



No. 95-46

**The University of the State of New York**  
**The State Education Department**  
State Review Officer

Application of a CHILD 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 City School District of the City of New York

**Appearances:**

Neal H. Rosenberg, Esq., attorney for petitioner  
Hon. Paul A. Crotty, Corporation Counsel, attorney for respondent,  
David J. Gold, Esq., of Counsel

**DECISION**

Petitioner appeals from the decision of an impartial hearing officer which denied petitioner's request for an order requiring respondent to reimburse him for the cost of his son's tuition at the private school in which petitioner placed the child for the 1994-95 school year. The hearing officer denied petitioner's request for reimbursement on the basis of petitioner's alleged failure to demonstrate the appropriateness of the educational services received by his son at the private school, and petitioner's alleged failure to request tuition reimbursement in a timely manner. The appeal must be sustained in part.

The record does not reveal when petitioner's child, who is eight years old, was initially identified as a child with a disability, or whether he has ever been enrolled in respondent's schools. On March 9, 1994, the committee on special education (CSE) of Community District No. 2 reviewed the results of the child's triennial evaluation. That evaluation revealed that the child's cognitive skills were in the high average range, but that he had deficits in his ability to solve visually presented mathematical problems and in his expressive language vocabulary. A speech/language evaluation revealed that the child had some speech articulation deficits, as well as weak auditory processing and word retrieval skills. He was described as sensitive and imaginative, but not exhibiting any major emotional difficulty. The

CSE recommended that the child be classified as learning disabled. The child's classification is not in dispute in this proceeding. The CSE also recommended that the child be placed in a special education class in respondent's modified instructional services-I (MIS-I) program, with the related services of individual and group speech/language therapy and individual counseling, at P.S. 40, during the 1994-95 school year. At the hearing in this proceeding, respondent's representative conceded that the CSE was invalidly constituted because it lacked the required parent member (see Section 4402 [1] [b] [1] of the Education Law). Therefore, the CSE's recommendation was a nullity (Application of a Child with a Disability, Appeal No. 95-8).

The record reveals that the child has been enrolled by his parents at their expense in the Stephen Gaynor School, since the 1991-92 school year. The Stephen Gaynor School, which is located in New York City, is a private school for children with disabilities. However, it has not been approved by the New York State Education Department as a school for educating children with disabilities, for the purpose of State reimbursement to school districts for the cost of the tuition of the children placed in the school by school districts.

At the hearing in this proceeding on May 9, 1995, petitioner sought reimbursement for tuition costs resulting from his unilateral placement of the child at the Stephen Gaynor School for the 1994-95 school year. Petitioner, who did not attend the hearing, was represented at the hearing by his attorney. Respondent was represented at the hearing by the assistant chairperson of the CSE of Community School District No. 3. Five exhibits were introduced into evidence. Respondent submitted an individualized education program (IEP) prepared by the CSE on March 9, 1994, a final notice of the CSE's recommendation dated June 6, 1994, and a "PSF-1" notice dated July 21, 1994. Petitioner submitted a copy of the child's progress at the private school for the 1994-95 school year, and a class profile describing the levels of cognitive, social and physical development and management needs of the child's classmates during the 1994-95 school year.

Respondent's representative argued that petitioner was precluded from seeking tuition reimbursement because he had unilaterally placed the child in the private school, and had rejected the MIS-I placement which respondent had offered to him. He relied upon a notation reportedly written by petitioner's wife on the notice of the CSE's recommendation. She wrote as follows: "I am refusing the public school placement + would like to continue services at the Stephen Gaynor School" Petitioner's wife also signed a copy of respondent's PSF-1 Notice. The PSF-1 Notice is a request for transportation to a private school. The PSF-1 includes a place upon which a child's parent indicates that he or she has received notice of the CSE's recommendation, but intends to enroll the child in a private school "...and will privately fund this program placement." (Exhibit 3). Respondent's representative asserted that a parent and a private school representative were required to endorse the notice, in order to receive "Assembly Bill" transportation (presumably transportation pursuant to section 4402[4][d] of the Education Law). The representative also argued that in addition to expressly waving his right to obtain tuition reimbursement when he requested

transportation for the child, petitioner had delayed too long in asserting his claim for tuition reimbursement.

Two teachers at the Stephen Gaynor School, testified by telephone at the hearing. Ms. Judith Schneider testified that tuition at the school was \$18,000 per year. Ms. Anne Miller, one of the child's teachers at the school, testified about the child's educational needs and progress. Ms. Miller testified that the child, whom she described as having an extreme attention deficit disorder, required instruction in a small group, in order to extract information from his memory. She testified that the child received instruction in reading in a group of three children and in mathematics in a group of five children. She opined that the child had made "small progress" during the 1994-95 school year, but had progressed in retrieving information from his memory, and in his ability to handle adult frustration.

Petitioner has submitted an affidavit, sworn to on June 4, 1995, by Ms. Miller, in which she cited numerous errors in the transcription of her testimony. Indeed, Ms. Miller denies having said that the child made "small progress" during the 1994-95 school year. Portions of the affidavit appear to contain information regarding facts which were neither previously testified to, nor unavailable at the time of the hearing. In deciding this appeal, I will not consider facts not previously testified to, or unavailable at the hearing. However, I will consider corrections sworn to by Ms. Miller. Indeed, respondent concedes that portions of Ms. Miller's affidavit do clarify her mistranscribed testimony. The hearing transcript, as a whole, contains obvious and numerous transcription errors. An accurate and complete record is essential for review of a hearing officer's determination. The failure to maintain an accurate and complete record may afford a basis for annulling a hearing officer's decision (Application of a Handicapped Child, 21 Ed. Dept. Rep. 617).

In her decision dated June 2, 1995, the hearing officer found that respondent had failed to meet its burden of proving that it had offered the child an appropriate educational program for the 1994-95 school year. While opining that the MIS-I program which the CSE had recommended appeared to be appropriate, she noted that the CSE was not validly constituted. The hearing officer found that respondent had offered no proof of the appropriateness of the recommended placement at P.S. 40. However, the hearing officer found that petitioner had not met his burden of proving that the services provided by the Stephen Gaynor School were appropriate for the 1994-95 school year. While acknowledging that the parent's unilateral placement of the child in the private school did not relieve the CSE of its obligation to recommend an appropriate program for the child, the hearing officer found that it was unreasonable for petitioner to seek tuition reimbursement, since he "... failed to give due consideration to a public placement." The hearing officer further found that petitioner had unduly delayed in challenging the CSE's recommendation for the 1994-95 school year.

A board of education may be required to reimburse parents for the cost of a child's educational services attained by the parents, if the services offered by the board of education were inadequate or inappropriate, the services obtained by the parents were appropriate,

and equitable considerations support the parents' claim for reimbursement (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]; Hiller v. Brunswick CSD, 674 F. Supp. 73 [N.D.N.Y., 1987]; Application of a Child with a Disability, Appeal No. 95-37). Prior to November 9, 1993, petitioner was precluded from seeking tuition reimbursement, because the Stephen Gaynor School had not been approved by the State Education Department as a school for children with disabilities (Tucker v. Bay Shore UFSD, 873 F. 2d, 563 [2nd Cir., 1989]; Lombardi v. Nyquist, 63 AD. 2nd 1058 [3rd Dept., 1978]). On November 9, 1993, the U.S. Supreme Court held that a parent could obtain reimbursement for tuition at an unapproved private school, if the private school provided the child with an appropriate education (Florence County School District v. Carter by Carter, \_\_\_ U.S. \_\_\_, 114 S. Ct. 361 [1993]).

The impartial hearing officer found, and respondent concedes, that respondent did not meet its burden of demonstrating that it had offered the child an appropriate program or placement for the 1994-95 school year. As a result, petitioner prevailed with respect to the first Burlington criterion, i.e., whether the services offered by the board of education in the 1994-95 school year were appropriate for the child.

With regard to the second Burlington criteria, the hearing officer found that petitioner failed to meet his burden of proving the appropriateness of the educational services he obtained for his child. The hearing officer largely relied upon testimony of the child's teacher in reaching her conclusion. However, as discussed earlier, the child's teacher disputes the accuracy of the transcript of her testimony. Obvious mistakes permeate the hearing transcript record, supporting the teacher's claim. While the hearing officer heard the testimony at the hearing, the decision of the impartial hearing officer must be based upon the record. Respondent asserts that the supporting documentation submitted by petitioner also support the hearing officer's determination, because they allegedly establish that the child was grouped with children having dissimilar cognitive skills, and that his academic progress was slight during the 1994-95 school year. I find that these documents do not provide an adequate basis for the decision reached by the hearing officer with respect to the second Burlington criterion. In view of the unreliable transcript, I find it necessary to remand this matter for a further hearing on the appropriateness of educational services provided to the child by the Stephen Gaynor School for the 1994-95 school year.

In finding that equitable considerations did not support petitioner's claim for tuition reimbursement, the hearing officer relied upon the decision in Salley v. St. Tammany Parish School Board, 21 IDELR 12 (ED La., 1994) for the proposition that petitioner was required "to demonstrate that the Board of Education's failure to follow appropriate procedures in some way changed the course of events so as to deny the student a free appropriate education". I find that the hearing officer's reliance upon the Salley decision is misplaced. The Court in Salley found that the child was not eligible to receive special education during the period when the Board of Education committed its procedural errors. Here, the child was eligible to receive a free appropriate public education, which respondent failed to offer because the CSE's recommendation was a nullity.

The hearing officer found that petitioner's claim was barred by the equitable doctrine of laches, because petitioner did not attempt to assert his claim for reimbursement within a reasonable time after the CSE's recommendation was made in March, 1994. It should be noted that the record before the hearing officer did not include any evidence of when petitioner requested a hearing. In this appeal, respondent asserts that petitioner requested a hearing in April, 1995, but has offered no proof to support that assertion. In his petition, petitioner asserts that he did not become aware of his right to seek reimbursement for tuition at an unapproved school until January, 1995, and that he requested a hearing shortly thereafter.

The issue of the timeliness of a parental request for tuition reimbursement must be considered in determining, whether equitable considerations support the parents' claim for reimbursement, i.e., the third Burlington criterion (Application of a Child with a Disability, Appeal No. 95-37; Application of a Child with a Disability, Appeal No. 95-32). A determination of the equitable considerations in this matter requires an analysis of facts which are not in the record before me. Both parties have made assertions about the content and date of the notice of due process rights which petitioner received. They differ about petitioner's obligation, if any, to inform respondent of his dissatisfaction with the CSE's recommendation. They also differ about when the petitioner requested a hearing. Respondent has also asserted that there would be budgetary chaos if parents were entitled to assert stale claims for tuition reimbursement. I find that the parties should have an opportunity to establish a basis in the record for their respective positions concerning the equities of awarding tuition reimbursement to the petitioner for the 1993-94 school year.

This proceeding is another in a growing series of appeals in which the hearing record is inadequate to determine whether equitable factors supported the parents' claim for tuition reimbursement (Application of the Bd. of Ed. City School District of the City of New York, Appeal No. 95-25; Application of the Bd. of Ed. City School District of the City of New York, Appeal No. 95-26; Application of a Child with a Disability, Appeal No. 95-31; Application of a Child with a Disability, Appeal No. 95-34; Application of a Child with a Disability, Appeal No. 95-37). I am compelled by the similarly limited record in this proceeding to make the same finding in this matter, and to remand this matter for a further hearing. As outlined in Application of a Child with a Disability, Appeal No. 95-37, there are a number of questions to be addressed by an impartial hearing officer to afford an adequate basis for reaching a decision with regard to the third Burlington criterion. These include: When did petitioner request a hearing? What notice of his due process rights was given to petitioner? When did the petitioner become aware, or when should he have become aware, of his right to obtain reimbursement for the placement of his child in an unapproved private school? When did the CSE become aware, or when should it have become aware, of petitioner's dissatisfaction with the CSE's recommendation for the 1994-95 school year (Bernardsville Bd. of Ed. v. JH et al., \_\_\_ F.3d \_\_\_ [3rd Cir., 1994])? Did petitioner cooperate with the CSE during the time in question?

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED;**

**IT IS ORDERED** that the portion of the hearing officer's decision which denied petitioner's claim for tuition reimbursement for the 1994-95 school year is annulled;

**IT IS FURTHER ORDERED** that within 10 days after the date of this decision, respondent shall schedule a hearing to resolve the issues of whether the Stephen Gaynor School offered appropriate services to the child during the 1994-95 school year, and whether equitable considerations support petitioner's claim for tuition reimbursement for the 1994-95 school year.

**Dated:** Albany, New York  
September 28, 1995

  
DANIEL W. SZETELA