The University of the State of New York

The State Education Department
State Review Officer
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No. 11-014

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, G. Christopher Harriss Esq., of counsel

DECISION

Petitioner (the district) appeals from a portion of an impartial hearing officer's decision which ordered it to reimburse respondents (the parents) for the cost of a 1:1 paraprofessional for their daughter at the IVDU/Beacon School (Beacon) for November through June of the 2009-10 school year. The appeal must be sustained.

During the 2009-10 school year, the parents unilaterally placed the student at Beacon where she received 1:1 paraprofessional services at the parents' expense (Tr. pp. 139, 180, 232-36, 249, 309-10, 312, 318, 337; Dist. Ex. 20). Beacon has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see Dist. Exs. 1 at p. 3; 4 at p. 1; Parent Ex. C at p. 1; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The student's early educational history was previously discussed in Application of a Student with a Disability, Appeal No. 06-042 and will not be repeated here. The hearing record reflects that the Committee on Special Education (CSE) convened on April 3, 2009 for an annual review of the student's educational program (Dist. Ex. 3 at pp. 1-2). The resultant individualized education program (IEP) indicates that 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 and related services (id. at pp. 1, 19). The CSE considered placement in a 12:1+1 special class in

a special school but determined that it was insufficient to address the student's social/emotional needs, and also considered 1:1 academic instruction but determined that it was too restrictive for the student's socialization needs (id. at p. 18).

The CSE reconvened on May 18, 2009 for a requested review of the student's educational program (Dist. Ex. 4 at pp. 1-2). The resultant May 2009 IEP included new goals and objectives for the student (compare Dist. Ex. 3 at pp. 6-16, with Dist Ex. 4 at pp. 6-20).[1]

The district notified the parents of the student's assigned school in a letter dated June 11, 2009 (Dist. Ex. 5). The parents subsequently notified the district by letter dated June 15, 2009 that they were unilaterally enrolling the student in a private school for the 2009-10 school year, which she had previously attended since 2005 (Tr. pp. 39, 124, 304-05; Dist. Ex. 15). On August 6, 2009, the parents' educational advocate sent the district a letter requesting that the CSE reconvene to consider a less restrictive placement for the student (Dist. Ex. 17). The educational advocate sent the district another letter dated August 10, 2009 to advise that the parents would be unilaterally enrolling the student in Beacon for the 2009-10 school year, which was a different private school than what the student had previously attended (Tr. p. 337; Dist. Ex. 16). The parent signed an undated tuition contract for Beacon in September 2009 (Tr. p. 340; Parent Ex. I).[2]

The CSE reconvened on November 6, 2009 for a requested review of the student's educational program (Parent Ex. C at pp. 1, 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 and related services (id. at pp. 1, 21). The November 2009 IEP reflects that the CSE recommended modifying the student's services to include a full-time 1:1 "crisis management" paraprofessional (id. at pp. 4, 8, 19, 21). It noted that placement in a 12:1+1 special class in a special school was considered and rejected as inappropriate without new evaluations to determine the student's current academic and social/emotional needs (id. at p. 20). The CSE also considered placement in a 6:1+1 special class in a special school without a 1:1 crisis management paraprofessional, but rejected such placement as insufficient to address the student's current social/emotional and behavioral needs (id.). The district notified the parents of a new assigned school for the student in a letter dated November 23, 2009 (Parent Ex. D at p. 1).

Due Process Complaint Notice

The student's mother filed a due process complaint notice on or about March 26, 2010, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year on procedural and substantive grounds (Dist. Ex. 1). The parent alleged that the district failed to draft an IEP and recommend a placement that was reasonably calculated to allow the student the opportunity to progress academically, socially, and emotionally (id. at p. 1). She identified, among other things, concerns relating to IEP goals, the need for a 1:1 crisis

[1] A district school psychologist who attended the May 2009 CSE meeting testified at the impartial hearing that the purpose of that CSE meeting was to add math goals to the student's previously created IEP (Tr. pp. 108, 110, 116).

[2] The educational director of the student's previous private school testified that the student's mother informed her in June or July 2009 that the student would attend a different private school for the 2009-10 school year (Tr. pp. 121, 137).

management paraprofessional, the functioning levels of the students in the assigned school, and the restrictiveness of the placement recommended by the district for the student (id. at pp. 1-3). As relief, the parent sought payment for the student's 2009-10 tuition at Beacon, transportation to and from Beacon, payment of the student's 1:1 crisis management paraprofessional at Beacon, and that the district provide the student with the related services that were recommended on her last agreed upon IEP (id. at pp. 3-4).

The district responded to the parent's due process complaint notice, contending that it offered the student a FAPE for the 2009-10 school year, that a 12:1+1 special class in a special school was not supportive enough for the student, and that 1:1 academic instruction was too restrictive for the student (Dist. Ex. 2 at p. 3). The district alleged that the placement offered to the student was reasonably calculated to enable the student to obtain meaningful educational benefits (id.). The district also stated that a subsequent IEP review was conducted on November 6, 2009 to initiate the services of a 1:1 crisis management paraprofessional and that a new notice regarding the student's placement was issued on November 23, 2009 (id.).

Impartial Hearing Officer Decision

An impartial hearing convened on June 4, 2010 and concluded on December 8, 2010, after four days of proceedings (Tr. pp. 1-409). The impartial hearing officer issued a decision dated December 23, 2010, finding that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 16-17). She stated that the hearing record refuted the parents' arguments that the recommended placement was inappropriate because of the other students' functioning levels and that it was too restrictive (id. at p. 16). The impartial hearing officer determined that the student's severe language delays impeded her ability to properly communicate with her peers and required prompting (id. at p. 17). The impartial hearing officer found the parents' other arguments to be without merit, except she determined that the parents were entitled to full reimbursement for the costs of the 1:1 paraprofessional from "November, 2010 through December, 2010, as authorized via [the student's] November 6, 2010 IEP" (id.). She determined that the district was not liable to the parents for tuition reimbursement for the 2009-10 school year; however she directed the district to reimburse the parents for the student's full-time 1:1 paraprofessional for the months of November and December (id.).

The impartial hearing officer subsequently issued an "amended" decision dated January 24, 2011, maintaining her finding that the district offered the student a FAPE for the 2009-10 school year, but modifying her determination by extending the end of the reimbursement period for the costs of the student's full-time 1:1 paraprofessional from December 2010 to the end of the school year as recommended in the student's November 6, 2010 IEP (Amended IHO Decision at pp. 16-17). The impartial hearing officer then ordered the district to reimburse the parents for the cost of the 1:1 paraprofessional for the months of November and December (id. at p. 17).

The impartial hearing officer then issued a "corrected" amended decision, also dated January 24, 2010, that changed the ordering clause of the amended decision to award the parents the cost of the student's 1:1 paraprofessional from November 2010 though the end of the school year (Corrected Amended IHO Decision at p. 17).

Appeal for State-Level Review

This appeal by the district ensued. The district alleges that the impartial hearing officer did not have authority to issue the amended decision or the corrected amended decision, as they contained substantive changes as opposed to clarification of clerical errors, and that they are void. The district also alleges that the impartial hearing officer's award of reimbursement for the student's 1:1 paraprofessional was erroneous as a matter of law because the district offered the student a FAPE for the 2009-10 school year.[3] In the alternative, the district alleges that, even if it had failed to offer the student a FAPE for the 2009-10 school year, the unilateral placement was not appropriate for the student, that equitable considerations preclude an award of reimbursement, and that any award of reimbursement would have to be reduced by the percentage of religious instruction provided to the student at the unilateral placement.

The parents did not file an answer to the petition.[4]

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]).

[3] The district maintains that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2009-10 school year.

[4] Notwithstanding the parents' failure to answer, I am required to examine the entire hearing record and make an independent decision based on the entire hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

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).

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

As an initial matter, I will first address the district's contention that the impartial hearing officer did not have authority to issue the January 24, 2011 amended decision or corrected amended decision as they contained substantive changes as opposed to clarification of clerical errors. I find that the impartial hearing officer lacked the authority to issue both the second and third decision in this matter. Impartial hearing officers are appointed by a 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]). An impartial hearing officer's jurisdiction is limited by statute and regulations and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also Application of the Dep't of Educ., Appeal No. 08-041). An impartial hearing officer's decision is final unless timely appealed to a State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, an impartial hearing officer was appointed, presided at a hearing, and issued a written decision on December 23, 2010, which ended her jurisdiction over the matter. The impartial hearing officer erred when she rendered a second and third decision modifying the relief in the original decision. Accordingly, because she had no authority to issue a second or third decision, those decisions dated January 24, 2011 are null and void (see Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024). Having found that the January 24, 2011 decisions are null and void, I need not address the district's assertions concerning those decisions.

Secondly, I note that the impartial hearing officer's reference to the year 2010 in the portions of her decision relating to reimbursement of 1:1 paraprofessional fees appears to be a typographical error and, upon review of the hearing record, should reference 2009 since November and December 2010 were part of the 2010-11 school year and 2009-10 is the school year at issue in this matter (IHO Decision at p. 17).

The parties have not appealed the impartial hearing officer's determination that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 16-17), and therefore this determination is final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][[v]; see, e.g., Application of a Student with a Disability, Appeal No. 10-010).

I now turn to the district's contention regarding whether it was proper for the impartial hearing officer to award reimbursement to the parents for the cost of the student's 1:1 paraprofessional. The impartial hearing officer specifically found that the district offered the student a FAPE via the educational program and related services recommended in the IEP meetings held in April and May 2009 (IHO Decision at p. 17). Additionally, although she did not also specify that the district offered the student a FAPE via the educational program and related services recommended in the November 2009 IEP meeting, which resulted in an IEP containing the recommendation for a full-time 1:1 paraprofessional for the student, the impartial hearing officer found that the district "satisfied the first prong of the Burlington test" (IHO Decision at p.

16). Thus, absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate an award of additional services (see 34 C.F.R. § 300.148[a]; Application of a Student with a Disability, Appeal No. 08-078). Consequently, in the absence of any other basis, the impartial hearing officer's award to the parents for reimbursement of the cost of the student's 1:1 paraprofessional must be annulled.

Conclusion

In view of the forgoing, I find that the parents are not entitled to reimbursement for the cost of the student's 1:1 paraprofessional. I have considered the district's remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's January 24, 2011 amended decision and corrected amended decision are annulled;

IT IS FURTHER ORDERED that the portions of the impartial hearing officer's decision dated December 23, 2010 finding that the parents are entitled to 1:1 paraprofessional fees and ordering reimbursement for the same are hereby annulled.

Dated: **Albany, New York**
February 28, 2011

JUSTYN. P. BATES
STATE REVIEW OFFICER