The University of the State of New York

The State Education Department
State Review Officer
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No. 11-006

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Lakshmi Singh Mergeche, Esq., of counsel

Greenberg Traurig, LLP, attorneys for respondent, Caroline J. Heller, Esq., and Lauren C. Harrison, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Matthew Lenaghan, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2009-10 school year. The appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending an ungraded 8:1+3 special class at the Rebecca School, which the student has attended since April 2007 (Tr. p. 62; Dist. Ex. 1 at pp. 1-2). The Rebecca School is 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 programs and related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In a letter dated April 23, 2009, the student's pediatrician indicated that the student has diagnoses of "[m]ild [a]utism, [m]ild [m]ental [r]etardation and a severe language impairment" and continued to exhibit chronic health issues, including asthma and severe food allergies to fish and seafood (Parent Ex. L).[1] The pediatrician noted that the student was allergic to both eating and being exposed to fish and seafood in his environment (id.). The pediatrician indicated that the student required an "EpiPen" and "Benadryl" for his food allergies, and further recommended that a nurse should be "on-site" and that special accommodations be provided to address the student's food allergies (id.).

On April 29, 2009, the Committee on Special Education (CSE) convened to develop an individualized education program (IEP) for the student's 2009-10 school year (Dist. Ex. 4). The CSE continued the student's classification as a student with autism and recommended placement in a 12-month 6:1+1 special class in a specialized school with the related service of speech-language therapy (id. at pp. 1, 10, 12). The resultant IEP indicated that the student had chronic asthma and allergies to seafood and fish (id. at pp. 1, 5). The IEP reflected that the student could not have seafood in his environment, and that he required medication and a nurse on site to monitor his asthma and allergies (id.).

The district notified the parent of the student's assigned school by letter dated May 14, 2009 (Dist. Ex. 3). By letter dated May 27, 2009, the parent advised that she had met with the assistant principal of the assigned school on May 15, 2009 and that the parent believed that the assigned school was inappropriate for the student because it was not a fish/seafood free environment as she was advised that the school serves fish and seafood on a consistent basis (Parent Ex. B).

By letter to the parent dated June 16, 2009, the CSE chairperson responded to the parent's assertion that the district could not provide a fish/seafood free environment for the student at the district's assigned school (Parent Ex. D). According to the CSE chairperson, provisions are made to ensure the safety of students with severe allergies in the district's schools, including the development of a "management plan" by the school, parents, and medical providers to address both the prevention of exposure to allergens as well as the treatment in the event of an accidental exposure (id.). The CSE chairperson also noted that health staff is informed of students who have severe allergies, that a school maintains a medication administration form, and that a school nurse and/or school personnel are trained and designated to administer an EpiPen if a student is unable to self-administer medication (id.). The CSE chairperson advised the parent to contact the principal at the assigned school to discuss her concerns and determine how she, the school, and medical staff could work collaboratively to develop an appropriate management plan for the student regarding his food allergies (id.).

By letter dated June 24, 2009, the parent notified the district that she was unilaterally placing the student at the Rebecca School for July and August 2009 and the 2009-10 school year, because the assigned school could not address the student's severe food allergies (Parent Ex. C). The parent further indicated that she intended to seek payment from the district for the student's tuition at the Rebecca School (id.).

[1] The hearing record contains a similar letter from the student's pediatrician dated April 22, 2010 (Parent Ex. M).

By letter to the CSE chairperson dated September 2, 2009, the parent advised that after some scheduling difficulty, she met with the assistant principal of the assigned school as well as other school personnel on August 6, 2009 (Parent Ex. E). The parent noted her dissatisfaction that the school nurse was unavailable to meet with her on August 6, 2009 (id. at p. 1). In her letter, the parent described the school building, her meeting with a teacher of a 6:1+1 class, and concluded that the assigned school was not appropriate for the student (id. at pp. 1-2). With regard to the student's fish/seafood allergies, the parent expressed concern that the student would not be able to participate in the breakfast and lunch breaks that take place in the cafeteria where fish and seafood is served (id. at p. 2). She reiterated that the student has a severe fish/seafood allergy that is airborne and alleged that school personnel have not responded to her inquiries of how they would ensure the student's safety from exposure to fish and seafood (id.). The parent concluded her September 2, 2009 letter by noting her continuing rejection of the district's assigned school (id.).

Due Process Complaint Notice

In a due process complaint notice dated April 1, 2010, the parent, through her attorneys, asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year (Dist. Ex. 1). The parent asserted that the April 29, 2009 IEP did not adequately address the student's health needs, did not provide for an appropriate staffing ratio, and did not mandate that the student receive occupational therapy (OT) (id. at p. 2). In asserting that the district failed to adequately address the student's health needs, the parent contended that the student had a "life threatening" food allergy which required that the student be placed in an environment free of all seafood, including fish oils used in cooking (id. at p. 3). Among other things, the parent also alleged that fish was regularly served in the cafeteria of the assigned school and that the school did not develop a plan of how to address the student's food allergies (id.). As relief, the parent sought payment of the student's tuition at the Rebecca School for the 2009-10 school year including summer 2009, and that the district provide the student with transportation to and from the Rebecca School on an air-conditioned bus (id. at p. 4).

Impartial Hearing and Decision

An impartial hearing convened on June 15, 2010 and concluded on November 10, 2010, after a total of seven hearing days (Tr. pp. 1, 11, 126, 226, 299, 437, 537; IHO Decision at pp. 1, 2). In a decision dated December 6, 2010, the impartial hearing officer determined that the district failed to meet its burden to show that it offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 3, 6). The impartial hearing officer determined that the district failed to offer the student an allergen free environment because the cafeteria routinely served fish/seafood, the district lacked experience with airborne allergies, and further, that school staff would not seek to develop a plan for addressing the student's allergies until after he was enrolled in the school (id. at pp. 3-5). The impartial hearing officer decided that a post-enrollment plan was inappropriate because the parent did not have sufficient detail to make a reasoned judgment as to the acceptability of the assigned school (id. at pp. 4-5). The impartial hearing officer further determined that the district had the affirmative obligation, given the IEP's mandate of a fish/seafood free environment, to develop a plan addressing the student's allergies at the assigned school prior to any expectation that the parent would consent to enroll the student at the assigned school (id.).

The impartial hearing officer also determined that the Rebecca School was an appropriate placement for the student, finding, among other things, that the Rebecca School serves students similar to the student and that its program is designed to meet both the student's academic and social/emotional needs (IHO Decision at pp. 6-7). Furthermore, the impartial hearing officer noted that the district did not controvert testimony that the student had made progress at the Rebecca School (id. at p. 7). The impartial hearing officer further determined that equitable considerations favored an award of tuition reimbursement. For relief the impartial hearing officer directed the district to pay for, among other things, the student's tuition at the Rebecca School for the 2009-10 school year (id. at pp. 7-8).

Appeal for State-Level Review

The district appeals, asserting that the impartial hearing officer erred in, among other things: (a) determining that the district failed to offer the student a FAPE based on the student's allergy to fish/seafood; (b) determining that Rebecca School was an appropriate placement for the student; (c) awarding tuition reimbursement to the Rebecca School, because the Rebecca School is a "for profit" school, and according to the district, "for profit" schools are not eligible for funding under the Individuals with Disabilities Education Act (IDEA); and (d) awarding direct tuition payment to the Rebecca School, because the parents had yet to incur out-of-pocket expenses. The district requests that the impartial hearing officer's decision be vacated.

In her answer, the parent asserts that the district failed to offer the student a FAPE because the district did not demonstrate the manner in which it would have provided for a fish/seafood free environment. The parent also asserts that the Rebecca School is an appropriate placement for the student, and that equitable considerations favored an award of tuition reimbursement. The parent also contends that the impartial hearing officer was correct in ordering direct tuition payment to the Rebecca School, and that "for profit" schools were eligible recipients under the IDEA for awards of tuition reimbursement.

Applicable Standards

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 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 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 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a 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 (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; 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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

First, I will address the district's contention that the impartial hearing officer erred in determining that it failed to offer the student a FAPE because the district did not describe how the assigned school would address the student's allergies (see IHO Decision at pp. 3-4). With regard to the health or safety of a student with a disability, a school district denies the student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178; citing Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ., 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]).

In this case, there is no evidence that the district failed to consider the heath risks associated with the student's allergies. The hearing record demonstrates that the district clearly identified the student's allergy to fish and seafood on the front of the student's April 2009 IEP and further, the IEP noted the possibility that the student could have an anaphylactic response to exposure to seafood or fish (Dist. Exs. 4 at pp. 1, 5). Consequently, the April 2009 IEP noted that the student required a nurse on site to monitor his asthma and allergies (id. at p. 5). I find that the student's IEP appropriately addressed the identified need with regard to his seafood allergy.

The essence of the parent's complaint appears to be that district was incapable of addressing the student's needs because it did not sufficiently describe to her satisfaction the strategies that would be employed before she placed the student at the Rebecca School. However, the hearing record does not support the conclusion that the district was unable to implement or would have deviated from the student's IEP in a way that was material, or that the student would be precluded from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston

Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). The principal at the assigned school testified that several students in the building had allergies, including allergies to peanuts, latex, chocolate, and eggs (Tr. p. 110). The principal also testified that one of the first things that occurs when a student is newly enrolled at the school is that the parent is invited to sit down with the school nurse and review the student's medical and health history (Tr. pp. 81-81, 110-11). She explained that the nurse would place allergy information for a student into the computer system and into the assigned school's records (Tr. p. 111). According to the principal, the student's allergy history would then be placed on the school's special alerts list, his teacher and the cafeteria would be notified, and "everyone who is involved with the student is notified" (id.). The principal noted that the personnel were informed in order to take precautions, interventions, and notify the nurse if something goes wrong (id.). The principal also provided examples of how interventions for working with students' allergies, including notifying parents that certain foods should not be allowed in the classroom during parties, and that in instances when the cafeteria is serving seafood downstairs, a plan would be put in place so that the student can [eat] upstairs (Tr. pp. 112-13). The principal also noted that a written plan would be implemented by the teachers, paraprofessionals, nurse, an administrator, and a nutritionist (Tr. p. 113). The principal also testified that the assigned school has two nurses available, and that the EpiPens are kept in the nurse's office and, if the nurse leaves the office, she does not leave the building and her whereabouts are known (Tr. pp. 115-16).

The district's director of school nurses for the district's special education schools testified that school nurses who work for the district must be licensed, have at a minimum of one year of RN clinical experience, and that was preferably in pediatrics (Tr. p. 152). The director testified that when the district is made aware that a student has an allergy, the district will develop a plan in order to prevent something like an anaphylactic reaction (Tr. p. 154). The director noted that those personnel involved with the student, including the principal, the school nurse, and the staff involved with the day to day activities of the student would have the doctor's orders (through the district's Medication Administration Form), they would get the doctor's instructions, and with the family, they would create the plan (Tr. pp. 154-57). The director also noted, that if the nurse was unavailable to administer a student's EpiPen, and the student moved to another area of the school, the EpiPen would be provided to another person who was trained by the school nurse in its administration in order to keep it near the student in case it was needed (Tr. pp. 158-59).

Although the parent's heightened concerns with regard to potential health risks in a school environment are understandable, I find that the hearing record demonstrates that the district was appropriately aware of this student's allergies and identified them in his IEP, that the district has procedures in place to address students' severe allergies, and that a plan is made to accommodate such students and appropriately implement their IEPs.

Conclusion

In view of the forgoing evidence, I find that the parents claim that that the district failed to offer the student a FAPE due to the manner in which it addressed the student's allergy to fish and seafood is not supported by the preponderance of the evidence in the hearing record. Accordingly, it is not necessary to reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119

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 address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated December 6, 2010 which determined that the district failed to offer the student a FAPE and directed the district to pay for the student's tuition costs at the Rebecca School are hereby annulled.

Dated: **Albany, New York**
March 11, 2011

JUSTYN. P. BATES
STATE REVIEW OFFICER