



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-026

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, Neha Dewan, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to reimburse respondent (the parent) for the cost of a 1:1 paraprofessional for the student at the Stephen Gaynor School (Stephen Gaynor) for the 2009-10 school year. The parent cross-appeals the impartial hearing officer's determination that the district offered the student an appropriate educational program and denied his request to be reimbursed for his son's tuition costs at Stephen Gaynor for the 2009-10 school year. The appeal must be sustained. The cross-appeal must be dismissed.

During the 2009-10 school year, the parent unilaterally placed the student at Stephen Gaynor where he received 1:1 paraprofessional services at the parent's expense (Tr. pp. 278, 279, 336-37). Stephen Gaynor has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; see Dist. Ex. 3 at p. 1).

Background

The hearing record is sparse with regard to the student's educational history. According to the parent, the student initially received speech-language therapy at two years old (Tr. p. 297). During the student's second year of preschool, he reportedly did not "fit in well" and was referred to a psychologist; however, the parent reported that although the student met with a psychologist for "a while," he did not make progress (Tr. p. 298). The parent further reported that during the following year, the student's teacher reported that the student was hiding under his desk and refusing to come out (id.).

On June 27, 2006, the Committee on Special Education (CSE) developed an individualized education program (IEP) for the student that reflected a recommendation for a 12:1+1 special class in a community school with related services including group counseling once per week, and individual occupational therapy (OT) and speech-language therapy, both at a frequency of three times per week (see Dist. Ex. 6 at p. 1).¹ The parent reported that the student began attending Stephen Gaynor in September 2006 (Tr. p. 349; Dist. Ex. 5 at p. 2).²

On February 8, 2007, the student underwent a psychoeducational reevaluation by a district school psychologist (Dist. Ex. 6 at p. 1). The resultant evaluation report reflected that the referral was made because the staff at Stephen Gaynor recommended a "shadow" teacher to address problems the student was having making the transition to the school (id.).³ Administration of the Weschler Intelligence Scale for Children–Fourth Edition (WISC-IV) was attempted; however, due to the student's behavior, all subtests could not be presented and as such, a full scale IQ could not be determined (id. at p. 6). Although the student initially refused to enter the testing room and attempted to leave the building on his own, he was later able to engage in the testing process (id. at pp. 3-4). However, the student became upset or angry when he perceived the questions were too difficult, at one point pretended to be asleep, and later, ran out of the testing room (id. at pp. 4-5). The report reflected that he agreed to return if accompanied by the parent and he was able to complete two subtests, despite at one point hiding under the table (id. at pp. 5-6).

The evaluation report further reflected that although the student was able to correctly complete the sample items for the coding subtest, he refused to complete the subtest when he discovered he was being timed and became agitated to the extent that the testing session was ultimately discontinued (Dist. Ex. 6 at p. 6). According to the student's performance on parts of the WISC-IV, his cognitive abilities fell within the average range; however, the evaluator indicated that due to the unusual testing situation, the student's scores should be considered "minimal estimates" of his intellectual potential (id. at p. 7). The evaluator noted that at the end of the testing session when the student was told he could go home, his behavior abruptly changed; he immediately smiled, exhibited a calm demeanor, and engaged in humorous dialogue (id. at p. 6). The evaluator opined that the student's behavior during testing indicated that he had "considerable difficulty" accepting authority and control, and that he appeared to need to feel in control at all times (id. at p. 7). The evaluator also stated that while the student appeared to be somewhat aware that his negative behavior was manipulative in order to get what he wanted, it was also self-destructive in that the student did not appear to understand how his angry tone of voice and refusal to cooperate affected the feelings of others who experienced his outbursts (id. at p. 8). The report reflected that the student also drew a picture of a person, which according to the Goodenough scoring system was immature for his age (id. at pp. 5, 7). The report further reflected that recommendations for the student would be considered at the CSE review (id. at p. 8).

On March 9, 2007, a district social worker prepared a social history update of the student with the parent acting as the respondent (Dist. Ex. 5 at pp. 1-3). The social history update reflected that the student was "very oppositional" and exhibited noncompliant behavior, "tantrums and

¹ The hearing record does not contain the student's June 27, 2006 IEP.

² Although the parent indicated in a March 9, 2007 social history that his son entered Stephen Gaynor in September 2006 for first grade, a report of psychoeducational testing conducted by the district on February 8, 2007, reflected that at the time of the testing the student was a "second grader (by age)" at Stephen Gaynor (Dist. Ex. 6 at p. 7).

³ The hearing record reflects that the term "shadow" refers to a 1:1 paraprofessional (Tr. pp. 165, 184).

outbursts," both at home and at school (id.). The parent reported that the student became easily upset and angry at routine and normal activities including academic tasks, especially writing tasks and completing assignments (id. at p. 1). The parent also reported that when the student was able to complete a task, he did so easily; however, when tasks were difficult, he often refused to engage due to anxiety and fear of failure (id. at pp. 2-3). The parent stated that school officials at Stephen Gaynor had indicated that the student's outbursts had included throwing chairs and that he had hit a teacher (id. at p. 2). In contrast, the parent also stated that the student could be charming and humorous, was popular and well liked by his peers, and had the intellectual capacity to succeed academically (id. at pp. 2-3). Aside from low muscle tone, the parent indicated that the student was a well child, who demonstrated age appropriate growth and development, normal vision and hearing, and was not taking any medications (id. at p. 3).

The hearing record reflects that the student continued to attend Stephen Gaynor during subsequent school years (Tr. p. 336). On February 23, 2009, the parent signed a contract for the student to attend Stephen Gaynor for the 2009-10 school year (Dist. Ex. 9 at pp. 1-2).

On April 27, 2009, the CSE met for an annual review of the student and to develop his IEP for the 2009-10 school year (Dist. Ex. 3 at pp. 1, 2). Meeting attendees included the district's special education teacher who also served as the district representative, a district regular education teacher, a district school psychologist, the parent, an additional parent member, and the student's teacher from Stephen Gaynor who participated telephonically (id. at p. 2). The resultant IEP reflected teacher estimated instructional levels for the student including a mid-second grade level in broad reading; an early second grade level in reading comprehension and listening comprehension; and an early fourth grade level in broad math (id. at p. 4). With regard to the student's present level of speech-language performance, the IEP reflected that the student required constant repetition and often required 1:1 teacher assistance in order to follow directions (id.). The IEP further reflected that the student took a long time to formulate and organize his expressive language, benefited from specific questioning prompts to keep him on topic, and had recently increased his level of participation in the class language group (id.).

With regard to the student's social/emotional performance, the April 2009 IEP reflected that although he enjoyed playing with peers, demonstrated appropriate social interactions, and exhibited appropriate behavior when outside of the classroom; the student had difficulty using a "nice tone of voice" with peers and teachers, being respectful to his teachers, focusing on and following directions without individual assistance, keeping himself organized, and completing independent work (Dist. Ex. 3 at p. 5). The IEP included academic, social/emotional, and health and physical development management needs as well as annual goals in the areas of auditory and reading comprehension, writing, math, OT, speech-language therapy, and social/emotional skills (id. at pp. 8-20). The IEP also reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher, and that the student was taking medication at home to address anxiety (id. at pp. 5, 6). The April 2009 IEP recommended that the student attend a 12:1+1 special class in a community school with related services including one 30-minute individual counseling session per week, three 30-minute individual OT sessions per week, three 30-minute individual speech-language therapy sessions per week, and a 1:1 behavior management paraprofessional five days per week (id. at pp. 1, 23).

In a letter to the CSE dated August 12, 2009, the parent stated that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year and informed the CSE that he was unilaterally placing the student at Stephen Gaynor and intended to seek tuition reimbursement (Parent Ex. A).

In a letter dated August 13, 2009, the district summarized the recommendations made by the April 2009 CSE and notified the parent of the school to which the district assigned the student (Dist. Ex. 4).⁴ On August 25, 2009, the parent responded to the district's letter and informed the district that although he had attempted to contact the assigned school, it was not in session for the summer (Dist. Ex. 7). In his letter, the parent requested a "class profile and program description for the class as it [would] be constituted in September," and indicated that without the requested information and an opportunity to observe the class and school in session, he could not make a decision at that time (id.).

On September 21, 2009, the parent visited the assigned school (Tr. p. 355; Dist. Ex. 8 at p. 1). By letter dated September 29, 2009, the parent wrote to the CSE chairperson rejecting the district's offer on the basis of the school to which the district assigned the student (Dist. Ex. 8 at p. 1). Specifically, he stated that the school was large and noisy, the class was academically far behind his son in reading and math, only 2/3 of the students were engaged in learning during his visit to the classroom, and the student would be "lost" in that environment (id.). The parent also stated that because he had not been provided with any information regarding a paraprofessional for the student, he had to hire one privately to assist his son at Stephen Gaynor and, accordingly, he intended to seek reimbursement for his son's tuition and the cost of the paraprofessional (id.).

Due Process Complaint Notice

The parent filed a due process complaint notice on October 13, 2009, alleging that the district failed to offer the student a FAPE during the 2009-10 school year (Dist. Ex. 1 at p. 1). The parent alleged that the April 2009 CSE was improperly constituted because it lacked a special education teacher "who could implement the program" and the student's teacher from Stephen Gaynor did not meaningfully participate in the meeting (id.). The parent further alleged that the April 2009 IEP "was prepared with insufficient evaluative data," there was no behavioral intervention plan (BIP) despite the CSE's recommendation for a full-time 1:1 behavior management paraprofessional, the CSE failed to recommend preferential seating and an FM unit, and the 12:1+1 placement was "inadequate to meet the [student's] needs" (id.). The parent then alleged that the IEP recommended a behavior management paraprofessional, but "despite several requests by the parent," a paraprofessional was not provided by the district, a related services authorization (RSA) was not issued, and a list of providers was not given to the parent; which "forced" the parent to pay for a private paraprofessional (id.).

The parent further alleged that the assigned school was "too big and overwhelming" for the student and that the classroom was "poorly supervised," with children who were not engaged and were functioning on a "significantly lower level" than the student (Dist. Ex. 1 at p. 1). The parent further contended that no multisensory teaching methods were being used in the classroom and that the assigned class was inappropriate for the student (id.). The parent asserted that the student

⁴ The district's August 13, 2009 letter did not reflect the 1:1 behavior paraprofessional that was recommended in the April 2009 IEP (compare Dist. Ex. 3 at p. 23, with Dist. Ex. 4). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][iii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]); see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Although the parent raises this issue on appeal, he did not raise the issue in his due process complaint notice for adjudication at the impartial hearing. Therefore, I will not address this issue for the first time on appeal.

required "a small nurturing school, small class environment, grouped with like functioning peers, with full time special education using multi-sensory teaching techniques, provided by two special education teachers" (id. at p. 2).

For relief, the parent requested tuition reimbursement for the student's attendance at Stephen Gaynor for the 2009-10 school year and provision of transportation and related services, including the cost of a behavior management paraprofessional (Dist. Ex. 1 at p. 2).

The district responded to the parent's due process complaint notice on February 16, 2010, contending that it offered the student a FAPE for the 2009-10 school year and that the assigned school was reasonably calculated to enable the student to obtain educational benefits (Dist. Ex. 2).

Impartial Hearing Officer Decision

An impartial hearing convened on September 24, 2010 and concluded on November 5, 2010, after two days of proceedings (Tr. pp. 1-392). The impartial hearing officer issued a decision dated January 31, 2011, finding that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 7-9). The impartial hearing officer stated that the district "presented several witnesses who testified that the program could meet the [student's] needs and offer him an opportunity for an educational benefit" (id. at p. 8). She further determined that "none of the parent's witnesses had any substantial familiarity with [the district's] program and thus, were unable to credibly state that [the student] could not receive educational benefit there" (id.).

Specifically, the impartial hearing officer found that the parent's contention that there was no special education teacher at the April 2009 CSE meeting was incorrect in that a district special education teacher who could teach in a classroom attended the meeting (IHO Decision at p. 8). Furthermore, she noted that the student's teacher from Stephen Gaynor participated in the April 2009 CSE meeting (id.). Regarding the assigned school, the impartial hearing officer found that the evidence showed that the curriculum at the school was modified according to the needs of each student and therefore, the parent's concern that the students in the classroom were too low functioning for the student, was "totally unfounded" (id.). Additionally, she found the parent's concern that the student would be "lost" at the assigned school was unfounded, stating that if the student had attended the district's school, he would have had a 1:1 paraprofessional as he had at Stephen Gaynor (id.). The impartial hearing officer also found that the testimony of the classroom teacher at the assigned school showed that she used a multisensory approach, that the student would be taught in small groups, and that the students were given 1:1 instruction in writing (id. at p. 9). Based on the above, she found that the district had offered the student a FAPE.

The impartial hearing officer then noted that although she did not need to address whether Stephen Gaynor was appropriate for the student or whether equitable considerations favored an award of tuition reimbursement, the parent's failure to send a letter rejecting the assigned school months after paying a "significant portion" of the tuition at Stephen Gaynor, which he knew was nonrefundable, did not "tip the equities for reimbursement in his favor" (id.).

Despite finding that the district had offered the student a FAPE for the 2009-10 school year, the impartial hearing officer found that the district had failed to implement the April 2009 IEP because it did not provide the 1:1 paraprofessional or an RSA for the student as mandated on his IEP (IHO Decision at pp. 9-10). The impartial hearing officer further determined that while the student's father had not requested an RSA in writing, he testified that he telephoned the district and asked for a paraprofessional (id. at p. 10). The impartial hearing officer further determined, however, that the parent did not advise the district that he was hiring a private paraprofessional

until mid-October 2009 (*id.*). The impartial hearing officer concluded that "given this confusion" and the mandate on the April 2009 IEP that the student have a paraprofessional, the district should have provided the parent with an RSA so that he could have selected a paraprofessional from the district's list of providers (*id.*). She therefore denied the parent's request for tuition reimbursement at Stephen Gaynor for the 2009-10 school year, but granted his request for reimbursement of the private paraprofessional "at a rate up to and consistent with the rates set by the [district] when an RSA is utilized" (*id.*).⁵

Appeal for State-Level Review

The district appeals, arguing that the impartial hearing officer's award of reimbursement for the student's private 1:1 behavior management paraprofessional was erroneous as a matter of law because the district offered the student a FAPE for the 2009-10 school year. The district contends that because it offered the student a FAPE, as the impartial hearing officer correctly decided, it was not required to provide the student with a private paraprofessional at Stephen Gaynor. The district further alleges that the impartial hearing officer failed to articulate a basis for the award and failed to cite any authority for the reimbursement of the paraprofessional.

The district also contends that Stephen Gaynor was not appropriate for the student because it failed to provide him with the related services and a 1:1 paraprofessional as mandated on his April 2009 IEP. Moreover, the district argues that staff at Stephen Gaynor did not use sufficient methods of measurement or provide sufficient instruction. Regarding equitable considerations, the district alleges that the parent never seriously intended to enroll the student in a public school and he paid a nonrefundable deposit prior to the April 2009 CSE meeting and did not inform the CSE of such payment. The district also argues that the parent did not give timely or proper notice of his intent to enroll the student at Stephen Gaynor. The district requests an order annulling the impartial hearing officer's decision, insofar as she determined that the district was responsible for funding the student's 1:1 paraprofessional.

The parent answers, asserting that even if the district offered the student a FAPE, it was legally obligated to fund the privately obtained 1:1 paraprofessional. Additionally, the parent cross-appeals the impartial hearing officer's determination that the district offered the student a FAPE, and contends that the April 2009 IEP was inadequate and that the assigned school was inappropriate for the student. The parent further asserts that Stephen Gaynor was an appropriate placement and that the equities support his claim for tuition reimbursement.

The district answers the parent's cross-appeal, denying the parent's claims and asserting, among other things, that the district's allegations in the petition should be deemed admitted because the parent did not admit or deny the allegations in his answer, and that the parent raised an issue in his cross-appeal that was not raised in his due process complaint notice or at the impartial hearing.

Applicable Standards

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

⁵ I note that the parties' closing briefs were not submitted with the hearing record. Although oral statements and written briefs by attorneys or parties are not treated as evidence, State regulations nevertheless require the impartial hearing officer to identify (*i.e.* mark) and enter "all other items" he or she considers into the hearing record (8 NYCRR 200.5[j][5][v]).

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 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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, but, 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Pleadings—Form Requirements

Initially, I will address a procedural issue raised in the district's answer to the parent's cross-appeal. The district asserts that the parent failed to comply with State regulations regarding the contents of an answer because he did not admit or deny the allegations enumerated in the petition (8 NYCRR 275.12). Therefore, the district requests that the allegations in the petition be deemed admitted.

A review of the parent's answer and cross-appeal reveals that the district is correct that the parent did not specifically admit or deny the allegations enumerated in the petition. Therefore, the answer does not technically conform to State regulations (8 NYCRR 275.12). However, at this juncture the parent is proceeding pro se in this case and the district was able to formulate a responsive answer to the cross-appeal and has not explained how this technical error prejudiced the district. Therefore, I will not deem the allegations in the petition admitted in this instance. In the event that the parent has a need to bring another matter to a State Review Officer in the future, he is advised to review the requirements of the State regulations and consult the guiding instructions for filing an appeal with the Office of State Review located at <http://www.sro.nysed.gov/overview.html>.

Scope of the Appeal

In his due process complaint notice, the parent alleged that the April 2009 CSE was improperly composed because it lacked a special education teacher who could implement the

program (Dist. Ex. 1 at p. 1). This claim was not raised on appeal; therefore, I will not address it in this decision.⁶

April 2009 IEP

I will first address the issues raised in the parent's cross-appeal regarding whether the district offered the student a FAPE for the 2009-10 school year. For the reasons set forth below, I agree with the impartial hearing officer that the district offered the student a FAPE.⁷

Evaluations Reflected on IEP

Regarding the parent's contention that the April 2009 IEP did not accurately reflect the evaluations reviewed by the CSE, I note that the parent testified that he believed that the present levels of performance on the student's IEP were accurate (Tr. p. 307; see Tr. pp. 315-16). The district's special education teacher who attended the April 2009 CSE meeting testified that the IEP reflected information that was provided at the meeting by the student's Stephen Gaynor teacher including the student's instructional levels in reading, writing, and math (Tr. pp. 26, 29). He also testified that the parent did not object to the characterization of the student's functional levels at the CSE meeting (Tr. p. 29). The hearing record reflects that the student's father and his teacher from Stephen Gaynor were given an opportunity to provide input during the CSE meeting, and that the CSE discussed all of the recommendations for the student with them (Tr. pp. 39, 342).

Notwithstanding the parent's contention regarding the evaluations reviewed at the CSE meeting, the hearing record demonstrates that the recommendations in the April 2009 IEP were designed to address the student's needs. The special education teacher testified that the CSE considered the student's areas of need including his inability to focus, his reading and his writing deficits (Tr. pp. 26-27). He further testified that the CSE believed that the 12:1+1 program recommendation was appropriate to address these deficits (Tr. p. 27). A review of the student's annual goals in the April 2009 IEP reveals that they were aligned with the student's needs as described in the present levels of performance on the IEP (Dist. Ex. 3 at pp. 3-7; see Dist. Ex. 3 at pp. 8-13). The IEP also contained academic management strategies to address the student's needs, which included breaking down all new information presented, presentation of new material multiple times for internalization, use of a "great deal of positive reinforcement," and monitoring of frustration levels to intervene before the student shut down (Dist. Ex. 3 at p. 4). In addition, the April 2009 IEP contained social/emotional management strategies to address the student's needs

⁶ Even if I were to address this contention had it properly been before me, the parent's argument would be unpersuasive where, in this case, the student's teacher from Stephen Gaynor participated in the April 2009 CSE meeting and the CSE reviewed teacher reports from the private school (Tr. pp. 23, 24, 25, 29, 33, 39, 306-07; Dist. Ex. 3 at pp. 2, 3-5; see *C.T. and T.T. v Croton-Harmon Union Free Sch. Dist.*, 10-cv-1624 [S.D.N.Y. Jul. 18, 2011]). Therefore, the lack of a district special education teacher in this case did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]; Winkelman, 550 U.S. at 525-26; A.H., at *2; E.H., 2008 WL 3930028, at *7; Matrejek., 471 F. Supp. 2d at 419).

⁷ In the cross-appeal, the parent alleges that even if the district offered the student a FAPE, pursuant to Education Law § 3602-c, the district was still required to fund the private paraprofessional that the parent hired for the student at Stephen Gaynor (Answer pp. 12-13; see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007). Once again, this argument was not raised in the parent's due process complaint notice, and no evidence is contained in the hearing record showing that the parent dually enrolled the student in the district and sought services from the district under an individualized education services program (IESP) for a student attending a nonpublic school when FAPE was not at issue. Therefore, I find the parent's argument to be unpersuasive.

including the provision of individual teacher assistance, positive reinforcement, a classroom behavior program, verbal rehearsal, color coded folders for help with organization, refocusing and redirection as necessary, and mediation for frustration tolerance (*id.* at p. 5). The IEP also recommended that the student receive counseling and provided goals for those sessions (*id.* at pp. 13, 20, 21). As further discussed below, the April 2009 IEP recommended a 1:1 behavior management paraprofessional to assist the student in following through with independent work (*id.* at pp. 5, 23).

1:1 Behavior Management Paraprofessional

The parent asserts in his cross-appeal that although the April 2009 IEP recommended a 1:1 behavior management paraprofessional, it did not indicate "how that paraprofessional was expected to engage with [the student] in order to prevent him from shutting down when faced with challenging materials." I am not persuaded by the parent's argument. Initially I note that although the CSE recommended a 1:1 behavior management paraprofessional for the student, the hearing record reflects that the student did not require a BIP (Dist. Ex. 3 at pp. 7, 23). Moreover, an IEP does not have to include a BIP (*see J.A. v. East Ramapo Sch. Dist.*, 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; *see also T.Y. v. Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir. 2009] *cert. denied*, 130 S. Ct. 3277 [2010]). Testimony by the district's special education teacher reflected that neither the student's father nor his teacher from Stephen Gaynor indicated at the CSE meeting that the student required a BIP (Tr. p. 86). The district's special education teacher further testified that the CSE believed that the student's social/emotional goals, which would be addressed both in counseling and in the classroom, coupled with a classroom behavior management plan, would be sufficiently designed to meet the student's needs (*id.*).

With regard to how the paraprofessional would engage with the student to prevent him from shutting down when faced with challenging material, the hearing record reflects that the paraprofessional and the teacher in the classroom would have addressed the social/emotional management strategies included in the April 2009 IEP (Tr. pp. 32-33). A CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (*Rowley*, 458 U.S. at 204; *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1102 [11th Cir. 2006]; *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 [7th Cir. 1988]; *Application of a Student with a Disability*, Appeal No. 11-032 *Application of a Student with a Disability*, Appeal No. 10-056; *Application of the Dep't of Educ.*, Appeal No. 08-075; *Application of a Child with a Disability*, Appeal No. 07-065; *Application of a Child with a Disability*, Appeal No. 07-054; *Application of a Child with a Disability*, Appeal No. 07-052; *Application of a Child with a Disability*, Appeal No. 06-022; *Application of a Child with a Disability*, Appeal No. 05-053; *Application of a Child with a Disability*, Appeal No. 94-26; *Application of a Child with a Disability*, Appeal No. 93-46).

Break Out Room

The parent also asserts that the district did not offer the student a FAPE because the student's "need for 1:1 instruction in an isolated environment," such as in a break out room, would not have been addressed. The evidence does not support the conclusion that the student needed 1:1 instruction in an isolated environment in order to receive a FAPE. Testimony by the student's 1:1 paraprofessional at Stephen Gaynor indicated that when the student became frustrated or anxious, she removed him from the classroom and went either to the break out room or to the hallway where she would discuss the problem, calm the student down, and get him back on track so he would complete his work (Tr. p. 269). She also testified that the student only had to be removed from the classroom one time per week (Tr. p. 284; *see* Tr. p. 243). The student's teacher

at Stephen Gaynor testified that he had to be removed from the classroom due to tantrums only "occasionally," and that his tantrums "got less and less as the year went on" (Tr. pp. 243-44). Although Stephen Gaynor used a break out room to address the student's tantrums and the parent may arguably view that approach as far superior, that viewpoint did not require the district to replicate the identical strategy used in the private school (E.M. v. New York City Dept. of Educ., 2011 WL 1044905, at *9 [S.D.N.Y. Mar. 14, 2011]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; Tarlowe, 2008 WL 2736027, at * 8 [holding that the district did not fail to meet its obligations when the substance of the student's behavioral needs was fairly addressed in the IEP]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). Furthermore, as discussed above, the April 2009 IEP was appropriately designed to address the student's social/emotional needs. As such, the district was not mandated to address the student's needs by specifying a break out room on his IEP.

Use of Assessments

Regarding the parent's claim that the April 2009 CSE inappropriately recommended on the student's IEP that he be assessed using "regular testing," I note initially that the parent is not arguing that the student requires alternate assessment (see 8 NYCRR 200.4[d][2][vii]; see also 20 U.S.C. § 1412[a][16][C]; 34 C.F.R. § 300.320[a][6][ii]). A review of the April 2009 IEP reveals that other methods of assessment of the student's progress toward his annual goals were delineated on the IEP including the use of observation, classroom participation, portfolio assessment, work samples, and homework (Dist. Ex. 3 at pp. 8-13).⁸ Additionally, the IEP also recommended testing accommodations to be used consistently throughout the student's educational program including extended time (2x), exams administered in a separate location, directions read and reread aloud, questions read and reread to the student, and answers recorded in any manner (id. at p. 23). Moreover, I note that one of the student's counseling goals specifically addressed improving the student's coping skills for frustrating or anxiety producing situations by developing a realistic appraisal of his present strengths and weaknesses, and by learning to accept simple errors (id. at p. 13). Based on the support that the student would have been offered during testing situations, the variety of assessment techniques other than "regular testing," and the support provided daily in the classroom and weekly in counseling sessions to move the student toward meeting his social/emotional goals, the hearing record reflects that the April 2009 IEP appropriately addressed the student's needs with regard to assessment.⁹

Based on all of the above, I find that the recommendations in the April 2009 IEP were reasonably calculated to enable the student to receive educational benefits and that the special education services were designed to address the student's needs as reflected in the IEP. Therefore, I agree with the impartial hearing officer that the district offered the student a FAPE for the 2009-10 school year.

1:1 Paraprofessional—Unilateral Placement

I now turn to the district's cross-appeal that the impartial hearing officer erred in awarding reimbursement to the parent for the cost of the student's 1:1 paraprofessional at Stephen Gaynor

⁸ The April 2009 IEP contains several pages that appear to contain duplicates of the IEP goals (Dist. Ex. 3 at pp. 14-20).

⁹ Although the parent alleges that the student cannot be assessed using regular testing, I note that as part of the district's psychological evaluation, the student was able to complete nearly half of the WISC-IV as well as a figure drawing which was scored using the Goodenough scoring system (Dist. Ex. 6 at pp. 2, 4-7).

after she determined that the district had offered the student a FAPE for the 2009-10 school year. The impartial hearing officer specifically found that the district offered the student a FAPE via the educational program and related services recommended in the April 2009 IEP (IHO Decision at p. 9). Thus, absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists in the hearing record upon which to predicate an award of additional services (see 34 C.F.R. § 300.148[a]; Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). Consequently, in the absence of any other basis, the impartial hearing officer's award to the parent for reimbursement of the cost of the student's 1:1 paraprofessional must be annulled.

Conclusion

I have considered the parties' remaining contentions and find them unpersuasive in light of my decision. Based upon a review of the hearing record, the district's appeal must be sustained and the parent's cross-appeal must be dismissed.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the impartial hearing officer's decision dated January 31, 2011 determining that the district failed to provide the student with a 1:1 behavior management paraprofessional and directing the district to reimburse the parent for the costs of the 1:1 paraprofessional, are annulled.

Dated: Albany, New York
July 22, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER