The University of the State of New York

The State Education Department
State Review Officer

No. 08-094

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, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the educational programs and services respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2008-09 school year were appropriate. The district cross-appeals from the impartial hearing officer's decision and asserts that the impartial hearing officer improperly considered the issue of whether the district offered the student a free appropriate public education (FAPE). The appeal must be sustained in part. The cross-appeal must be dismissed.

During the 2007-08 school year, the student attended a district first grade general education classroom (see Parent Exs. B at p. 1; D at p. 1; E at p. 1). The student's mother referred him to the School Assessment Team in late 2007 due to concerns about the student's reading and writing (Parent Ex. E at p. 1). In a social history completed by the school social worker in November 2007, the student's mother reported that her son previously received speech-language therapy through Early Intervention services, and at age three, her son received physical therapy, occupational therapy (OT), and speech-language therapy (id.). The student's mother also reported a family history of dyslexia and her belief that her son had dyslexia (id.). While attending the district during the 2006-07 school year, the student received OT services until March 2007, when he was "decertified" after meeting his OT goals (Parent Exs. B at p. 1; D at p. 1). The social history concluded with a statement indicating that the school social worker explained "due process" to the student's mother and provided her with a copy of the procedural safeguards and a guide to special education (Parent Ex. E at p. 2).

On March 14, 2008, the CSE convened to conduct an initial referral review and to develop the student's individualized education program (IEP) for the 2008-09 school year (Parent Ex. A at

pp. 1-2). In addition to the social history, the district conducted an OT evaluation, a classroom observation, and a psychoeducational assessment prior to the CSE meeting (see Parent Exs. B-E).[1] According to the attendance section of the IEP, the CSE members included a district school psychologist (also acting as district representative), a regular education teacher, a school social worker, an individual who identified her role at the CSE as "IEP," and the student's mother (Parent Ex. A at p. 2).[2] The CSE found the student eligible to receive special education programs and services as a student with a learning disability and recommended placement in a general education setting for all subjects; three sessions per week of special education teacher support services (SETSS) in an 8:1 setting for direct instruction; and testing accommodations (id. at pp. 1, 3-5, 9, 11).[3] The CSE recommended strategies to implement for the student's academic and social/emotional management needs, including repetition of instructions, verbal prompts to reread items, multisensory instruction, frequent review of information, chunking information, verbal mediation, verbal rehearsal, introduction of new material with "paired visual-auditory modalities," rephrasing instructions, repetition of questions, teacher demonstration of orally presented directions or instructions, and preferential seating (id. at pp. 4-5, 9). The CSE developed annual goals to address the student's identified needs in the areas of critical analysis, comprehension, independent thinking skills, and language arts skills required for reading on grade level (id. at pp. 7-8). In addition, the CSE developed 26 short-term objectives targeting specific skills, such as phonetic analysis skills, to support the annuals goals (id.).

By due process complaint notice dated May 12, 2008, the parent stated that she disagreed with the CSE's recommendation for SETSS services and therefore, declined the services (Answer Ex. 1 at p. 2). As a resolution, the parent proposed that the student receive Orton-Gillingham instruction from the same provider who instructed the parent's older son in Orton-Gillingham, which had been directed pursuant to an impartial hearing (id.).

The parties convened for the impartial hearing on July 1, 2008 (Tr. p. 1). The impartial hearing officer explained that the district bore the burden to establish the appropriateness of its recommendations and then admitted evidence jointly agreed upon by the parties into the hearing record (Tr. pp. 1-5).[4] The parent then briefly stated that she sought an order from the impartial hearing officer directing the district to provide the recommended SETSS services outside of school, as well as additional funds to pay for a certified Orton-Gillingham instructor to provide such services (Tr. pp. 5-6). Turning to the district's position, the district representative asserted that this was an "initial case," the parent failed to consent to the provision of services, and if given

[1] Due to the limited nature of this appeal, the student's evaluative data relied upon by the CSE will not be discussed in detail (see Parent Exs. B-E).

[2] The school social worker at the CSE meeting conducted the student's classroom observation and completed the social history (compare Parent Ex. A at p. 2, with Parent Exs. C; E at pp. 1-2). The school psychologist at the CSE meeting administered the student's psychoeducational assessment (compare Parent Ex. A at p. 2, with Parent Ex. D at p. 6). The regular education teacher at the CSE meeting was the student's first grade teacher (compare Parent Ex. A at p. 2, with Parent Ex. C).

[3] The CSE recommended placement in the same district public school where the student attended first grade during the 2007-08 school year (see Tr. pp. 5-9; Parent Exs. B at p. 1; D at p. 1; E at p. 1). The student's older brother attended the same district public school as the student (Parent Ex. E at p. 1; see Tr. pp. 5-9, 25).

[4] Although the hearing transcript reflects that the parties jointly agreed upon the exhibits submitted into evidence, the hearing record identifies all of the documents as "Parent" exhibits (Tr. pp. 2, 4-5; see Parent Exs. A-E).

consent, the district could deliver the SETSS services recommended (Tr. pp. 6-7). Upon questioning by the impartial hearing officer, the parent explained that she did not provide consent because she did not want the SETSS teacher in the student's recommended placement to "provide the service in a group of 8 with a variety of different aged children in that group" and asserted that dyslexic students required "proven methods" of instruction, such as Wilson or Orton-Gillingham, by certified instructors (Tr. pp. 7-8; see Tr. p. 9). The parent further explained that since the student exhibited "strong characteristics of . . . dyslexia . . . paralleling [her] older son" she did not want to make the same mistake with the student as she had with her older son by allowing the same resource room teacher at the student's recommended placement to provide "SETSS services" since her older son failed to make progress with the same recommended SETSS services by the same provider (Tr. pp. 6-7, 43-44). The parent also stated that she was unaware that consent for services was required prior to proceeding to an impartial hearing, but had she known consent was necessary, she would have consented to the SETSS services (Tr. pp. 8-9).

The impartial hearing officer then moved on to receive the district's testimonial evidence offered by the SETSS teacher (resource room teacher) from the student's recommended placement (Tr. pp. 9-42). Generally, the SETSS teacher worked with students in groups of eight or less for 45-minute sessions outside their classroom setting, and the students are generally grouped according to similar ages and grades (Tr. pp. 11-12, 20-21). The SETSS teacher testified that she would use a variety of programs to target a student's reading or phonics needs, including developmental learning materials, flashcards, sight vocabulary labs, and workbooks (Tr. p. 12). The SETSS teacher acknowledged that she had received training in Orton-Gillingham, but was not a certified instructor (Tr. pp. 12-13). She had reviewed the student's 2008-09 IEP and expressed familiarity with the annual goals and short-term objectives, and further, that she could effectively provide services to remediate the student's reading needs (Tr. pp. 13-14). The SETSS teacher explained generally how she would instruct a student, noting that she focused her services on the student's weaknesses and did not repeat work performed by the student's classroom teachers (Tr. pp. 14-17, 19-20). She then testified regarding how she assessed or measured the student's progress (Tr. pp. 17-18).

Upon cross-examination, the parent asked the SETSS teacher whether she would be able to provide 1:1 instruction to her son using Orton-Gillingham (Tr. p. 21). The SETSS teacher explained that the student's goals were not Orton-Gillingham based, that she could work on "certain skills" that Orton-Gillingham "worked on," but that she could not "work on a program just on Orton-Gillingham" (Tr. pp. 21-22). The parent then asked about her ability to use multisensory instruction, "different fine-motor textured activities," and "the whole body to reprogram the brain to learn to read" (Tr. p. 22). The SETSS teacher testified that she followed the student's IEP, but that she also, at times, worked with the students in smaller groups, which could allow her to use other techniques, such as writing in the air or using sand, sandpaper, or large "brillo pad" scours so that the students could "feel the letters" (Tr. pp. 23-24). The SETSS teacher also testified that the use of these materials or techniques did not need to be in the student's IEP (Tr. pp. 24-25). When the parent asked if the SETSS teacher had used such materials or techniques with the student's older brother, the district objected and the impartial hearing officer noted her agreement with the objection and the parent moved on to further questioning (Tr. p. 25).

The parent's cross-examination then turned to how the SETSS teacher would deal with a student's frustration level, handle homework assignments, how she would work with the student's classroom teacher to address the student's dyslexia to coordinate "instructional work," and how the

SETSS teacher would address examples of specific reading difficulties (Tr. pp. 25-36). At the conclusion of the parent's cross-examination, the impartial hearing officer asked the SETSS teacher to explain "chunking information" as set forth in the student's IEP, as well as whether she could use "visual auditory modalities within the resource room" to address the student's difficulty with information being presented through a singular modality (Tr. pp. 38-42).

At the conclusion of the witness's testimony, the impartial hearing officer requested brief closing statements by the parties (Tr. p. 42). The district representative stated that district proved it could deliver the SETSS services if the parent had provided consent (id.). In addition, the district representative asserted that the parent "offered no evidence, no witnesses, no medical documentation to demonstrate that [the student] could not benefit from SETSS services within a public school setting" (Tr. pp. 42-43).

In a brief statement, the parent asserted the following:

> The evidence that I could only provide at this time is my experience with the resource room teacher with my older son, where the modalities that [the resource room teacher] did discuss that she would be implementing with my younger son were never used with my older son, even through discussion with myself and my husband during IEP meetings, during parent-teacher conferences, and my discussion with [the resource room teacher] of my frustration in working with my child as well as her work that she gave to my older son, that is my evidence, is my experience, the two years that [the resource room teacher] worked with my older son.

(Tr. p. 43). The parent concluded that she would only consent to the provision of SETSS services outside of school and the provision of additional funding to pay for an Orton-Gillingham certified instructor (Tr. pp. 43-44).

By decision dated July 31, 2008, the impartial hearing officer concluded that the district offered the student a FAPE and that the evidence demonstrated that the district's recommended SETSS services could meet the student's goals listed in the IEP (IHO Decision at p. 4). She also found that the evidence failed to demonstrate that the student required one particular learning strategy or that the student would not benefit from the provision of school-based SETSS services (id.). The impartial hearing officer dismissed the due process complaint, but added that the dismissal did not prevent the parent from filing another due process complaint for an impartial hearing at a later date (id.). In addition, the impartial hearing officer encouraged the parent to seek alternative services for the student if the student failed to make progress in the school-based SETSS services (id.).

On appeal, the parent challenges the manner in which the impartial hearing was conducted, alleging that the impartial hearing officer precluded her from presenting evidence of her experience with her older son's disability, the impact of delayed services, and her previous experience with the SETSS services in the student's recommended placement. The parent also asserts that the district failed to contact her for a resolution session after she filed her due process complaint notice, noting that the failure to conduct a resolution session deprived her of an opportunity to learn what evidence she would need to present and defend her case. The parent also contends that she has

begun the process of obtaining private evaluations in order to gather the necessary evidence to prove her case. In addition, the parent contends that after the impartial hearing, she contacted the district to request a CSE meeting to revise her son's IEP to include some of the techniques, strategies, and methods stated by the SETSS teacher in her testimony, but that the district failed to contact her to schedule a CSE meeting. As relief, the parent seeks an order directing the district to provide her son with the SETSS services outside of school and the provision of additional funding. In the alternative, the parent seeks an amendment to revise her son's IEP to include the provision of SETSS services in a 3:1 setting and to incorporate some of the techniques, strategies, and methods set forth in the SETSS teacher's testimony at the impartial hearing.

In its answer, the district specifically denies the parent's claim that it failed to offer the parent a resolution session and that she was precluded from presenting evidence at the impartial hearing. With respect to the parent's assertion that a resolution session would have provided an opportunity to learn information about the evidence needed to pursue her claim, the district refers to the federal regulations noting that the purpose of a resolution session is to discuss the due process complaint notice and resolve the issues. As a material fact, the district claims, among other things, that the CSE included the requisite members. The district asserts as affirmative defenses that the parent failed to properly commence her appeal by failing to timely serve a notice of intention to seek review; that the impartial hearing officer properly precluded the parent's evidence; and alternatively, that if a State Review Officer does not dismiss the parent's appeal based upon her failure to consent to the initial provision of services, then the district sustained its burden to establish that the recommended special education programs and services offered the student a FAPE. In its cross-appeal, the district contends that the impartial hearing officer should never have considered the issue of whether the district offered the student a FAPE because the parent failed to provide consent for the initial provision of services and thus, the district cannot be liable for the denial of a FAPE.

Turning first to the issue raised in the district's cross-appeal, I am not persuaded that the parent's due process complaint notice or appeal should be dismissed based upon the district's characterization of the parent's claim as an alleged failure to consent to the initial provision of services. According to State and federal regulations, a district "must obtain informed consent" from the parent of a student with a disability "before the initial provision of special education and related services" to the student (see 34 C.F.R. § 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]).[5] In addition, the district must make "reasonable efforts to obtain informed consent" from the parent, which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 C.F.R. §§ 300.300[b][2], [d][5], 300.322[d]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006] [indicating that "to meet the reasonable effort requirement, a public agency must document its attempts to obtain consent using the procedures in § 300.322(d),"

[5] As defined in the federal and State regulations, consent means: the parent have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[*l*]).

and further, that "a public agency should make these same reasonable efforts to obtain parental consent for initial services"]). The regulations also provide that if the parent fails to respond to a request for consent or refuse to consent to "the initial provision of special education and related services," a district "[w]ill not be considered to be in violation of the requirement to make available FAPE . . . for the failure to provide the [student] with the special education and related services for which the [district] requests consent" (34 C.F.R. § 300.300[b][4][i]; see 8 NYCRR 200.5[b][4][i]; see also 20 U.S.C. § 1414[a][1][D][ii][III][aa]). Thus, the district contends that since the parent acknowledged at the impartial hearing that she did not consent to the initial provision of special education services, the district cannot be found in violation of its obligation to offer the student a FAPE and further, the impartial hearing officer should not have reached the issue of whether the district offered the student a FAPE (see Tr. pp. 6-8).

Here, it is undisputed that the CSE convened on March 14, 2008 to conduct the student's initial referral review and to develop the student's IEP for the 2008-09 school year, which recommended, among other things, that the student receive SETSS services in an 8:1 setting (Parent Ex. A at p. 2). It is also undisputed that the parent acknowledged at the impartial hearing that she did not provide consent because she "did not want the SETSS teacher in [the recommended placement] to provide" the SETSS services as recommended by the CSE (Tr. pp. 7-8). Further undisputed is the parent's admission at the impartial hearing that had she known consent was required prior to seeking an impartial hearing, she would have provided consent for the SETSS services, which she believed would "not help" her son (Tr. pp. 8-9). Notably absent from the hearing record, however, is any evidence of the district's "reasonable efforts" to obtain informed consent from the parent, such as telephone calls, correspondence, or visits to the parent's home or place of employment.

In addition, a review of the parent's due process complaint notice dated May 12, 2008, does not reveal a refusal to provide consent or a withholding of consent to the initial provision of special education services, but rather—in full compliance with State and federal regulations—identifies the name, address, and current school of the student; describes the nature of the problem relating to the proposed SETSS services, noting her disagreement with the CSE's recommendation for SETSS services; and proposes a resolution seeking the provision of SETSS services outside of school by a certified Orton-Gillingham instructor (see Answer Ex. 1; see also 34 C.F.R. § 300.308[b]; 8 NYCRR 200.5[i]).[6] The parent objected to the particular special education services being offered—SETSS services—and did not dispute the student's eligibility for special education services or the CSE's recommended classification (see Answer Ex. 1). In fact, the parent sought the provision of special education services she believed to be appropriate for her son, having obtained similar services for her older son whom the parent alleges exhibits a similar disability.

The parent's due process complaint notice also does not assert that the district failed to offer the student a FAPE based upon the failure to provide the student with the special education and related services for which the district sought consent (see Answer Ex. 1; 34 C.F.R. § 300.300[b][4][i]; 8 NYCRR 200.5[b][4][i]). Absent an assertion that the district failed to implement the student's IEP or the recommended services for which the district sought consent, the district's argument that it cannot be considered to be in violation of the requirement to make a

[6] The district did not challenge the sufficiency of the complaint, respond to the parent's due process complaint notice, or provide an "other party" response to the parent's due process complaint notice (see Tr. pp. 1-45; Parent Exs. A-E; Answer Ex. 1; see also 34 C.F.R. § 300.508[d], [e], [f]; 8 NYCRR 200.5[i][3], [4], [5]).

FAPE available to the student is inapposite (see 34 C.F.R. § 300.300[b][4][i]; 8 NYCRR 200.5[b][4][i]; Colbert County Bd. of Educ. v. Cagle, 51 IDELR 16 [No. Dist. Ala. June 19, 2008]). Thus, given the facts of this case, the district's failure to produce any evidence to demonstrate that it made "reasonable efforts" to obtain the informed consent of the parent, and the absence of a claim that the district failed to implement the student's IEP or the recommended services, I am not persuaded that the parent's lack of consent bars the instant challenge regarding the appropriateness of the recommended SETSS services in the student's 2008-09 IEP. As such, the parent is fully entitled to seek an impartial hearing regarding the provision of a FAPE to her Individuals with Disabilities Education Act (IDEA) eligible son (34 C.F.R. § 300.511; 8 NYCRR 200.5 [j][1]). Thus, the district's cross-appeal is dismissed.

Turning next to the issues raised in the parent's appeal, I agree with the parent's contention that the impartial hearing officer improperly precluded the presentation of evidence at the impartial hearing, and thus, the impartial hearing officer's decision should be annulled. Federal and State regulations pertaining to hearing rights provide that a party has the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. § 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]). Here, the parent attempted to ask the SETSS teacher during cross-examination whether she had implemented any of the techniques, strategies, and methods mentioned during her testimony with the parent's older son (Tr. pp. 21-25). Although the district objected to the question, neither the district nor the impartial hearing officer articulated a basis for the objection or for "agreeing" with the objection (Tr. p. 25). Given the parent's prior experience with the same SETSS teacher and her provision of SETSS services to the parent's older son, the impartial hearing officer should have allowed this line of questioning as it bears directly on the district's ability to provide appropriate services, it falls squarely within the scope of the witness's direct examination, and it may have led to information sufficient to rebut the district's case. Thus, while an impartial hearing officer may properly limit an examination of a witness whose testimony involves irrelevant, immaterial or unduly repetitious evidence (8 NYCRR 200.5[j][xii][d]), here, there was no showing that the testimony sought through the parent's cross-examination fell within these categories. By improperly limiting the parent's ability to cross-examine the district's witness, the impartial hearing officer improperly precluded the parent's presentation of evidence at the impartial hearing such that the parent was not afforded due process and a new hearing is required. Having found that the procedures at the impartial hearing were not consistent with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]), this matter will be remanded for further proceedings to fully develop the hearing record consistent with the provisions of 34 C.F.R § 300.511 and 8 NYCRR 200.5(j). Upon remand, the impartial hearing officer shall also conduct a prehearing conference in accordance with the provisions and purposes of 8 NYCRR 200.5(j)(3)(xi) prior to proceeding with the impartial hearing.

Finally, although the hearing record is very limited in this case, certain additional procedural irregularities exist that must be addressed. First, in its answer the district alleges as a material fact that the March 14, 2008 CSE was properly composed, specifically claiming that a special education teacher attended the CSE meeting, and further, that the failure to include an additional parent member did not deprive the parent of a meaningful opportunity to participate in the development of the student's 2008-09 IEP (Answer ¶¶ 16, 59-61). A review of the attendance signature section of the student's IEP reveals that five individuals attended the March 14, 2008 CSE meeting, and there was no individual signed in as the special education teacher (Parent Ex. A at p. 2). I find this troubling given the fact that a special education teacher is a required member of the CSE, the district characterized the CSE meeting as an initial referral review, the CSE found

the student eligible for special education programs and services, and there was no special education teacher—specifically, a SETSS teacher who may have provided the recommended services—at the CSE meeting to provide the parent with an opportunity to ask questions about the recommended SETSS services (34 C.F.R. § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). Moreover, the parent alleged in her petition on appeal that having heard the SETSS teacher's testimony at the impartial hearing, she was willing to reconvene with the CSE—and requested a CSE meeting—to revise her son's IEP to include some of the methods, techniques, or strategies mentioned at the impartial hearing. Thus it appears that had the parent been more fully informed about the recommended SETSS services at the CSE meeting, an impartial hearing may have been avoided. In going forward, the parties are reminded and strongly encouraged to continue to work together in the formulation of the student's IEP and are reminded that the "core" of the IDEA is the collaborative process between parent and schools, primarily through the IEP process in planning and providing appropriate special education services (see Schaffer v. Weast, 126 S. Ct. 528, 531-32 [2005]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]).

Second, it appears that the district did not conduct—or even attempt to schedule—a resolution meeting in this matter. Federal and State regulations implementing the IDEA require that the district, within 15 days of receiving notice of the parent's due process complaint notice, "must" convene a resolution meeting with the parent and relevant members of the CSE who have "specific knowledge of the facts identified in the due process complaint" (see 34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][2]). A resolution meeting need not be held if the parent and the district "agree in writing to waive the meeting" (34 C.F.R. § 300.510[a][3][i]; 8 NYCRR 200.5[j][2][iii]). The hearing record does not contain any documentary evidence that the parties agreed "in writing" to waive the resolution session. As noted in the commentary to the federal regulations, the "purpose of the meeting is for the parent to discuss the due process complaint and the facts that form the basis of the due process complaint so that the [district] has an opportunity to resolve the dispute" (Resolution Meeting, 71 Fed. Reg. 464700 [Aug. 14, 2006]). The district is reminded that a resolution meeting is required prior to proceeding to an impartial hearing, unless the parties agree in writing to waive the meeting.

I have considered the parties' remaining contentions and in light of my determinations, I need not reach them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated July 31, 2008 is annulled; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the CSE shall convene a meeting within 30 calendar days from the date of this decision to review the parent's concerns regarding the provision of SETSS services to her son and to develop an IEP, with a SETSS teacher in attendance, as appropriate for the remainder of this school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, if the parent's concerns are not resolved by agreement of the parties during the above ordered CSE meeting and the parent wishes to pursue an impartial hearing, that a resolution meeting shall be held within 45 days of the date of this decision in an attempt to resolve this matter; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, a prehearing conference will be held within 60 days of the date of this decision if the parties cannot resolve this matter at the resolution meeting, with an impartial hearing to begin thereafter as scheduled by the parties; and

IT IS FURTHER ORDERED that if the parties proceed to an impartial hearing, this matter is remanded to the same impartial hearing officer who presided below, if available, and if not available, the impartial hearing shall be scheduled with a new impartial hearing officer.

Dated: **Albany, New York**
November 18, 2008

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PAUL F. KELLY
STATE REVIEW OFFICER