



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-066

Application of a STUDENT WITH A DISABILITY, by her 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:

Goldstein, Ackerhalt & Pletcher, LLP, attorneys for petitioners, Jay C. Pletcher, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy SiligmueLLer, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the individualized educational services program (IESP) respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2008-09 school year was not properly implemented, that the district was not required to provide special education transportation services to the student, and that ordered the district to provide assistance to the parents in identifying suitable providers of hearing and vision services as mandated on the student's IESP. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a tenth grade class at a private school in the district, but resided outside of the district (Tr. p. 5; Parent Ex. A at pp. 1-2). In this appeal, the parties do not dispute the student's eligibility for special education and related services (Dist. Ex. 9 at p. 1; see 34 C.F.R. § 300.8[c][2]; 8 NYCRR 200.1[zz][3]).

The district's CSE convened on September 25, 2008, to modify the student's IESP for the 2008-09 school year (Dist. Ex. 9 at p. 1).¹ The meeting attendees included the student's mother, a

¹ Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts, upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1]).

regular education teacher who also served as a district representative, a special education teacher, and a speech-language pathologist/auditory therapist who participated via telephone (id. at p. 2). The CSE modified the IESP to add an augmentative note-taking device (a laptop computer) and "special education transportation" (id.). The IESP also provided for preferential seating, testing accommodations, a copy of class outlines/teacher notes, a solid ruler, and a directive for a clean blackboard without direct sunlight due to the student's difficulty seeing in dim or very bright light (id. at pp. 2, 9). The IESP also included a recommendation for related services in the form of one 30-minute session of 1:1 visual education services per week in a separate location and one 30-minute session of 1:1 hearing education services per week in a separate location (id. at p. 9).

By due process complaint notice dated November 12, 2008, the parents requested an impartial hearing relating to matters concerning the 2008-09 school year (Dist. Ex. 1). In their due process complaint notice, the parents alleged that the special education transportation services set out in the student's IESP were not being provided and they proposed the solution that the district provide the services to and from the private school (id.).

The parents, through their attorney, filed an amended due process complaint notice dated January 29, 2009 (Parent Ex. A. at p. 1). In the amended due process complaint notice, the parents argued that the district failed to properly implement the September 25, 2008 IESP (id. at p. 2). Specifically, they argued that the district failed to deliver visual and hearing education services and special education transportation as set forth on the student's IESP (id.). They also argued that the IESP was flawed in that it did not provide for transition services (id.). They requested the following resolution: that the district immediately provide visual and hearing education services and transportation services, that the CSE convene to develop transition services, that the district provide additional services to compensate for the failure to provide services, that the district reimburse the parents for the cost of providing transportation, and lastly that the district pay for attorney's fees (id.).

An impartial hearing was held on March 18, 2009 (Tr. p. 1). By amended decision dated May 8, 2009, the impartial hearing officer denied the parents' application for an order providing for transportation services (id.).² The impartial hearing officer also ordered the district to provide "assistance to the parents" in identifying related service providers of hearing and vision services as mandated on the student's IESP (id. at pp. 4-5).

The parents appeal the impartial hearing officer's decision contending that the impartial hearing officer erred in ruling on the transportation services, in part, because the IESP issued by the district specifically provided for transportation. The parents also argue that the impartial hearing officer erred in amending her original decision by removing an order to reimburse the parents for the cost of transporting the student during the 2008-09 school year. According to the parents, the impartial hearing officer erred in ordering the district to assist the parents in locating related service providers. Additionally, the parents argue that the impartial hearing officer erred in failing to order additional services to compensate the student for the district's failure to provide

² The impartial hearing officer did not specifically address in her amended decision the parents' claim for reimbursement of transportation costs, which was raised in their amended due process complaint notice (see Parent Ex. A at p. 2).

related services and erred in failing to order the district to develop and implement appropriate transition services for the student.

In its answer, the district admits that it issued related services authorizations (RSAs) to the parents to obtain vision and hearing related services and asserts that it attempted to assist the parents in locating service providers, but was unable to locate service providers who would go to the private school during the 2008-09 school year. However, the district asserts that it has since located visual and hearing education service providers for the student who can deliver services during the 2009-10 school year and that therefore, the district has already complied with the impartial hearing officer's order to assist the parents in locating service providers. Next, the district admits that the student did not receive hearing or vision related services during the 2008-09 school year and it asserts that it does not oppose an order from a State Review Officer directing the CSE to convene to determine the appropriate amount of additional compensatory services to remedy this failure to provide services. The district further argues that the parents' request for an order regarding transportation services for the 2009-10 school year was not raised in the parents' due process complaint notices or at the impartial hearing and in any event, is premature. Lastly, the district states that an order requiring the district to reimburse the parents for the cost of transporting the student to the private school for the 2008-09 school year would be appropriate because the student's IESP specifically included special education transportation services.

Turning to the merits of the instant case, because the district has agreed to provide much of the relief sought in the parents' petition, I will sustain the appeal in part on that basis as set forth more fully in the order below.

Addressing the remaining areas of disagreement between the parties, I find that the parents' request for an order directing the district to provide the student with special education transportation to and from the private school for the 2009-10 school year has not been properly raised and is premature. The parents failed to raise this allegation in their due process complaint notices and the issue was not discussed at the impartial hearing (*see* Dist. Ex 1; Parent Ex. A). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; *see Saki v. Hawaii*, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; *see also A.E. v. Westport Bd. of Educ.*, 463 F. Supp. 2d 208, 215-216 [D. Conn. 2006] *aff'd*, 2007 WL 3037346 [2d Cir. October 18, 2007]; *A.B. v. San Francisco Unified Sch. Dist.*, 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; *Application of a Student with a Disability*, Appeal No. 09-034; *Application of a Student with a Disability*, Appeal No. 08-130; *Application of a Student with a Disability*, Appeal No. 08-102; *Application of the Dep't of Educ.*, Appeal No. 08-037; *Application of a Child with a Disability*, Appeal No. 06-139; *Application of a Child with a Disability*, Appeal No. 06-065). Moreover, as the district points out, the claim for this relief in the 2009-10 school year is premature given that the CSE had not yet met to create a program for the 2009-10 school year at the time of the pleadings. Lastly, the parents make this claim for relief in their memorandum of law, but not in their petition. State regulations require the petition for review to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR

279.4[a]; see Application of the Bd. of Educ., Appeal No. 07-097). The petition does not contain reference to this claim for relief and I note that the memorandum is not a substitute for a properly drafted petition for review (see 8 NYCRR 279.4, 279.6; Application of a Child with a Disability, Appeal No. 06-096).

The parents also argue in their petition that the impartial hearing officer erred in failing to order the district to develop and implement appropriate transition services for the student. Under State regulations, beginning when the student is age 15, an individualized education program (IEP) must include a statement of the student's needs, taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]).

In the present case, although the student's IESP contained a transition plan, that plan only set forth long-term adult outcomes for the student, and lacked the other content required by 8 NYCRR 200.4(d)(2)(ix) (Dist. Ex. 9 at p. 10).³ Accordingly, I will order the district's CSE to convene to develop appropriate transition services for the student.

I have considered the parties' remaining contentions and find that they were either not properly raised or that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that if it has not done so already, the district, upon the parents' submission of proof of mileage, shall reimburse the parents for mileage at the current IRS reimbursement rate for two round trips to the private school from the parents' residence for each day the student attended the private school from September 25, 2008 through the end of the 2008-09 school year; and

³ The September 25, 2008 IESP at issue in this case was the program in effect at the time the student became 15 years of age (Dist. Ex. 9 at p. 1; see 8 NYCRR 200.4[d][2][ix]). Education Law § 3602-c(2)(b)(1) requires that the district, as the district of location in this matter, must provide the student with an "individualized education service program for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program" (see also Office of Vocational and Educational Services for Individuals with Disabilities (VESID) guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c").

IT IS FURTHER ORDERED that within 30 days of the date of this decision, unless the parties otherwise agree, a CSE shall convene to assess the student's transition needs and develop an appropriate transition services plan for the student; and

IT IS FURTHER ORDERED that within 30 days of the date of this decision, unless the parties otherwise agree, a CSE shall convene to determine the amount of IESP recommended hearing and vision education related services that the student was not provided during the 2008-09 school year and the amount of hearing and vision education related services that are necessary to make up for the services that were not provided during that school year, and the district shall provide make-up related services sessions to the student during the 2009-10 school year in an amount appropriate to remedy the prior failure of the district to provide those services.

Dated: **Albany, New York**
 August 12, 2009

PAUL F. KELLY
STATE REVIEW OFFICER