



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-051

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

Appearances:

Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed the parent's due process complaint notice concerning the 2010-11 school year. The appeal must be dismissed.

The hearing record reflects that the student is ten years old and is currently attending the School for Language and Communication Development (SLCD) (Petition ¶ 2).¹ SLCD is an out-of-district private school which has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student is also receiving two hours of Lindamood-Bell reading services three times per week (Petition ¶ 4).²

On April 27, 2010, the Committee on Special Education (CSE) convened in order to develop an individualized education program (IEP) for the student's upcoming 2010-11 school

¹ The record on appeal in this case consists of two due process complaint notices by the parent (Parent Exs. 1; 2), a letter from the district to the impartial hearing officer regarding the complaint at issue (Dist. Ex. 1), a letter from the district to an impartial hearing officer regarding her appointment in another case regarding the student (Dist. Ex. 2), and the impartial hearing officer's decision in the case at bar (IHO Decision), in addition to the pleadings on appeal. No hearing dates were held in this matter and the exhibits were not marked into evidence. For convenience in this decision, the Office of State Review has numbered these exhibits as noted above.

² It is unclear from the record whether these Lindamood-Bell services are being funded by the district or the parent.

year (Parent Exs. 1 at p. 2; 2 at p. 2; see Answer ¶ 1). The student's IEP was not completed and the CSE meeting adjourned; however, the CSE chairperson stated that another CSE meeting would be set up to finish the IEP (id.).

Prior to the CSE reconvening, by due process complaint notice dated April 28, 2010, the parent requested an impartial hearing (Parent Ex. 1). The parent alleged, among other things, that the CSE had failed to include 1:1 multisensory remedial services for reading and math in the student's 2010-11 educational program (id. at pp. 2-3). The parent also alleged that the CSE chairperson failed to "attain [a] clear consensus from the other committee members if [the student] is in need of these services" (id. at p. 2). The parent alleged further that the district did not come to the meeting prepared with goals for the 2010-11 school year, and that this lack of preparation delayed the CSE process, and ultimately resulted in a failure to finish the student's IEP (id.). The parent stated that the student was attending a program at Lindamood-Bell for two hours per day, three days per week, which had "halted his regression...[and produced] substantial gain" (id.). As relief, the parent requested that the student receive 1:1 remediation in reading, 1:1 remediation in math, and that an impartial hearing officer order a review of the district's special education practices (id. at p. 3).

By letter dated May 3, 2010, and addressed to the impartial hearing officer, the district responded to the parent's April 28, 2010 due process complaint notice (Dist. Ex. 1 at pp. 1-2). The district asserted that the parent's due process complaint notice was insufficient because it failed to comply with the requirements of both 8 NYCRR 200.5(i)(1) and 34 C.F.R. § 300.508 because "the nature of the problem is described as disagreement with an [IEP] which does not exist" (id. at p. 1). The letter further asserted that the due process complaint notice was premature because "there is no recommended program for the student" for the 2010-11 school year (id.).

In a decision dated May 7, 2010, the impartial hearing officer stated that on May 3, 2010, "the [d]istrict requested that the petition be dismissed because there is no [IEP] nor a recommendation" (IHO Decision). She found that the parent's due process complaint notice indicated that there was no IEP and that the CSE chairperson had stated that a CSE meeting would take place "in the future" (id.). Therefore, the impartial hearing officer dismissed the matter for lack of "subject matter jurisdiction" (id.).

The parent appeals and asserts that the student requires reading and math remediation. The parent also asserts that the CSE chairperson at the April 27, 2010 CSE meeting failed: (1) to consider the parent's request for remedial assistance; and (2) to "attain clear consensuses [sic] from the other committee members if... [the student]...[wa]s in need of these services." The parent asserts further that the district failed to come to the CSE meeting prepared with goals for the 2010-11 school year and that this lack of preparation delayed the CSE process. As relief, the parent requests "a review of the schools [sic] procedure for choosing the impartial hearing office [sic]," an order annulling the impartial hearing officer's decision, extended school year Lindamood-Bell services, and a review of the district's special education department (Petition ¶¶ 11-14).

The district submitted an answer in which it maintains that the impartial hearing officer's decision to dismiss the due process complaint should be upheld. The district notes that the CSE

reconvened on May 20, 2010, at which time recommendations for the student's 2010-11 IEP were finalized (see Parent Ex. 2).³ The district also notes that on May 21, 2010, the parent filed a second due process complaint notice (Parent Ex. 2) and an impartial hearing officer was appointed to hear this new matter (Dist. Ex. 2). The district asserts that the sole issue in this appeal is whether the impartial hearing officer properly dismissed the parent's April 28, 2010 due process complaint notice. The district also asserts that because there was no impartial hearing conducted before the impartial hearing officer, a State Review Officer has no jurisdiction over the remaining issues raised in the petition. The district further asserts that the parent's new May 21, 2010 due process complaint notice regarding the same 2010-11 school year renders the issue of whether the impartial hearing officer properly dismissed the parent's April 28, 2010 due process complaint notice moot. The district asserts further that the parent improperly served the notice of intention to seek review in violation of 8 NYCRR 279.2(b). As relief, the district requests that the parent's petition be dismissed in its entirety.

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 free appropriate public education (FAPE)⁴ 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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]). 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];

³ According to the district's answer, the IEP has not yet been approved by the district's Board of Education (Answer ¶ 1).

⁴ 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]; see 34 C.F.R. § 300.17).

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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 least restrictive environment (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 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

Under the IDEA and State regulations, the "CSE must review each child's educational program at least once each year to determine its adequacy and to recommend an educational

program for the next school year" (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). A district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"]; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088).). As a matter of State law, a school year runs from July 1 through June 30 (Educ. Law § 2[15]).

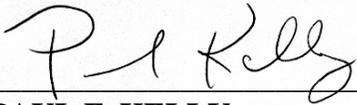
In the instant case, at the time of the impartial hearing in this matter, the CSE had not yet completed its annual review for the student's educational program for the 2010-11 school year and had not finished formulating the IEP. Because the 2010-11 school year does not start until July 1, 2010 (Educ. Law § 2[15]), at the time of the parent's April 28, 2010 due process complaint notice, the district still had time to prepare an appropriate IEP for the student for the upcoming school year. The parent's procedural and substantive claims for the 2010-11 school year, and the request for review by an impartial hearing officer, as raised in the April 28, 2010 due process complaint notice were therefore premature (see Application of a Student with a Disability, Appeal No. 10-011; Application of a Student with a Disability, Appeal No. 09-066; Application of a Child with a Disability, Appeal No. 07-050; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006). Moreover, as discussed above, subsequent to the parent's April 28, 2010 due process complaint notice, the CSE reconvened and formulated an IEP recommending a program for the student's 2010-11 school year, the parent filed a complaint regarding that IEP, and another impartial hearing officer has been assigned to hear the matters arising from that complaint.⁵

Based on this record, I find that the parent's underlying claims have been asserted prematurely and dismissal of the parent's appeal is required.

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
June 23, 2010



PAUL F. KELLY
STATE REVIEW OFFICER

⁵ I note that the parent's May 21, 2010 due process complaint notice raises many of the same issues raised in his April 28, 2010 complaint. This decision does not preclude the parent from pursuing his claims in the May 21, 2010 due process complaint notice.