The University of the State of New York

The State Education Department
State Review Officer
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No. 12-006

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 Board of Education of the Jamestown City School District

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Hodgson Russ LLP, attorneys for respondent, Andrew J. Freedman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services a subcommittee of respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2011-12 school year was appropriate. The district cross-appeals from that portion of the IHO's decision which found that it failed to offer the student a FAPE for the 2011-12 school year by impeding the parent's participation in a CSE meeting. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152; 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the impartial hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case has received diagnoses of porencephaly,[1] cerebral palsy with concomitant hypertonia, and a seizure disorder; is legally blind; requires the use of a shunt to drain spinal fluid; and has moderate hearing loss in one ear (Tr. pp. 203-04; Parent Exs. 17 at p. 1; 18 at p. 1; 20; 24; 29; 35).[2] At the time of the impartial hearing, the student was attending a district

[1] Porencephaly is described in the hearing record as a central nervous system disorder in which cavities form in the cerebral hemispheres of the brain (Tr. p. 203; Parent Ex. 24 at p. 1).

[2] The parent's exhibits are numbered consecutively to the district's (Tr. pp. 5-6). The transcript for the proceedings on August 26, 2011 is paginated nonconsecutively with the transcript for the impartial hearing; citations to the August 26, 2011 proceedings are prefaced by (Aug. 26, 2011 Tr. p. [page number]).

elementary school in an ungraded 8:1+1 classroom and, among other accommodations and services, receiving related services including speech-language therapy, occupational therapy (OT), physical therapy (PT), and vision services, as well as the services of a supplemental support personnel (aide) to assist him with activities of daily living (ADL) (Dist. Ex. 2 at pp. 7-9). His eligibility for special education programs and related services as a student with multiple disabilities is not at issue in this appeal (see 34 CFR 300.8[7]; 8 NYCRR 200.1[zz][8]).

A subcommittee of the CSE convened to develop an IEP for the student on April 5, 2011 (Dist. Ex. 2 at p. 1). The April 2011 IEP indicates that the student "needs adult assistance throughout his school day and to transport him throughout the building" (Dist. Ex. 2 at p. 4). The IEP reflects that the student was "dependent on an adult for all position changes, self-care, transfers and mobility," required "direct adult assistance" when in a prone stander, and was "dependent on an adult for all of his self-care needs" (id. at pp. 4-5). The CSE subcommittee noted that it had received a recommendation that the student receive 1:1 supervision while feeding, "with the same feeder whenever possible to maintain consistency" (id. at p. 5). The IEP further indicates that the student "requires adult assistance for all functional, daily living skills [and] requires an Individual Health Care Plan" (id. at p. 6). A section of the IEP entitled "Special Alerts" states that the student "is prone to seizures and may require emergency medications[,] is nonambulatory and uses [a] wheelchair[,] has a shunt and needs caution when transferring out of wheel chair[, and] needs 1:1 assistance for emergency evacuations" (id. at p. 1).

As reflected on the IEP, the CSE subcommittee recommended placement in an 8:1+1 classroom and that the student receive adapted physical education (APE) and related services including individual OT, PT, and speech-language therapy; nursing services; vision services; and a "Supplemental Support Personnel (SSP)" (aide) for 6 hours per day in "all school settings (including meal time) with the exception of therapy rooms, APE, and small group instruction with the teacher in the classroom" (Dist. Ex. 2 at pp. 8, 10). The aide's role was to assist the student with ADL, getting on and off the school bus, transferring in and out of his adaptive equipment; monitor him for seizure activity and positioning; remain in close proximity while the student was resting; position his head during instruction and play time; and provide hand over hand assistance so that the student could "participate in the learning environment" (id. at p. 8). The CSE subcommittee also recommended that the student receive assistive technology including "wedges for proper positioning during feeding and therapy activities[,] an adaptive chair for seating and a prone stander, as well as a parent provided wheelchair when available" and "simple switches" for use in making choices (id. at pp. 8-9). The CSE subcommittee found the student eligible for extended school year (ESY) services and offered the student a similar program for the summer (id. at p. 11).[3]

[3] On May 6, 2011, the district and the parent agreed to amend the student's IEP without a CSE meeting (see 20 U.S.C. § 1414[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]) to include a program modification stating that the student would "have a notebook containing data sheets to record trials of skills practiced throughout the day. Related service providers will identify skills to be targeted in the classroom setting" (Dist. Ex. 3 at p. 8). The only other substantive change was to clarify that an increase in the amount of vision services the student received would go into effect at the beginning of the 2011-12 school year, rather than immediately (compare Dist. Ex. 2 at p. 8, with Dist. Ex. 3 at p. 8). The April 2011 and May 2011 IEPs comport in large part, but not entirely, with the form prescribed by the Commissioner; I remind the district that "for all IEPs developed for the 2011-12 school year, and thereafter, the State's IEP form may not be modified to otherwise change its appearance or content" ("Model Forms: Student Information Summary and Individualized Education Program

A. Due Process Complaint Notice

By due process complaint notice dated June 27, 2011, the parent asserted that the April 2011 IEP deprived the student of a free appropriate public education (FAPE) by not specifying that the student's aide services would be provided in a 1:1 ratio and not providing the student with a 1:1 aide for the entire school day, and that the student's needs could not be met by the provision of an aide who was also responsible for assisting other students (IHO Ex. 1 at pp. 1-2).[4] The parent also alleged that the district failed to provide the student with a 1:1 aide from January 2011 until April 2011 (id. at p. 2). The parent requested that the district comply with the student's prior IEP during the pendency of the proceedings, that the April 2011 IEP be amended to specify that the student receive aide services in a 1:1 ratio for the entire school day, and additional services to compensate for the district's failure to properly implement the student's prior IEP (id.).[5]

In a response to the due process complaint notice dated July 6, 2011, the district denied the parent's claims, specifically stating in response to the parent's claim that the CSE did not recommend that the student receive a 1:1 aide for the 2011-12 school year that the IEP offered the student six hours of supplementary support personnel services (Dist. Ex. 7 at p. 1).

B. Impartial Hearing and Interim Decision

An impartial hearing convened on August 26, 2011 during which the issue of the student's pendency (stay-put) placement was addressed (Aug. 26, 2011 Tr. pp. 3-4). At the impartial hearing, the parent clarified that she was only in disagreement with the April 2011 IEP to the extent that it did not provide the student with a 1:1 aide (Aug. 26, 2011 Tr. p. 6). In an interim decision dated September 26, 2011, the IHO found that the placement recommended by the April 2010 IEP constituted the student's pendency placement (IHO Ex. 5 at pp. 8-9). The IHO further found that the district had failed to establish that it could no longer offer a 1:1 aide so as to permit substitution of a substantially similar program (id. at pp. 9-10). Accordingly, the IHO determined the student's pendency placement to include 1:1 aide services (id. at p. 11).

C. IHO Decision

The impartial hearing reconvened on October 3, 2011 and concluded the next day, with nine witnesses testifying (Tr. pp. 1-230). In a decision dated November 29, 2011, the IHO found that, while the district had significantly impeded the parent's ability to participate in the April 2011 CSE subcommittee meeting, the support provided to the student by the district was appropriate for

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(IEP)" [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm; see 8 NYCRR 200.4[d][2]).

[4] Neither party addresses the May 2011 IEP; accordingly, this decision refers to the April 2011 IEP. I note that the arguments raised by the parents on appeal, and my analysis thereof, apply to either IEP.

[5] The student's prior year IEP, developed April 7, 2010, is substantially similar to the April 2011 IEP, with the exception that the aide services are specified as being in a 1:1 ratio (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 2 at p. 8) and, while the April 2011 IEP specifies the student's need for adult assistance, the April 2010 IEP states that the student requires the assistance of a 1:1 paraprofessional (compare Dist. Ex. 1 at pp. 4-6, with Dist. Ex. 2 at pp. 4-6).

the student (IHO Decision at pp. 10-15).[6] The IHO determined that it was appropriate for the student to receive small group instruction without the presence of an aide and that the hearing record indicated that the teacher was close to the student during small group instruction and trained to recognize seizures and immediately report them to the nurse (id. at p. 14). The IHO further found that many of the student's related services providers had been providing the student with therapies without the presence of an aide and that many of the providers were trained to recognize the student's seizures and immediately contact the nurse (id.). Accordingly, the IHO denied the parent's request that the April 2011 IEP be amended to include the provision of a 1:1 aide throughout the student's entire school day (id. at p. 15). Furthermore, the IHO found that the district had not failed to implement the student's April 2010 IEP from January 2011 to April 2011 so as to warrant additional services (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that it was appropriate for the student not to have an aide during small group instruction and related services and that the related services providers were sufficiently trained to obviate the student's need for a 1:1 aide during related services. The parent further asserts that the IHO improperly shifted the burden of proof on these issues to her, and contends that the district failed to put forth any evidence regarding the student's need for an aide during APE.[7]

The district answers, denying the district's allegations with respect to the contested issues, and cross-appeals the IHO's finding that the district impeded the parent's participation at the April 2011 CSE meeting.

The parent answers the cross-appeal and argues in favor of upholding the IHO's determination on that issue. The parent also asserts that the answer and cross-appeal should be rejected insofar as it contains no citations to the hearing record and the district did not specify any particular factual findings or legal conclusions with which it took issue, objecting only to the IHO's ultimate determination.

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[6] The IHO fairly and efficiently conducted the impartial hearing in two consecutive days, including the parties' post hearing memoranda in the hearing record as IHO exhibits, and documenting in the record all requests for and granting of extensions of the timelines applicable to impartial hearings (IHO Exs. 2-4). Furthermore, the hearing record indicates that the IHO properly closed the record on the date he received the parties' post hearing memoranda (IHO Decision at p. 2).

[7] Although the parent alleged in her due process complaint notice that the April 2011 IEP permitted the district to provide aide services to the student in a ratio other than 1:1, she has abandoned this argument on appeal from the IHO's decision, and there is no indication in the hearing record that the district ever implemented the student's IEP in such a manner. Furthermore, the IDEA does not require that a district use specific terminology to refer to a 1:1 aide, and I find the testimony at the impartial hearing indicates that the "Supplemental Support Personnel" listed on the student's IEP would provide services in a 1:1 ratio, so that the parent's challenge with respect to terminology is without merit (see D.S. v. Hawaii, 2011 WL 6819060, at *9-*10 [D. Hawaii Dec. 27, 2011]). Were the district to implement the student's IEP in a manner inconsistent with that testified to at the impartial hearing, it could possibly give rise to a claim of improper implementation (see Dorchester County #2 Sch. Dist., 37 IDELR 289 [OCR 2002]; "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at p. 3 [Off. Spec. Educ. Jan. 2012], available at http://www.p12.nysed.gov/specialed/ publications/1-1aide-jan2012.pdf).

V. Discussion

A. Parental Participation at the April 2011 CSE Meeting

Turning first to the district's cross-appeal, I decline to dismiss it for the district's failure to comply with the form requirements in the practice regulations, although I caution the district to ensure compliance with such regulations in the future (8 NYCRR 279.4[a], [b]; 279.8[b]). The IHO found that the determination to exclude the student's aide services from certain activities was based on a district policy of not providing students with 1:1 aides during small group instruction and related services, rather than on the student's individual needs (IHO Decision at p. 13). This finding relies on a conflation of two separate and distinct matters: whether the district systemically violated the IDEA by carrying out a policy that was inconsistent with the IDEA; and whether the district, in this instance, provided the student with a FAPE. Initially, no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 2009 WL 3765813 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Therefore, while the IHO had jurisdiction over the parent's claim that that the IEP was not based on the student's needs, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the district's policy.[8, 9]

In any event, I find the claim that the parent was prevented from participating in the development of the IEP to be belied by the entirety of the hearing record. The IDEA entitles parents to participate in the substantive formulation of their child's educational program, and requires the CSE to consider any "concerns" parents have for "enhancing the education of their child" when it formulates the IEP (20 U.S.C. § 1414[d][3][A][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516-17, 530 [2007]). A school district has an affirmative obligation to take steps to ensure that one or both parents of a student are present at each CSE meeting or are afforded the opportunity to participate, and, if neither parent can attend a CSE meeting, to use other methods to ensure participation, including individual or conference telephone calls (34 CFR 300.322[a],

[8] Although not raised by the district, I note that this assertion is not contained in the due process complaint notice; rather, the parent simply alleged that to the extent any of her claims could be considered procedural, they impeded her participation in the decision-making process and deprived the student of educational benefit. Such a general allegation is insufficient to preserve the procedural argument addressed by the IHO (see B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *5 [E.D.N.Y. Jan. 6, 2012]). This assertion was first raised in the parent's opening statement at the impartial hearing (Tr. pp. 28-29), and although the IHO found that the district did not object to the parent raising these claims (IHO Decision at p. 10), there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include this issue even if the IHO had jurisdiction over such claims. Accordingly, the IHO should not have expanded the scope of the impartial hearing to address this issue (C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-*12 [S.D.N.Y. Oct. 28, 2011]; see 20 U.S.C. § 1415[c][2], [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7], [j][1][ii]).

[9] To the extent that the IHO relied on Application of the Board of Educ., Appeal No. 11-051, I note that rather than passing upon the validity of a district policy, that decision merely noted that there was no evidence of the alleged policy. In this case, there is no dispute that the district changed its approach to IEP development.

[c]; 8 NYCRR 200.5[d]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 395 [S.D.N.Y. Jan. 29, 2010]). 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; 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]).

Here, the district members of the CSE responded to the parent's concerns that the student required the assistance of a 1:1 aide at all times throughout the day, and the student's father indicated that he did not object to the student not receiving 1:1 aide service during related services so long as the related services were provided in a 1:1 ratio (Dist. Ex. 4). With regard to whether the student would receive aide support during small group instruction, the parent explained that she was not concerned with the student's physical safety (id.). Furthermore, although the parent disagreed with the district's decision to remove aide support during small group instruction, the parents were allowed to state their concerns (id.). Rather, testimony indicated that the district members of the CSE felt that the student's teacher would be able to sufficiently monitor him while receiving small group instruction (Tr. pp. 55-56, 58, 113-14, 196-98). Because the right to participate does not include a veto over all aspects of an IEP with which a parent does not agree (see, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]), I find that IHO erred in finding that the district significantly impeded the parent's opportunity to participate in the decision-making process at the April 2011 CSE meeting.

B. The Student's Need for Aide Services

Before addressing the merits of the parent's appeal, I note the limited scope of the petition. The parent appeals specifically only from the IHO's determinations that the student did not require the services of an aide during small group instruction and related services, and from the IHO's failure to rule regarding the student's need for an aide during APE.[10] As noted above, the parent has abandoned her initial argument that the April 2011 IEP, as written, would permit the district to provide aide services to the student in a greater than 1:1 ratio; however, I find that the due process complaint notice's assertion that the student requires a full time 1:1 aide was clear while also being sufficiently broad to encompass the more limited grounds now asserted on appeal.

Guidance released by the Office of Special Education in 2010 lists "[a]ssignment of supplementary school personnel" as a type of supplementary aid and service, and requires IEPs to specify "the frequency, location and duration of such services" ("Guide to Quality Individualized

[10] I disagree with the parent's assertion that the IHO placed the burden of establishing the student's need for a 1:1 aide during small group instruction and related services on her; rather, the IHO found that the hearing testimony indicated that the classroom teacher and related service providers had been adequately trained in recognizing the student's seizures that he did not require the assistance of a 1:1 aide during such times, and that the parent had not submitted evidence tending to rebut such testimony (IHO Decision at p. 14).

Education Program [IEP] Development and Implementation," available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). I note that the form prescribed for use in developing IEPs by the Commissioner also requires that districts include "service delivery recommendations" when recommending that a student receive supplementary aids and services, program modifications, or accommodations (http://www.p12.nysed.gov/specialed/formsnotices/IEP/IEPform.doc), and while a ratio need not be specified for such recommendations, the April 2011 IEP states that the student is to receive aide assistance for six hours daily "[i]n all school settings" except during small group instruction, related services, and APE (Dist. Ex. 2 at p. 8).[11] Testimony adduced at the impartial hearing indicates that district personnel interpreted the language of the April 2011 IEP to make no substantive change to the aide services provided to the student, and that with the exceptions specified on the IEP, the student would receive individual aide services throughout the school day (Tr. pp. 52, 59, 84-85, 99, 102, 104-05, 107, 110-12, 139-40, 146, 158; see Aug. 26, 2011 Tr. pp. 34-35, 37, 74, 76-77, 80, 82-83, 85, 87, 93-94).

Addressing first whether the student required aide services during APE, the parent is correct that the IHO did not rule on the district's decision to exclude APE from the locations in which the student would receive aide support. Furthermore, the district presented no evidence on this issue. Accordingly, I find that the district did not establish that the student did not require aide services during APE and, in the absence of any evidence in the hearing record that the student did not require them, I will order the district to provide the student with such support during APE, unless the parties otherwise agree.

With respect to whether the student required aide services during small group instruction, the evidence on this issue is equivocal. The student's special education classroom teacher for the 2010-11 school year (Teacher 1) testified that while she provided small group instruction to the student, which was for a maximum of five minutes, she would be "knee to knee" with the student, with two other students in Rifton[12] chairs flanking her (Tr. pp. 55-56, 58). Teacher 1 testified that if the student suffered a seizure, she would have been able to take him to the school nurse immediately (Tr. p. 58). The director similarly testified that small group instruction without aide support allowed the student to socialize without risk of harm, potentially leading to greater independence for the student (Tr. pp. 196-99). The director admitted, however, that the student should not be without an aid for more than "a short period of time, five to 10 minutes within arm's length of the teacher in a small group" (Tr. p. 225). Contrary to the description given by Teacher 1 and the director, the student's special education classroom teacher for the 2011-12 school year (Teacher 2) testified that during small group instruction, she required "the paraprofessionals to help with positioning switches, positioning [the student's] wheelchair, so to encourage him to use the other side, [and] to help in the instruction, because [the student's] instruction is so much different than the other students, because he is unable to make a mark on a paper with a pencil and unable to answer questions in a traditional sense, and he requires a lot of switches and hooking

[11] Recent guidance issued in January 2012 from the Office of Special Education entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide" provides a list of considerations districts should keep in mind when determining the need for aide services (available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

[12] Rifton chairs are described in the hearing record as an "adaptive equipment" enabling children who cannot sit up on their own to "sit up appropriately and be engaged that way" (Tr. pp. 66-67).

things up, so [she needed] a paraprofessional there to help in the positioning and the switches and recording and all sorts of equipment" (Tr. pp. 159-60). Teacher 2 testified that an aide would stand nearby during small group instruction, in charge of the student's adaptive equipment and positioning, as well as monitoring the student for signs of a seizure (Tr. p. 163). I also note that the "Daily Plan for Supplemental Support Personnel," dated April 5, 2011, specifies that the student required assistance with switches and a voice box, as well as hand over hand assistance to participate in activities during small group instruction, but also states that the student did not require aide assistance during small group instruction (Dist. Ex. 10 at pp. 3-4). I find that the evidence is very close, but that the district failed to establish that the student did not require aide services at such time. Accordingly, I will order the district to provide the student with aide support during small group instruction, unless the parties otherwise agree.

Finally, with regard to the student's need for an aide during related services, the student's speech-language pathologist testified with regard to the signs that the student was experiencing a seizure in substantially the same manner as they were described by the parent (compare Tr. p. 128, with Tr. pp. 209-10). While the speech-language pathologist testified that he had received no formal training with regard to monitoring the student's seizures, or the actions he should take were the student to experience a seizure (Tr. p. 129), he also stated that, were the student to have a seizure during a therapy session, he would ensure that the student was safe and contact the school nurse by radio, as he had done with other students who had experienced seizures in his care (Tr. pp. 131-33). The school nurse testified that she had discussed with the student's teachers, aides, and service providers the signs that the student was having a seizure, as related to her by the parent (Tr. pp. 178-79). The nurse further testified that when the student experiences a seizure, he is usually brought to her within 15 to 30 seconds, although some of his seizures are so short that he does not need medical attention (Tr. pp. 176-78).[13] Furthermore, Teacher 1 testified that the student's 1:1 aide did not accompany him to speech-language therapy, OT, or PT, based on the service providers' preferences (Tr. pp. 46, 75-76), and the speech-language pathologist testified that the student's aides had not accompanied him to speech-language therapy in the three years he had been providing services to the student (Tr. pp. 129, 131). Finally, while not dispositive to my determination, I also note that at the April 2011 CSE meeting, the student's father indicated that he did not object to the student not receiving aide support during his related services so long as he was receiving them in a 1:1 ratio (Dist. Ex. 4). Accordingly, while I concur with the IHO that the hearing record did not show that the student required the services of an aide during related services, I encourage the district to ensure that all of its personnel who interact with the student are appropriately trained in both recognizing the signs that the student is having a seizure, and in the protocol to follow in the event that he experiences one (see Application of a Student with a Disability, Appeal No. 08-030).

VI. Conclusion

While I can sympathize with the parent's concern that her son should receive appropriate care and the seriousness of his needs, I find that the district established that the recommended services met his needs, with the limited exceptions stated above. Although the matter was not raised in the due process complaint notice, I also find in the alternative that the district did not

[13] Evidence in the hearing record indicates that the student need not be administered medication unless a seizure lasts for more than three minutes (Tr. pp. 220, 222-23; Dist. Ex. 4).

significantly impede the parent's right to participate at the April 2011 CSE meeting. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 29, 2011 is modified, by reversing those portions which (1) determined that the district impeded the parent's participation at the April 2011 CSE meeting and (2) denied the parent's requests that the student be provided with aide services during small group instruction and APE for the 2011-12 school year; and is otherwise affirmed.

Dated: **Albany, New York**
February 8, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER