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

No. 07-059

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

Advocates for Children of New York, Inc., attorney for respondent, Marc Silverman, Esq., of counsel

DECISION

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's son for the 2006-07 school year was not appropriate. The appeal must be dismissed.

The record is sparse regarding the student's early educational history. At the time of the impartial hearing, respondent's son was almost 17 years old and had not been attending school since January 17, 2007 (Parent Ex. J at pp. 1-2, 5). The student's eligibility for special education programs as a student with a learning disability (8 NYCRR 200.1[zz][6]) is not in dispute. Respondent's son has reportedly been receiving special education services since first grade (Parent Ex. J at p. 3). The student was registered to attend the ninth grade at petitioner's New Dorp high school for the 2006-07 school year beginning on September 11, 2006 (Parent Ex. B at p. 1; Tr. p. 18). Petitioner provided the student with an interim service plan (ISP) on September 13, 2006 (Parent Ex. A; Tr. p. 18). However, the ISP was not implemented for approximately one month (Tr. p. 18). Petitioner's CSE also generated an individualized education program (IEP) for the student on February 5, 2007[1] (Tr. pp. 11-12, 19; Resp't Mem. of Law at pp. 1-2). The IEP recommended that the student be classified as a student with a learning disability and that he be

[1] The student's February 5, 2007 IEP was not made a part of the hearing record.

enrolled in a specialized class with a 15:1 student to staff ratio in a community school and receive related services of speech-language therapy and counseling (id.). Subsequent to the creation of the February 5, 2007 IEP, petitioner provided respondent with a related service agreement (RSA) for respondent to obtain private counseling services for her son (Tr. pp. 11, 14, 19, 30-31).[2] The student reportedly began receiving counseling services on February 26, 2007 (Parent Ex. J at p. 2). Respondent was not given an RSA for the student's mandated speech-language services and the student did not receive those services for the 2006-07 school year (Tr. pp. 14-15).

By letter dated February 26, 2007, respondent expressed her dissatisfaction with her son's educational program and requested an impartial hearing (Parent Ex. H). An impartial hearing commenced on April 19, 2007 as a result. The record reflects that petitioner's representative arrived about 30 minutes late to the impartial hearing and alleged that, just prior to her arrival there had been an "off-the-record" ex parte conversation between the impartial hearing officer and respondent (Tr. pp. 8-9). The impartial hearing officer indicated on the record that an off-the-record "prehearing conference" occurred between herself and respondent at the scheduled time of the impartial hearing and that the district representative was not available (Tr. p. 9). At the impartial hearing, petitioner agreed to provide the student with interim home instruction until an appropriate placement could be found (Tr. pp. 6-8; see Pet. ¶ 10).

The impartial hearing officer rendered a decision on April 25, 2007. She noted that at the impartial hearing respondent requested that petitioner: 1) provide the student with interim home instruction; 2) pay for an independent occupational therapy evaluation of the student; 3) issue RSAs for the student to obtain private speech-language therapy and counseling through summer 2007; and 4) provide respondent with a "Nickerson letter"[3] to place the student in a state-approved private school for the remainder of the 2006-07 school year and for the 2007-08 school year (IHO Decision at p. 2).[4] The impartial hearing officer found that petitioner failed to provide a free

[2] An RSA for counseling was not made part of the hearing record.

[3] A Nickerson letter is a letter from the Department of Education (DOE) to a parent authorizing the parent to place the child in an appropriate special education program in any state-approved private school, at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a Nickerson letter is intended to address the situation in which a child has not been evaluated or placed in a timely manner (see Application of the Bd. Of Educ., Appeal No. 06-088; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

[4] It should be noted that these remedies set forth by the impartial hearing officer were not specified in respondent's hearing request (Parent Ex. H).

appropriate public education (FAPE)[5] for the 2006-07 school year and ordered petitioner to: 1) provide the student with interim home instruction; 2) pay for an independent occupational therapy evaluation of the student to be conducted; 3) issue RSAs for the student to obtain private speech-language therapy and counseling through summer 2007; and 4) provide respondent with a Nickerson letter to place the student in a state-approved private school for the remainder of the 2006-07 school year and for the 2007-08 school year (IHO Decision at pp. 5-6).

On appeal, petitioner contends that the impartial hearing officer erred in holding an off-the-record ex parte conversation with respondent and allowing her to raise matters beyond the scope of the impartial hearing request. Petitioner also contends that the impartial hearing officer applied an incorrect standard of law in finding that it "failed to demonstrate" that it offered a FAPE to the student for the 2006-07 school year. Petitioner further contends that the impartial hearing officer erred in ordering it to provide a Nickerson letter to respondent for the remainder of the 2006-07 school year and the 2007-08 school year, and erred in ordering that it provide RSAs for the student to obtain speech-language therapy and counseling services for summer 2007 because such orders were premature. Petitioner seeks annulment of the impartial hearing officer's decision.

Respondent answers, arguing that the impartial hearing officer ruled correctly in ordering relief. Respondent also asserts that petitioner's CSE developed an April 25, 2007 IEP for the student with a deferral to petitioner's Central Based Support Team (CBST) for a non-public school placement and that, as such, petitioner's arguments regarding the award of a Nickerson letter for the 2006-07 and 2007-08 school years are rendered moot. Respondent further argues that the RSAs were appropriately awarded as compensatory services because the student did not receive speech-language services for the 2006-07 school year and did not begin to receive counseling services until the end of February 2007. Lastly, respondent contends that the impartial hearing officer's off-the-record "prehearing conference" with respondent did not constitute ex parte communication. Respondent requests that petitioner's appeal be dismissed in its entirety.

Before addressing the parties' contentions, it should be noted that many of the issues raised at the hearing below are no longer in controversy given that an April 25, 2007 IEP and April 2007 ISP were developed by petitioner's CSE (Pet. Ex. II).[6] The April 2007 IEP and ISP supersede the ISP from September 2006 and the IEP dated February 5, 2007 which were in dispute at the hearing.

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[5] 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]).

[6] The ISP generated at the time of the April 25, 2007 IEP was not made part of the hearing record.

Petitioner has not appealed from the portion of the decision of the impartial hearing officer which ordered it to pay for an independent occupational therapy evaluation of the student (IHO Decision at p. 6). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of the Dept. of Educ., Appeal No. 07-014; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Having failed to appeal from that portion of the impartial hearing officer's decision, petitioner is bound by that portion of the decision.

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]; 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]).

Petitioner contends that the impartial hearing officer applied an incorrect standard of law in finding that it "failed to demonstrate" that it offered a FAPE for the 2006-07 school year. 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]). At the time of the impartial hearing, petitioner was not providing special education services that were listed on the student's IEP, including speech-language therapy, for the 2006-07 school year (Tr. pp. 14-15, 19, 30-31). While I agree with petitioner's contention that respondent, as the party challenging the IEP for the 2006-07 school year, had the burden of persuasion, I find that the record demonstrates that petitioner failed to offer the student a FAPE for the 2006-07 school year because it did not properly implement the student's IEP for that school year.

Respondent argues on appeal that the issuance of a Nickerson letter for the remainder of the 2006-07 school year and the 2007-08 school year is no longer an issue in controversy because the need for a Nickerson letter was superseded by the April 25, 2007 IEP which deferred the student's placement to petitioner's CBST (Resp't Mem. of Law at pp. 5-6). I agree.

In this case, petitioner's CSE met on April 25, 2007, which was the same day that the impartial hearing officer's decision was issued (compare Pet. Ex. II at p. 1, with IHO Decision at p. 6). The CSE recommended that the student receive 30 minutes of group speech-language therapy twice a week, 30 minutes of individual counseling once a week and 30 minutes of group counseling once a week (Pet. Ex. II at p. 9). The CSE recommended that the student be enrolled

in a special class with a student to staff ratio of 12:1+1 (id. at pp. 1, 7). The CSE referred the matter to petitioner's CBST, which was to recommend a specific nonpublic school in which to place respondent's son (id. at p. 1). Pending the CBST recommendation, the CSE provided the student with an ISP and an interim placement of home instruction with speech-language and counseling services (Pet. Exs. III; IV). The CSE recommended that the student receive interim home instruction and speech-language therapy and counseling as related services (id.). In light of the CSE providing an ISP providing for interim home instruction, speech-language therapy and counseling services and an IEP referring the matter to the CBST for a state-approved private school placement, I need not address the issuance of the Nickerson letter because the issue is no longer in controversy.

Additionally, petitioner asserts that the impartial hearing officer prematurely ordered it to issue RSAs to provide the student with private speech-language therapy and counseling "through at least" summer 2007. Under the circumstances of this case, I see no reason to overturn or reduce the impartial hearing officer's order that respondent receive RSAs through summer 2007 (see 20 U.S.C. §1415[f][3][E]; Letter to Kohn, 17 IDELR 522 [OSEP 1991]). Respondent seeks on appeal that the RSAs be extended through the fall of the 2007-08 school year because summer 2007 is almost over (Resp't Mem. of Law at p. 9). I will order that RSAs be extended until the end of the 2007-08 school year based on petitioner's failure to provide the student with a FAPE for the 2006-07 school year. Although the April 2007 IEP and ISP provide for speech-language therapy and counseling services during the 2007-08 school year (Application of the Dept. of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006), the RSAs will afford access to additional services to make up for the deprivation of services during the 2006-07 school year (see Application of the Bd. of Educ., Appeal No. 06-074).

Petitioner contends that respondent was permitted to expand the scope of the impartial hearing request based upon the impartial hearing officer having ex parte communications with respondent prior to the impartial hearing. Impartial hearing officers must refrain from communicating with any party or a party's representative about any issue of fact or law, except upon notice and opportunity for all parties to participate (Application of a Child with a Disability, Appeal No. 98-1; Application of a Child with a Disability, Appeal No. 96-69; Application of a Child with a Disability, Appeal No. 93-49). While an impartial hearing officer's ex parte communication with a party may afford a basis for annulling the impartial hearing officer's decision (see Signet Construction v. Goldin, 99 A.D.2d 431 [1st Dep't 1984]), I am not persuaded by the record which is before me that there is a basis for doing so in this case. Although it appears that an ex parte communication took place between the impartial hearing officer and respondent at the time that the impartial hearing was scheduled to begin but before petitioner's district representative arrived (Tr. pp. 8-9), I find that the conversation in question does not afford a basis for invalidating the impartial hearing officer's decision (Application of a Child with a Disability, Appeal No. 02-050; Application of the Bd. of Educ., Appeal No. 00-053). However, it must be noted that impartial hearing officers should avoid even the appearance of impropriety by refraining from engaging in such ex parte conversation (Application of the Bd. Of Educ., Appeal No. 00-053). I therefore caution the impartial hearing officer to refrain from such communications in the future.

Petitioner further asserts that the impartial hearing officer erred in impermissibly allowing respondent to expand the scope of the hearing request (Pet. ¶ 30). I agree. A party requesting an impartial hearing may not raise issues at the impartial due process hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]) or the original request is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). In the instant case respondent did not raise the issue of a Nickerson letter in her impartial hearing request nor did she seek the permission of petitioner to raise a new issue or amend her impartial hearing request (Parent Ex. H). A review of the record indicates that the impartial hearing officer stated during the course of the impartial hearing that respondent was now requesting a Nickerson letter (Tr. p. 16). Petitioner's representative objected as the issue had not been raised in the impartial hearing request and sought an adjournment so that she could present a defense regarding the newly raised request for a Nickerson letter; however that request was denied by the impartial hearing officer (Tr. pp. 16-18, 32-33).

I note that the impartial hearing officer erred in allowing respondent to raise new issues during the course of the hearing over the objection of petitioner's representative (Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065). The impartial hearing officer also erred in overruling petitioner's reasonable request for an adjournment in order to prepare a defense to the new issues raised. Furthermore, the impartial hearing officer improperly engaged in a conversation with respondent on substantive issues prior to the arrival of petitioner's representative (8 NYCRR 200.5[j][3][vii]). However, under the circumstances, I decline to overturn the impartial hearing officer's decision and remand the case for another hearing. In this case, a remand would serve no useful purpose because the issues are no longer in controversy.

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

THE APPEAL IS DISMISSED.

IT IS ORDERED that the speech and counseling RSAs ordered by the impartial hearing officer be extended until the end of the 2007-08 school year.

Dated: **Albany, New York**
August 10, 2007

PAUL F. KELLY
STATE REVIEW OFFICER