The University of the State of New York

The State Education Department
State Review Officer
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No. 08-154

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Solange Captan, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer to the extent it ordered respondent's (the district's) Committee on Special Education (CSE) to reconvene and develop a new individualized education program (IEP) for the student. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a 12:1+1 third grade special class in a district school, and she was receiving counseling, occupational therapy (OT), physical therapy (PT), and speech-language therapy as related services (Tr. pp. 18, 27; see Parent Ex. C at pp. 19-21). During third grade, the student also attended a general education setting for music and science (Tr. p. 18). The student's eligibility for special education programs and services as a student with speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[11]; 8 NYCRR 200.1[zz][11]).

In second grade during the 2007-08 school year, the student attended a 12:1+1 special class in a district school with related services (Tr. p. 171; see Parent Exs. A at p. 1; E at p. 1). By letter dated December 16, 2007, the parents wrote to the school assessment team (SAT) to request an annual review (Parent Ex. P). In the letter, the parents indicated that they sought to "exercise" their daughter's "right to be educated in the L[east] R[estrictive] E[nvironment] [(LRE)]" and specifically requested their daughter's placement in a collaborative team teaching (CTT) classroom in February 2008 (id.). To prepare for the requested annual review, the district completed an updated social history in January and February 2008, conducted a psychoeducational evaluation over five days in February 2008, and performed a classroom observation in March 2008 (Dist. Exs. 8; 10; Parent Ex. A). On March 17, 2008, the district assembled a team of individuals to

conduct an educational planning conference (EPC) (Parent Ex. D at pp. 1-2). The following members attended the EPC: a school psychologist (who also acted as district representative), a special education teacher, a physical therapist, a school social worker, a guidance counselor, a supervisor of psychologists, an assistant principal, the parents, and the parents' advocate (id. at p. 2). Concluding that the student's academic deficits required "intensive remediation," the team drafted an IEP that recommended the student's continued placement in a 12:1+1 special class with related services of OT, PT, and counseling (id. at pp. 1, 18-20). As noted in the IEP, the team considered and rejected other programs and services—such as placement in a general education setting with "only additional supplementary aids and services" or placement in a CTT classroom—because the student required "full-time remediation in a small setting" (id. at p. 19). The team also considered and rejected placing the student in a special class in a specialized school because it was "too restrictive" (id.).

On or about May 2, 2008, the parents prepared and filed a due process complaint notice alleging that their daughter's placement in a 12:1+1 special class denied the student a free appropriate public education (FAPE) in the LRE (Parent Ex. K at pp. 1-2; see IHO Ex. 1 at pp. 1-2). As relief, the parents sought placement in a CTT classroom for all core academic subjects (Parent Ex. K at p. 2).

Upon referral by the district, the student underwent an evaluation to assess her visual processing skills on May 29, 2008 (Parent Ex. I at p. 1).[1] On June 5, 2008, the parents obtained a private neuropsychological evaluation of the student to determine her "level of cognitive and adaptive function" (Parent Ex. B at p. 1).[2, 3] On June 11, 2008, a district social worker performed a classroom observation (Dist. Ex. 7 at pp. 1-2). According to the hearing record, the parties convened at a resolution session on June 19, 2008 (Parent Ex. L at pp. 1-3; see IHO Ex. 1 at p. 2).[4]

On June 20, 2008, the district convened an EPC meeting with the following members in attendance: a school psychologist (who also acted as district representative), a special education teacher, a physical therapist, a guidance counselor, a principal, and the student's mother (Parent Ex. C at pp. 1-2). The school psychologist/district representative, the special education teacher, the physical therapist, and the guidance counselor at the June 2008 EPC meeting had also attended the March 2008 EPC meeting (compare Parent Ex. C at p. 2, with Parent Ex. D at p. 2). Similar to the March 2008 EPC team, the June 2008 EPC team concluded that the student's academic deficits required "intensive remediation," and drafted an IEP that recommended the student's continued placement in a 12:1+1 special class with related services of OT, PT, and counseling, but added speech-language therapy services (compare Parent Ex. C at pp. 1, 19-21, with Parent Ex. D at pp. 1, 18-20). In addition, the EPC team recommended that the student attend music and science

[1] The hearing record does not indicate when, or if, the district received a copy of the visual processing evaluation report (see Tr. pp. 1-542; Dist. Exs. 1-2; 7-8; 10; Parent Exs. A-F; I-W; IHO Exs. 1-2).

[2] The hearing record does not indicate when, or if, the parents provided the district with a copy of the private neuropsychological evaluation report (see Tr. pp. 1-542; Dist. Exs. 1-2; 7-8; 10; Parent Exs. A-F; I-W; IHO Exs. 1-2).

[3] The parents submitted an addendum to the private neuropsychological evaluation, dated October 3, 2008, into evidence at the impartial hearing (Parent Ex. V).

[4] See also 34 C.F.R. § 300.510[a][2]; 8 NYCRR 200.5[j][2].

in a general education setting (Parent Ex. C at p. 19; see Parent Ex. L at p. 1). According to the IEP, the June 2008 EPC team considered and rejected the same "other programs and services"—namely placement in a general education setting with "only additional supplementary aids and services" or placement in a CTT classroom—that were considered and rejected by the March 2008 EPC team (compare Parent Ex. C at p. 20, with Parent Ex. D at p. 19). Similar to the March 2008 EPC team, the June 2008 EPC team documented in the IEP that the team considered and rejected the other programs and services because the student required "full-time remediation in a small setting" (id.).

On July 15, 2008, the student completed a vision therapy skills evaluation (Parent Ex. J at pp. 1-3). As a result of her assessment, the private evaluator recommended that the student receive a "1:1 oriented Vision Therapy program to minimize distractions and issues with inattention" on a "weekly basis for 24 sessions" (id. at p. 3).

By amended due process complaint notice dated July 23, 2008, the parents incorporated and elaborated upon the case's procedural history, including information regarding the resolution session, the June 2008 EPC meeting, and their daughter's July 2008 vision therapy evaluation (IHO Ex. 1 at pp. 1-3). The parents continued to allege that their daughter had been denied a FAPE in the LRE and as relief, sought the following: placement of their daughter "part-time" in a 12:1+1 special class for literacy and mathematics instruction "ONLY;" placement of their daughter "part-time" in a CTT classroom for all other areas of instruction; a recommendation for a ".7, 1:1, Transitional Support Para" to assist the student with transitions between the part-time CTT classroom and the part-time 12:1+1 special class; and the provision of "36 one hour sessions of 1:1 vision therapy" (id. at p. 2).

The parties proceeded to impartial hearing on September 11, 2008, which concluded on November 6, 2008, after five days of testimony (Tr. pp. 1-542). Both parties and the impartial hearing officer submitted documentary evidence into the hearing record (Dist. Exs. 1-2; 7-8; 10; Parent Exs. A-F; I-W; IHO Exs. 1-2). By decision dated November 12, 2008, the impartial hearing officer concluded that the failure to include a regular education teacher when developing the student's IEP at the June 20, 2008 EPC meeting constituted a procedural violation that substantively affected the student's right to a FAPE in the LRE and thus, he annulled the June 20, 2008 IEP (IHO Decision at pp. 8-10). In his decision, the impartial hearing officer indicated that the parents' amended due process complaint notice challenged the appropriateness of both the March 2008 and June 2008 IEPs on the basis that both IEPs recommended placement in a 12:1+1 special class (id. at p. 4).[5] He then set forth his findings of fact derived from both the testimonial and documentary evidence presented at the impartial hearing (id. at pp. 5-8).

Turning to the merits of the parents' case and noting that the parents requested the June 2008 meeting to "again address [their] demand that [their daughter] be placed in a less restrictive setting," the impartial hearing officer enunciated the LRE mandate under the Individuals with Disabilities Education Act (IDEA) to educate students with disabilities "to the maximum extent appropriate" with non-disabled students (IHO Decision at pp. 8-9, citing 20 U.S.C.

[5] The impartial hearing officer noted that although the parents challenged both the March 2008 and June 2008 IEPs, no reason existed to review the actions of the committee responsible for developing the March 2008 IEP as the committee reconvened subsequently on June 2008 and developed a subsequent IEP (IHO Decision at p. 8).

§ 1412[a][5][A]). The impartial hearing officer then identified the district's failure to include the participation of a regular education teacher at the June 2008 meeting as a fatal flaw—both procedurally and substantively—in the development of the student's June 2008 IEP, citing to both the federal and the State regulations implementing the IDEA for the proposition that an IEP team must include the participation of a regular education teacher if the student "is, or may be, participating in the regular education environment" (id. at pp. 9-10). Thus, the impartial hearing officer concluded that since the committee that convened to develop the student's June 2008 IEP knew that the primary purpose of the June 2008 meeting was to discuss the student's educational placement, and specifically, the student's participation in a general education setting, the regular education teacher's attendance and "input . . . at that meeting was vital in seriously considering" the student's deficits and needs, and whether the student's "needs might be successfully addressed in the general education environment, either with or without supplemental aids and services and, if such were necessary, which of the various supplemental aids and services might enable the Student to successfully function in such setting" (id. at p. 10). In addition, he noted that the school psychologist who attended the June 2008 meeting admitted in testimony that the committee did not consider any "supplemental aids or services" at that meeting, other than the related services already in the student's IEP (id.).

Based upon the hearing record, the impartial hearing officer concluded that he could not "presume to determine . . . whether—or to what degree—[the] Student should be educated in the general education environment or what supplemental aids and services" might be required by the student to do so (IHO Decision at p. 10). In so holding, the impartial hearing officer remanded the matter to the CSE to reconvene and to "revisit the issue of [the] Student's placement in the [LRE] in full accordance" with federal and State regulations and with a properly composed CSE (id.). In fashioning his relief, the impartial hearing officer then provided very specific guidance and instruction to facilitate the CSE's discussion and consideration of the student's educational placement in the LRE (id. at pp. 10-13). In his decision, the impartial hearing officer recited and explained the Second Circuit Court of Appeals' newly adopted two-prong standard for determining whether the recommendations in a student's IEP placed a student in the LRE (id. at pp. 11-12, citing P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]). He further noted that upon reconvening, the CSE would have "substantially more information" about the student's ability to "function or not function in a regular class environment" since the hearing record indicated that the student had attended "certain regular education classrooms for a portion of her day" without any supplemental aids or services during the current school year (id. at p. 11; see Tr. pp. 229-30, 249-50, 565; Parent Ex. C at p. 19). The impartial hearing officer also indicated that while the CSE was not "bound simply to accept or reject" the parents' "desired program," the CSE was required to discuss and consider whether the student could be "educated satisfactorily in a regular education class, either with or without supplemental aids and services and, if necessary to determine which of the many supplemental aids and services" the student would require "to succeed" (IHO Decision at pp. 11-12). Finally, the impartial hearing officer denied the parents' request for 36 one-hour sessions of vision therapy services, finding that the parents could not have provided the vision therapy evaluation report, dated July 15, 2008, at the June 2008 EPC meeting for consideration, and that his review was necessarily limited to "reviewing an action" of the committee (id. at p. 12). The impartial hearing officer ordered the June 2008 IEP annulled, he remanded the matter to the CSE for consideration of the student's educational placement in the LRE, consistent with regulatory requirements, and he dismissed the parents' request for vision therapy services (id. at pp. 13-14).

On appeal, the parents assert that although they agree with the impartial hearing officer's decision to annul the June 2008 IEP, the impartial hearing officer's order to remand the matter for further CSE review and reconsideration was not an appropriate remedy. The parents argue that the hearing record contained sufficient information for the impartial hearing officer to conclude that the program proposed by the parents in their amended due process complaint notice was appropriate to meet the student's needs in the LRE. In their petition, the parents contend that, as ordered by the impartial hearing officer, the CSE reconvened on November 24, 2008 and drafted an IEP, which the parents attached to the petition as additional evidence for consideration in this appeal. The parents argue that because the November 2008 IEP was "almost . . . identical" to the March and June 2008 IEPs, the November 2008 IEP constituted evidence that the impartial hearing officer improperly remanded the matter to the CSE.

In further support of their contention that the impartial hearing officer improperly remanded the matter, the parents set forth facts related to the November 2008 CSE meeting and the development of the November 2008 IEP, noting that the "team once again rejected all of the proposals for increasing [the student's] LRE opportunities." In addition, the parents allege that the impartial hearing officer's decision to remand was inappropriate given the testimony of two witnesses who "agreed" that the parents' proposed program was appropriate, and in light of the evidence that demonstrated the district's lack of a "true understanding" of their own policies regarding LRE considerations. The parents also assert that the impartial hearing officer's decision to remand the matter was "inappropriate and unfair" because it prolonged the student's right to a FAPE in the LRE, and further, the parents hoped that they would not be forced to seek due process on "yet another IEP." The parents further argue that it was inappropriate to remand the matter to the "same team" to "develop a new IEP."

Finally, the parents contend that they sustained their burden to establish the appropriateness of the parents' proposed program through testimonial and documentary evidence. As relief, the parents seek to overturn the impartial hearing officer's decision remanding the matter to the CSE and further, seek an order directing the district to place the student in the parents' proposed program, consisting of a part-time CTT classroom, a part-time 12:1+1 special class for literacy and mathematics instruction, and the provision of a 1:1 paraprofessional to assist the student in the areas of science, social studies, music, art, gym, and lunch.

In its answer, the district contends that the impartial hearing officer properly determined that the failure to include the participation of a regular education teacher in the development of the June 2008 IEP substantively affected the student's right to a FAPE in the LRE, and further, that he properly remanded the matter to the CSE for further discussion and consideration of the student's educational placement in the LRE. The district asserts that the parents' appeal should be dismissed on several grounds: the parents are not aggrieved by the impartial hearing officer's decision; the impartial hearing officer's decision was factually and legally correct; the November 2008 IEP should be rejected as additional evidence; the parents have not exhausted their administrative remedies with respect to the November 2008 IEP and thus, it is not properly before a State Review Officer for review; and, the parents' appeal is procedurally defective in that the petition is not verified, contains no numbered paragraphs, fails to reference the hearing record, and fails to include a notice with petition. The district argues that the parents are not aggrieved by the impartial hearing officer's decision because the annulment of the June 2008 IEP provided substantially all of the relief requested by the parents in their amended due process complaint notice. In addition,

the district notes that if the parents do not agree with the November 2008 IEP, the proper remedy is to request a new impartial hearing through the due process procedures. The district further argues that the impartial hearing officer did not have sufficient information upon which to order the student's placement in the parents' proposed program. Ultimately, the district seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the parents' appeal.

First, I will address the parents' request to consider the November 2008 IEP attached to their petition as additional evidence. 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 impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; 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, although the November 2008 IEP was not available at the time of the impartial hearing, I will accept the additional evidence for the limited purpose of establishing that the impartial hearing officer's decision and order has been fully implemented and that a subsequent IEP has been developed for the student's 2008-09 school year.

Next, after reviewing the hearing record, I do not agree with the parents' assertion that the impartial hearing officer improperly remanded the matter to the CSE for review and consideration of the student's educational placement in the LRE. Contrary to the parents' argument, the hearing record does not contain sufficient information upon which the impartial hearing officer could conclude that the parents' proposed program was appropriate to meet the student's needs in the LRE (but cf. Application of a Student with a Disability, Appeal No. 08-078; Application of a Student with a Disability, Appeal No. 08-019 [noting that the hearing record contained extensive testimonial and documentary evidence, which provided a sufficient basis upon which the impartial hearing officer could rely to properly determine and order services that were not recommended by the CSE]; Application of a Child with a Disability, Appeal No. 02-076). Although the parents refer to testimonial evidence of two witnesses who "agreed" that the parents' proposed program was appropriate to meet the student's needs in the LRE, the hearing record contains equally persuasive and relevant testimonial evidence from the student's second grade special education teacher and current third grade special education teacher, who both indicted that the student had been appropriately placed in each of their respective 12:1+1 special classes, and moreover, who both testified that it would not be appropriate to increase the student's LRE opportunities (Tr. pp. 169-71, 175-77, 204-05, 210-12, 226-27, 230-31, 246-52). I also note that, as argued by the district in its answer, the hearing record fails to contain any evidence or information about modifications and supplementary aids and services that would allow the student to remain in the general education environment to the maximum extent appropriate, and in particular, how the parents' proposed program would have met the student's needs in the LRE. Without this evidence, the impartial hearing officer could not make a determination regarding the appropriateness of the parents' proposed program, or "whether—or to what degree—[the] Student should be educated in the general education environment or what supplemental aids and services" might be required by the student to do so (IHO Decision at p. 10). Based upon the foregoing, I am not persuaded that

the impartial hearing officer improperly remanded the matter to the CSE for further review and consideration on the issue of the student's educational placement in the LRE.

In addition, I agree with the district's contention that it is improper and premature to review the appropriateness of the November 2008 IEP on appeal as the parents have failed to exhaust their administrative remedies with regard to that IEP (see Application of a Child with a Disability, Appeal No. 06-060; Application of a Child with a Disability, Appeal No. 06-046). Here, the impartial hearing officer annulled the student's June 2008 IEP and remanded the matter to the CSE for further review and consideration (IHO Decision at p. 10). The CSE convened on November 24, 2008, and developed a new, subsequent IEP for the student's 2008-09 school year, thus, fully implementing the impartial hearing officer's decision and order. While I sympathize with the parents' stated frustration in proceeding through the sometimes time-consuming due process impartial hearing procedures, the newly developed 2008-09 IEP—which the parents contend is "almost . . . identical" to the March and June 2008 IEPs—is not evidence, in and of itself, that the impartial hearing officer's decision to remand the case was improper or that the November 2008 IEP should be reviewed on appeal. Under the doctrine of exhaustion of remedies, the appropriateness of the November 2008 IEP must first be reviewed by an impartial hearing officer prior to review by a State Review Officer (Educ. Law § 4404; 8 NYCRR 200.5[k]; see J.S. v. Attica Cent. Sch., 386 F.3d 107, 112 [2d Cir. 2004] [holding that "[i]t is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court. The process includes review by an impartial due process hearing officer and an appeal from that hearing"]). Additionally, the jurisdiction of a State Review Officer is limited to the review of a determination of an impartial hearing officer, and in the instant case, such a determination has not been made pertaining to the appropriateness of the November 2008 IEP developed for the 2008-09 school year or the actions of the November 2008 CSE in the development of the November 2008 IEP (see Educ. Law § 4404[2]). Based on the foregoing, the parents' claims that pertain to the November 2008 IEP and the actions of the November 2008 CSE are beyond the scope of my review because they were not raised below (Application of a Child with a Disability, Appeal No. 06-060; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 18, 2009

PAUL F. KELLY
STATE REVIEW OFFICER