



The University of the State of New York

The State Education Department State Review Officer

No. 07-065

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer, which determined that the educational program respondent's Committee on Special Education (CSE) recommended for their son for the 2006-07 school year was appropriate and denied their request to include a specific instructional methodology on his 2006-07 individualized education program (IEP). The appeal must be dismissed.

Initially I must address a procedural matter. Petitioners request leave to file an untimely appeal. A petition for review by a State Review Officer must comply with the timelines specified in the state regulations (see 8 NYCRR 279.2). The petition must be served upon the respondent within 35 days from the date of the impartial hearing officer's decision sought to be reviewed (8 NYCRR 279.2[b]). If the impartial hearing officer's decision has been served by mail upon petitioners, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The good cause for the failure to timely seek review must be set forth in the petition (id.).

In this case, the impartial hearing officer's decision is dated April 23, 2007 (IHO Decision at p. 38). Presuming that the impartial hearing officer's decision was mailed to petitioners, the last day to serve the petition was June 4, 2007.¹ Petitioners' Affidavit of Service shows the date of

¹ I note that based upon the Commissioner's regulations, petitioners' last day to timely serve the petition fell on June 2, 2007, a Saturday. Part 279.11 notes that if the last day for service falls on a Saturday or Sunday, service may be made on the following Monday, which in this case is June 4, 2007 (see 8 NYCRR 279.11).

service as June 15, 2007 (see Pet'r's Aff. of Service attached to Pet.). Thus, the petition for review was not timely served according to the Commissioner's practice regulations.

In their petition for review, petitioners request that the delay in service of the petition for review be excused based on petitioners' involvement in impartial hearings, the preparation of other appeals, and "a multiplicity" of medical appointments for her children, which had been scheduled sometime "between 8 and 10 months" prior to the appeal (Pet. ¶ 1).

I note that petitioners, in connection with the impartial hearing and the preparation and service of their Notice of Intent to Seek Review for the instant appeal, previously sought assistance from an advocacy group and an attorney (see Tr. p. 1). It also appears that petitioners knew of their obligations with regard to their children's appointments long before the initiation of the instant appeal, and in addition, knew that other resources were available to assist in the timely preparation and filing of the instant appeal. Therefore, I am not persuaded that the reasons for the delay set forth in the petition constitute good cause shown to excuse the untimely service of the petition for review and in the absence of good cause stated, I will dismiss the appeal as untimely (Application of a Child with a Disability, Appeal No. 06-117; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 05-106 [dismissing petitioners' appeal as untimely and finding that petitioners' reasons for untimely service, including that 'they proceeded without counsel (although one of the petitioners is an attorney), that the hearing record was "dense," and that petitioners' available time to pursue the appeal was constrained by, including among other things, commitments to professional obligations and the birth of a new daughter' did not constitute good cause]; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-048 [dismissing petitioner's appeal as untimely and finding that petitioner's reasons for untimely service, including that "she had been undecided whether to file an appeal" and "her attorney was unavailable due to professional commitments to other clients" did not constitute good cause shown]; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-067).²

Despite dismissing the petition as untimely, I have reviewed the merits of petitioners' appeal and, as set forth below, I concur with the impartial hearing officer's determinations that petitioners failed to meet their burden to establish that respondent's recommended program, as set

² The failure to comply with the practice requirements of Part 279 of the Commissioner's regulations may result in the dismissal of a petition for review by a State Review Officer (see 8 NYCRR 279.2, 279.13; Application of the Bd. of Educ., Appeal No. 07-055; see, e.g., Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 01-048; see also Application of the Dep't of Educ., Appeal No. 05-073). I note that petitioners are aware, or should be aware, of the procedural requirements associated with practice on review of hearings for students with disabilities, having recently prepared, served, and filed Application of a Child with a Disability, Appeal No. 07-054, and Application of a Child with a Disability, Appeal No. 07-052, in compliance with the Commissioner's regulations (see 8 NYCRR 279.2, 279.4[a], 279.8, 279.13; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of the Bd. of Educ., Appeal No. 04-072; Application of a Child with a Disability, Appeal No. 00-003).

forth in the April 11, 2006 IEP, failed to offer their son a free appropriate public education (FAPE)³ for the 2006-07 school year, and further, that respondent was not required to "specify a particular methodology" on the child's 2006-07 IEP (IHO Decision at pp. 34-35).

At the commencement of the impartial hearing on October 3, 2006, the child was five years old and receiving home-based special education programs and related services (Tr. pp. 1, 6, 201; Parent Exs. DD; II). The child's eligibility for special education programs and services and classification as a child with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

Prior to the CSE meeting on April 11, 2006, petitioners provided numerous evaluations and progress reports to the CSE's Chairperson from the child's service providers regarding the child's educational programming for the 2006-07 school year (Parent Exs. A-W; see Tr. pp. 272, 303). The evaluations and reports identified the child's present levels of performance, learning characteristics, health and physical development, academic management needs, social/emotional management needs, and offered recommendations for the child's 2006-07 educational programming (Parent Exs. C at p. 2; H at p. 4; L at p. 2; M at p. 2; N at p. 2; O at pp. 7-8; P at pp. 7-9; see generally Parent Exs. A-W). In particular, the child's home-based ABA provider noted that he required 1:1 discrete trial teaching and verbal behavior ABA in both the school-based and home-based programs (Parent Ex. P at pp. 4, 7-8). Some of the service providers also drafted annual goals and short term objectives (Parent Exs. C at pp. 3-4; H at pp. 5-6; J at pp. 3-5; K at p. 2; L at pp. 3-4; M at p. 3; N at p. 3; P at pp. 10-18).

At the child's "turning 5" conference on April 11, 2006, respondent's CSE developed the child's 2006-07 IEP (Tr. p. 57; Parent Ex. EE at p. 1; see Parent Ex. A at p. 1). The CSE, which met for approximately six hours, classified the child as a student with autism and made a dual recommendation for the delivery of special education programs and services through both a school-based and a home-based program (Parent Ex. EE at pp. 1-2, 54-55). The school-based program included placement in a 6:1:1 special class in a specialized school with related services, a 12-month program, special education transportation, assistive technology, and adapted physical education (id. at p. 1). The CSE recommended the following school-based related services: individual speech-language therapy five times per week for 30 minutes per session; individual occupational therapy (OT) five times per week for 30 minutes per session; individual physical therapy (PT) five times per week for 30 minutes per session; individual counseling two times per week for 30 minutes per session; and the assistance of a 1:1 full-time health services paraprofessional while at school (id. at p. 54). For the home-based program, the CSE recommended 15 hours per week of special education teacher support services (SETSS) and

³ 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][D]).

related services, including: individual speech-language therapy five times per week for 45 minutes per session; individual OT two times per week for 30 minutes per session; individual counseling once per week for 60 minutes per session; individual PT five times per week for 60 minutes per session; individual feeding therapy seven times per week for 30 minutes per session (id. at pp. 1, 54-55; see Tr. pp. 314-15).⁴

The 2006-07 IEP developed by respondent's CSE directly incorporated information provided by the child's service providers regarding the child's academic performance and learning characteristics, social/ emotional performance and needs, and health and physical development (compare Parent Ex. EE at pp. 6-9, 12, 14, 17-18, 20, with, Parent Exs. C at p. 2; H at p. 4; L at p. 2; M at p. 2; N at p. 2; O at pp. 7-8; P at pp. 7-9). The CSE also directly incorporated many of the annual goals and objectives created by the child's service providers and drafted additional annual goals and short term objectives (compare Parent Ex. EE at pp. 27-40, 43-48, with, Parent Exs. C at pp. 3-4; H at pp. 5-6; J at pp. 3-5; K at p. 2; L at pp. 3-4; M at p. 3; N at p. 3; P at pp. 10-18; see Parent Ex. EE at pp. 41-42, 49-51). The CSE removed references to verbal behavior ABA as the instructional methodology and did not refer to a specific instructional methodology in the child's 2006-07 IEP (see Parent Ex. EE at pp. 3, 7-9). By Final Notice of Recommendation (FNR) dated June 19, 2006, respondent offered the child a placement in a 6:1:1 special class in a specialized school with related services and a 1:1 full-time paraprofessional located at P.S. 37, in addition to the special education programs and related services to be delivered through the home-based program (Dist. Ex. 3).

The impartial hearing commenced on October 3, 2006, and after five days of testimony concluded on March 22, 2007 (Tr. pp. 1, 540). Prior to the presentation of testimony, petitioners explained the allegations contained in their request for an impartial hearing and the relief sought (Tr. pp. 5-9). Both parties presented documentary and testimonial evidence (Tr. pp. 1-593; Parent Exs. A-TT; Dist. Exs. 1-8). Petitioners elicited testimony from the child's various home-based providers, who opined that the child required verbal behavior ABA as an instructional methodology and that he made progress using this approach (Tr. pp. 25-26, 116-18, 159). Respondent asserted at the impartial hearing that it offered the child a FAPE and that the inclusion of a specific instructional methodology on the child's IEP would "tie our clinical hands" and respondent "wanted [the child's teachers] to be able to utilize other methodologies if they felt that those would be appropriate" (Tr. pp. 12, 288-95, 304, 565-66).

In a thorough 38-page decision, dated April 23, 2007, the impartial hearing officer concluded that petitioners failed to meet their burden to establish that respondent's recommended program, as set forth in the April 11, 2006 IEP, failed to offer their son a FAPE for the 2006-07 school year (IHO Decision at pp. 34-35). The impartial hearing officer also concluded that respondent was not required to "specify a particular methodology" on an IEP, but that the IEP team "may" address methodology on an IEP, if it is determined that a particular methodology is "necessary" in order to confer a FAPE' (id. at p. 35). He noted that although petitioners' evidence supported the conclusion that their son received educational benefit and made progress through

⁴ It should be noted that the feeding therapy recommended by respondent's CSE was identified in the child's 2006-07 IEP as individual sessions of speech therapy (see Parent Ex. EE at p. 55). The CSE's Chairperson testified that the child's feeding therapy was listed as speech therapy on the IEP because it was provided to the child by a speech therapist (Tr. p. 315).

the use of verbal behavior ABA instruction, the evidence did not support the conclusion that it was the "only" way the child could learn (*id.* at pp. 35-37). He noted, moreover, that the record demonstrated that the child learned through the use of other teaching methods, as set forth in the child's preschool teacher's testimony (*id.* at p. 35). The impartial hearing officer accurately cited to legal authority to support his conclusion that questions of methodology were best left to educators (*id.* at pp. 36-37). The impartial hearing officer also noted that respondent complied with the procedural requirements to develop an IEP that was "reasonably calculated to enable the student to receive educational benefit" (*id.* at p. 37).

On appeal, petitioners assert the impartial hearing officer erred when he determined that respondent was not required to include a specific instructional methodology in their son's 2006-07 IEP and that methodology must be left to the discretion of each teacher. Petitioners argue that they were denied meaningful participation at the CSE meeting because the determination to not designate a specific instructional methodology on their son's IEP was solely made by respondent's CSE Chairperson based upon a predisposed policy or practice. Petitioners also argue that their son's IEP did not contain a behavioral intervention plan (BIP). Petitioners seek to annul the impartial hearing officer's decision and to reinstate 1:1 verbal behavior ABA as the instructional methodology on their son's IEP, and to adopt the implementation of 40 hours per week of 1:1 ABA instruction by a qualified special education teacher.

Respondent asserts in its answer that petitioners failed to meet their burden to demonstrate that respondent's recommended program in the child's 2006-07 IEP failed to offer him a FAPE, and that respondent was not required to include a specific instructional methodology on the child's IEP. Respondent requests that the impartial hearing officer's decision be upheld in its entirety and that petitioners' appeal be dismissed.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)⁵ 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];⁶ 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

⁵ Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, *et. seq.*]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to the IDEA 2004, unless otherwise specified.

⁶ 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. 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, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

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 education benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; see 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. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensure 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 Bd. of Educ., Appeal No. 07-028; 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).

Although an IEP must provide for specialized instruction in the child's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a child's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

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]).

After carefully reviewing the entire record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported decision, correctly held that petitioners failed to sustain their burden to establish that respondent's recommended program in the child's April 11, 2006 IEP failed to offer their son a FAPE for the 2006-07 school year (IHO Decision at pp. 34-38). The impartial hearing officer applied the proper legal analysis in determining whether the child was offered a FAPE and whether respondent was required to include a specific instructional methodology on the child's 2006-07 IEP. The decision shows that the impartial hearing officer carefully considered and weighed all of the testimony and exhibits from both parties. The record amply supports the impartial hearing officer's conclusion that the child was provided with a program that was appropriate to his special education needs. In short, based upon my review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the findings of fact or conclusions of law as determined by the impartial hearing officer (34 C.F.R. § 300.514[b][2]; N.Y. Educ. Law § 4404[2]). I, therefore, adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 05-095; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have considered petitioners' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

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

**PAUL F. KELLY
STATE REVIEW OFFICER**