The University of the State of New York

The State Education Department
State Review Officer

No. 08-005

Application of the BOARD OF EDUCATION OF THE COLTON-PIERREPONT CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hogan, Sarzynski, Lynch, Surowka & DeWind, LLP, attorney for petitioner, Edward J. Sarzynski, Esq., of counsel

Law Office of H. Jeffrey Marcus, attorney for respondent, Jason H. Sterne, Esq. and H. Jeffrey Marcus, Esq. of counsel

Joyce B. Berkowitz, Esq., attorney for respondent

DECISION

Petitioner, the Board of Education, appeals from a decision of an impartial hearing officer which determined that respondent's son should receive the educational program and services listed on the individualized education program (IEP) recommended by the Committee on Special Education (CSE) for the 2007-08 school year. The appeal must be sustained.

At the outset, it should be noted that an impartial hearing during which witness testimony was presented did not take place in this proceeding. In lieu of an oral hearing, the evidence appearing in the hearing record was presented by the parties through a stipulation of facts and accompanying documentary exhibits (IHO Ex. 1; IHO Decision at p. 1).[1]

The student is classified as having a learning disability and his classification is not in dispute (Dist. Ex. 1 at p. 1; IHO Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The student has visual impairments, and among the special education and related services recommended by the CSE on the student's May 5, 2007 IEP are three hours per week of instruction by a teacher of the visually impaired, large print materials, books on cassette or CD,

[1] State regulations encourage impartial hearing officers, wherever practicable, to enter stipulations of fact and joint exhibits agreed to by the parties into the hearing record (8 NYCRR 200.5[j][3][xii][b]).

Kurzweil 3000 software, and a computer with a large screen monitor and a scanner compatible with the Kurzweil software (Dist. Ex 1 at pp. 1-2; IHO Ex. 1 at p. 1). The parties do not dispute that, at respondent's election, the student is home schooled pursuant to State regulations (Dist. Ex. 1 at p. 1; IHO Ex. 1 at p. 1; see 8 NYCRR 100.10).

In August 2007, petitioner's school superintendent notified the parents of all home schooled students that, effective September 1, 2007, petitioner would no longer provide special education services to students who were not enrolled in petitioner's district or at a New York State recognized nonpublic school (IHO Ex. 1 at p. 1). By letter dated August 29, 2007, petitioner's CSE chairperson notified respondent that petitioner would no longer provide special education services to home schooled students and requested that respondent return equipment loaned to respondent's family (id. at p. 2).

On September 7, 2007, respondent filed a due process complaint notice, alleging that the student needed the services recommended on his May 2007 IEP, and respondent informed petitioner that she was aware of a previous decision by a State Review Officer cited in a September 1, 2007 letter from the superintendent (Dist. Ex. 3 at p. 1).[2, 3] Respondent requested that the student be given the education program and services listed in the May 2007 IEP (id. at pp. 1-2).

The impartial hearing officer received the parties' stipulation of facts and exhibits into evidence (IHO Ex. 1). Among the exhibits entered into the hearing record was a letter from the Executive Coordinator for the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) to petitioner's attorney dated June 11, 1998 (June 1998 Letter) and an undated document posted on the State Education Department website entitled "Home Instruction Questions and Answers" (Q&A document) (Dist. Ex. 5; Parent Ex. F).[4]

On January 4, 2008, the impartial hearing officer rendered a decision directing petitioner to provide the services listed in the May 2007 IEP to the student (IHO Decision at pp. 1, 8-9). The impartial hearing officer determined that the "substantially equivalent" education language in article 65 of the New York State Education Law (the "compulsory education" law) were not words of clear import and thus required interpretation (id. at pp. 2-4; see Educ. Law § 3204[2]). He determined that deference should be given to the State Education Department in accordance with the June 1998 Letter and the Q&A Document, and that the dispute should be resolved in accordance with the Q&A Document (IHO Decision at pp. 4-6). The impartial hearing officer observed that the Q&A Document was amended in December 2007 to omit the questions related to special education services while the proceeding before him was pending (id. at p. 6). The impartial hearing officer held that the amendments to the Q&A Document should not be given retroactive effect because respondent filed her claim prior to the amendments therein and he agreed

[2] Both petitioner and respondent previously appeared in Application of the Bd. of Educ., Appeal No. 07-043; however, the dispute in that case involved a different student (IHO Ex. 1 p. 2).

[3] The September 1, 2007 letter or its contents are not otherwise identified in the hearing record.

[4] A disclaimer added to the Q&A document indicates that, as of February 25, 2005, the document does not reflect changes to the State regulations made by the Board of Regents in September 2004 and that the Q&A document may not, therefore, necessarily be accurate (Dist. Ex. 5 at p. 1).

that respondent's son should be awarded the services on the May 2007 IEP for the 2007-08 school year (id. at p. 8).

Petitioner appeals, contending that the impartial hearing officer failed to give sufficient weight to the decision rendered in Application of the Bd. of Educ., Appeal No. 07-043 or the revisions to the State Education Department's Q&A document. Petitioner argues that the impartial hearing officer misapplied the doctrine of retroactivity and that he failed to conclude under federal and State law that students who are home schooled are not entitled to special education services "because such students are not enrolled in a public school and are not deemed enrolled in a private school." According to petitioner, the State Education Department has, subsequent to the rendering of the impartial hearing officer's decision, published a guidance memorandum in January 2008 explaining that special education services are not available to home schooled students under the Individuals with Disabilities Education Act (IDEA) or New York State law.[5] Petitioner requests that the impartial hearing officer's decision be annulled.

Respondent answers and denies that the impartial hearing officer erred, arguing that the impartial hearing officer devoted a great deal of time to analyzing the parties' legal arguments. Respondent also asserts that a resolution of this appeal requires a State Review Officer to exercise jurisdiction over employees of the State Education Department, which respondent argues is prohibited under State regulations. With respect to the decision rendered in Application of the Bd. of Educ., Appeal No. 07-043, upon which petitioner has relied, respondent asserts, among other things, that that decision was rendered in excess of the authority of a State Review Officer. Respondent contends that the January 2008 policy memorandum is irrational and should not be afforded any deference, and that the impartial hearing officer's conclusion that the Q&A document favoring the provision of special education services to students who are home schooled should be accorded deference and be upheld.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a free appropriate public education (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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[6]

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[5] A copy of the January 2008 guidance memorandum proffered by petitioner (see Pet. Ex. 15 at pp. 2-3) is posted at http://www.vesid.nysed.gov/specialed/publications/policy/homeschool.pdf.

[6] 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]).

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 student, 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 student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (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]).[7]

Turning first to respondent's argument regarding the scope of jurisdiction of a State Review Officer, "[a] state review officer . . . shall review and may modify, . . . in order to properly effectuate the purposes of [Article 89], any determination of the impartial hearing officer relating to the . . . selection of an appropriate special education program or service and the failure to provide such program and require such board [of education] to comply with the provisions of such modification" (Educ. Law § 4402[2]; see 34 C.F.R. § 300.514[b]; 8 NYCRR 279.1[a]). A State Review Officer's jurisdiction is circumscribed insofar as he or she may not review impartial hearing decisions in which the State Education Department is a party (8 NYCRR 279.1[c][1]) or review the actions of any officer or employee of the State Education Department (8 NYCRR 279.1[c][2]). The statutory and regulatory schemes for State-level review in New York were held not to violate federal law (Board of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc. 2d 539, 543-44 [Sup. Ct. Nassau County 1994]).

In this case, neither the State Education Department nor any of its employees are a party to these proceedings, and no actions of the State Education Department are under review. The decision of the impartial hearing officer rejects the reasoning of petitioner, a local school district, which declined to implement the student's May 2007 IEP (IHO Decision at pp. 1-2, 8; see IHO Ex. 1 at pp. 1-2). Although a party may opt to rely on a decision issued by a State Review Officer, or another document published by the State Education Department, as a reason for its actions, the State regulations do not provide that the party's reliance divests a State Review Officer of jurisdiction (see 8 NYCRR 279.1[c][1]-[2]). Accordingly, I find that respondent's jurisdictional argument lacks merit.

With respect to respondent's challenge to the decision in Application of the Bd. of Educ., Appeal No. 07-043, I note that a State Review Officer's decision is final and binding upon the parties unless appealed in a civil action (20 U.S.C. § 1415[i][1][a]; 34 C.F.R. §§ 300.514[d]; 300.516; 8 NYCRR 200.5[k][3]). Here, the parties' stipulation of facts suggests that litigation challenging the decision rendered in Application of the Bd. of Educ., Appeal No. 07-043 was commenced in the United States District Court for the Northern District of New York (IHO Ex. 1 at p. 2; see 34 C.F.R. § 300.516[a]; 8 NYCRR 200.5[k][3]). In addition, an application to reopen or reargue a prior decision of a State Review Officer is expressly prohibited by State regulation (8 NYCRR 276.8[d]). Therefore, it is unnecessary to review respondent's challenge to the decision in Application of the Bd. of Educ., Appeal No. 07-043 in this case.

Turning next to the parties' contentions regarding the provision of special education services to students who are not enrolled in a public or nonpublic school and are instead home

[7] On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced before the effective date of the amendment.

schooled (see 8 NYCRR 100.10),[8] the Official Analysis of Comments to the revised IDEA regulations indicates that:

> "[a] few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.
>
> Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools."

(Expenditures, 71 Fed. Reg. 46594 [August 14, 2006]). This analysis is consistent with and further clarifies the guidance previously issued by the United States Department of Education Office of Special Education Programs (OSEP), which occurred prior to both the 1999 federal regulations implementing IDEA 1997 and the 2006 federal regulations implementing IDEA 2004 (Letter to Sarzynski, 29 IDELR 904 [OSEP 1997]; Letter to Williams, 18 IDELR 742 [OSEP 1992]).[9] Thus, the IDEA, as implemented by the United States Department of Education, provides that home schooled students shall receive special education services to the same extent that other parentally-placed private school students receive services if home schools are recognized under state law as private elementary (34 CFR § 300.13) or secondary schools (34 CFR § 300.36). However, in New York State, a home schooled student does not have an entitlement to IEP services because home schools are not recognized in New York as private elementary or secondary schools (see 8 NYCRR 100.10).[10]

In this case, there is no dispute that the student is home schooled (IHO Ex. 1 at p. 1) and that respondent seeks an order entitling the student to services pursuant to his IEP. Although the impartial hearing officer reasoned that the substantial equivalence language in the compulsory education law, the June 1998 Letter and the Q&A document require that the student receive special education services from respondent (Educ. Law §§ 3204[2], 3210[2][d]), I do not agree in light of the more recent interpretation of the IDEA by the United States Department of Education regarding the manner in which states may opt to extend entitlement to special education services to eligible

[8] Although State regulation refers to home schooling as students who are receiving "home instruction" (8 NYCRR 100.10), upon reviewing the hearing record as a whole, I note that the parties and the impartial hearing officer have often used the terms "home schooling" and home instruction interchangeably (see, e.g., IHO Decision at pp. 1-2, 5; IHO Ex. I at pp. 1, 3). Although the parties use the terms interchangeably, it is apparent from the hearing record that their dispute concerns home schooling (8 NYCRR 100.10) and not home and hospital instruction (8 NYCRR 200.6[i]), I will therefore use the term home schooling.

[9] A copy of the OSEP letter is also included in the hearing record (Parent Ex. B).

[10] Some states have opted to extend entitlement to special education services to home schooled students (see, e.g., Ariz. Rev. Stat. § 15-763[C]; Ark. Code Ann. § 6-15-507[a][2]; Del. Code Ann. tit 14 § 2703A; Ga. Code Ann. § 20-2-159; Me. Rev. Stat. Ann tit. 20-A § 5021[3]; Nev. Rev. Stat § 392.070[2]; Wash. Rev. Code § 28A.150.350).

home schooled students (Expenditures, 71 Fed. Reg. 46594 [August 14, 2006]; see Hooks v. Clark County Sch. Dist., 228 F.3d 1036, 1041 [9th Cir. 2000]).[11] In this case, for the student to have entitlement to IEP services to the same extent as parentally-placed private school students, the State must recognize home schools as private elementary or secondary schools defined pursuant to the IDEA (id.).

The Commissioner of Education has determined that home school students are not considered dually enrolled in nonpublic schools (see Appeal of Ando 45 Educ. Rep. 523 [2006] [holding that a home school student may not receive career education services though BOCES; Appeal of Pope, 40 Educ. Rep. 473 [2001] [finding that a home school student may not participate in driver education classes that are offered to students enrolled in the public school]; see also Educ. Law § 3602-c). In accordance with the foregoing, I find that, for all times relevant to this proceeding, no provision of the Education Law, or State regulations purports to recognize home schools as private or nonpublic schools under the IDEA and, therefore, the student is not entitled to receive special education or services under the IDEA or State Education Law in accordance with his May 2007 IEP.[12]

I have considered the parties remaining contentions and find that it is unnecessary to address them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated January 4, 2008 is annulled.

Dated: **Albany, New York**
March 17, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[11] The hearing record does not indicate whether the State Education Department adopted or publicized a policy relying on the June 1998 letter.

[12] I note that, in general, a school district's responsibility pursuant to the child find provisions to identify and, with the consent of the parent, evaluate a student with regard to eligibility for special education services is much broader than its responsibility to implement such recommended services (see Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313 [W.D.N.Y. 2007]; see also 20 U.S.C. § 1412[a][3]; Educ. Law §§ 4402[1][a]; 4410[4]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a]).