The University of the State of New York

The State Education Department
State Review Officer
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No. 10-011

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

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

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that respondent's (the district's) Committee on Special Education (CSE) failed to offer her son a free appropriate public education (FAPE)[1] for the 2009-10 school year and ordered the district to issue a "Nickerson letter"[2] and convene a new CSE meeting. The appeal must be sustained in part.

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[1] The term "free appropriate public education" means special education and related services that-
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

[2] A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a student in a New York State approved non-public school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner. (see Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

At the time of the impartial hearing in November 2009, the student was attending a 6:1+1 special education class in a district special school (District 75) with related services of speech-language, occupational therapy (OT), and physical therapy (PT) to be delivered in-school (Tr. pp. 8, 21; Dist. Ex. 3 at p. 1; see Dist. Ex. 1). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. p. 8).

The hearing record reflects that between the ages of 5 and 15 the student had been placed by the district in various State-approved nonpublic schools (Tr. pp. 10-11, 21; Parent Ex. A at p. 1; see Pet. ¶ 5b). The hearing record shows that the district developed an interim service plan (ISP) for the student on January 18, 2008 (January 18 ISP) (Parent Ex. A). The January 18 ISP noted the student's eligibility for special education services as a student with multiple disabilities and that he had previously been placed at "NYS Approved NPS/Day @ DDI" (Tr. p. 10; Parent Ex. A at p. 1).[3] The January 18 ISP recommended that the student be placed in a 6:1+1 special class within one of the district's specialized schools at "D. 75"[4] and that he receive in-school related services consisting of individual speech-language therapy three times per week for 30 minutes, and individual OT and PT once per week each for 30 minutes each (id. at pp. 1, 2). In addition, the January 18 ISP provided for one individual 30-minute session each of speech-language therapy, PT, and OT "outside of school" (id.; see Tr. p. 28).[5]

On January 25, 2008, the CSE reconvened to reconsider the student's classification and to develop an IEP (Parent Ex. D).[6] The January 25, 2008 CSE determined that the student's classification should be changed from a student with multiple disabilities to a student with autism and that he should receive the same type and amount of related services as identified on the January 18 ISP, which provided for the delivery of related services at school and "outside of school" (id. at pp. 1, 2, 6, 8). The January 2008 IEP also reflected that the CSE deferred the student's placement to the "CBST" (Tr. pp. 10, 11, 12; Parent Ex. D at p. 1).[7]

The CSE again reconvened on January 28, 2008, and developed a second ISP (January 28 ISP) (Parent Ex. B). The hearing record reflects that the January 28 ISP was developed in order to facilitate placing the student into the district's 6:1+1 classroom until the student was able to be placed in a State-approved nonpublic placement (Tr. pp. 20-21). The CSE did not alter the

[3] The hearing record does not indicate what "DDI" stands for.

[4] While not identified in the hearing record, the reference is presumably to the district's District 75 (see http://schools.nyc.gov/Offices/District75/default.htm).

[5] The hearing record does not clearly indicate how these outside related services were to be provided to the student.

[6] The January 25, 2008 IEP does not reflect an initiation date (Parent Ex. D at p. 2). The hearing record, however, indicates that the student reportedly started attending the district's 6:1+1 class in February 2008 (Tr. p. 21) and it appears from the hearing record that he has remained in a 6:1+1 class ever since (Tr. pp. 8,21).

[7] Although not described in the hearing record, the "CBST" appears to refer to the district's "Central Based Support Team" (see e.g., Application of a Student with a Disability, Appeal No. 09-134; Application of a Student with a Disability, Appeal No. 09-097; Application of the Dep't of Educ., Appeal No. 08-058).

student's recommended program, placement, or related services as described on the January 18 ISP (compare Parent Ex. A, with Parent Ex. B).

Subsequent to the development of the January 28 ISP, the hearing record shows that the student remained in the district's 6:1+1 special education class within the special school for the remainder of the 2007-08 school year, the 2008-09 school year, and into the 2009-10 school year, at least up until the time of the impartial hearing below (Tr. pp. 8, 21).

On March 19 and 23, 2009, the student was administered a psychological evaluation by a district school psychologist (Dist. Ex. 3). On April 6, 2009, the student underwent a speech-language evaluation (Dist. Ex. 5).

On April 22, 2009, the CSE convened a "requested" "EPC"[8] in order to review the student's program and to develop an IEP for the student for the remainder of the 2008-09 school year and a portion of the 2009-2010 school year (Dist. Ex. 1 at pp. 1, 2). The April 2009 IEP indicated effective dates of May 27, 2009 through May 27, 2010 (id. at p. 2). The April 2009 CSE recommended that the student continue to be classified as a student with autism and placed in a 6:1+1 special class in a district special school (id. at p. 1). The April 2009 CSE also recommended that the student receive in-school related services of speech-language therapy for two individual 30-minute sessions and one 30-minute session in a group of 2, and one individual session per week for 30-minutes each of OT and PT (id. at pp. 1, 5, 19, 21). The CSE also developed a behavioral intervention plan (BIP) to address the student's behavioral management needs (id. at p. 22). The April 2009 CSE discontinued its prior recommendation for "outside" speech-language therapy, PT and OT, as described in the January 18 ISP, the January 28, ISP, and the January 25, 2008 IEP (Tr. pp. 28-29; compare Dist. Ex. 1, with Parent Exs. A; B; D), thereby reducing the level of recommended related services for the student.

The parent rejected the resultant April 2009 IEP and the CSE reconvened on May 27, 2009 (Tr. pp. 30-31). The May 2009 CSE made no changes to the April 2009 IEP and the district issued an IEP reflecting both the April and May 2009 CSE meeting dates (Tr. p. 55; Dist. Ex. 1 at p. 1).

The parent filed an amended due process complaint notice dated July 26, 2009 with the district (Dist. Ex. 2).[9] In the amended due process complaint notice, the parent asserted that she was not provided copies of any evaluations, reports or recommendations from the student's teachers or therapists prior to the CSE meeting and that the first time she was given copies of "some of the reports" was at the meeting (id.).[10] The parent also asserted that the IEP changed her son's placement from a State-approved nonpublic school to a District 75 school "contrary to [her] wishes" (id.). The parent also alleged that the IEP eliminated all of her son's outside related services, and that the IEP, as revised, was inappropriate and not in her son's best interest (id.). For

[8] Although not defined in the hearing record, it is presumed that "EPC" refers to an "educational planning conference."

[9] The original due process complaint notice was not made a part of the hearing record; however, the impartial hearing officer noted in her decision that the date of the original complaint was July 8, 2009 (IHO Decision at p. 5).

[10] The parent's due process complaint notice did not specify which CSE meeting or meetings she was challenging.

relief, the parent requested that the district "[r]estore" the prior State-approved nonpublic placement and outside related services (id.).

An impartial hearing was conducted on November 18, 2009. By decision dated December 15, 2009, the impartial hearing officer determined that the "May 27, 2009 IEP significantly impeded the parent's opportunity to participate in the decision making process" and "caused a deprivation of educational benefits" (IHO Decision at p. 7). The impartial hearing officer also found that the April and May 2009 CSE meetings were held "merely to reflect [the student's] placement at [the district's school]" (id.). She determined that "as a matter of law" the CSE failed to offer the student a FAPE because the April and May 2009 IEPs were "not valid" (id.). For relief, the impartial hearing officer ordered the district to issue the parent: (1) a Nickerson letter for the 2009-10 school year; and (2) "whatever other documentation or authorization [is] necessary to enable [the student] to attend, at public expense," an appropriate State-approved nonpublic school for the 2009-10 school year (id. at pp. 7-8). The impartial hearing officer also directed the district to convene a CSE meeting in order to develop a "procedurally and substantively valid IEP" and to conduct current evaluations in order to develop an appropriate 12-month program and placement for the student "in the event" that the Nickerson letter could not be utilized (id. at p. 8).[11]

The parent appeals, asserting that the impartial hearing officer erred when she failed to order the district to restore the student's outside related services. The parent asserts that the decision for any placement and continuation of related services should have been made based upon the "2008 ISP and IEP."[12] The parent requests that: (1) a State Review Officer modify the impartial hearing officer's decision to provide for the immediate restoration of the outside related services of PT and OT; and (2) that a State Review Officer also modify the impartial hearing officer's decision to enable the student to attend, at public expense, a State-approved nonpublic school without limiting the time period to the 2009-2010 school year.

In its answer, the district acknowledges that the impartial hearing officer did not make a determination regarding the outside related services, but asserts that the parent failed to present evidence that the student required those services. In the alternative, the district asserts that the matter should be remanded back to the impartial hearing officer for a determination of the issue regarding the appropriateness of the outside related services. The district also asserts that the parent's request for placement in a State-approved nonpublic school beyond the 2009-10 school year is premature, as the district has yet to convene a CSE meeting with regard to the 2010-11 school year.

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

[11] On appeal, the district alleges that it has complied with the impartial hearing officer's order and that it provided the parent with a Nickerson Letter and convened a CSE meeting on December 18, 2009 resulting in a new IEP with an initiation date of January 1, 2010 (Answer Ex. 2). Based upon the district's assertions, the January 2010 IEP recommended placement in a 6:1+1 District 75 classroom with the same level of in-school related services as recommended in the April and May 2009 IEPs (id.). The January 2010 IEP does not provide for the "outside related services" as provided for in the January 2008 ISPs and IEP.

[12] The parent does not indicate whether the references to the "ISP" are to the January 18 or January 28, 2008 ISP.

them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i];

Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

Initially, I note that the district has not cross-appealed from the determination by the impartial hearing officer that the district failed to offer the student a FAPE. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the impartial hearing officer's conclusion that the student was not offered a FAPE for the 2009-10 school year is a final determination.

In her appeal, the parent asserts that the district's April and May 2009 IEPs should not have discontinued the student's outside related services. The parent asserts that the proper remedy ordered by the impartial hearing officer should have been a reinstatement of the services and programs provided for in the 2008 ISP and IEP.

In this case, the hearing record reflects that the parent disagreed with the district's April 2009 and May 2009 recommendations to remove the outside related services and filed a due process complaint notice contesting such recommendations (see Dist. Ex. 2). At the impartial hearing below, the district bore the evidentiary burden to show that the reduction in related services, as provided for by the April and May 2009 IEPs (i.e. the elimination of the outside related services), was appropriate. A review of the impartial hearing record reveals that the district did not meet its burden in this regard. In fact, the hearing record is devoid of evidence supporting the appropriateness of such a reduction in services. I will therefore direct the district to reinstate the delivery of such services within two weeks of the date of this decision. The district should do so by either providing the services directly or by providing the parent with authorization to obtain such services from appropriately certified service providers. Such outside related services shall consist of one individual 30-minute session per week each of speech-language therapy, PT and OT, and shall be provided until the end of the 2009-10 school year, unless their continuation is required by virtue of pendency,[13] agreement of the parties, or by order upon administrative or judicial review.

The parent also asks that the impartial hearing officer's decision be modified to extend the Nickerson letter beyond the 2009-10 school year. The hearing record reflects that the only school year that was the subject of the impartial hearing and is the subject of this subsequent appeal is the 2009-10 school year (Dist. Ex. 2). Under the IDEA and State regulations, the "CSE must review

[13] For statutory and regulatory provisions pertaining to a student's educational placement during administrative or judicial proceedings, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

each child's educational program at least once each year to determine its adequacy and recommend an educational program for the next school year" (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). Here, no request for compensatory education has been made, therefore, a request for an order directing services beyond the 2009-10 school year is premature (see Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 32 [1st Cir. 2006]; see also Application of a Student with a Disability, Appeal No. 09-066; Application of a Student with a Disability, Appeal No. 08-138; Application of Student with a Disability, Appeal No. 08-043; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Bd. of Educ., Appeal No. 04-034; Application of a Child with a Disability, Appeal No. 00-039). Therefore, the parent's request to extend the Nickerson letter beyond the 2009-10 school year is denied.

I have considered the parties' remaining contentions and find that it is unnecessary for me to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, unless the parties otherwise agree, the district shall reinstate the delivery of outside related services to the student within fourteen days of the date of this decision, by either providing the services directly or by providing the parent with authorization to obtain such services from appropriately certified service providers, and that such outside related services shall consist of one individual 30-minute session per week each of speech-language therapy, PT and OT, and shall be provided until the end of the 2009-10 school year, unless their continuation is required by virtue of pendency, agreement of the parties, or by order upon administrative or judicial review.

Dated: **Albany, New York**
March 8, 2010

PAUL F. KELLY
STATE REVIEW OFFICER