The University of the State of New York

The State Education Department
State Review Officer
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No. 09-024

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, Tracy Siligmueller, Esq., of counsel

Law Offices of Skyer, Castro, Cutler and Gersten, attorneys for respondents, Jesse Cole Cutler, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student had graduated from Bay Ridge's Bridge program and was attending a local college (Tr. p. 198). The hearing record indicates that the student had attended the Bridge program for ninth through twelfth grade (Tr. p. 185). The hearing record describes the Bridge program as a program specifically for students with learning disabilities housed within a regular high school building (Tr. p. 175). Bay Ridge is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services prior to graduation as a student with a learning disability is not in dispute (Tr. pp. 22, 203; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

In June 2005, the district conducted a psychoeducational/vocational evaluation of the student as part of the triennial evaluation process (Dist. Ex. 5). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a "Full-4 IQ score of 78," which was noted to be in the "borderline range" of intellectual functioning (id. at p. 2). According to the evaluator's

report, the student presented with much stronger visual/motor skills than language skills (id.). With respect to verbal skills, the evaluator noted that the student displayed significant delays in vocabulary development and verbal reasoning (id.). The evaluator indicated that the student had "relatively good perceptual/visual skills" (id.).

The student's reading and math skills were assessed using subtests of the Woodcock-Johnson III—Tests of Achievement (Dist. Ex. 5 at pp. 2-4). The student attained the following standard (and percentile) scores on reading subtests: letter-word identification 88 (21) and passage comprehension 80 (9) (id. at pp. 2, 4). The evaluator reported that the student displayed significant delays in decoding and reading comprehension (id. at p. 2). On the math calculation subtest, the student attained a standard score of 88 (22) (id. at p. 4). The evaluator reported that the student displayed delayed calculation skills, noting that the student had difficulty solving examples involving long division and fractions (id. at p. 3). The evaluator opined that math appeared to be a relative strength for the student (id.). The student's writing skills were assessed using informal writing samples (id.). The evaluator reported that while the student was able to write complete sentences that were fairly well organized, the sentences lacked detail and creativity (id.). The evaluator noted that the student's handwriting, grammar, and spelling all required improvement (id.). According to the evaluator, the student presented with articulation delays and "somewhat" delayed expressive and receptive language skills (id. at pp. 1-2).

The evaluator described the student as reserved, cooperative, and socially appropriate (Dist. Ex. 5 at p. 3). The evaluator reported that the student found school to be difficult, that she tended to withdraw from challenges, and that she did not seem motivated in school (id.). The evaluator indicated that the student was enrolled in a self-contained class at Bay Ridge, where she appeared to be doing well and was passing all of her classes (id.). Based on her findings, the evaluator concluded that the student would continue to benefit from special education support with an emphasis on improving her math, writing, decoding and comprehension skills (id.).

In December 2006, a special education teacher from the district conducted a structured observation of the student in her English class at Bay Ridge (Dist. Ex. 4). The special education teacher observed that the class was performing a "round robin style" reading assignment, with each student taking turns reading a sentence and identifying the subject and predicate, and that the student responded correctly when called on (id.). According to the report, the student's Bay Ridge teacher stated that the student was showing improvement in her work, was taking a more serious approach to completing her assignments, and that her behavior was satisfactory (id.).

In a February 2, 2007 progress report, the student's current events teacher in the Bridge program indicated that the student attended school on a consistent basis, but was frequently late for class (Dist. Ex. 6). The teacher reported that the student received a "B-" for the first semester and noted that the student's academic standing could be attributed to her modified program (id.). The teacher reported that the student demonstrated a relative academic strength in spelling and weaknesses in comprehension and writing (id.). The teacher indicated that the student's comprehension difficulties contributed to "adverse social interactions" with peers and teachers (id.).

On February 5, 2007, the Committee on Special Education (CSE) met to formulate the student's individualized education program (IEP) for the 2007-08 school year and to develop a

transition plan for post high school (Tr. pp. 53-54; Dist. Ex. 1). Meeting participants included a district representative (who also signed in as the district's school social worker), a school psychologist, a district special education teacher, and the student's father (Tr. p. 43; Dist. Ex. 1 at p. 2). A Bay Ridge teacher, designated as the regular education teacher on the CSE attendance form, participated by telephone (Dist. Ex. 1 at p. 2). According to the district's special education teacher, the CSE had before it the December 2006 structured observation, teacher progress reports, two report cards, and the June 2005 psychological evaluation (Tr. pp. 33-34).

The student's present levels of performance, as reported by the student's history teacher, indicated that the student was very motivated and had good organizational skills (Dist. Ex. 1 at p. 3). The IEP further indicated that the student had difficulty processing information and understanding text and abstract concepts (id.). It noted that at times the student required redirection and refocusing (id.). The February 2007 CSE determined that academically, the student's present levels of performance were in the high seventh grade range for decoding, in the sixth to seventh grade range for reading comprehension, at the ninth grade level for writing, at the eighth grade level for calculation, and at the seventh grade level for applied problems (id.). The CSE also noted that the student had a severe allergy to peanuts, peanut oils, and peanut smells (id. at p. 1).

The February 2007 CSE continued the student's eligibility for special education services as a student with a learning disability and recommended placement in a 15:1 special class within a community high school (Dist. Ex. 1 at p. 1). The February 2007 CSE further recommended that the student receive related services of individual counseling one time per week, group counseling one time per week, and group speech-language therapy three times per week (id. at pp. 1, 14). The February 2007 CSE further recommended that the student participate in all Statewide assessments with testing accommodations (id. at p. 14). The testing modifications included time and a half for all exams longer than 30 minutes, separate testing location with no more than 15 students, use of a calculator permitted except for those tests measuring calculating skills, and directions read and reread (id.). The student's IEP included reading, math, spelling, writing, organization, speech, and counseling goals (id. at pp. 6-11). In addition, the IEP included a transition plan with the following long term adult outcomes: the student will integrate into the community independently, the student will attend a post-secondary institution for a Bachelor of Arts degree, the student will live independently, and the student will be competitively employed (id. at p. 15). The transitional services listed on the student's IEP indicated that the student would relate school subjects to potential careers, apply for a part-time summer job, continue to meet with her guidance counselor at school to discuss and make plans for her future after high school, and assess personal strengths and weaknesses (id. at pp. 15-16). The student's IEP also indicated that she was expected to graduate from high school in June 2008 with a Regents Diploma (id. at p. 15).

On or about February 13, 2007, the district mailed the parents a final notice of recommendation (FNR), recommending a special class within one of its high schools (Parent Ex. D).

By letter dated August 20, 2007, the parents notified the district that they were rejecting the February 5, 2007 IEP, unilaterally placing their daughter in the Bridge program at Bay Ridge, and intending to seek from the district door-to-door busing of the student to and from Bay Ridge and tuition reimbursement (Parent Ex. B). The parents generally asserted that the district failed to offer their daughter a free appropriate public education (FAPE) on both procedural and substantive

grounds (id.). The parents argued that no valid IEP had been created for the student and that they were denied meaningful participation in the development of the student's IEP (id.). They further argued that the proposed placement did not provide "suitable and functional" grouping (id.).

By due process complaint notice dated January 8, 2008, the parents asserted that the district failed to offer their daughter a FAPE for the 2007-08 school year (Parent Ex. A at p. 2). With respect to procedural flaws, the parents asserted that the composition of the February 2007 CSE was defective because it lacked an additional parent member and the special education teacher who participated at the meeting was not properly qualified (id. at p. 3). The parents maintained that the goals and objectives in the proposed IEP were inappropriate to meet the student's educational needs and that the IEP required the student to meet twelfth grade promotional standards without any modifications (id.). With respect to the transition plan contained in the February 2007 IEP, the parents contended that the proposed transition goals and objectives were vague and generic, that the transition plan did not meet State standards, and that the district made no effort to involve the student or any service agency in the review (id. at p. 4). As relief, the parents requested that the district reimburse them for the student's tuition costs at Bay Ridge (id. at pp. 2, 4-5).

An impartial hearing began on August 7, 2008 and concluded on November 17, 2008, after two days of testimony (Tr. pp. 1, 110). By decision dated January 22, 2009, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2007-08 school year because the CSE meeting lacked an additional parent member, the CSE relied on an outdated June 2005 psychoeducational/vocational evaluation, and the proposed district placement was an "illusory placement" (IHO Decision at pp. 13-15). He further determined that the Bridge program at Bay Ridge appropriately met the student's special education needs and that equitable considerations do not bar an award of tuition reimbursement (id. at pp. 15-16). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition costs at Bay Ridge for the 2007-08 school year (id. at p. 16).

The district appeals and asserts that the impartial hearing officer erred in finding that it did not offer the student a FAPE for the 2007-08 school year and that the unilateral placement of the student at Bay Ridge was appropriate. The district asserts that it offered the student a FAPE. Regarding the composition of the February 2007 CSE, the district argues that the impartial hearing officer erred in finding that the lack of an additional parent member at the February 2007 CSE meeting caused a deprivation of a FAPE and, although not decided by the impartial hearing officer, that the lack of a special education teacher of the student did not rise to the level of a denial of a FAPE. As to other issues that were not addressed by the impartial hearing officer but were raised in the parents' due process complaint notice, the district argues that the student's IEP contains a sufficient transition plan that comports with State regulations and that the district's placement offer sufficiently accounted for the student's severe peanut allergy.

The district also asserts that the impartial hearing officer exceeded his authority by deciding issues that were not properly before him. Specifically, the district argues that the impartial hearing officer erred in deciding that the evaluations used by the CSE in creating the student's IEP were outdated and that the district's offered placement was "illusory." The district alleges that the February 2007 CSE had sufficient information about the student's present levels of performance to create an appropriate recommendation. It also argues that contrary to the impartial hearing

officer's findings, the district actually offered the student a specific placement that had a space available for the student at the time it was offered. Lastly, the district asserts that the parents have not met their burden to demonstrate the appropriateness of Bay Ridge for the student. Asserting that the impartial hearing officer erred by awarding tuition reimbursement, the district requests that the impartial hearing officer's decision be annulled in its entirety.

The parents filed an answer alleging general denials and admissions. They assert, among other things, that: (1) the district did not have a seat available for their daughter at the proposed placement; (2) the transition services described in testimony were too generic and vague and failed to meet the individualized needs of the student; (3) if the CSE had made an additional parent member available to the parents at the February 2007 CSE meeting, then the parents' concerns about the transition goals and objectives would have been better advocated for and addressed by the CSE; (4) the district bore the responsibility of providing a special education teacher at the CSE and the district failed to provide a special education teacher who complied with the law; (5) the parents were denied the opportunity to meaningfully participate in the CSE process because the district failed to permit the parents with the opportunity to visit the proposed placement; (6) the district failed to offer the student a placement at a specific location that was available as of the first date of the 2007-08 school year; and (7) the Bridge program at Bay Ridge is an appropriate placement. The parents do not cross-appeal any portion of the impartial hearing officer's decision and request that the impartial hearing officer's decision be upheld in its entirety.

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 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 (see 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]; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C.

§ 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]), 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 New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion 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).

Initially, I will address the district's contentions that the impartial hearing officer erred in sua sponte raising and deciding several issues that were not identified in the parents' due process complaint notice. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is essential that the impartial hearing officer disclose his or her intention to

reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

In the instant case, the district asserts that the impartial hearing officer improperly found that the February 2007 CSE's reliance the June 2005 psychoeducational/vocational evaluation report created a deprivation of FAPE. The parents did not assert in their due process complaint notice that the June 2005 evaluation report reviewed by the February 2007 CSE did not afford a reasonable basis to plan the student's educational program for the 2007-08 school year (see Parent Ex. A at pp. 2-5). In addition, while testimony adduced at the impartial hearing indicated that the February 2007 CSE relied on the June 2005 psychoeducational/vocational education evaluation report to develop the student's IEP for the 2007-08 school year (Tr. p. 65), the appropriateness of doing so was not raised as an issue by the parents during the impartial hearing.

Likewise, the district asserts that the impartial hearing officer erred in finding that the district's specific placement recommendation was "illusory" because the parents never raised this claim in their due process complaint notice or opening statement. A review of hearing record confirms that the availability of the proposed placement was not raised as an issue by the parents in their due process complaint notice. In addition, although there was testimony at the impartial hearing regarding the number of students enrolled in the proposed 15:1 class, the parents did not assert that there was not a space available for the student in the district's proposed placement (Tr. pp. 140, 150, 166-67).

Based upon the forgoing, I find that in determining that the district failed to offer the student a FAPE for the 2007-08 school year, the impartial hearing officer erred in sua sponte raising these issues that were neither identified in the parents' due process complaint notice, nor raised during the impartial hearing. The impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; Application of the Bd of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Therefore, I find that the impartial hearing officer improperly determined that the district failed to offer a FAPE based upon his findings that the February 2007 CSE used outdated evaluations and that the district's placement recommendation was "illusory."

I will now address whether the February 2007 CSE was duly constituted. In their due process complaint notice, the parents alleged that the February 2007 CSE was improperly constituted because there was no additional parent member or waiver thereof and the person who signed in as the special education teacher did not meet the qualifications for membership on a CSE review team. On appeal, the district asserts that the impartial hearing officer erred when he determined that the district had failed to offer a FAPE to the student because the February 2007

CSE meeting did not include an additional parent member. The impartial hearing officer did not address the parents' arguments with respect to the special education teacher.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]).

It is undisputed that an additional parent member did not attend the February 2007 CSE meeting at which the 2007-08 IEP for the student was developed (Tr. pp. 43-44; Dist. Ex. 1 at p. 2). Furthermore, there is no parental waiver of the additional parent member contained in the hearing record. The special education teacher assigned to the CSE testified that an additional parent member was invited to the CSE meeting but cancelled that day (Tr. p. 43). She noted that it was difficult to coordinate between meeting participants and the CSE decided to go forward with the meeting because the student's father was present and the student's teacher was ready to participate (Tr. p. 44). While the lack of an additional parent member, absent a proper waiver, is a procedural error and contrary to State law and regulations, I am not persuaded by the evidence in the hearing record that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). The parents do not allege any specific harm that this procedural error caused the student or that the lack of an additional parent member impeded the parents' opportunity to meaningfully participate in the formulation of the IEP (see A.C., 553 F.3d at 172; Matrejek, 471 F. Supp. 2d at 419). They merely assert that the February 5, 2007 CSE was not duly constituted. A review of the hearing record reflects that the parents had some familiarity with the IEP process as the student's father indicated that he had previously attended four or five CSE meetings (Tr. p. 214). In addition, the student's father reported that he had been working with an advocate since the student was first classified in fifth grade (Tr. p. 221). He further testified that when he would have a question on an issue raised at a CSE, or if he had questions in general, he would call an advocate (id.). Although the February 2007 CSE meeting was improperly constituted under State law and regulation in the absence of a proper waiver (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]), there is insufficient evidence in the hearing record to demonstrate that the composition of the February 5, 2007 CSE meeting rose to the level of a denial of a FAPE (R.R., 2006 WL 1441375 at *5; Mills, 2005 WL 1618765 at *5; see Application of the Dep't of Educ., Appeal No. 08-105; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ.,

Appeal No. 05-058). I caution the district however to ensure that it complies with the requirements of State regulations pertaining to the attendance of the additional parent member at CSE meetings.

I now turn to the issue of whether the lack of a proper special education teacher at the February 2007 CSE meeting rose to the level of a denial of a FAPE. Although the impartial hearing officer did not determine if the lack of a special education teacher "of the student" or a "special education provider of the student" denied the student a FAPE, the district was on notice of that procedural violation because it was raised in the parents' due process complaint notice and it was addressed the issue at the impartial hearing.

The IDEA requires that an IEP be developed by a group of individuals including at least one special education teacher, or where appropriate, at least one special education provider of such student (20 U.S.C. § 1414[d][1][B][iii]; see 34 C.F.R. § 300.321[a]; 8 NYCRR 200.3[a][1][iii]; IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The hearing record reveals that the district's special education teacher, who participated in the February 5, 2007 CSE meeting, was assigned to a review team and had not worked in a classroom for approximately ten years (Tr. pp. 27-28, 43, 59). Also, at the time of the February 2007 CSE meeting, the teacher did not intend to return to classroom teaching (Tr. p. 60). The district's special education teacher was not a person who was or would be responsible for implementing the student's IEP. However, the teacher testified that she had observed the student in the classroom at the private school on at least three occasions and had also "sat in on reviews" (Tr. pp. 30, 91-92). The February 5, 2007 IEP indicates that a teacher from Bay Ridge participated in the CSE meeting by telephone, filling the role of the regular education teacher (Tr. pp. 43, 215; Dist. Ex. 1 at p. 2). The district's special education teacher reported that she had observed the Bay Ridge teacher teaching special education classes at the private school (Tr. pp. 37-39). The special education teacher further reported that the CSE reviewed the structured observation of the student, as well as teacher progress reports and two report cards (Tr. pp. 33-34).

Based on the hearing record, I find that no special education teacher or provider of the student attended the May 2007 CSE meeting (see 20 U.S.C. § 1414 [d][1][B][iii]; 34 C.F.R § 300.321[a]; 8 NYCRR 200.3[a][1][iii]). Therefore, the February 2007 CSE was not properly constituted. However, impartial hearing officers and State Review Officers are constrained by federal and State regulations from finding that a FAPE is denied by a procedural violation unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or 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]; A.C., 553 F.3d at 172; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek, 471 F. Supp. 2d at 419). Notwithstanding that the February 2007 CSE was not properly constituted, I find that the hearing record does not demonstrate that the lack of a special education teacher of the student at the February 2007 CSE meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. I therefore find that there is insufficient information in the hearing record to conclude that the failure to include a special education teacher of the student at the February 2007 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student with a Disability, Appeal No. 08-

064). I do, however, caution the district to ensure compliance with the procedures for the development of an IEP.

Next, I address the parties' contentions regarding the transition plan. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]). It must also include the transition services needed to assist the student in reaching those goals (id.). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]).

Here, where the district offered a transition plan as part of the student's February 2007 IEP, the issue in dispute is whether the transition plan was adequate, and if not, did the inadequacy rise to the level of denying the student a FAPE. In their due process complaint notice, the parents asserted that the transition goals and objectives set forth in the proposed February 2007 IEP were vague and generic and did not comport with State regulations (Parent Ex. A at p. 4). They further asserted that the district made no effort to involve the student or any service agency to the student's CSE review, as required by law (id.). In addition, the parents contended that the February 2007 CSE made no effort to create annual goals and short-term objectives for transitional services and that the "[f]ailure to provide such goals inhibits meaningful guidance to the professionals responsible for implementing the goals" (id.). Without citing any specific authority, the parents note that the failure to incorporate the necessary components of a transitional service plan and the failure to provide applicable annual goals and short term objectives have each been held to be a denial of a FAPE (id.).

The district's special education teacher member of the CSE testified that the February 2007 CSE relied on the June 2005 pscyhoeducational/vocational evaluation report to develop the student's transition goals (Tr. pp. 83-85, 102). The cited report contains only one statement regarding the student's postsecondary goals (Dist. Ex. 5 at p. 2). Specifically, the report indicates that the student "expressed an interest in working in her parents' clothing business in the future" (id.). The special education teacher member testified that the CSE relied on non-documentary information in addition to the psychoeducational/vocational evaluation, stating "[w]e speak to the school, we talk about what their interests are" (Tr. p. 102). Although the special education teacher member of the CSE testified that it was district's normal process to invite a student to CSE meetings, the hearing record in this instance contains no evidence that the student was invited to the February 2007 CSE meeting at which the transition plan was developed (Tr. pp. 34-37). The student's father testified that he complained about the student's transitional goals at the February 2007 CSE meeting, advising the CSE that he believed the goals were too vague (Tr. pp. 215, 220).

The transition portion of the student's February 5, 2007 IEP included four measurable long-term adult outcomes (goals) for the student, including: integrating into the community independently; attending a postsecondary institution for a Bachelor of Arts degree; living independently; and being competitively employed (Dist. Ex. 1 at p. 15). The special education teacher member of the CSE testified that these were the type of goals that would be in place for a high school level student who would attend college (Tr. p. 54). She indicated that based on the student's performance in school, it was contemplated that the student might be able to attend postsecondary schooling (id.). However, there is no indication in the hearing record that the student's postsecondary goals were based upon appropriate transition assessments related to training, education, employment, or independent living skills (see 8 NYCRR 200.4[d][2][ix][b]). In addition, it is not clear how these outcomes related to the student's stated interest of working in her parents' clothing business.

State regulations require that the IEP include a statement of the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations further require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]). The February 2007 IEP indicated that the student was pursuing a Regents diploma (Dist. Ex. 1 at p. 15). Although the student's transition plan indicated that she would relate school subjects to potential careers, specific courses and potential careers were not identified or linked (id.). Likewise, the transition activity of applying for a part- time job was linked to her long term outcome of integrating into the community, although not linked to any specific job interest (id.). The transition activity that required the student to meet with her guidance counselor to discuss and make plans for her future after high school was linked to the student's long-term outcome of attending a postsecondary institution for a Bachelor of Arts degree (id.). The transition activity that required the student to assess her personal strengths and weaknesses in independent living skills was linked to her long-term outcome to live independently (id. at p. 16). Consistent with applicable regulations, the student's transition plan delineated who was responsible for each of the transition activities (Dist. Ex. 8 at pp. 13, 15; see 8 NYCRR 200.4[d][2][ix][e]).

A district English teacher testified that she worked at the proposed district placement as a transition linkage coordinator (Tr. p. 116). According to the transition linkage coordinator, it was her responsibility "to meet with the students on each grade level and start to introduce them to thoughts about what they want to do when they leave high school" (Tr. p. 117). In her role as transition linkage coordinator, she also assisted students with getting working papers and brought in speakers from colleges and trade schools to discuss the career paths that the students have expressed an interest in (Tr. pp. 117-18). The transition linkage coordinator noted that students complete interest inventories (id.). She reported that during a student's senior year she runs "quite a few" parent meetings, which includes meetings with a Vocational and Educational Services for Individuals with Disabilities (VESID) counselor and social security representative (Tr. p. 118). She further testified that she usually sees students on a formal basis twice during their senior year (Tr. p. 125).

The transition linkage coordinator testified that she was familiar with the student through her IEP (Tr. p. 120). To address the community integration goal on the student's IEP, the transition linkage coordinator testified that she would have "looked into [the student] possibly applying for a summer youth job" and also worked on interviewing skills with the student (Tr. p. 121). The transition linkage coordinator commented that the transition objective related to instructional activities, requiring the student to relate school subjects to potential careers, was "a little vague" (Tr. p. 122). However, she indicated that the student would have worked on resume writing in her English senior class and would have prepared a college essay (id.). With respect to post high school, the transition linkage coordinator indicated that the student would have met with her to complete VESID forms (Tr. pp. 122-23). In addition, the student would have met with the VESID counselor (Tr. p. 123). She further indicated that the school had a college advisor, who had a "wealth of knowledge" and who could have shared his ideas about potential colleges for the student (Tr. p. 125). She noted that the student and her parents could have downloaded information about that college and then pursued more information in writing (Tr. pp. 125-26). The transition linkage coordinator indicated that she did not know what the independent living objective requiring the student to assess her personal strengths and weaknesses meant (id.). She noted; however, that the student's reading comprehension was "a little low" and indicated that the student could possibly attend a Special Education Teacher Support Services (SETSS) class for reading or a remedial reading class (id.). The transition linkage coordinator further suggested that when the student came to visit her she could have used the computer to explore occupations (id.).

The assistant principal of instructional support services at the district's proposed placement testified that the student's transition goals were "standard goals for kids that are in our program" and that "those are skills that we work on with the majority of the kids in my department" (Tr. p. 160). The assistant principal reported that the part of the competitive employment goal would be worked on in the classroom (id.). Another part would be addressed by the transition linkage coordinator who worked with students on interviewing skills and tried to get interested students a job (id.). She noted that the transition linkage coordinator attempted to assist students in finding jobs that matched their interests (Tr. p. 161). According to the assistant principal, the school did a lot of work preparing students for college (id.). She indicated that they did resume writing in class and took students to visit postsecondary schools and institutions (id.). She reported that the "Office of Disabilities" had come to the school to provide a workshop on services available at the college level for students with learning disabilities (id.).

The hearing record does not demonstrate that the alleged inadequate transition plan impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, caused a deprivation of educational benefits, or otherwise caused substantive harm, which rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4]). I note also that the parents did not assert any specific substantive harm to the student in their pleadings, nor did the impartial hearing officer's decision point to or analyze any substantive harm to the student which would rise to the level of a denial of a FAPE on the basis of the alleged inadequate transition plan (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]). Moreover, the hearing record reflects that the type of transition services the student would have received at the district's recommended school were similar to those she received at Bay Ridge (Tr. pp. 190, 192-93). The hearing record also indicates that, at the time of the hearing, the student was attending college (Tr. p. 198).

Therefore, I find that the transition plan contained the requisite level of specificity for this particular student based on her individual needs, preferences and interests, and it included long-term adult outcomes with objectives/activities in her areas of need including instruction, community experiences and in the development of her postsecondary adult living objective (college) in order to move the student toward those outcomes. Nonetheless, even if the transition services as outlined in the student's IEP did not comport with statutory or regulatory requirements, such defects here did not rise to the level that the student was not offered a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Application of the Dep't of Educ., Appeal No. 08-080; Application of a Child with a Disability, Appeal No. 07-128; Application of a Child with a Disability, Appeal No. 97-70).

Having decided that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE and that the transition plan developed by the district did not deny the student a FAPE, I need not need not address the parties' remaining contentions, including the issue of whether Bay Ridge was appropriate, and accordingly the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated January 22, 2009 is hereby annulled to the extent that he determined that the district failed to offer the student a FAPE and awarded the parents tuition reimbursement.

Dated: **Albany, New York**
April 1, 2009

PAUL F. KELLY
STATE REVIEW OFFICER