

In re: Special Education Due Process Case # DP-23-02

ORDER

In this case, Parent filed a due process complaint seeking an order requiring the Supervisory Union to reimburse Parent for tuition paid to a private school after Parent unilaterally placed Student in that private school. The Supervisory Union objected to that request. The due process hearing was commenced on January 2, 2023 and completed on January 3, 2023. The parties and witnesses participated in the evidentiary hearings via Zoom.¹

Over the course of two days, the parties called 14 witnesses. The School District provided copies of the Core Exhibits comprising 3439 pages of documents organized in two bound volumes to Parent and the hearing officer before the due process hearing commenced. These exhibits were supplemented by additional documents, including the final IEP offered in August 2022 that is the subject of this hearing. LEA Core Ex. 3441-3465. In addition, Parent submitted hundreds of pages of documents, copies of which were either provided to the hearing officer

¹ A recording of the hearing is preserved and available on the Zoom cloud.

and the Supervisory Union's attorney at the prehearing conference or emailed to them on October 19, 2022.

FACTS

1. Parent and Student reside in a School District within the Supervisory Union that is the responding party to the due process complaint filed in this case.²
2. In 2015, while attending second grade in the School District, Student was found eligible for special education and related benefits under the disability category of Specific Learning Disability. LEA Core Ex. 8547.
3. Student continued to be eligible for special education and related benefits for a Specific Learning Disability until February 2018, when the school psychologist's psycho-educational examination indicated that Student's scores indicated that Student did not meet the criteria for Severe Learning Discrepancy between Student's ability and expected levels of performance in one or more of the basic skill areas. LEA Core Ex. 85.
4. Subsequently, Parent requested an independent evaluation. The School District commissioned the Stern Center for Language and Learning to evaluate Student and its report was completed in October 22, 2018.

² The due process complaint was filed on August 17, 2022.

5. Relying on a battery of tests administered during the evaluation, the Stern Center Report indicated that Student's profile is "consistent with a specific learning disability in the area of basic learning, reading fluency, reading comprehension, written expression and math calculations. [Student] could also be described as dyslexic and dysgraphic. Dyslexia is an impairment in the transcription aspects of writing (i.e., spelling and handwriting)." LEA Core Ex. 74.
6. The report then referred to a definition of dyslexia provided by the International Dyslexia Association that described dyslexia as a "specific learning disability that is neurobiological in nature ...[one that] is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities." LEA Core Ex. 73.
7. Based on these findings, the Stern Center report recommended that Student's IEP Team consider providing Student with special education services that would address phonological awareness and basic reading skills, spelling, handwriting and written expression, math, and social and emotional issues. LEA Core Ex. 74-79.
8. In April 2019, while Student was still in the sixth grade, the IEP Team approved an IEP that provided for special education services addressing the issues identified in the Stern Center report. LEA Core Ex. 433-461.

9. These services included direct instruction in structured reading, spelling, and math, and extended school year services in the same areas, all to be provided by the Stern Center. LEA Core Ex. 458.
10. While attending seventh and eighth grade at a middle school in the Supervisory Union, Student was assigned to the Supervisory Union's structured language-based literacy program.
11. Student's special education teacher³ and others developed this highly structured systematic program to develop students' foundational skills so that they could learn how to improve their phonologic and phonetic awareness, and their executive functions.
12. According to Student's special education teacher who is now the Supervisory Union's Literacy Facilitator, dyslexia is a neurobiological condition. Based on recent scientific literature, educators now realize that dyslexic students must learn how to, in effect, "re-train" their brain by acquiring new skills and practicing those skills until they are mastered to improve their ability to read and write.

³ Student's special education teacher in the seventh and eighth grade who was instrumental in developing the Supervisory Union's structured language-based literacy program is a doctoral candidate at Mount St. Joseph University.

13. According to this teacher, students who have participated in the Supervisory Union's structured language-based literacy program usually make slow but steady progress in acquiring these new skills.
14. Educational data reviewed by the Supervisory Union's Literacy Facilitator, who taught Student in the seventh and eighth grades, indicates that the program has been very successful.
15. In fact, last year the Supervisory Union's Literacy Facilitator and the Supervisory Union's Superintendent were invited to give a presentation at an international conference where they described how the Supervisory Union developed and implemented its structured language-based literacy program.
16. Following this presentation, school officials from around the United States and Canada have contacted the Supervisory Union asking for additional information related to the development and implementation of this program.
17. The Supervisory Union's Literacy Facilitator testified that test results showed that student achieved slow and steady progress while participating in the Supervisory Union's structured language-based literacy program during the seventh and eighth grade.

18. Student's 2021 IEP, approved at the IEP Team's March 2021 meeting, approved placement at the Supervisory Union's high school where Student would continue Student's participation in the Supervisory Union's structured language-based literacy program. LEA Core Ex. 279-300.
19. Before Student matriculated to the Supervisory Union's high school, Parent unilaterally placed Student in an out-of-state private school that offered educational programming similar to that offered at the local high school. LEA Core Ex. 3441-3465.
20. In December 2021, Parent filed a due process complaint seeking reimbursement for tuition paid to the private school.
21. This hearing officer dismissed that complaint because the complaint was filed more than 90 days after Parent unilaterally placed Student in the private school.
22. Following a meeting of Student's IEP team on August 30, 2022, the Supervisory Union offered Student an IEP that placed Student at the Supervisory Union's high school where Student would continue participating in the Supervisory Union's structured language-based literacy program.

23. Student's IEP provided for direct instruction in language-based mathematics, language-based environmental science, writing, and structured literacy in small classes (2-4 students). LEA Core Ex. 3461.
24. The IEP included provisions for case management consultation with classroom teachers, progress monitoring, and modification support, monitoring, and content support for general education classes. LEA Core Ex. 3461.
25. The IEP also included 21 program modifications and supports, and post-graduate transition planning. LEA Core Ex. 3458-3459 and 3464.
26. Parent rejected a proposal for including a counselling component because Student planned to attend the private school for the school year 2022-2023.
27. The private school's public school liaison testified at the due process hearing.
28. The private school's public school liaison described the private school's curriculum and structured approach to teaching students with severe learning disabilities caused by or related to dyslexia.
29. The private school's public school liaison testified that Student had made, and was making, slow but steady progress in Student's studies.

30. The private school's public school liaison testified that Student was an earnest, thoughtful, and hard-working student who was well-liked by Student's peers.

31. The private school's public school liaison participated in the development of Student's 2022 IEP and was asked if the IEP had any deficiencies. The private school's public school liaison had the following questions:

- Are the Supervisory Union's teachers qualified to provide language-based instruction in all subjects?
- Are licensed special education teachers in each of Student's classes, including subjects like history and science?
- Who was providing content support?
- Do the teachers assigned to Student's classes know how to teach reading and writing?
- Will Student be taught how to take notes, prepare for a test, and take a test?
- Will Student be assigned to classes who share Student's educational profile?

32. In her testimony, the Supervisory Union's Literacy Facilitator addressed each of the issues raised by the private school's public school liaison as follows:

- Teachers assigned to teach the small group classes in the high school's structured language-based program were all highly trained and qualified special educators who collaborated with the Supervisory Union's Literacy Facilitator.
- With the exception of Student's history class, teachers assigned to Student's classes, including science, were special educators who connected speech with text in every course.
- Content support would be provided by trained and qualified staff members, all of whom had college degrees.
- Special educators assigned to Student's small group classes employ techniques incorporated into the high school's structured language-based literacy program.
- Students enrolled in the high school's structured language-based literacy program learn how to take notes, acquire skills, practice those

skills until mastered, and generalize those skills in other classes, including general education classes.⁴

- Student's assigned to classes in high school's structured language-based literacy program share Student's educational profile.

33. Testimony at the hearing revealed that Student received counseling services in grade and middle schools to address mental health issues that appeared to have come to the school's attention in the sixth grade.

34. The counselor assigned to Student provided therapeutic services while Student was a sixth, seventh, and eighth grader.

35. This counselor testified that Student was frustrated with Student's academic achievements and that weighed on Student.

36. According to this witness, Student was stressed by Student's own high expectations and that Student needed to recognize how to deal with this issue.

37. The counselor was able to identify Student's emotional growth between the sixth and seventh grade, and, that at the end of the eighth grade, Student "still had a way to go."

⁴ The Supervisory Union's Literacy Facilitator pointed out in her testimony that the high school's structured language-based literacy program used the same approach as the private school Student is now attending.

38. Based on this history, Student's 2021-2022 IEP included a counseling component. LEA Core Ex. 318.
39. In August 2022, Student's IEP team wanted to include the counseling component in Student's 2022-2023 IEP, but Parent declined this offer because Student would be attending the private school.
40. After deciding to unilaterally place Student at the private school for the 2022-2023 school year, Parent filed a due process complaint requesting an order requiring the Supervisory Union to reimburse Parent for tuition and other fees paid to the private school.
41. The Supervisory Union had no objection to Parent's decision to file the due process complaint before Student actually started attending classes at the private school.
42. Parent's complaint alleged that the Supervisory Union could not provide Student with a Free Appropriate Public Education (FAPE) for a number of reasons, including Parent's belief that Student had not made "meaningful" progress in Student's studies while attending schools within the Supervisory Union and "teachers in the public schools were not trained in language-based instruction."

CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act (IDEA) “offers States federal funds to assist in educating children with disabilities.” States accepting federal funding must “provide a free appropriate public education – a FAPE, for short – to all eligible children.” *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 993 (2016).

To meet its substantive obligations under IDEA, schools are required to develop and offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The ‘reasonably calculated’ qualification reflects recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. at 998-999.

The IDEA does not require states to “maximize the potential of handicapped children.” *Board of Education v. Rowley*, 458 U.S. 176, 197, n. 21 (1982). Instead, the purpose of the Act was “more to open the door of public education to

handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Board of Education v. Rawley*, 458 U.S. at 192. And because public “resources are not infinite,” federal law “does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each [qualified] child.” *Lunceford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984).

In addition to providing qualified students with specially designed education services provided through a school’s educational support system as defined by VSER 2361.1(34), a LEA must also provide developmental and corrective services required to “assist a child who requires special education services to benefit from his or her special education.” VSER 2360.2.16.

1. Tuition reimbursement requests under IDEA and Vermont law

Under the IDEA and Vermont special education law, if the parents of a child believe that the IEP offered by the school district fails to provide the child with a FAPE, the parents may unilaterally remove the child from the district’s placement and place them at another school at the parents’ own expense, and then file a due process complaint seeking reimbursement. Reimbursement may be awarded upon a demonstration that: “(1) the proposed [programming] failed to provide the student with an appropriate education; (2) the parent’s private placement was appropriate

to the child’s needs; and (3) equitable considerations support the parent’s claim.” *Reyes ex rel. R.P. v. N.Y.C. Dep’t of Educ.*, 760 F.3d 211, 215 (2d Cir. 2014); see also *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836 (2d Cir. 2014).

2. Did the Supervisory Union fail to provide Student with an appropriate education?

The central question in this case is whether the Supervisory Union developed an IEP for Student for the school year 2022-2023 that is “reasonably calculated to enable [Student] to make progress appropriate in light of [Student’s] circumstances. The ‘reasonably calculated’ qualification reflects recognition that crafting an appropriate program of education requires a prospective judgment by school officials.”

To prevail in this case, Parent must demonstrate that the April 2019 IEP was inadequate to provide Student with a FAPE. *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). Parent alleges that the Supervisory Union violates Student’s procedural and substantive rights under IDEA.

To prove a procedural violation, Parent would have to demonstrate that the Supervisory Union failed to comply with the procedures set for in the IDEA. *Cerra v. Pawling Central School District*, 427 F.3d 186, 192 (2d Cir. 2005). Parent alleges two procedural violations in Parent’s post-hearing memorandum. First, Parent asserts that the Supervisory Union failed to schedule Student Triennial

Evaluation in 2021. Second, Parent claims that Student's IEP Team predetermined placement at the Supervisory Union's high school when it formulated Student's 2022-2023 IEP.

To prevail on these claims, Parent has the burden to demonstrate that these alleged procedural violations "impeded the child's right to a [FAPE]," "significantly impeded the parents' opportunity to participate in the decision making process," or "caused deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *A.C. and M.C. v. Board of Education of the Chappaqua Central School District*, 553 F.3d 165, 172 (2d Cir. 2009).

The evidence produced at the hearing indicated that the Supervisory Union contacted Parent in 2021 to schedule Student's Triennial Evaluation. In response, Parent's advocate specifically told Student's IEP case manager that Parent was holding off on pursuing the evaluation. For that reason, the Supervisory Union is not responsible for the postponement of Student's Triennial Evaluation. Thus, Parent's procedural claim on this basis fails.

Parent faults Student's IEP Team for prejudging its placement decision before Student's 2022-2023 IEP was completed. This allegation is difficult to understand. In August 2022, members of the IEP Team were aware that Student had a specific learning disability that profoundly affected Student's ability to read

and write. The IEP Team members knew that “to enable [Student] to make progress appropriate in light of the [Student’s] circumstances,” Student would have to participate in a structured language-based literacy program. The IEP Team members were all aware that Student had participated in the Supervisory Union’s structured language-based literacy program while in the seventh and eighth grades and that Student had made slow, but significant progress. In 2021, the IEP Team had developed an IEP that placed Student at the Supervisory Union’s high school where Student would continue to participate in that school’s structured language-based literacy program in small classes with other students who shared Student’s educational profile. And finally, the IEP Team had an obligation to place Student in the “least restrictive environment,” i.e., in a non-residential school, if possible.

Based on all of these factors, there is no reason why Student’s IEP Team would not have been predisposed to placement at the Supervisory Union’s high school as they prepared Student’s 2022-2023 IEP. But even if their predisposition to do so somehow violated IDEA procedures, Parent has not shown that this predisposition “significantly impeded the parents’ opportunity to participate in the decision making process,” or “caused deprivation of educational benefits.”

For these reasons, Parent has not met Parent’s burden to show that the procedural violations alleged in Parent’s post-hearing memorandum “impeded the child’s right to a [FAPE],” “significantly impeded the parents’ opportunity to

participate in the decision making process,” or “caused deprivation of educational benefits.”

In addition to alleging procedural violations, Parent claims that the Supervisory Union substantively violated Student’s right to a FAPE. To prevail on a claim alleging a substantive denial of FAPE, Parent must show that Student’s IEP was not “reasonably calculated to enable [Student] to receive educational benefits.” *R.E. v. New York City Dep’t of Education*, 694 F.3d 167, 190 (2d Cir. 2012).

Based on the testimony and other evidence introduced at the due process hearing, it is impossible to conclude that the IEP developed by Student’s IEP team in August 2022 failed to meet the standard required by federal and state law.

In October 2018, the Stern Center reported that Student’s ability to read and write was impaired and that the probable cause of Student’s learning disability was dyslexia. In March 2019, Student’s IEP was modified to address Student’s specific learning disability. Each subsequent IEP developed by Student’s IEP recognized that Student would need to be enrolled in a structured language-based learning program.

While attended middle school, Student was enrolled in a model program developed by the Supervisory Union’s Literacy Facilitator. At the hearing, the

Literacy Facilitator testified that Student made slow, but steady progress in improving Student's reading and writing skills.

Understandably, Parent was disappointed in the progress Student was making in middle school. Parent's disappointment was probably related to the fact that it took so long to identify the cause of Student's specific learning disability. It is easy to understand this frustration, but the evidence developed at the hearing demonstrates that the Supervisory Union appropriately responded to the Stern Center's findings and implemented the recommendations from the October 2018 report.

Parent, of course, had the right to unilaterally place Student in the private school. The question presented in this case is not whether that decision was a correct one, but whether federal and state law requires the Supervisory Union to reimburse Parent for tuition and costs associated with Student's placement at the private school.

The evidence presented at the hearing demonstrates that IEP developed by Student's IEP Team in August 2022 indicated that Student suffered from double-deficit dyslexia, the most severe form of dyslexia that affects both phonological processing and rapid automatized naming. The Supervisory Union's Literacy

Facilitator testified that these are foundational skills necessary to learn how to read and write.

To address Student's specific learning disability, the 2022-2023 IEP indicated that Student would be enrolled in the Supervisory Union's structured language-based literacy program. Student would be instructed by qualified and highly trained special educators and attend classes in small groups with students who shared Student's education profile.

In addition, the 2022-2023 IEP included 21 program modifications and supports and post-graduate transition planning. Parent rejected a proposal for including a counselling component because Student planned to attend the private school for the school year 2022-2023.

When he testified at the hearing, even the private school's public school liaison acknowledged that the goals and objectives in Student's August 2022 IEP were appropriate. Although he expressed concern about how the IEP would be implemented at the Supervisory Union's high school, those concerns were directly addressed by the Supervisory Union's Literacy Facilitator who described in detail how that school's structured language-based literacy program worked.

During the hearing and in the post-hearing memorandum, Parent alleged that the goals included in Student's 2022 were simply recycled from prior IEPs. Parent

specifically addressed this issue when cross-examining the Supervisory Union’s Literacy Facilitator. When asked about this, the witness explained that a goal incorporated in an earlier IEP was not the same as the goal in the August IEP. No other examples of the alleged “recycling” were discussed with the Supervisory Union’s Literacy Facilitator.

Because the Supervisory Union’s Literacy Facilitator was able to explain that the goals incorporated in Student’s various IEP’s were not recycled, Parent has failed to prove this particular allegation.

At the hearing, Parent questioned witnesses about the absence of an extended school year program in the 2022-2023 IEP. The witnesses, however, all agreed that because an IEP is a so-called “living document,” extended year services could be added to the IEP anytime before the school year ended in June 2023.

Based on the evidence that was introduced at the hearing, it is hard to imagine how the comprehensive IEP for the school year 2022-2023 developed by Student’s IEP did not meet the standards set forth in the IDEA and federal court decisions interpreting that law.

Because Parent has not met the first part of the three-part test adopted by the Second Circuit in *Reyes ex rel. R.P. v. N.Y.C. Dep’t of Educ.*, 760 F.3d 211, 215

(2d Cir. 2014), i.e., that the “proposed [programming] failed to provide the student with an appropriate education,” there is no need to address the other two elements of the *Reyes* test. *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998)(when the evidence establishes the adequacy of the placement proposed in an IEP, request for tuition reimbursement must be denied). For that reason, Parent is not entitled to the reimbursement of tuition Parent paid to the private school for the school year 2022-2023.

Therefore, judgment must be entered in favor of the Supervisory Union.

CONCLUSION

For the reasons stated in this order, judgment is entered in favor of the Supervisory Union in this matter.

NOTICE OF APPEAL RIGHT

Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction in accordance with Rule 2365.1.9."

Dated, January 9, 2023

David J. Williams
Vermont Agency of Education
Due Process Hearing Officer