



The University of the State of New York

The State Education Department State Review Officer

No. 07-058

Application of the BOARD OF EDUCATION OF THE EAST RAMAPO CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of education services to a child with a disability

Appearances:

Greenberg, Wanderman & Fromson, attorney for petitioner, Carl L. Wanderman, Esq., of counsel

Marvin L. Schwartz, Esq., attorney for respondents

DECISION

Petitioner, the Board of Education of the East Ramapo Central School District, appeals from a decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' son for the 2006-07 school year was not appropriate. The appeal must be dismissed.

At the commencement of the impartial hearing on December 4, 2006, respondents' son was 20 years old and attending an 8:1+1 ungraded special education program at Kiryas Joel Union Free School District (KJ), where he was expected to receive an individualized education program (IEP) diploma (Dist. Ex. 1 at p. 1; Parent Ex. A at p. 1). The student has been continuously receiving special education services at KJ for approximately 15 years (Tr. p. 328). The student has diagnoses of cerebral palsy, asthma and epilepsy (Parent Ex. A at p. 1). A February 1, 2006 psychological update noted that the student's cognitive functioning was reported to be within the extremely low range, and that he was emotionally labile and had difficulty responding to suggestions or criticism (*id.* at p. 2). The student reportedly displayed significant deficits in visual motor integration as well as significant delays in reading comprehension, math concepts, language skills, motor skills, and social skills (*id.* at pp. 2-3). The student's eligibility for special education services as a student with multiple disabilities is not in dispute in this appeal (see 8 NYCRR 200.1[zz][8]).

The student was evaluated on several dates in 2006 in preparation for a review of his program by petitioner's Committee on Special Education (CSE) at the end of the 2006-07 school year (Dist. Ex. 1 at p. 7). On February 1, 2006, the school psychologist at KJ completed a triennial psychological update of the student (Parent Ex. A). Results of administration of the Wechsler

Abbreviated Scale of Intelligence to the student yielded a verbal IQ score of 55, a performance IQ score of 57 and a full scale IQ score of 53, all within the extremely low range of cognitive functioning (id. at pp. 2-3). During a classroom observation conducted as part of the evaluation, the student was described as sitting calmly until the evaluator came into the room, at which time the student put his head on the desk (id. at p. 2). When the classroom teacher explained the reason for the observer's presence, the student resumed his work independently and the evaluator noted that the student appeared calmer after the explanation (id.). The evaluator also reported that the student responded to attention and affection from the teacher and answered several questions asked by the teacher (id.). The classroom teacher reported that the student had demonstrated improvement since the beginning of the year (id.). During the previous year, respondents' son would throw things when upset, but was now described as calmer and responding to structure (id.). The teacher described the student as responsive to praise and "crushed" by even minimal criticism (id.). The teacher reported progress in the student's ability to acknowledge the needs of others and his ability to relate to peers (id.). He also reported that respondents' son "responds to his environment" and was "keenly aware of stressful nuances" and opined that the student regarded the class as a "safe haven" (id.). The teacher noted that he was working with the student to help him become less sensitive in preparation for his placement in other settings (id.). Academically, the teacher reported that the student was reading on the elementary level and performing addition and subtraction of up to three digits (id.). In the vocational program, the student could sort, count, assemble and stuff boxes, and could organize boxes for delivery (id.).

The February 2006 psychological update also included a summary of an interview with the therapist who provided counseling services to the student and also conducted a social skills training program in the student's class (Parent Ex. A at p. 2). The therapist reported that the student was responsive to counseling and able to relate events in his life (id.). Although he was not able to articulate his feelings, he was able to respond affirmatively or negatively when the therapist suggested the feelings that might have been evoked by those events (id.). The therapist reported that the student participated in after-school activities and enjoyed the companionship of a classmate during these activities (id.). The therapist opined that the student was receiving the support he needed in his program at KJ (id.).

The school psychologist at KJ recommended that the student continue in his current placement with related services, continue to work on his independent living skills such as meal preparation, clothing selection and organization of his belongings; and continue to develop vocational skills to prepare him for transition after graduation (Parent Ex. A at p. 3).

A February 2006 occupational therapy (OT) evaluation report was prepared by a KJ occupational therapist when the student was 19 years and four months old (Parent Ex. B). Administration of the Beery Developmental Test of Visual-Motor Integration (VMI) yielded a score at the six year, three month age level, indicating significant deficits in visual-motor integration (id. at p. 2). The therapist also reported that the student demonstrated improvement in the fine motor and graphomotor areas, and was able to print the upper and lower case alphabet from memory and copy cursive writing (id.). The therapist further noted that the student has been working to learn to tie his shoes independently (id.). She recommended that he continue to receive OT services to address deficits in fine motor, visual motor, graphomotor and self-care skills (id.).

The subcommittee of petitioner's CSE convened on March 22, 2006 for the student's annual review (Dist. Ex. 1 at p. 7). Meeting notes indicated that the student was in an 8:1+1 self contained classroom, that he was receiving related services of counseling and OT, and that he had demonstrated significant progress and was able to make the transition to a new teacher (id.). The student was reported to be doing well with vocational tasks and took pride in his work (id.). He had improved in his social/emotional development and demonstrated more self control, but remained emotionally fragile and had difficulty responding to suggestions (id.). The CSE recommended that the student be placed into one of its self-contained special education classes at Ramapo Freshman Center (Ramapo Center) (id.). Respondents disagreed with the recommendations, expressing concerns about nursing staff, scheduling and life skills training, and the subcommittee recommended and scheduled a meeting of the full CSE (id.).

Petitioner's full CSE met on June 19, 2006 (Dist. Ex. 1 at p. 7). Notes of this meeting indicate that recent testing confirmed that the student's cognitive functioning was within the "extremely low range" (id.). The student's overall academic skills were reported to be between the first and second grade level, his adaptive behavior functioning was in the extremely low range when compared to a typical population and in the low average range when compared to a sample of individuals with mental retardation (id.). The meeting notes also indicate that vocationally, the student excelled in the areas of packaging, storing, serving, and labeling (id.).

Petitioner's CSE reconvened on June 21, 2006 (Dist. Ex. 1 at p. 6). Notes from the June 21, 2006 meeting indicate that the CSE reviewed recent psychological, education and OT reports (id.). The student's classroom teacher reported that the student had improved his reading sight word vocabulary and reading comprehension skills, had learned to perform three-digit addition and started to perform one-digit subtraction (id. at pp. 3, 6). The teacher described him as "extremely motivated" and as having improved his ability to function independently (id. at p. 6). The teacher also described him as capable of benefiting from more advanced levels of vocational training, and as overcoming his shyness and improving his ability to accept criticism (id.).

The June 21, 2006 CSE determined that the student should be classified as a student having multiple disabilities (Dist. Ex. 1 at p. 1). The CSE recommended that, for the 2006-07 school year, respondents' son be placed in an 8:1+1 special class at Ramapo Center as the least restrictive appropriate placement and receive related services of counseling and OT on an individual basis once per week (id. at pp. 1-2). The CSE also recommended that the student receive extended school year services to prevent regression (id. at p. 1).

By letter dated July 28, 2006, respondents filed a due process complaint notice alleging that the transfer from KJ to Ramapo Center would be detrimental and harmful to the student (IHO Ex. 1). Specifically, respondents asserted that, if the student was forced to transfer, he may suffer emotionally and physically from, among other things, heightened anxiety, emotional pain and the exacerbation of his epilepsy and asthma (id.). As relief, respondents requested that the student be allowed to continue attending school at KJ (id.).

The impartial hearing commenced on December 4, 2006, and after three days of testimony, concluded on March 8, 2007. Petitioner's principal and the special education teacher who would have taught the student at petitioner's school testified, along with the student's current and past special education teachers as well as the principal and the superintendent from KJ.

The principal at KJ testified that she had known the student for his entire 15-year school career while at KJ (Tr. p. 328). She stated that, upon entry into the program at age five, he was nonverbal and very shy, and that he had received counseling on an ongoing basis to address emotional concerns (Tr. p. 329). The principal testified that the student was still very shy, had difficulty with new situations and new people, and needed guidance in new situations to avoid "outbursts" and acting out behavior (*id.*). She further stated that new situations caused him to withdraw, sit for long periods of time with no interaction, and refuse to comply with teacher requests (*id.*). She further noted that this behavior was an ongoing concern and at times necessitated intervention by having a psychologist or social worker brought to the classroom (Tr. pp. 330-31). She opined that a transition to petitioner's district program would be "extremely difficult" because of the changes he would encounter in the program and new or different people he would encounter (Tr. p. 384).

The superintendent of KJ testified that the student's major concerns were his shyness and his difficulty developing interpersonal relationships (Tr. p. 288). He described the student as withdrawn and indicated that the student needed time to acclimate to new circumstances and people (Tr. p. 313). He opined that the student would need long-term planning and long-term processing in order to successfully transition to another program (Tr. p. 313). The superintendent expressed concern regarding the student's ability to adjust to a new school, a new academic class and a new vocational setting where he would be exposed to different teaching styles, different responsibilities and different tasks (Tr. pp. 315-16). He opined that the decision to move the student was not appropriate (Tr. p. 308).

The student's teacher for the 2005-06 school year testified that the student had progressed emotionally in his classroom. Initially, when the student was upset, he would become withdrawn for 20 minutes and go into a "shell," and eventually the student's "episodes" would get shorter and shorter, with each episode followed by discussions with the student as to what caused the episode (Tr. pp. 77-78).

The teacher from the East Ramapo special education class testified that, although he was a part of the CSE team which created the June 21, 2006 IEP for respondents' son, he had not looked at the IEP in detail, and moreover, he was just "given, you know, information about him" (Tr. p. 393). He also testified that students were appropriately placed in his class and that their educational needs were being met (Tr. pp. 404, 420, 416). Petitioner's special education teacher also testified that the students are always learning during the entire day, and the vocational aspect of petitioner's program reinforces mathematics and other academic skills (Tr. pp. 394-95). He further indicated that the classroom work was geared to their vocational component so as to assist them with the work site (Tr. pp. 397-98, 401-02, 406-10).

The student's mother testified that after seeing the proposed classroom, she felt that the program was inappropriate for her son (Tr. pp. 231-37). She testified that petitioner's special education teacher, who would have taught her son for the 2006-07 school year, admitted to her that her son was "higher functioning" than the other students in his classroom, that the other students were not up to double digit addition or subtraction in math, and that there is no routine for spelling (Tr. pp. 234-35). The student's mother stated that her son had been using a computer for "over seven years now," but that petitioner's teacher told her that his classroom did not have a computer at the time (Tr. p. 235). She also testified that vocational training has been part of her

son's schooling at KJ for at least the prior six years, and that as part of the vocational training, he has done such jobs as automotive assembly line work, messenger service work, bussing lunch tables, assisting wheelchair bound persons, office filing, and perfume factory assembly line work (Tr. pp. 221-23). The student's mother also stated that after discussing petitioner's vocational program with petitioner's special education teacher, she was under the impression that her son was already performing higher functioning jobs than those of the other students in petitioner's recommended program (Tr. p. 249).

By decision dated May 8, 2007, the impartial hearing officer determined that petitioner had failed to offer to provide respondents' son a free appropriate public education (FAPE)¹ because petitioner's CSE failed to develop a transition plan or program that would have helped the student successfully transfer from KJ to petitioner's program (IHO Decision at pp. 9-10). He determined that the absence of an adequate plan to transition the student to KJ "makes remote the likelihood of [the student] receiving educational benefits" (*id.* at p. 9). The impartial hearing officer specifically found that the student's significant needs should have given the CSE the "heightened sense" of its need to develop a transition plan for transferring the student from KJ to petitioner's school (*id.*). In rendering his decision, the impartial hearing officer gave "significant weight" to the testimony of the student's counselor at KJ who opined that moving the student out of his program at KJ would cause his learning and education to be delayed for a significant period of time (*id.* at p. 8). The impartial hearing officer noted that the individuals who know and work with the student at KJ uniformly expressed their "grave concerns" regarding problems that would arise if the student was moved to petitioner's proposed program (*id.* at pp. 8-9). He further noted that the testimony of KJ's principal was "most compelling" in that moving the student would be detrimental to the progress the student had made (*id.* at p. 9). The impartial hearing officer ordered petitioner's CSE to reconvene within 30 days to develop an IEP that includes a transition plan for the student's transition from KJ back into petitioner's school and appropriate transition services for post-school related activities (IHO Decision at pp. 10-11).

On appeal, petitioner asserts that the impartial hearing officer erred when he determined that petitioner failed to offer the student a FAPE because: a) respondents failed to prove that a transition plan from KJ to Ramapo Center was required in order to provide the student a FAPE; b) petitioner proved that its transition services were adequate and superior to those provided by KJ; c) petitioner's program was reasonably calculated to produce progress; d) additional counseling is available if it appears that the student requires it; e) the IEP's goals and objectives addressed any problems that might arise in connection with the student's transition from KJ to Ramapo Center; and f) the impartial hearing officer erroneously placed the burden of proof on petitioner regarding

¹ 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]).

the provision of transition services. Additionally, petitioner alleges that the impartial hearing officer did not credit its proof that it was required to place the child in the least restrictive environment (LRE). Petitioner seeks a reversal of the impartial hearing officer's decision.²

Respondents assert in their answer a new claim of predetermination pertaining to the IEP in dispute. The assertion of predetermination was not raised in respondents' due process complaint notice (IHO Ex. 1), nor was it raised during the impartial hearing. Respondents also argue that the impartial hearing officer's decision was proper and should be upheld.

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];³ 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]). 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 educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 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.

² Petitioner's memorandum of law was received by the Office of State Review more than 30 days after petitioner filed its petition. The memorandum of law was rejected as untimely and was not considered upon review (8 NYCRR 279.4[a]; see 8 NYCRR 279.1[a]).

³ 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. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

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).

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 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).

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, I agree with the impartial hearing officer that the June 21, 2006 IEP was substantively inadequate such that it was not reasonably calculated to confer educational benefits. The impartial hearing officer concluded that petitioner's CSE should have had a "heightened sense" of its need to develop a plan to better assist the student's transfer from his current long-term placement at KJ into Ramapo Center, especially in light of the need to prepare the student for his graduation from high school in the following school year (Tr. pp. 119-20; District Ex. 1 at p. 3). I am likewise persuaded, as was the impartial hearing officer, by the testimony of the service providers and educators, who had been working with the student over a period of time, that the offered IEP was inappropriate.

The record demonstrates that the student, who at the time of IEP development was 19-8 years old, had been attending KJ since kindergarten (Tr. p. 385). Although his June 21, 2006 IEP describes the student as overcoming his shyness and improving his ability to accept criticism, the principal of KJ testified that the student was still very shy, had difficulty with new situations and new people, and needed guidance in interacting in new situations (Dist. Ex. 1 at p. 1; Tr. p. 329). She also opined that moving the student to Ramapo Center would be detrimental to the educational progress he had been making at KJ (Tr. pp. 331-32). A former superintendent of KJ, who was familiar with the student, testified that some of the concerns about the student were his shyness and his difficulty developing interpersonal relationships (Tr. p. 288). He opined that the student was withdrawn and that he needed time to acclimate to new circumstances and people (Tr. p. 313). The former superintendent expressed concern regarding the student's ability to adjust to a new school, a new academic class and a new vocational setting where he would be exposed to different

teaching styles, different responsibilities and different tasks (Tr. pp. 315-16). He opined that simultaneously changing the student's educational and vocational settings at the student's age would be "a double barrel shotgun" (Tr. pp. 313-14). The student's counselor opined that this change in the location of the student's program so close to his upcoming graduation would result in "lost years" and would be "two steps backwards" for the student, particularly because of his difficulties with transitions (Tr. pp. 118-20). In addition, as noted by the impartial hearing officer, the June 2006 CSE was provided with information that the student had recently experienced aggressive episodes caused by the knowledge that he might be removed from his program at KJ (Tr. pp. 119, 124-26, 339-40, 364-370; Parent Ex. C).

The IEP stated that the student could discuss his feelings in counseling, and was able to address mood shifts and solve problems (Dist. Ex. 1 at p. 4). However, the IEP did not specifically address the student's social and emotional needs during his transition to a new program. The significant concerns about the student's ability to handle major change were either not mentioned or inadequately addressed in the IEP (*id.* at pp. 3-5). The IEP contains one goal, learning coping skills, which could have addressed one of the student's transition issues (*id.* at pp. 9-10). However, this goal did not adequately address this student's identified needs during the proposed transfer from KJ to Ramapo Center. Therefore, I concur with the impartial hearing officer's determination that the IEP did not adequately identify and address the student's needs during the student's proposed transition from KJ to Ramapo Center in order to ensure that the student would receive educational benefit during the 2006-07 school year. Thus, I find that the June 2006 IEP failed to offer the student a FAPE.

I also concur with the impartial hearing officer's determination that the student's IEP should be reconsidered by petitioner's CSE. The impartial hearing officer directed the CSE to consider services to support the transition from KJ to Ramapo. This directive, however, unduly restricts the CSE in developing an appropriate IEP. Upon reconvening, the CSE should also reconsider its recommendation to transfer the student from KJ, taking into consideration whether the student will receive meaningful educational benefit if transferred to Ramapo in light of: his length of placement at KJ, his functioning level and ability to tolerate significant change, and the fact that a transfer to a new school will be shortly followed by another change, his graduation. Because the impartial hearing officer's decision could have the unintended effect of forcing petitioner to recommend a particular school location for the student, I will modify his order to the extent that I will remand this matter to petitioner's CSE to consider the student's current needs and recommend an appropriate program and placement for the student.⁴

With respect to respondents' assertion that petitioner's CSE predetermined the student's program prior to its development at the IEP meeting, I find that this issue is beyond the scope of my review because it was not raised below (Application of the Bd. of Educ., Appeal No. 06-108, Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

⁴ Petitioner's CSE correctly considered LRE concerns in making its recommendation. Upon a review of the record, I do not find that LRE considerations alone would require that this student be moved from his current placement.

I have considered petitioner's and respondents' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

IT IS ORDERED that petitioner's CSE reconvene within 30 days of the date of this decision to review the student's needs and recommend an appropriate program and placement for the student consistent with this decision.

Dated: **Albany, New York**
 July 18, 2007

PAUL F. KELLY
STATE REVIEW OFFICER