



The University of the State of New York
The State Education Department
State Review Officer

No. 07-037

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida M. Alvy, Esq., of counsel

Daniel M. Ajello, Esq., attorney for respondent

DECISION

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer which ordered it to pay for the costs of a private summer camp and paraprofessional services for respondent's son for summer 2007. The appeal must be sustained in part.

At the outset, a procedural matter must be addressed. As an affirmative defense, respondent asserts that the petition for review was improperly served and on that basis seeks dismissal of the appeal. In its reply, petitioner concedes service irregularities, but asks that they be excused. The Regulations of the Commissioner of Education require that, when a board of education initiates an appeal from an impartial hearing officer's decision, the petition be served upon the parent (8 NYCRR 279.2[c]). Personal service of a petition for review on a respondent is required whether the petitioning party is a parent or a board of education (8 NYCRR 275.8, 279.1[a]; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 01-048). However, personal service of a petition may be waived by a respondent (Application of the Bd. of Educ., Appeal No. 04-058). In the instant case petitioner was prepared to effectuate personal service upon respondent (Reply ¶ 5); however, on April 17, 2007 respondent's counsel asked petitioner's counsel not to personally serve his client (Reply ¶ 6). Respondent's counsel also informed petitioner that he would accept service of the petition on behalf of his client on April 18, 2007 (Reply ¶ 6). Personal service of the petition upon respondent's counsel was attempted at approximately 1:00 p.m. on April 18, 2007, but respondent's counsel had left his office

and personal service did not take place (Pet. Ex. I ¶ 5). A copy of the petition was left at the office of respondent's counsel (*id.*). In addition, upon learning that such personal service did not occur, petitioner attempted to personally serve respondent at her residence that same day; however, respondent was not at home (Pet. Ex. I ¶ 8). A copy of the petition was left in a mailbox at respondent's residence by petitioner's process server (*id.*). Petitioner also attempted to personally serve respondent's counsel on April 19, 2007 at his law office, but was unsuccessful because no one answered the door (Pet. Ex. I ¶ 13). On that day, petitioner left a second copy of the petition at the office of respondent's counsel and also sent a copy of the petition by facsimile to the office of respondent's counsel (*id.*).

Although petitioner did not comply with the service requirements of 8 NYCRR 275.8[a], I find that respondent effectively responded to petitioner's allegations in a timely manner upon receipt of the petition and I will not dismiss the petition in this case for improper service (Application of the Dep't of Educ., Appeal No. 05-073; Application of the Bd. of Educ., Appeal No. 05-002; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-084; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 01-055; Application of a Child with a Disability, Appeal No. 93-2).

At the commencement of the impartial hearing on September 7, 2006, the student was almost 12 years old and was attending seventh grade at petitioner's intermediate school (Tr. p. 42). The student has deficits in semantic and pragmatic language skills consistent with a diagnosis of Asperger's Syndrome, an autism spectrum disorder (Parent Ex. ZZ at p. 10; Tr. p. 286). The student's eligibility for special education programs as a student with autism (8 NYCRR 200.1[zz][1]) is not in dispute. The central dispute in this appeal is the appropriateness of the impartial hearing officer's order pertaining to summer 2007.

Petitioner's committee on special education (CSE) convened on June 13, 2006 to formulate an individualized education program (IEP) for the student for the 2006-07 school year (Parent Ex. U). The CSE recommended that the student attend a 13:1 collaborative team teaching class at petitioner's intermediate school for all "major subjects" with a full-time 1:1 crisis management paraprofessional (*id.* at pp. 1, 21). The CSE recommended that the student receive a 12-month educational program with related services (*id.* at p. 1), including: two 30-minute sessions of individual occupational therapy per week; two 60-minute sessions of individual occupational therapy per week; one 30-minute session of individual physical therapy per week; two 30-minute sessions of group speech-language therapy per week; two 60-minute sessions of individual speech-language therapy per week; and one 30-minute session of group counseling per week (*id.* at p. 23). The CSE also recommended that the student use assistive technology devices including an "FM" unit and a laptop computer with related accessories and software programs (*id.* at p. 21). In addition, the CSE recommended that the student participate in therapeutic listening therapy (*id.*).

At the June 13, 2006 CSE meeting, the student's mother was advised by petitioner's regional administrator of special education (RASE) that there was no need to add to the IEP a statement about a 2006 summer camp program for children with an autism spectrum disorder because her son was "on the list" to attend a district sponsored social skills summer camp program (Tr. 464-65).

On July 3, 2006 the student's mother was advised that the summer 2006 summer program for children with an autism spectrum disorder was cancelled and that the student would not be able to attend the program (Tr. p. 467). After the student's mother called petitioner's deputy chancellor, she was informed that the student could attend a "vacation day camp" with other children ranging from the ages 11 to 14 years old (*id.*). The student attended the camp for approximately a week with a 1:1 paraprofessional before the student's mother removed him from the camp (Tr. pp. 9, 467-69).

Respondent requested an impartial hearing by due process complaint notice dated July 11, 2006 (Parent Ex. Y). Respondent alleged, among other things, that an appropriate summer program had not been offered at the June 13, 2006 CSE meeting.¹

An impartial hearing commenced on September 7, 2006. The student's mother contended at the impartial hearing that she was seeking an appropriate "summer program" to address her son's social and emotional "regression" (Tr. p. 7). She testified that petitioner's district administrator and regional administrator promised that the student was going to be placed in a summer camp program for children with an autism spectrum disorder for summer 2006, but that this did not occur (Tr. p. 10). The student's mother also testified that the student attended a different summer program during summer 2006 for four days before he was removed because it was not an appropriate placement for him (Tr. p. 9). She further requested appropriate summer programming for summer 2007 (Tr. p. 27). Petitioner's district representative objected to the consideration of respondent's request and contended that it was premature to determine summer 2007 educational programming (Tr. pp. 9, 19, 26-27). The impartial hearing officer permitted the impartial hearing to proceed on the merits of respondent's claim (Tr. p. 35-37).

The impartial hearing concluded on February 16, 2007, after six days of testimony. The impartial hearing officer rendered a decision on March 14, 2007, and found that respondent failed to demonstrate that her son was not provided a free appropriate public education

¹ Respondent's contentions regarding the delivery of related services as identified on her son's June 13, 2006 IEP were resolved by agreement of the parties during the impartial hearing (Tr. pp. 135-36, 143-46).

(FAPE)² for the 2006-07 school year (IHO Decision at p. 19).³ He also determined that the record showed and the parties agreed that extended school year (ESY) services were appropriate for the student (IHO Decision at pp. 20-21). The impartial hearing officer found that respondent demonstrated that there were appropriate private summer camps for summer 2007 available at the Staten Island Academy and Staten Island Jewish Community Center and ordered petitioner to pay for summer camp at either place and provide reimbursement for a 1:1 paraprofessional for the student during summer 2007 (IHO Decision at p. 22).

Petitioner appeals and contends that the impartial hearing officer erred in awarding prospective relief for a summer 2007 summer camp program because respondent's claim regarding ESY services for summer 2007 was premature. Petitioner also contends that there is insufficient evidence in the record to demonstrate that the summer programs offered at Staten Island Academy and Staten Island Jewish Community Center are appropriate. Petitioner requests that the impartial hearing officer's decision be annulled, or, in the alternative, that the State Review Officer order the CSE to convene to address the student's need for a summer program for summer 2007.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)⁴ is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of

² 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, 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]).

³ Respondent does not appeal from this determination. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, that part of the decision that was not appealed is final and binding (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024).

⁴ On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 [IDEA 2004], Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

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];⁵ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 (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]). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; see also Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

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 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"

⁵ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

(Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). Objective factors such as the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress and one important factor in determining educational benefit (Rowley, 458 U.S. at 207, n.28, 203-04; Walczak, 142 F.3d at 130; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]). 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 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Students shall be considered for ESY services in accordance with their need to prevent substantial regression (8 NYCRR 200.6[j]; Application of the Bd. of Educ., Appeal No. 04-102). Substantial regression is the inability of a student to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year (8 NYCRR 200.1[aaa]).

Petitioner contends that respondent's claim for ESY services for summer 2007 is premature. I agree. The student's IEP is required to be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b]; N.Y. Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[d][2][xi], [f]). The CSE must determine a student's need for ESY services (34 C.F.R. § 300.106[a]; see 8 NYCRR 200.6[j][1]). At the time of the impartial hearing, petitioner's CSE had not yet conducted its annual review for the student's educational program for the 2007-08 school year, which will begin on July 1, 2007 (N.Y. Educ. Law § 2 [15]).⁶ Respondent's claim regarding ESY services for summer 2007 is premature (see Application of a Child with a Disability, Appeal No. 00-006). However, because the record reflects that the student regressed socially during summer 2006 and that ESY services for the student beyond related services would be appropriate (Tr. pp. 232, 311-12, 393), I will order that a CSE convene and develop an appropriate IEP for the 2007-08 school year which provides 12-month programming in accordance with

⁶ The student's mother alleges on appeal that the CSE met on January 12, 2007 to formulate an IEP for the student and that the IEP does not reflect "any summer program" (Answer ¶ 44). However, respondent did not attach the IEP to its answer. Moreover there is no IEP in the record pertaining to the 2007-08 school year.

the need to prevent substantial regression in all areas of need, including socialization skills (8 NYCRR 200.1[j]).

In light of this determination, it is not necessary that I address petitioner's remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent that it ordered petitioner to pay for "summer camp" at either at the Staten Island Academy or the Staten Island Jewish Community Center for summer 2007 and to the extent that it ordered reimbursement for paraprofessional services for the student for summer 2007.

IT IS FURTHER ORDERED that within 15 days from the date of this decision, unless the parties otherwise agree, petitioner shall reconvene a CSE meeting to formulate an appropriate IEP for the student for the 2007-08 school year which includes appropriate ESY services.

**Dated: Albany, New York
May 30, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**