The University of the State of New York

The State Education Department
State Review Officer

No. 08-144

Application of a STUDENT 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:
Skyer, Castro, Foley & Gersten, attorneys for petitioners, Jesse Cole Foley, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Brooklyn Autism Center Academy (BAC) for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was of kindergarten age and enrolled at BAC, a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student previously received diagnoses of an autistic disorder, verbal apraxia and an auditory processing disorder (Dist. Ex. 14 at p. 9). The student's cognitive abilities are in the very low range, he is non-verbal and he exhibits significant delays in adaptive, speech-language, play, sensory integration and motor skills (Dist. Exs. 8-14). The student also exhibits high rates of distractibility and self-stimulatory behaviors (Dist. Ex. 12 at p. 4).

The student previously received occupational therapy (OT), physical therapy (PT) and speech-language therapy through the Early Intervention Program (EIP) (Tr. p. 607). At 18 months of age, the student was diagnosed as having an autistic spectrum disorder, sensory integration dysfunction and language delays (Tr. p. 608; Dist. Ex. 14 at p. 1). In addition to OT, PT and speech-language therapy services, the EIP provided play therapy and special education instruction to the student that included the use of Floortime and applied behavioral analysis (ABA) methods (Tr. p. 608). At the time the student transitioned to respondent's (the district's) Committee on

Preschool Special Education (CPSE), the EIP was providing the student with 40 hours of special education itinerant teacher (SEIT) instruction, five 60-minute sessions of speech-language therapy, five 60-minute sessions OT per week, and two 60-minute sessions of PT per week (Tr. p. 609). For the 2006-07 school year, the CPSE determined that the student was eligible for special education services as a preschool student with a disability and offered the student 30 hours per week of direct home-based SEIT service, five hours of indirect parent training and related services consisting of five individual 60-minute sessions per week of speech-language therapy, three individual 60-minute sessions per week of PT and three 60-minute and two 45-minute sessions of individual OT per week (Tr. p. 611; Parent Ex. B at pp. 1, 30).[1]

On June 4, 2007, the Committee on Special Education (CSE) convened to develop the student's special education program for the 2007-08 school year (Dist. Ex. 4). Meeting attendees included the student's mother, the student's ABA program coordinator, a district representative who also participated as a district school psychologist, a regular education teacher, and a special education teacher (id. at p. 2).[2] The CSE determined that the student was eligible for special education services as a student with autism and recommended annual goals and short-term objectives to improve the student's skills in the areas of oral-motor, speech-language, augmentative communication, social/peer interaction, play, activities of daily living, fine motor, gross motor, cognitive, imitation, and pragmatic language; as well as an annual goal and short-term objectives to eliminate inappropriate/maladaptive behaviors from his "repertoire" (id. at pp. 8-29). The CSE further recommended for the student a 6:1+1 special class program in a specialized school, assistive technology device(s), three 30-minute individual sessions of counseling per week, and five 30-minute individual sessions each of OT, PT and speech-language therapy per week (id. at pp. 1, 7, 32).

The parents sent a letter dated August 20, 2007 to the CSE chairperson informing him that they were unilaterally placing the student at BAC as of the first day of school for the 2007-08 school year and that they intended to seek funding for the placement from the district (Parent Ex. A). The letter stated in general terms that the parents maintained that the student's individualized education program (IEP) and the offered placement denied the student a free appropriate public education (FAPE) "on both procedural and substantive grounds," and that further details describing the nature of the problem(s) with the IEP and/or placement would "follow in a hearing request under separate cover" (id.).[3]

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[1] The CPSE provided the student's special education services through August 2007 (Tr. p. 611).

[2] The hearing record reflects that the CSE meeting lasted for approximately 45 minutes and that the regular education teacher attended the meeting for approximately 15 minutes (Tr. pp. 40, 42).

[3] The notice informed the district that the unilateral placement was intended to be at district expense, but it did not state, except in general terms, the parents' concerns with the district's recommended IEP (see 20 U.S.C. § 1412[a][10][C][iii][I][aa]). The notice requirement of 20 U.S.C. § 1412 "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). The notice in this matter provided the district notice of the unilateral placement intended at public expense, but it did not give adequate notice of the parents' particular procedural or substantive concerns with the proposed IEP. Whether under 20 U.S.C. § 1412 notice requirements or general equity principles regarding notice (see Frank G. 459 F. 3d. 356, 376), the notice did not adequately inform the district of the parents' concerns (see Application of a Child with a Disability, Appeal No. 08-088).

The parents, through their attorneys, filed a "corrected" due process complaint notice dated December 28, 2007 alleging that the district failed to offer the student a FAPE on both procedural and substantive bases (Dist. Ex. 1). Procedurally, the parents alleged that the June 4, 2007 CSE meeting was not properly constituted because a regular education teacher did not participate for the entire duration of the meeting (id. at p. 2). The parents also alleged that the failure of the CSE to include an additional parent member, despite securing a written waiver from the parents, was inappropriate (id.).

The parents also alleged that the academic performance and learning characteristics portion of the June 4, 2007 IEP was photocopied from a district CPSE IEP dated June 15, 2006 (see Parent Ex. B; Dist. Ex. 4), despite the parents providing the CSE with progress reports after June 2006 (Dist. Ex. 1 at p. 2). The parents asserted that the "recycling" of the June 15, 2006 IEP resulted in the June 4, 2007 IEP failing to accurately reflect the student's then-current levels of functioning, as well as denying the CSE the opportunity to properly group the student and denying the student's teachers and service providers of accurate and current information regarding the student's functioning (id.). The parents similarly alleged that the social/emotional performance and the majority of the annual goals and short-term objectives in the June 4, 2007 IEP were also photocopied from the June 15, 2006 IEP (id.). With respect to the annual goals and short-term objectives, the parents alleged that they did not contain baseline, then-current, or target levels of functioning, resulting in goals that were not measurable (id.). The parents argued that the alleged deficiencies rendered it impossible to determine whether the recommended program would convey an academic benefit to the student (id.).

The parents alleged that the CSE recommendation that the student's related services be reduced to being provided in 30-minute sessions, without the participation of an occupational therapist, physical therapist or speech-language therapist, or supporting documentation at the CSE meeting, denied the student a FAPE by being made without regard to the student's individualized needs (Dist. Ex. 1 at p. 2).

With regard to the offered placement location, the parents alleged that it failed to provide the student with functional grouping for academic, social and emotional purposes (Dist. Ex. 1 at pp. 2-3). The parents also alleged that the staff at the proposed placement were not sufficiently trained and knowledgeable regarding the student's individualized learning and communication needs, and that the failure of the district to appropriately train the staff amounted to a denial of a FAPE for the student (id. at p. 3).

The hearing record reflects that the student's mother participated in the CSE meeting at which the student's June 2007 IEP was developed, and that she did not express that she felt that the recommended goals were not appropriate for the student (Tr. pp. 42-43, 57-58). There is no indication in the hearing record that the student's mother objected to the 6:1+1 placement of the student at the CSE meeting, although she later stated that she was concerned about it (Tr. p. 625). The student's ABA coordinator testified that she voiced disagreement at the CSE meeting with reducing the length of the student's OT, PT and speech-language therapy sessions (Tr. p. 372). The hearing record reflects that the student's IEP was sent to the parents on June 5, 2007 (Dist. Ex. 4 at p. 2).

As a means for settlement, the parents proposed that the district reimburse the parents for tuition paid to BAC for the student for the 2007-08 school year (Dist. Ex. 1 at p. 3).[4]

An impartial hearing convened for six days from April 9, 2008 to October 8, 2008 (Tr. pp. 1, 162, 338, 505, 603, 724). The district called three witnesses and submitted 19 documents into evidence (Tr. pp. 33, 165, 318; Dist. Exs. 1-19). The parents called four witnesses, including the student's mother, and submitted 16 documents into evidence (Tr. pp. 346, 442, 606, 684; Parent Exs. A-P).

In a decision dated October 22, 2008, the impartial hearing officer found that the district offered the student a FAPE and therefore declined to award the parents tuition reimbursement (IHO Decision at p. 18). The impartial hearing officer found that the program offered to the student was substantively appropriate and calculated for him to make educational progress, and that the district met its burden of production and persuasion (id. at p. 5).

The impartial hearing officer found that any procedural flaws in the development of the student's IEP for the 2007-08 school year did not constitute a denial of a FAPE (IHO Decision at p. 6). Specifically, the impartial hearing officer found that (1) the absence of an additional parent member did not rise to a denial of a FAPE as the parent still participated in the development of the IEP;[5] (2) the limited involvement of a regular education teacher did not rise to a denial of a FAPE as there was no evidence in the record that the absence of a regular education teacher from the entire duration of the IEP meeting resulted in a loss of educational opportunity or compromised the development of an appropriate IEP for the student; (3) the parent was not precluded from meaningful participation in the formulation of the student's IEP; (4) any photocopying from a prior IEP did not constitute a denial of a FAPE as the student's past information was still accurate based on information in the hearing record; and (5) although the IEP did not state that certain progress reports were reviewed, the hearing record otherwise reflected that the documents were reviewed in preparing the student's IEP and therefore this does not result in a denial of a FAPE (id. at pp. 6-8).

Substantively, the impartial hearing officer found that the student's IEP accurately reflected the results of the student's evaluations and identified the student's then-current needs, as well as contained levels of present performance that accurately reflected the evaluations in the hearing record and the testimony at the impartial hearing (IHO Decision at pp. 8-11). With respect to the annual goals contained in the student's IEP, the impartial hearing officer found that they related to the student's needs and provided for the use of appropriate educational services, as well as reflected

[4] The hearing record contains a response by the district to a due process complaint notice purportedly dated December 19, 2007 (Dist. Ex. 2), which due process complaint notice is not part of the hearing record. The hearing record does not contain a response to the December 28, 2007 corrected due process complaint notice that is part of the hearing record (Dist. Ex. 1).

[5] The impartial hearing officer notes that parents have the right to decline, in writing, the participation of an additional parent member (8 NYCRR 200.5[c][v][2]) and that the parents did make a written declination in this case (IHO Decision at p. 7; see also Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058).

the student's evaluations, provided sufficient information to properly group the student, and provided the student's teachers with accurate information (id. at p. 11). The impartial hearing officer also found that testimony at the impartial hearing supported that the goals were appropriate for the student (id.). The impartial hearing officer determined that the program offered to the student was substantively appropriate and calculated for him to make educational progress (id.). This finding was supported by the impartial hearing officer's repeated citation to the hearing record with respect to the appropriateness of the offered 6:1+1 placement with related services, the classroom in which the student would have been placed, and the methodologies utilized by the classroom teacher (id. at pp. 11-18). The impartial hearing officer also found that, based on the hearing record, the student would have been suitably grouped for academic, social and emotional purposes, and that the staff's training, certification and experience were sufficient to address the student's needs (id. at p. 18).

The parents appeal the decision of the impartial hearing officer, raising the same issues that they raised in their due process complaint notice and alleging that the impartial hearing officer erred in finding that the district met its burden of proving that it offered the student a FAPE for the 2007-08 school year. Specifically, the parents request that a State Review Officer determine (1) that the CSE was required to review and consider the most recent evaluations of the student prior to developing his IEP and that it failed to do so in this instance, resulting in a denial of a FAPE; (2) that the CSE was required to consider the individualized nature of the student's disability when making its program recommendation and that it failed to do so in this instance; (3) that the CSE disregarded the recommendations of the related service providers without justification or participation of any member qualified to make such a determination, resulting in the denial of a FAPE; (4) that the CSE failed to ensure the attendance of an additional parent member and secured the parents' written waiver under duress, resulting in the denial of a FAPE; (5) that the annual goals and short-term objectives were not discussed at the CSE meeting, which resulted in the parents being denied the opportunity to meaningfully participate in the development of the student's IEP; (6) that the site offered by the district failed to meet all of the students educational needs, failed to provide the student with the level of individualized instructional support that he required, failed to have staff that was appropriately trained to meet the student's needs, and was otherwise inappropriate for the student; (7) that BAC conferred educational benefit upon the student; (8) that the equities support the parents' claim for reimbursement; and (9) that the parents are entitled to reimbursement for tuition at BAC for the 2007-08 school year.

In their answer, the district denies many of the parents' allegations and asserts that the impartial hearing officer properly found that the district met its burden to show that it offered the student a FAPE for the 2007-08 school year. The district also asserts that the parents failed to demonstrate that BAC was an appropriate placement for the student.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018;[6] 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

[6] The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

I agree with the impartial hearing officer that there were no procedural inadequacies in the development of the student's IEP in this case that rose to the level of a denial of a FAPE to the student. I also concur with the impartial hearing officer that the district sufficiently demonstrated that the IEP developed for the student in this case was reasonably calculated to enable the student to receive educational benefits (IHO Decision at pp. 5, 11).

Based on the hearing record and the particular facts before me, and upon a complete and independent review of the hearing record, I am not persuaded that the impartial hearing officer erred in finding that the district met its burden of proof to show that the student was offered a FAPE for the 2007-08 school year. I find that the impartial hearing was conducted in a manner consistent with the requirements of due process (34 C.F.R. §§ 300.511-13; N.Y. Educ. Law § 4404[2]) and that the decision of the impartial hearing officer relating to the above issues demonstrates that she carefully reviewed the evidence in the hearing record and the parents' allegations, and applied a proper legal analysis. I find no need to modify the impartial hearing officer's decision and order of dismissal on these issues. A review of the hearing record also demonstrates that a FAPE was offered to the student in the LRE.

Having determined that the parents did not meet their burden of proving that the district failed to offer the student a FAPE for the 2007-08 school year, I need not reach the issue of whether BAC was appropriate for the student, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 9, 2009

PAUL F. KELLY
STATE REVIEW OFFICER