



The University of the State of New York

The State Education Department State Review Officer

No. 07-096

Application of a CHILD WITH A DISABILITY, by his parent, 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:

Meredith I. Madon, Esq., attorney for petitioner

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

DECISION

Petitioner appeals from a decision of an impartial hearing officer which denied her request for home-based speech-language therapy and home-based applied behavioral analysis (ABA) instruction. Respondent cross-appeals from the impartial hearing officer's interim decision which denied its motion to dismiss the due process complaint notice. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing that began in February 2007, the student was attending a private school that the Commissioner of Education has approved as a school with which school districts may contract to instruct students with disabilities (approved school) (see 8 NYCRR 200.1[d], 200.7). The student's prior educational history is discussed in petitioner's prior appeal, Application of a Child with a Disability, Appeal No. 06-131, and will not be repeated here in detail. The student's eligibility for special education services and classification as a student with autism are not in dispute in this proceeding (8 NYCRR 200.1[zz][1]).

On March 21, 2006, the Committee on Special Education (CSE) convened for an annual review and to develop an individualized education program (IEP) for the student's 2006-07 school year (Parent Ex. A). For the 2006-07 school year, the March 2006 CSE recommended that the student be placed in a 6:1+3 special class at the approved school (id. at p. 1). Related services recommendations for the student included two individual 30-minute speech-language therapy

sessions per week in a separate location, one 30-minute speech-language therapy session per week in a group of four in a separate location, two individual 30-minute sessions per week of physical therapy in a separate location and two 30-minute sessions of occupational therapy in a separate location (id. at p. 15). The March 2006 CSE did not recommend the continuation of the home-based services that the student had received in previous school years (see Application of a Child with a Disability, Appeal No. 06-131); however, the hearing record indicates that the student received ABA instruction and speech-language therapy in school as part of his program at the approved school (Tr. pp. 70-71, 89; see Parent Ex. A). Although petitioner agreed with the March 2006 CSE's recommendations that the student continue to attend the approved school and receive related services, she maintained that her son required continuation of home-based services in order to generalize the skills learned at school to his home and community and to receive a free appropriate public education (FAPE) (Dist. Ex. 5 at pp. 1-2).¹

An assistive technology assessment was conducted two days prior to the March 2006 CSE meeting; however, the evaluation report was not completed until May 19, 2006 (Dist. Ex. 13). The purpose of the evaluation was to determine whether or not the student required an augmentative communication device to meet his then current IEP goals and, if so, what type of device would best meet his needs (id. at p. 1). The augmentative communication evaluators determined that the student would benefit from a dynamic display, voice output communication aid in order to increase his language development, expressive output and communicative interactions in all settings (id. at p. 3). The evaluators recommended a device that could be easily transported and accessed while ambulating (id.). The evaluators further recommended that training be arranged for the student, staff and parents after respondent received the device (id. at p. 4).

By due process complaint notice dated August 24, 2006, petitioner requested an impartial hearing and asserted that respondent failed to offer the student a FAPE because respondent did not provide her son with home-based ABA instruction and home-based speech-language therapy (Dist. Ex. 5 at p. 2). An impartial hearing (Hearing 1) was conducted in September 2006 (Dist. Ex. 2 at p. 1). By decision dated October 19, 2006, an impartial hearing officer (Impartial Hearing Officer 1) determined that petitioner did not meet her burden to establish that respondent failed to offer the student a FAPE (id. at pp. 6, 9). Specifically, Impartial Hearing Officer 1 found that petitioner did not establish that home-based ABA instruction and home-based speech-language therapy were necessary in order to provide the student a FAPE (id. at pp. 6-7). Despite her findings, Impartial Hearing Officer 1 ordered the CSE to reconvene to review any assessments of the student offered

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]).

by petitioner, determine whether to conduct additional assessments of the student, and reconsider the student's recommended services "in order to be certain that the CSE has considered the child's anticipated needs if the home-based services are discontinued" (*id.* at p. 8). Until such time that the CSE reconvened, Impartial Hearing Officer 1 directed respondent to provide the student with five hours of home-based speech-language therapy per week and ten hours of home-based ABA instruction per week (*id.*).

In support of petitioner's request for home-based services, the student's pediatric neurologist submitted letters dated August 24, 2006 and November 8, 2006, recommending that the student receive the additional home-based speech-language therapy and ABA services due to his underlying neurological condition (Dist. Exs. 18; 19).

On November 13, 2006, respondent's social worker conducted a classroom observation of the student for 45 minutes (Dist. Ex. 21). The social worker reported that, for most of the observation, there were six adults in the classroom and six students, each of them working 1:1 with an adult (*id.* at p. 1). Throughout the observation, the student made almost no eye contact with the adult with whom he was working, and he needed repeated physical and verbal prompting to look at the material that he was working with (*id.*). According to the social worker, he often rubbed his eyes, put his hands over his ears, grabbed the sleeve of the adult working with him and leaned his head on her (*id.*). At times the student would move his feet or bang them on the floor, and during the last half of the observation, he banged his head against the wall and on the table (*id.*). The social worker reported that the student verbalized only once or twice during the entire observation, and his primary method of communication was pointing at his papers or at the reinforcers that he was requesting (*id.*). The observation report indicated that the student worked for edible reinforcers but was also given verbal praise and physical reinforcement gestures by the adult (*id.*).

On November 13, 2006, the student was evaluated using the Vineland Adaptive Behavior Scale-Classroom Edition, with an unnamed teacher serving as reporter (Dist. Ex. 20 at pp. 1, 5). The student's scores in all domains were below the first percentile with age equivalencies ranging from 1 year to 2.4 years old (*id.* at p. 2).

An updated social history was conducted on November 15, 2006 (Dist. Ex. 24). The social worker indicated that the student had "refractory medical at epilepsy, autism, [and] global developmental impairments" (*id.* at p. 1). Petitioner reported to the social worker that the student had limited verbal ability and poor articulation, stated only a few words clearly, and that petitioner understood the student, but others did not (*id.* at pp. 1-2). The student was reportedly toilet trained, but he was unable to dress independently (*id.* at p. 2). While in school, the social history indicates the student received edible reinforcers, and when outside of school, petitioner used video games or a book as reinforcements (*id.*). Petitioner reported that the student bangs his head by knocking on doors, walls or tables (*id.*). According to the social history, the student was medically monitored on a regular basis, was on various medications for seizures, and was recently hospitalized (*id.* at p. 3).

Pursuant to the impartial hearing officer's order in Hearing 1, the CSE reconvened on November 15, 2006 (Dist. Ex. 25). The CSE meeting notes indicated that the November 2006 CSE reviewed the student's previous and updated evaluations and reports both from respondent's

staff and from the private school staff and discussed the student's needs regarding ABA instruction and speech-language therapy (id. at p. 1). Petitioner indicated that the student's after school speech therapy was provided in the therapist's office and not in their home (id. at p. 2). It was reported that the student's private speech therapist had been working on increasing the student's vocalizations (id.). It was noted that the Picture Exchange Communication System (PECS) provided to the student was not used outside of school (id.). The November 2006 CSE determined that the student did not need additional speech services because petitioner did not support her assertion that home-based speech therapy helped the student generalize the skills learned in school to the home environment and community (id.). The November 2006 CSE determined that the student may benefit from an augmentative communication device (id.).

During the November 2006 CSE meeting, petitioner informed the CSE that the home-based ABA provider was not certified in ABA and was using methods of "floor time" and Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) (Tr. pp. 196-97; Dist. Ex. 25 at p. 1). The CSE meeting notes indicated that there was no documentation describing how the home-based ABA provider or speech-language provider assisted the student with generalization of skills to the home environment and the community (Tr. pp. 197-99; Dist. Ex. 25 at p. 1). The November 2006 CSE did not recommend additional speech-language or ABA services outside of the school program (Dist. Ex. 25 at p. 1). Petitioner indicated that, with regard to parent training, she had been teaching at a private school for students with autism and had a certificate in ABA (Tr. pp. 159, 202; Dist. Ex. 25 at p. 1). She further indicated to the November 2006 CSE that she attended many autism workshops and is completing a master's degree in special education (Tr. pp. 160, 202; Dist. Ex. 25 at p. 3). She indicated that she communicates regularly by phone and in person with school staff as well as visiting the school to observe her son (Tr. pp. 202-03; Dist. Ex. 25 at p. 3). The November 2006 CSE noted that the approved school is providing an appropriate degree of parent training (Dist. Ex. 25 at p. 3). Consistent with the recommendations of the March 2006 CSE, the November 2006 CSE recommended that the student be placed in a 6:1+3 special class at the approved school (Parent Ex. B at p. 1). Related services recommendations for the student included two individual 30-minute speech-language therapy sessions per week in a separate location, one 30-minute speech-language therapy session per week in a group of four in a separate location, two individual 30-minute sessions per week of physical therapy in a separate location and two 30-minute sessions of occupational therapy in a separate location (id. at p. 19). In addition, the November 2006 CSE recommended that the student be provided with assistive technology, in the form of a dynavox, to increase his expressive output in the academic and home environment (id. at p. 8).

By due process complaint notice dated November 17, 2006, petitioner requested a second impartial hearing and asserted that the November 2006 CSE incorrectly concluded that the student did not require home-based ABA and speech-language services (Dist. Ex. 1 at p. 2). Petitioner further alleged that without such home-based services, the student's program was not reasonably calculated to confer educational benefits (id.). As part of the second hearing request, petitioner requested an interim pendency order continuing the provision of home-based services and a finding that the November 2006 IEP was procedurally and substantively defective to the extent that it did not provide for such home-based services (id.).

Petitioner appealed the October 19, 2006 decision of Impartial Hearing Officer 1 to a State Review Officer (Application of a Child with a Disability, Appeal No. 06-131). In a decision dated February 8, 2007, petitioner's appeal challenging the impartial hearing officer's decision in Hearing 1 regarding the March 2006 IEP was dismissed (Application of a Child with a Disability, Appeal No. 06-131; Dist. Ex. 3).² On or about March 1, 2007, respondent discontinued providing home-based services to the student (Tr. pp. 135, 138).

A second impartial hearing (Hearing 2) with respect to the November 2006 IEP was held before a new impartial hearing officer (Impartial Hearing Officer 2). Hearing 2 commenced on February 27, 2007 and concluded on June 18, 2007 after four days of testimony. By interim decision dated March 26, 2007, Impartial Hearing Officer 2 denied respondent's motion to dismiss the due process complaint notice on the ground of collateral estoppel, finding that the November 2006 IEP was a new IEP (Interim IHO Decision at p. 3).

By decision dated July 12, 2007, Impartial Hearing Officer 2 found that the November 2006 IEP was reasonably calculated to provide educational benefit to the student (IHO Decision at p. 17). Specifically, Impartial Hearing Officer 2 found that petitioner had not presented sufficient evidence as to how the student would benefit from home-based services nor was there evidence showing which skills would have been targeted for generalization (*id.*). Thus, Impartial Hearing Officer 2 found that there was no basis for her or the November 2006 CSE to find that home-based ABA instruction or home-based speech-language therapy were necessary to meet the educational needs of the student (*id.*). Impartial Hearing Officer 2 also noted that, to the extent that the hearing record showed that the student experienced some regression after the home-based services were stopped in March 2007, this information was not before the November 2006 CSE (*id.*).

This appeal by the parties ensued. Petitioner contends that she met her burden to establish that the student requires home-based ABA instruction and home-based speech-language therapy in order for him to generalize his skills to the home and community and receive a FAPE. Petitioner seeks reversal of Impartial Hearing Officer 2's finding that she had the burden of persuasion and argues that respondent should be directed to fund home-based services either as additional services or as a FAPE going forward. Alternatively, petitioner seeks reversal of Impartial Hearing Officer 2's finding that petitioner failed to meet her burden and an order directing respondent to provide home-based services either as additional services or as a FAPE going forward.

Respondent cross-appeals from Impartial Hearing Officer 2's March 2007 interim decision, which denied its motion to dismiss the due process complaint notice dated November 17, 2006 on the ground that petitioner's claim is barred by the doctrine of collateral estoppel. Respondent also argues that the program recommended in the November 2006 IEP was appropriate for the student and that petitioner failed to show that it failed to offer the student a FAPE. Respondent alleges

² Petitioner has sought judicial review of the decision rendered in Application of a Child with a Disability, Appeal No. 06-131 in the United States District Court for the Eastern District of New York. As of the date of this decision, that case remains pending.

that petitioner failed to prove that the home-based services were necessary for the student to generalize information taught in school.

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, 546 U.S. 49, 51 [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. 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).

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.

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, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). Returning to the instant case, since petitioner was the party who filed the due process complaint notice challenging the November 2006 IEP, I concur with the impartial hearing officer that the burden of persuasion was on petitioner as the party seeking relief (id.).

Turning to respondent's assertion that this proceeding should be dismissed pursuant to the doctrine of collateral estoppel, for the reasons described below, I concur with the impartial hearing officer's decision to permit this proceeding to continue on the merits. I note that respondent did not appeal that portion of Impartial Hearing Officer 1's decision which remanded the matter to the CSE for a reconsideration of the issue of home-based services (Application of a Child with a Disability, Appeal No. 06-131). Therefore, that portion of the decision from Hearing 1, which permitted petitioner to begin the due process procedures anew regarding the issue of the appropriateness of home-based services during the 2006-07 school year, became final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of a Child with a Disability, Appeal No. 07-026).

Turning next to petitioner's contention that the student requires home-based ABA instruction and home-based speech-language therapy in order for him to generalize his skills, I concur with Impartial Hearing Officer 2's conclusion that petitioner did not present sufficient evidence regarding how the student would benefit from the requested home-based services nor did she show which skills would have been targeted for generalization.

On November 15, 2006, the CSE met and developed a new IEP for the student (Parent Ex. B). The November 2006 IEP was similar to the March 2006 IEP, and petitioner was satisfied with the November 2006 IEP, except that it did not include home-based ABA and speech-language services (Tr. p. 161; Dist. Ex. 1 at p. 2; compare Parent Ex. B, with Parent Ex. A). The hearing record reveals that the student's home-based ABA provider was not utilizing ABA, and his speech-language therapy was provided at the therapist's office and not within the home. I note, as did Impartial Hearing Officer 2, that despite petitioner's presentation of witnesses and documentation in support of her contention that the student requires home-based services, petitioner failed to show how the student would benefit from such services or which skills would be targeted for generalization (IHO Decision at p. 17). Moreover, an independent reading of the hearing record

reveals that it does not contain evaluative data to support petitioner's contention that the student requires home-based services as a necessary component of a FAPE. For these reasons, I concur with Impartial Hearing Officer 2 that the November 2006 IEP offered the student a FAPE.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 November 7, 2007

PAUL F. KELLY
STATE REVIEW OFFICER