wanted to call it all speech therapy but it would still, they assured me that they would still address the same needs and the same goals.

(Tr. p. 247). He added that although he had no objection to the district's desire to remove the phrase "feeding therapy," he still objected to the provision of services at the recommended placement because "I don't think [the recommended placement] was willing to work on the issues that are addressed on the IEP" (Tr. p. 248).

This objection is not supported by the hearing record, which demonstrates that the CSE considered the evaluative reports and recommendations of the student's preschool providers at HASC in the formulation of the speech-language therapy program and annual oral-motor goal for the student contained in the March 11, 2008 IEP (see Dist. Ex. 14 at p. 4; see also Tr. pp. 68-69). Additionally, the hearing record demonstrates that the only appreciable difference between the services offered in the February 6, 2007 preschool IEP, which were consented to by the parent and credited by him for producing "huge progress" in the student (see Dist. Ex. 15), and those recommended in the March 11, 2008 IEP was that the oral-motor services provided in the February 6, 2007 preschool IEP were classified under the heading "feeding therapy," whereas those provided in the March 11, 2008 IEP were classified as "speech-language therapy" (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 14 at pp. 1-2).¹⁴

The parent also maintains that the district's recommended placement deprived the student of a FAPE because it would not have provided the student with access to staff adequately

¹⁴ The parent also argues that the district explicitly refused to implement feeding therapy "due to a potential risk of choking" (Dist. Ex. 15). The student's grandmother testified at the impartial hearing that during a meeting with the district superintendent and the CSE chairperson in January 2008, the district informed her that "feeding therapy is not provided" at the recommended placement, "only oral motor....They would not provide feeding therapy" (Tr. pp. 213-16; but see Tr. p. 247). The district's director testified that, contrary to the parent's representation in his letter to the district received on July 8, 2008 (Dist. Ex. 15), during the telephone conversation with the parent, she did not recall anyone refusing to provide feeding therapy to the student due to concern about a potential risk of choking (Tr. pp. 210-11). I encourage both parties to communicate more effectively with each other so as to avoid misunderstandings of this nature in the future.

proficient in speaking and understanding Yiddish. However, the March 11, 2008 IEP noted that although the student's native language was Yiddish, she did not require the services of a Yiddish interpreter (Dist. Ex. 14 at p. 1), and the parent did not contest this determination in the due process complaint notice (Dist. Ex. 1 at p. 2), during the impartial hearing, or in the petition. I also note that the speech-language pathologist who provided services to the student on-site at RISE during the 2008-09 school year testified that although she provides the student's speech-language therapy services in English, she is bilingual and speaks and understands the student in Yiddish (Tr. pp. 83-84). She added that she informed both parents that she spoke Yiddish while instructing the student at RISE (Tr. pp. 84-85). Additionally, the district's special education teacher of the recommended placement testified that one staff member in her classroom spoke Yiddish (Tr. p. 114), and the student's grandmother testified that at the November 2008 resolution session, the director advised that the recommended placement had some "Yiddish-speaking assistants in the classroom" (Tr. pp. 213, 218, 220).

In consideration of the foregoing, I conclude that the evidence in the hearing record is insufficient to establish that the student required a bilingual Yiddish environment in order to derive educational benefit from her special education program or related services. Furthermore, even if it supported such a requirement, the evidence contained in the hearing record does not demonstrate that the recommended placement's staff could not have effectively educated the student given their levels of Yiddish proficiency.

Additionally, the district correctly asserts that its proposed placement would have offered the student an appropriate program in the LRE. Although the special education teacher from the recommended placement testified that the recommended class had only five students enrolled at the time of the impartial hearing (Tr. p. 103), she confirmed that the student would have been placed with students ranging in age from five to seven, each of whom exhibited cognitive abilities below age and grade expectations, receptive and expressive speech-language delays, social/emotional disabilities, and management needs (Tr. pp. 100-01) similar to those of the student (see Dist. Exs. 10 at p. 2; 11 at pp. 2-3; 12 at pp. 2-3; 13; 14 at p. 3). The special education teacher explained how the student, based upon her standardized test scores and disability profile, "would fit right down the middle" of the class profile (Tr. pp. 103-05). She advised that she oriented her classroom focus around each student's IEP and individual needs, and noted that: "we take our lead from the speech therapist, the occupational therapist, and the physical therapist" for each student (Tr. p. 101). She also revealed that although the class was a self-contained special class, the student would have been exposed to non-disabled peers through supervised lunches at the class table in a mainstream lunch room, school wide assemblies, gym class, music class, and outside playground activities (Tr. pp. 116-18). She also opined that based upon her review of the student's performance and needs as outlined in the March 11, 2008 IEP, the student would have been an appropriate candidate for her classroom (Tr. p. 113).

Based upon a careful review of the evidence contained in the hearing record, I agree with the impartial hearing officer and conclude that the district's recommended special education program and speech-language services in the proposed March 11, 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see

Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having determined that the district offered the student a FAPE in the LRE for the 2008-09 school year, I need not reach the issue of whether RISE was appropriate for the 2008-09 school year, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
May 1, 2009



PAUL F. KELLY
STATE REVIEW OFFICER