



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-022

**Application of the BOARD OF EDUCATION OF THE
AUBURN ENLARGED CITY 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:

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondents, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that there was a deprivation of speech-language therapy services to respondents' (the parents') son during the period of January 1, 2008 through June 23, 2008 that denied the student a free appropriate public education (FAPE), and further found that the district's Committee on Special Education (CSE) should convene and determine what amount of additional services are necessary to remedy the deprivation. The appeal must be sustained.

The student's educational history is discussed in Application of the Bd. of Educ., Appeal No. 08-074, issued on September 5, 2008, and will not be repeated here in detail. A prior impartial hearing (Hearing 1) was held on this matter on four dates between March 20, 2008 and April 24, 2008 (see Application of the Bd. of Educ., Appeal No. 08-074). At the time of Hearing 1, the student was a patient at a New York State Office of Mental Health (OMH) facility, the St. Lawrence Psychiatric Center (SLPC) (*id.*). The student's eligibility for special education services as a student with autism was not in dispute (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). In a June 23, 2008 decision emanating from Hearing 1, the impartial hearing officer found that the district failed to offer the student a FAPE, primarily on the ground that the district had failed to recommend a residential placement for the student, and he ordered the district to provide the student with additional services (Dist. Ex. 46 at p. 17). The impartial hearing officer further ordered the

district's CSE to reconvene to recommend an appropriate program for the student and a placement in a residential school (id.).

The district appealed. The appeal was sustained in part, after a determination that the district's January 2008 individualized education program (IEP) offered the student a FAPE (see Application of the Bd. of Educ., Appeal No. 08-074). Additionally, the matter was remanded to the impartial hearing officer to determine the following: (1) whether there was a deprivation of occupational therapy (OT) and/or speech-language services while the student attended the educational program at SLPC from January 1, 2008 to the date of the impartial hearing officer's decision; (2) whether the deprivation, if any, denied the student a FAPE; and (3) what amount of additional services, based upon the evidence in the hearing record, would be appropriate to remedy any such deprivation (id.).

Prior to the issuance of Application of the Bd. of Educ., Appeal No. 08-074 on September 5, 2008, the district's CSE convened on July 2, 2008 for the student's annual review and to plan for the student's discharge from SLPC (Dist. Ex. 49 at pp. 1, 4-9). The July 2008 IEP indicated that the student displayed significant delays in reading, mathematics, written expression, social skills, attention, receptive language and expressive language (id. at pp. 3-8). For the 2008-09 school year, the district's CSE recommended that the student receive daily instruction in 12:1+1 special classes in the areas of English language arts (60 minutes), mathematics (30 minutes) and social skills (15 minutes) (id. at p. 1). The CSE also recommended that the student receive OT once weekly on an individual basis and once weekly within a group setting (id. at p. 2). The July 2008 IEP recommended that the student receive speech-language therapy twice weekly within a group setting in a general education classroom, once weekly within a group setting in the therapy room and one weekly individual session (id.).¹

By letter dated September 23, 2008, the district's director of special education advised the parents that a "resolution session" regarding the remanded issues was scheduled for September 30, 2008 (Dist. Ex. 44).² By letter dated October 1, 2008, the director of special education informed the parents that she was "disappointed" that they did not respond to her invitation to attend the resolution meeting scheduled for September 30, 2008 (Dist. Ex. 45). The director of special education asked the parents to contact her if they would like to reschedule the resolution session meeting (id.). She further requested that the parents sign a release of information form to allow SLPC to provide her with a summary of the related services provided to the student while at SLPC (id.).

Upon remand, by a decision dated October 3, 2008, the impartial hearing officer dismissed a motion to dismiss submitted by the district (Dist. Ex. 48). According to the impartial hearing officer's decision, the district moved to dismiss the parents' claim for additional services, arguing

¹ I note that the July 2008 CSE's recommendation regarding speech-language therapy represented an increase in group speech-language therapy sessions and a decrease in individual speech-language therapy sessions from the November 2007 CSE subcommittee's recommendation (compare Dist. Ex. 27 at p. 2, with Dist. Ex. 49 at p. 2).

² According to federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 C.F.R. § 300.510[a][2]; see 8 NYCRR 200.5[j][2]).

that the parents had unilaterally placed the student at SLPC and that thereafter, the district bore no responsibility to provide educational services to the student (id. at pp. 1-2). According to the decision, the parents opposed the district's motion by correspondence dated October 2, 2008 (id. at p. 2).³ In his decision, the impartial hearing officer found that there were outstanding issues of material fact regarding the nature of the student's placement at SLPC and what SLPC's legal status was regarding the education of children admitted to the facility (id. at pp. 4-5). Accordingly, the impartial hearing officer denied the district's request and ordered the impartial hearing to move forward (id. at p. 5).

An impartial hearing (Hearing 2) was held on November 5, 2008 (Tr. p. 1). At Hearing 2, testimony was taken from three district witnesses and the student's mother (Tr. pp. 18, 23, 55, 76). The district entered ten documentary exhibits into evidence (Dist. Exs. 38-41, 44-49). The impartial hearing officer issued a decision dated January 20, 2009 (IHO Decision at p. 7). The impartial hearing officer addressed two procedural issues raised by the district. First, the district contended that it was not responsible for the provision of the student's educational services during the time in question because SLPC was the entity legally responsible to do so (id. at p. 2). Second, the district argued that the parents' refusal to attend a resolution meeting warranted dismissal of the case (id. at pp. 2-3). The impartial hearing officer declined to make a ruling on either argument after finding them to be "beyond the scope of the remand directive" from the State Review Officer (id. at p. 3).

Addressing the issues on remand, the impartial hearing officer found that the student had been deprived of speech-language therapy services while he was at SLPC and that the deprivation had denied the student a FAPE (IHO Decision at pp. 4-6). Lastly, after noting that the parents had failed to offer any evidence relative to an appropriate compensatory award, the impartial hearing officer found that the district's CSE was best suited to determine what additional services were appropriate in light of the denial of a FAPE (id. at pp. 6-7). The impartial hearing officer ordered the district's CSE to "promptly convene following updated evaluative materials" so that it could develop "the appropriate quantity and method for delivery" of additional speech-language services (id. at p. 7).

The district appeals and argues that it was not responsible to provide the student's special education services while the student resided at SLPC because SLPC is an OMH facility and OMH is programmatically and financially responsible for educating the students in attendance at such facilities. Thus, the district contends that SLPC was responsible for the student's IEP and therefore SLPC is also required to deliver additional services in the event that a FAPE was denied. The district also argues that the impartial hearing officer erred in failing to dismiss the case after the parents refused to attend a resolution session because the remanded impartial hearing was a "new" impartial hearing and, therefore, required a resolution session. The district further contends that regardless of what entity was responsible to deliver a FAPE to the student while the student attended SLPC, the student in fact received a FAPE because the teachers at SLPC addressed the student's need for speech-language services.

³ The hearing record does not contain the district's motion to dismiss or the parents' response to the motion.

The parents contend that the district's argument that it was not responsible to offer the student a FAPE while he resided at SLPC lacks merit because the student was not placed at the hospital residentially, but was hospitalized to stabilize his medical condition and therefore, the district remained at all times the entity responsible to offer the student a FAPE. Moreover, the parents argue that neither the district's CSE, nor SLPC's CSE acted in any manner that would suggest either entity believed that SLPC was responsible. The parents also argue that the impartial hearing officer properly denied the district's motion to dismiss because a resolution session was not called for in the remand order and the regulations do not require one. Lastly, the parents argue that the impartial hearing officer properly found that the student did not receive appropriate speech-language services while at SLPC, that the deprivation denied the student a FAPE, and that additional services were required. The parents do not object to the impartial hearing officer's order that the district's CSE determine the appropriate additional services.

I will now address the district's argument that the impartial hearing officer erred denying its motion to dismiss the parents' case. The district argues that SLPC is a psychiatric center operated by OMH and that when the student was in such a facility attending the facility's education program, it was OMH, and not the school district, that was programmatically responsible for the education of the student. Relying on State regulation 8 NYCRR 200.6(i), the parents argue that because the student was not placed at the SLPC residentially, but was "hospitalized" to stabilize his medical condition, the district remained at all times the entity responsible for the student's FAPE. Moreover, the parents argue that neither the district's CSE, nor SLPC's CSE acted in any manner that would suggest either entity believed that SLPC was responsible to offer the student a FAPE, as evidenced by the fact that the district's CSE met twice and drafted two IEPs for the student while the student was hospitalized.

In its petition, the district references a guidance memorandum published by the New York State Department of Education's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) in February 1996 titled "Education Responsibilities for School-Age Children in Residential Care" (Pet. Ex. B).⁴ The guidance memorandum summarizes and categorizes the relevant statutory provisions (*id.* at p. 2; *see* Educ. Law § 112; Mental Hygiene Law §§ 29.15, 33.11; 8 NYCRR 116; *see also* 8 NYCRR 200.11). According to the guidance memorandum, as reflected in the State regulations, when a student attends a psychiatric center's education program, OMH is programmatically responsible for the provision of education and for CSE responsibilities for students with disabilities (*id.*). According to the guidance memorandum, as reflected in the State regulations, the school district where the student's parents reside is only required to provide education records and cooperate in discharge planning with the facility (*id.*).

⁴ The parents cite to 8 NYCRR 200.6(i) of the State regulations to support their position on appeal that because the student was "hospitalized," the VESID guidance memorandum does not apply to the student and the district was responsible to provide a FAPE to the student. 8 NYCRR 200.6(i) governs the special education services that a school district must provide to students on home and/or hospital instruction. The relevant text states that "[s]tudents with disabilities who are recommended for home and/or hospital instruction by the committee on special education shall be provided instruction and appropriate related services as determined by the committee on special education in consideration of the student's unique needs" (8 NYCRR 200.6[i]). In this case, the district's CSE did not recommend home and/or hospital instruction.

The guidance memorandum describes, as set forth in the relevant regulations, the duties of OMH and school districts in a case where a student with a disability resides in a State psychiatric facility, and attends the psychiatric facility's education program. I note that 8 NYCRR 116 applies to:

Any State department or agency or political subdivision, except a board of education or a board of cooperative educational services, which provides educational programs and services for children who are in full-time residential care in homes or facilities operated or supervised by such agencies, and who do not attend the public schools of the school districts in which such homes or facilities are located.

(8 NYCRR 116.1)

Further, State regulations require such homes or facilities to produce an educational evaluation of such children within 10 days of the child's admission (8 NYCRR 116.2). State regulations also mandate that students residing in such facilities "shall be identified, evaluated and provided with special education and related services in accordance with the provisions of section 116.6" (8 NYCRR 200.11). State regulations require such homes and facilities to provide a program for a student with a disability, as that term is defined in 8 NYCRR 200.1(zz),⁵ equivalent to those that a local school district must provide and to have available a committee with the same form and function as a CSE as defined in Education Law § 4402.1(b) (8 NYCRR 116.6[a]; see Mental Hygiene Law § 33.11). State regulations require each facility's committee to evaluate the needs of each student suspected of being a student with a disability and to recommend an appropriate educational program for each such student with a handicapping condition as defined in 8 NYCRR 200.1(zz) (8 NYCRR 116.6[a]). The State regulations provide students and student's parents with the same procedural due process in the identification, evaluation and placement of a student with a disability in accordance with the provisions of 8 NYCRR 200.4 and 200.5 (8 NYCRR 116.6[a]).

The hearing record reflects that SLPC is a New York State operated psychiatric facility, and the St. Lawrence Children and Youth Services is a unit of the SLPC that provides educational services to school-age students (Tr. pp. 24, 27-28). Both SLPC and the St. Lawrence Children and Youth Services unit are operated by OMH (Tr. pp. 24-25). The St. Lawrence Children and Youth Services unit employs a treatment team leader who is responsible for supervising its educational programs (Tr. p. 25). The treatment team leader testified that the St. Lawrence Children and Youth Services unit has its own committee on special education (CSE) (Tr. p. 30). The treatment team leader testified that the St. Lawrence Children and Youth Services unit "continued with the IEP [the student] came to us under" and he received "small classes with individualized instruction by (sic) special education teacher" (Tr. pp. 31, 32). The hearing record shows that the student was admitted to SLPC on December 31, 2007, began attending SLPC's psychoeducational program on January 2, 2008, and continued to attend the program until his discharge from SLPC on July 10, 2008 (Dist. Exs. 38 at p. 1; 40 at p. 1).

⁵ Formerly 8 NYCRR 200.1(cc).

In light of the above, I find that during the period of December 31, 2007 and July 10, 2008 that the district was not programmatically responsible for the student's education while at SLPC. Further, upon review of the hearing record and the content of the July 2008 IEP itself, I find that both of the CSE meetings conducted by the district's CSE during the time the student was admitted to SLPC were conducted to plan for the student's discharge from SLPC and his transition back to a district recommended educational program (Tr. p. 96; Dist. Ex. 49 at pp. 1, 4-9). Accordingly, I find that the impartial hearing officer erred in finding after the close of Hearing 2 that the district was required to provide additional services to the student to remedy any deprivation that may have occurred during the time that the student was admitted to SLPC.

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.

IT IS ORDERED that the impartial hearing officer's decision is annulled in its entirety.

Dated: **Albany, New York**
 March 27, 2009

PAUL F. KELLY
STATE REVIEW OFFICER