The University of the State of New York

The State Education Department
State Review Officer
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No. 09-070

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:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which ordered respondent (the district) to conduct evaluations of the student and to convene a meeting of the Committee on Special Education (CSE) in order to formulate an appropriate educational program for the student for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a district school (Parent Ex. EEE at p. 1). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1 [zz][11]).

The hearing record reveals that that student received a diagnosis of an autism spectrum disorder at age four (Parent Exs. A at p. 3; J at p. 3). After a 2006 CSE review, the student began receiving one hour per day of in-school applied behavioral analysis (ABA) services and one hour per day of after-school special education tutoring (Tr. pp. 119, 224-25, 451, 577). During the 2007-08 school year, the student was instructed in a collaborative team teaching (CTT) class with a 1:1 paraprofessional (Parent Ex. A at p. 1). He also received speech-language therapy, counseling, occupational therapy (OT), and ABA therapy (id. at p. 1).[1] For the 2008-09 school year, the CSE convened on June 20, 2008 and developed an individualized education program (IEP) for the student, which recommended a CTT class, five individual 60-minute sessions of

[1] The individualized education program (IEP) recommended speech-language therapy on a twelve-month basis (Parent Ex. A at p. 1).

special education tutoring per week, five individual 180-minute sessions of ABA therapy per week, two 30-minute 3:1 sessions of OT per week, one individual 30-minute session of OT per week, three individual 45-minute sessions of speech-language therapy per week, three 30-minute sessions of 3:1 counseling per week, and a full-time crisis management paraprofessional for the classroom (Parent Ex. J at pp. 1, 2, 16).

On February 13, 2009, the CSE convened to develop an IEP for the remainder of the 2008-09 school year and a portion of the upcoming 2009-10 school year (Parent Ex. MMM). Attendees included both parents, a district representative, the regular education teacher, the school psychologist, the ABA consultant, the student's paraprofessional, a family friend, the occupational therapist, the school counselor, the district's school principal, and the special education teacher (who participated by telephone) (id. at p. 2). The CSE recommended a 12:1 integrated co-teaching class, a full-time behavior management paraprofessional, three 30-minute sessions of 3:1 counseling services per week, three 30-minute sessions of 2:1 OT per week, and three 45-minute sessions of individual speech-language therapy per week (id. at p. 16). The February 13, 2009 IEP indicated that the parents and the ABA consultant disagreed with the CSE's modifications to the student's education program and services (id. at p. 2). The IEP further indicated that the recommended programs and services were to be in effect from February 13, 2009 through February 13, 2010 (id.).

By due process complaint notice dated February 16, 2009, the parents requested an impartial hearing for the student for the 2009-10 school year (Parent Ex. EEE). In the due process complaint notice, the parents requested a pendency hearing and requested that the student continue to receive the educational program and related services that had been outlined in the prior IEP dated June 20, 2008 (id. at pp. 1, 5, 16). The parents also alleged that the district had predetermined the level and type of related services prior to the February 13, 2009 CSE meeting and that this denied them the opportunity to meaningfully participate in the IEP process (id. at p. 3). The parents alleged further that the student would suffer a regression if any of the services provided in the June 20, 2008 IEP were terminated or if the student did not receive ABA therapy from qualified ABA providers (id. at p. 4).

The impartial hearing began on April 3, 2009 and concluded on April 28, 2009, after three days of testimony (Tr. pp. 1, 330, 582, 717). On May 19, 2009, the impartial hearing officer rendered her decision (IHO Decision at p. 26). She found that the district's decision not to include ABA services on the IEP was made in advance of the February 13, 2009 CSE meeting and without the input of the parents (id. at pp. 16-17). She also found that this decision by the district was based upon policy and budget considerations and not upon the student's needs (id. at p. 16). The impartial hearing officer also found that the hearing record provided an incomplete picture of the student's current needs and level of functioning (id. at p. 22). She noted that she was unable to determine from the hearing record whether: (1) the student was making academic progress; (2) the student's tutoring services were beneficial; (3) the student required an behavioral intervention plan (BIP) that included ABA therapy; and (4) whether a change in the location of the student's speech-language therapy and special education teacher support services (SETSS) from outside of school

to in-school would be detrimental (id. at pp. 18-24).[2] The impartial hearing officer further noted that the current evaluations were three years old and that a triennial evaluation was due (id. at p. 22). She ordered the CSE to conduct several evaluations and observations and then to convene within 30 days from the date of her decision to determine whether additional assessments were needed (id. at pp. 18, 25-26).[3] The impartial hearing officer further ordered the CSE to reconvene within 60 days from the date of her decision to consider all of the educational reports, evaluations, and input from the CSE participants, and to make appropriate recommendations for the student's educational program and services for the 2009-10 school year (id.). As the student's pendency placement, the impartial hearing officer ordered the district to provide the student with the educational program and services as outlined in the June 20, 2008 IEP until such time as the CSE reconvened to review the new evaluations ordered in her decision and make new recommendations (id. at pp. 18, 24-25).

The parents appeal and assert that prior to the February 13, 2009 CSE meeting, the district had determined that the student's ABA services would be removed from his 2009-10 program. The parents assert that this decision was based on policy considerations and not upon the student's needs. As such, the parents assert that they were denied the right to participate in the IEP process. The parents also assert that the CSE was improperly constituted because the CSE team lacked an additional parent member and because the special education teacher only participated by telephone. Additionally, the parents assert that the student requires tutoring and speech-language services at home because the district's in-school services would result in the student missing valuable classroom time. The parents object to the impartial hearing officer's decision and assert that the remand back to the CSE will only reinforce and add legitimacy to the district's improper policy of not writing ABA services on IEPs and their policy of ignoring student needs. As relief, the parents request that the student continue to receive the program and services recommended in the 2008-09 IEP throughout the 2009-10 school year.

By letter dated June 25, 2009 to the Office of State Review (prior to the district's submission of its answer), the parents further allege, among other things, that the impartial hearing officer was biased and request that a State Review Officer vacate the impartial hearing officer's decision.

The district answers and asserts that the parents' petition failed to comply with the procedural requirements of Part 279 of the State regulations. The district asserts that the parents failed to: (1) submit a document which is identified as a petition; (2) number the paragraphs in their pleadings; (3) cite to the hearing record; (4) indicate their reasons for challenging the

[2] The impartial hearing officer noted in her decision that the student had been receiving SETSS and speech-language therapy outside of school pursuant to a related services authorization (RSA) and a "P-3" letter (IHO Decision at p. 20).

[3] The impartial hearing officer ordered the CSE to arrange the following observations and assessments: a functional behavioral assessment (FBA); at least two classroom observations, including observations of the interactions with the paraprofessional and the ABA therapist; at least one observation of a SETSS session; teacher reports from the student's special education teacher and regular education teacher; updated reports from all related service providers; an updated report from the SETSS teacher; a psychoeducational evaluation (or a psychological and an educational assessment); a speech-language evaluation; and any other assessment deemed necessary by the CSE (IHO Decision at p. 25).

impartial hearing officer's decision; and (5) verify their pleadings appropriately. Substantively, the district asserts that the impartial hearing officer was correct to remand the case back to the CSE to conduct updated evaluations and to conduct another IEP review for the 2009-10 school year.[4] The district also asserts that the parents' letter alleging that the impartial hearing officer was biased should be disregarded because: (1) the issue of judicial bias was not raised at the impartial hearing; (2) the letter was untimely under 8 NYCRR 279.6, and (3) there is no evidence of impartial hearing officer bias.

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 free appropriate public education (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]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; see also 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

[4] The district noted in its answer that the CSE met with the parents on June 12, 2009, to discuss implementation of the impartial hearing officer's decision, and that all of the assessments, evaluations and progress reports the impartial hearing officer ordered have been completed. The district attached these reports to their answer. Accordingly, the district asserts that to the extent that the parents' appeal concerns the impartial hearing officer's decision to remand the matter back to the CSE in order to conduct updated evaluations, the completion of the evaluations has rendered that argument moot.

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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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]). The procedure for a reevaluation requires that a group that includes the CSE and other qualified professionals, as appropriate, conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Such review may take place without a meeting (8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional data is needed, the school district shall administer tests and obtain other evaluation materials as may be needed to produce the needed data (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]).

Initially, I note that the district stated in its answer that all of the evaluations and observations ordered by the impartial hearing officer have taken place. This assertion has not been controverted by the parents. I have considered both parties' procedural and substantive arguments.[5] Based upon my independent review of the hearing record and the thorough and well-reasoned decision of the impartial hearing officer, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b]; Educ. Law § 4404[2]; 8 NYCRR 200.5[k]). I find that the impartial hearing officer reviewed the evidence in the hearing record, carefully considered the parents' allegations, and applied the proper legal analysis. The hearing record amply supports the impartial hearing officer's determinations that the student was in need of triennial evaluations, that the triennial evaluations should take place, and that the CSE should reconvene to consider the evaluations (IHO Decision at pp. 22, 24-26; see G.B. v. San Ramon Valley Unified School District, 2008 WL 4279701, at *4-6 [N.D. Cal. Sept. 16, 2008]). Her directive regarding the evaluations was consistent with federal and State regulations (34 C.F.R. §§ 300.303-305; 8 NYCRR 200.4[b]). Therefore, I find no need to modify her order.

I have considered the parties other contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 19, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

[5] I have also considered the district's objection to the parents' submission of an additional document as evidence concerning judicial bias and will sustain its objection to the attempted submission of the additional evidence. Further, I note that the hearing record does not support an allegation that the impartial hearing officer was biased.