The University of the State of New York

The State Education Department
State Review Officer
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No. 09-006

Application of a STUDENT 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:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Vida Alvy, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that respondent (the district) made the requisite efforts to comply with its obligation to offer a free and appropriate education (FAPE) to the student, remanded the matter to the district's Committee on Special Education (CSE), and directed the CSE to reopen the student's case if the parent submits a written request to the CSE.[1] The appeal must be sustained in part.

According to the parent, the student is currently attending a private school (Pet. ¶ 1). According to the hearing record, the student is classified as a student with autism (Parent Ex. D at p. 3; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In an amended due process complaint notice dated September 6, 2008, the parent requested an impartial hearing (Dist. Ex. 8). The parent's September 6, 2008 amended due process complaint notice included general allegations that "[t]he parent and child are aggrieved by the actions of the

[1] The September 6, 2008 due process complaint notice is identified by the district as case number 115837. The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 08-046; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 09-004).

[district] evaluators and personnel in impede [sic] the due process procedures and impede the child from receiving FAPE which is continuing to the present day" (id. at p. 5). The parent's September 6, 2008 amended due process complaint notice also alleged that the district failed to provide the parent with a requested CSE meeting, an independent educational evaluation (IEE) and an annual review for the 2007-08 school year, and failed to provide the proper forum to amend documents (id.). The parent also raised general objections to the district's procedures concerning resolution sessions and the location of an impartial hearing (id. at pp. 2-3, 4, 6).[2]

The impartial hearing was held on two dates, November 24, 2008 and November 26, 2008. The parent did not appear at the impartial hearing (IHO Decision at p. 2). An individual identifying himself as the student's uncle and parent's "assistant" appeared before the impartial hearing officer (Tr. pp. 3, 10).

In a decision dated December 3, 2008, the impartial hearing officer found that the district had made the "requisite efforts" to comply with its obligations to offer the student a FAPE (IHO Decision at p. 3). The impartial hearing officer found that the district made at least three attempts to evaluate the student, as evidenced by the scheduling of three evaluations, "which is a preliminary step towards a full review by a review team of the student's current educational needs" (id. at pp. 2, 3). The impartial hearing officer also found that the parent did not produce the student for the evaluations (id. at p. 2). The impartial hearing officer noted that, at the impartial hearing, the district had indicated its continued willingness to schedule evaluations and an IEP conference upon request by the parent (id. at p. 3). The impartial hearing officer further found that the hearing record indicated that the most recent IEP developed was in 2007 and that the student was entitled to a review of that IEP (id.). The impartial hearing officer ordered a remand of the matter to the CSE and directed the CSE to "re-open" the student's case, upon submission of a written request by the parent (id.). The impartial hearing officer further ordered that "[a]part from evaluations and an IEP conference, the remaining relief requested, as set forth in the impartial hearing request, is denied and the issues raised therein are dismissed with prejudice" (id.).

The parent appeals from the impartial hearing officer's decision, claiming, among other things, that the impartial hearing officer's decision should be annulled and vacated on the basis of "misconduct." The parent alleges that the impartial hearing officer failed to fulfill her role and responsibility as an impartial hearing officer in that she "rushed" the "parent assistant" through the proceedings, did not review the evidence, precluded parent subpoena requests and did not provide the parent with a timely decision. The parent makes additional allegations regarding other

[2] The September 6, 2008 amended due process complaint notice was filed subsequent to Application of a Student with a Disability, Appeal No. 08-048, which granted the parent leave to amend his April 20, 2008 due process complaint notice within 30 days from the date of that decision. The April 20, 2008 due process complaint notice was included as part of the September 6, 2008 amended due process complaint notice and alleged that evaluations, assessments and/or information, as well as the procedural safeguards notice, were not provided to the parent before the student's June 1, 2007 CSE meeting (Dist. Ex. 8 at p. 9). The April 20, 2008 due process complaint notice also alleged that evaluations, assessments and information from the parent were not considered at the June 2007 CSE meeting (id.). The proposed solution indicated in the April 20, 2008 due process complaint notice sought copies of the written policy and procedures for a CSE meeting, the writing of a quality individualized education program (IEP), the written district criteria for the evaluations that were used at the CSE meeting, and written minutes of the CSE meeting (id. at p. 9). The parent also sought written criteria regarding procedures for changing a student's classification (id.).

impartial hearings and proceedings which are not related to the decision by the impartial hearing officer in the instant matter.

In its answer, the district alleges that the petition should be dismissed because it is procedurally defective based upon the parent's failure to articulate the reasons for challenging the impartial hearing officer's decision pursuant to 8 NYCRR 279.4(a). Also, the district alleges that, although the parent alleged misconduct by the impartial hearing officer, the allegations are vague and conclusory and unsupported by any references in the hearing record for support. The district further argues that the petition should be dismissed as the impartial hearing officer incorrectly expanded the scope of the proceeding and permitted the parent to raise a claim requesting an annual review for the 2008-09 school year at the impartial hearing. The district further alleges that the September 6, 2008 amended due process complaint notice should have been dismissed based upon the parent's failure to appear. In addition, the district alleges that the parent is not aggrieved by the impartial hearing officer's decision. The district also alleges that the impartial hearing officer's decision was factually and legally correct, as the evidence showed that the district had undertaken the necessary steps to provide the student with a FAPE, but was precluded from completing its responsibility due to a lack of parental cooperation.

Initially, I will address several preliminary matters. First, the parent requests oral argument before a State Review Officer. Such argument is authorized by the rules governing appeals to a State Review Officer only in the event that a State Review Officer determines that oral argument is necessary (8 NYCRR 279.10). I find that oral argument is not necessary in this matter, therefore, the parent's request is denied (see Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-041; Application of a Child with a Disability, Appeal No. 03-067). Second, the parent requests that a State Review Officer conduct a hearing. This request is also denied as unnecessary. Third, the district asserts that the additional documents attached as exhibits to the parent's petition, should be rejected. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the additional evidence submitted by the parent with the petition is not necessary for a decision and/or is duplicative. Accordingly, these documents will not be considered. Likewise, I decline the parent's request to submit additional evidence, including audio and video recordings "to complete" the record on appeal, as unnecessary. Fourth, the parent requests "compensatory, punitive and any other appropriate financial restitution as part of the relief deemed fair and appropriate in this forum." With regard to the parent's claim for monetary compensation, it is well settled that monetary damages, including compensatory and punitive damages, are not available to remedy violations of

the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). Consequently, these claims are not properly before me and must be denied.

Fifth, the parent's request that a State Review Officer conduct an independent verification of the rotational impartial hearing officer selection process is denied. In its answer the district alleges that the claim is waived as it was not raised at the impartial hearing below. In addition, the district provides documentary evidence in support of its claim that the impartial hearing officer was selected in a timely manner. I find that the parent's failure to allege any specific improprieties with the rotational selection process at the impartial hearing below renders that claim waived. Sixth, since the parent raised a claim below regarding the timeliness of the appointment of the impartial hearing officer, I will address that issue. Impartial hearing officers must be appointed by the board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). On September 10, 2008, the parent was notified via U.S. mail that an impartial hearing officer was recused from the case due to unavailability and a second impartial hearing officer was appointed (Answer Ex. IV at p. 1). Another notice was sent to the parent via U.S. mail on September 11, 2008, advising that a second impartial hearing officer was recused and a third impartial hearing officer was appointed (id. at p. 2). On September 22, 2008, the parent was advised that the third impartial hearing officer was recused and a fourth impartial hearing officer was appointed (id. at p. 3). The parent's due process complaint notice is dated September 6, 2008 (Dist. Ex. 8). A review of the 2008 calendar indicates that September 6, 2008 was a Saturday. The State regulations require that "[t]he rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent" (8 NYCRR 200.5[j][3][i][a]). Accordingly, I find that the evidence supports a finding that the rotational selection process was "initiated" "not later" than two business days after receipt by the district of the due process complaint notice.

Seventh, the parent asks for relief pertaining to a number of issues that were not properly raised before the impartial hearing officer in the parent's September 6, 2008 due process complaint notice relating to the operations of the district's hearing office. I decline to address those issues, in part because they were not properly raised below and are not properly before me (see Educ. Law § 4404[2]; 8 NYCRR 200.5[j][1][ii], [k]; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Child with a Disability, Appeal No. 07-085). Eighth, the parent requests that a State Review Officer determine that the impartial hearing officer engaged in "misconduct" or "incompetence," but he does not state any facts to support this allegation. A review of the record on appeal reveals no evidence of misconduct or incompetence by the impartial hearing officer. Accordingly, the parent's request is denied.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]; 8 NYCRR 200.5[j][4][ii]; 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, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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; 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).

A student identified as eligible for services under the IDEA is entitled to have their IEP reviewed and revised as appropriate (20 U.S.C § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]). Such review is to take place periodically, but not less than annually (id.). Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an evaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008])[3] and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

The hearing record shows that three appointments were scheduled by the district to obtain evaluations to assess the student's educational needs (Dist. Exs. 1-3). The appointments were scheduled on August 8, 2008, August 19, 2008, and September 11, 2008 (id.). The hearing record indicates that appointment letters were sent to the parent (id.). The hearing record reveals that the student did not attend any of the scheduled appointments (Dist. Ex. 4). By letter dated September 17, 2008, the district advised the parent that "[b]ecause you and your son have not attended any of these scheduled appointments … the Committee on Special Education will now close the case. If at any time you wish to re-open the case, please send a letter to the CSE and we will schedule an evaluation."[4] Here, the district apparently treated the student as a student initially referred for special education services and terminated the "referral" due to a lack of cooperation by the parent with the evaluation process (Dist. Ex. 4). However the hearing record shows that the student is not a student initially referred for an eligibility determination (see 8 NYCRR 200.5[b][1][i][c]), rather the hearing record shows that the student had been previously found eligible for services under the IDEA and that an IEP was formulated for the student on August 31, 2007 (see Parent Ex. D at p. 3). Moreover, the hearing record does not demonstrate that the student has been found ineligible for special education services (see 8 NYCRR 200.4[d][1]). Given the hearing record and the circumstances herein, I will direct that a CSE convene to review the student's IEP consistent with the requirements of 8 NYCRR 200.4[f].

I note that the hearing record reflects that the district attempted to reevaluate the student on three occasions; however, the parent did not bring the student to the three scheduled evaluation appointments. The hearing record also reflects that an annual review is needed, thus I will remand

[3] "Consent" is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[*l*]).

[4] I further note that the parent was sent a "Notice of Withdrawal from the Evaluation Process" dated September 17, 2008, and that this form indicated for "initial referrals only" (Dist. Ex. 5).

the matter to the CSE and direct that they convene, unless the parties otherwise agree, within 30 days of the date of the decision to develop an IEP for the remainder of the 2008-09 school year and to develop an IEP for the upcoming 2009-10 school year.[5] The CSE shall consider existing evaluation data and the need for additional evaluations (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). I also encourage the parent and the district to consider conducting a comprehensive psychoeducational evaluation of the student, including, but not limited to an assessment of the student's cognitive functioning; social/emotional functioning; reading, writing, and math skills; and need for any related services. I encourage the parties to cooperate to ensure that appropriate evaluations take place and that an appropriate IEP, if the student requires IDEA services, is formulated.

Lastly, I note that there is no requirement that an impartial hearing or CSE meeting be videotaped.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated December 3, 2008 that requires the parent to submit a letter to request the CSE to "re-open" the student's case is hereby annulled; and

IT IS FURTHER ORDERED that within 30 days after the date of this decision, the district's CSE shall convene, and review and revise as appropriate, the student's educational program for the student for the remainder of the 2008-09 school year if, as of the date of this decision, the CSE has not already recommended an educational program for the student for the 2008-09 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, within 30 days after the date of this decision, the CSE shall convene and formulate as appropriate, the student's educational program for the 2009-10 school year; and

[5] A CSE is required to include a parent of the student (34 C.F.R. § 300.321; 8 NYCRR 200.3[c][2]). However, a CSE may proceed without a parent or guardian in attendance and the CSE may make decisions in the parent's or guardian's absence if a school district is unable to convince a parent or a guardian to attend, so long as the school district maintains a detailed record of its attempts to secure a parent's participation (34 C.F.R. § 300.322[d]; 8 NYCRR 200.5[d][3], [4]; Application of a Student with a Disability, Appeal No. 08-026; Application of a Child with a Disability, Appeal No. 05-059; Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052).

IT IS FURTHER ORDERED that when the CSE convenes pursuant to this decision, it shall consider existing evaluation data and the need for additional evaluations.

Dated: **Albany, New York**
March 23, 2009

PAUL F. KELLY
STATE REVIEW OFFICER