



The University of the State of New York

The State Education Department State Review Officer

No. 08-030

Application of a STUDENT WITH A DISABILITY, by his parent, 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, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner, the parent, appeals from the decision of an impartial hearing officer which denied the parent's request for the services of a crisis management paraprofessional with specific training for the student for the 2007-08 school year. The appeal must be dismissed.

At the outset, I will address a procedural issue arising on appeal. Respondent, the district, attached two exhibits to its answer, asking that they be accepted as additional documentary evidence (Answer Exs. 1; 2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the attached exhibits include the student's October 29, 2007 individualized education program (IEP) and the parent's due process complaint notice dated November 26, 2007 (Answer Exs. 1; 2). The parent has not objected to the district's submission of these exhibits.¹ I will accept these exhibits because they are necessary to render a decision. The IEP for the school

¹ A petitioner may serve and file a reply for consideration by a State Review Officer "to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6).

year at issue and the due process complaint notice should have been made part of the hearing record.

At the time of the impartial hearing, the student attended a 6:1+1 special class in a district-operated special school with a 1:1 individual crisis management paraprofessional (Tr. p. 4; Answer Ex. 1 at p. 1).² The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (Answer Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). In addition to autism, the student has diagnoses of mental retardation and a sleep disorder and is described as having the ability to verbalize basic needs, complete vocational tasks and use a computer (Tr. pp. 10, 64; Answer Ex. 1 at p. 3). He has difficulty remaining focused on tasks and it takes "a while" to redirect him back to these tasks (Answer Ex. 1 at p. 3). Additionally, his behaviors interfere with his ability to participate in class activities (id.). According to his October 2007 IEP, the student requires the assistance of a crisis management paraprofessional and a functional academics and vocational skills curriculum (id.).

The hearing record is brief regarding the student's prior educational history. From age three to the date of the impartial hearing, the student has received services intermittently from an Office of Mental Retardation and Developmental Disabilities (OMRDD) outpatient clinic (Tr. pp. 31-32). Beginning in March or April 2007 and continuing through summer 2007, the student exhibited behaviors described by the parent as "very, very aggressive" (Tr. p. 20). The parent indicated that the student had an "extremely rare and violent reaction" to an anti-seizure medication (id.). The hearing record indicates the medication was discontinued; however, it does not provide a specific timeframe (id.).

During the 2007-08 school year, the student attends a 6:1+1 special class with his 1:1 crisis management paraprofessional (Tr. p. 23). The student's crisis management paraprofessional meets the student upon arrival at school in the morning and accompanies him throughout the day (Tr. pp. 23-24). Five days per week, from approximately 10 a.m. to 12 p.m., the student and his classmates attend a "work site" on a farm (Tr. p. 22). The student travels on the bus with his classmates to the farm (id.). Once at the farm, he has opportunities to interact with his classmates while working at one or two large tables in a greenhouse (Tr. pp. 22, 49). The students return to school for lunch (Tr. pp. 25, 48). At the time of the impartial hearing, the student ate lunch in the classroom with his crisis management paraprofessional while the other classmates ate lunch in the cafeteria (id.). After lunch, the classmates return to the classroom where the entire class, including the student, completes activities at various workstations (Tr. pp. 26, 49). The workstation desks are not positioned together because some students are engaged in different tasks (id.). The classroom teacher indicated that the student interacts with his peers when it is appropriate for instructional purposes (Tr. p. 50). Three times per week, the student attends an after-school program (Tr. p. 8).³

² Crisis management paraprofessionals are interchangeably referred to in the impartial hearing record as "paras" and "paraprofessionals" (see, e.g., Tr. pp. 4, 5).

³ The hearing record does not reveal whether the after-school program is privately or publicly funded.

At home and at the after-school program, the student receives the services of an individual trained in Strategies for Crisis Intervention and Prevention – Revised (SCIP) (Answer Ex. 2).^{4,5}

On October 29, 2007, the district's Committee on Special Education (CSE) convened at the request of the parent (Answer Ex. 1 at pp. 1-2). Participants included the student's mother, the district's school psychologist who also acted as the district representative, a special education teacher, a "speech teacher" and the assistant principal (id. at p. 2). Present levels of performance contained in the October 2007 IEP indicated that the student can verbalize basic needs, perform vocational tasks and use the computer (id. at p. 3). Assessment of communication, daily living and socialization skills, using the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), indicated that the student's abilities in these areas as well as his overall adaptive functioning skills were in the "low range" (id.).⁶ The October 2007 IEP indicated that the student has difficulty remaining focused on tasks and needs redirection and refocusing (id.).

At the time of the October 2007 CSE meeting, the student's medications were being readjusted, which, according to his mother, resulted in "significant behavioral changes" (Answer Ex. 1 at p. 5). The October 2007 CSE noted in the IEP that the student's behavior varies from day to day and, at times, interferes with his ability to complete tasks in school (id. at p. 4). The October 2007 IEP stated that the student can sometimes be uncooperative and needs his crisis management paraprofessional to redirect him from "crying and acting out" (id.).

The October 2007 CSE recommended that the student follow a curriculum of functional academics and vocational skills (Answer Ex. 1 at p. 3). The October 2007 CSE developed annual goals and short-term objectives for the student in the areas of activities of daily living, vocational skills, functional academics skills, communication skills, socialization and leisure skills, coping skills and adaptive physical education skills (id. at pp. 1, 6-9). The October 2007 IEP also contained a transition plan and a behavioral intervention plan (BIP) for the student (Tr. p. 58; Answer Ex. 1 at pp. 13, 14). The October 2007 CSE indicated that the student required a highly structured, small group, language-based instructional setting, positive reinforcement and verbal redirection to promote on-task behavior and attention, and the assistance of a crisis management paraprofessional (id. at p. 3). Also recommended were two individual and one group session of speech-language therapy per week and two individual sessions of occupational therapy per week (id. at p. 12). The October 2007 CSE determined that the student was eligible for a 12-month program (id. at p. 1). Placement of the student was deferred to the Central Based Support Team (CBST) for a recommendation of a non-public placement, but because such placement was unavailable at the time of the October 2007 CSE meeting, the student attended the district's 6:1+1 special class (id.; IHO Decision at p. 2).

⁴ "SCIP-R" and "SCIP" are used interchangeably in the hearing record (see, e.g., Tr. p. 4; Joint Ex. A at p. 1). For convenience in this decision, I will be using "SCIP."

⁵ The hearing record does not show whether the individual trained in SCIP is being funded by the district or the parent.

⁶ The hearing record does not indicate when the Vineland-II was conducted.

The parent testified the student's behaviors had improved since discontinuing his medication and he was able to attend school "fairly regularly" (Tr. p. 20).⁷ The student only attended two days of school in December 2007 due his parents' concern that he would be a danger to himself and/or others (Tr. pp. 37-38, 83). At that time, the student exhibited aggressive behavior due to oral pain which resulted in surgery (Tr. p. 83). In January 2008, his attendance improved and he attended the district's program 11 out of 21 school days (Tr. p. 38).

In a due process complaint notice dated November 26, 2007, the parent requested an impartial hearing to obtain the services of a SCIP-trained crisis management paraprofessional for the student during the school day (Tr. p. 4; Answer Ex. 2). The parent alleged that the student requires an individual trained in SCIP at school to address his aggressive behaviors, instead of the district's practice of keeping the student in "isolation" due to his behaviors (Answer Ex. 2). The parent also noted in his due process complaint notice that the student's behaviors are "slowly coming under control" at home and at his after-school program where the student has been receiving the services of an individual trained in SCIP (*id.*). On December 11, 2007, the impartial hearing officer granted the parent permission to file an amended due process complaint notice to include a request for the services of a paraprofessional to accompany the student on the school bus to his after-school program and home (Tr. pp. 4-5).⁸

The impartial hearing was conducted on February 13, 2008 (Tr. p. 1). In a decision dated February 29, 2008, the impartial hearing officer found that the district had sustained its burden to show that it provided the student with "appropriate educational services" (IHO Decision at p. 6). The impartial hearing officer concluded that the student's behavior had improved and that he was able to participate in class activities (*id.*). The impartial hearing officer further determined that the student was not isolated from his peers because he went to the farm with his classmates and worked along side them in the classroom (*id.*). The impartial hearing officer found that although the student spends his 20-minute lunch period in the classroom with his crisis management paraprofessional while his classmates go to lunch, the district's assistant principal testified that the student will be integrated into the lunch routine (*id.*). The impartial hearing officer further determined that the student's functional behavioral assessment (FBA) and BIP proved to be effective for the student (*id.* at p. 7). The impartial hearing officer concluded that at the time of the impartial hearing, it was unnecessary for the district to provide a crisis management paraprofessional trained in SCIP (*id.*). The impartial hearing officer also determined that should the student's behaviors deteriorate, it would be necessary to determine whether a public school placement is still appropriate for the student (*id.*). The impartial hearing officer ordered that the district provide the student with a crisis management paraprofessional to accompany him on the school bus to his after-school program and home (*id.*). Additionally, the impartial hearing officer "dismissed" the parent's request to provide a crisis management paraprofessional trained in SCIP (*id.*).

⁷ In a 99 school day period, the student had 37 absences and attended school 62 days (Tr. p. 38).

⁸ I note that neither the original nor the amended due process complaint notice was included in the hearing record; however, the original due process complaint notice dated November 26, 2007 was attached to the district's answer.

The parent appeals, contending that the impartial hearing officer erred by denying his request for a SCIP-trained crisis management paraprofessional to assist the student in the classroom. The parent asserts that the district could not describe any techniques used to prevent the student from injuring himself, another student or staff. Additionally, the parent alleges that the SCIP techniques are legal in New York State. The parent concludes that without a SCIP-trained crisis management paraprofessional, the student would be resigned to staying at home, which would be the most restrictive environment and a violation of his right to a free appropriate public education (FAPE).

In its answer, the district asserts that it met its burden of persuasion to show that the student was provided a FAPE. The district alleges that the BIP attached to the October 2007 IEP has been effective in controlling the behaviors of the student. Further, the district argues that its paraprofessionals are trained to deal with aggressive behaviors by means of redirection and positive reinforcement. The district asserts that the parent's request for a SCIP-trained paraprofessional is neither necessary nor appropriate.

The parent did not allege at the hearing below or on appeal any procedural or substantive violations of the IEP. The parent did not contest the student's 6:1+1 program. The appropriateness of the student having a crisis management paraprofessional in the classroom setting is not in dispute. As such, these issues are not before me in the instant case. The only issue on appeal is whether such crisis management paraprofessional should be trained in SCIP techniques.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁹

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

⁹ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

render an IEP legally inadequate under the IDEA (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Here, the parent's original due process complaint notice was dated November 26, 2007 (Answer Ex. 2) and the impartial hearing was held on February 13, 2008 (Tr. p. 1). Accordingly, the district had the burden of proof to demonstrate that it offered the student a FAPE for the 2007-08 school year.

Initially, I note that the district does not appeal from the impartial hearing officer's order directing the district to provide the student with a paraprofessional to accompany the student on the school bus (IHO Decision at p. 7). Accordingly, that aspect of the impartial hearing officer's decision has become final and binding upon the parties and I do not review it (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]).

Turning to the parent's arguments regarding the student's need for a SCIP-trained crisis management paraprofessional, I agree with the impartial hearing officer's conclusion that the district sustained its burden of persuasion to show that the student did not require the services of a SCIP-trained paraprofessional for the 2007-08 school year (IHO Decision at pp. 6, 7). SCIP is a training program for OMRDD personnel who work with individuals with disabilities and, upon request, parents of individuals who receive services through OMRDD (Tr. p. 64; Joint Ex. A at pp. 1-2). The hearing record reveals that SCIP is a program that develops skills for "sequential" crisis prevention and intervention (Joint Ex. A at p. 3). The focus of the SCIP program is to provide OMRDD staff "with methods of assisting and teaching individuals to maintain self-control and to train staff to engage in proactive methods of positive behavior support" (*id.*). Information contained in the hearing record states that the SCIP curriculum "supports staff awareness of the needs of persons with developmental disabilities and methods of preventing crises" (*id.*). SCIP is designed to "ensure competence when responding to a behavior crisis and using personal interventions" (*id.*).

A psychologist affiliated with OMRDD testified that the primary focus of SCIP is the prevention of aggressive and self-injurious behaviors (Tr. p. 34). Typically, SCIP-trained service providers are employed in group homes or private schools, rather than public school settings (Tr. pp. 34, 69-70). According to the psychologist, SCIP provides instruction for crisis situations, such as techniques that minimize the use of physical force so that students are not injured when they are engaged in aggressive behaviors (Tr. pp. 64-65).

The student's special education teacher testified that since January 2008 she has observed "a lot" of improvement with regard to the student's behaviors and that his behaviors are "better" (Tr. pp. 3, 45). She stated that the student is able to sit for longer periods of time, complete tasks, and keep his area neat (Tr. p. 45). His special education teacher reported that, in the past, the student had difficulty with his behavior on the school bus, in that he ripped and shredded "things," but testified since the student returned to school in January 2008, she has not observed that type of behavior (*id.*). She indicated that the student exhibited biting and aggressive behaviors in the past, but as of the date of the hearing has not displayed these behaviors (Tr. pp. 41, 45).

The special education teacher testified that when the student exhibited aggressive behaviors, classroom personnel removed the other students from the area (Tr. p. 46). Classroom personnel had to keep the student separated from his classmates in an area where he could not hurt himself or anyone else until he "calm[ed] down" (*id.*). The assistant principal stated, however, that since January 2008, classroom personnel have not had to move the student away from his classmates due to violent behavior (Tr. pp. 3, 53). To help the student calm down, classroom personnel talked to him, offered rewards (food, snacks) and used activities that the student enjoys (Tr. p. 46). The special education teacher opined that these strategies were effective because she has seen improvement (Tr. p. 47). She testified that when asked to complete an activity that he

does not want to do, the student will initially say "no," but that classroom personnel are able to assist the student in the completing activities without eliciting aggressive behavior (Tr. pp. 47-48).

The student's BIP identified his difficulty with following rules, staying focused, following directions, and with disruptive, destructive, aggressive and self-injurious behaviors (Answer Ex. 1 at p. 11). The special education teacher testified that classroom personnel attempt to prevent behaviors before they occur by working with the student on short rather than long tasks in areas away from his classmates (Tr. p. 61). Classroom personnel provide him with "sturdy" vocational tasks to reduce his urge to break and shred things (*id.*). Classroom personnel also provide positive reinforcement to the student and opportunities for him to work for tangible rewards, such as a snack and computer time (*id.*). The special education teacher opined that the student's BIP was effective in reducing the student's aggressive behaviors because the behaviors have decreased (Tr. p. 62).

Although the OMRDD psychologist testified that the student "periodically" becomes aggressive and SCIP training could be helpful to a paraprofessional working with him, I concur with the impartial hearing officer that the district was not required to provide a SCIP-trained crisis management paraprofessional in order to offer the student a FAPE, even if it was desirable by the parent (Tr. p. 35; *see Walczak*, 142 F.3d at 132). The hearing record indicates that classroom personnel are adequately trained in techniques to manage the student's behaviors (Tr. pp. 45, 47, 62). The district provides its crisis management paraprofessionals with training regarding how to manage aggressive behaviors, which consists of redirection and positive reinforcement (Tr. pp. 56-57). Although the district conceded that there is no specific training on how to physically detach a student who is biting another student, in the past, when the student bit another student, classroom personnel were able to successfully remove the student, and the classroom teacher testified that the student has not exhibited this behavior since that time (Tr. pp. 41, 45, 54-56). Furthermore, the psychologist testified that the district "basically does a lot of the same behavioral interventions and redirection and the preventative techniques that are taught in the [SCIP] class" (Tr. p. 64). He also opined that the current strategies and emphasis on positive proactive approaches are appropriate for the student (Tr. p. 74).

The OMRDD psychologist also indicated that the student has demonstrated "vast improvement" without the use of SCIP in school and because his aggressive behaviors have "diminished," the student is appropriately placed in the public school (Tr. pp. 71-72). In addition, the parent concedes that, with regard to the student's aggressive behavior, the student is "getting better" (Tr. p. 84).

While I concur with the impartial hearing officer that the hearing record did not show that the student required the services of a SCIP-trained paraprofessional, I encourage the district to ensure that its personnel are appropriately trained to manage behaviors that may occur in emergency situations, such as biting.

In conclusion, I note that the October 2007 IEP no longer accurately reflects the student's present levels of performance or the placement recommendation of the district. Although this issue is not raised by the parent and the parent does not request a reconvened CSE, I encourage the CSE to reconvene to update the student's present levels of performance with regard to his behavior in order to reflect his current progress, if they have not done so already.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 15, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**