



No. 95-48

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 the impartial hearing officer which denied petitioner's request for an order requiring respondent to reimburse her for the cost of her son's tuition at the private school in which petitioner placed the child for the 1993-94 school year. The hearing officer denied petitioner's request for reimbursement solely on the basis of petitioner's alleged failure to request reimbursement in a timely manner. This appeal must be sustained in part.

The record reveals that on October 13, 1993, the child was classified as learning disabled by the committee on special education (CSE) of the Community District No. 2. He also reportedly has an attention deficit disorder. The child's classification is not in dispute in this proceeding. The CSE recommended that the child be placed in a special education class in respondent's modified instructional services-I (MIS-I) program, with the related service of counseling, in P.S. 92. 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).

In September, 1993, prior to the CSE meeting, the child was enrolled by his parents in the sixth grade of the Winston Preparatory School. He remained there at their expense during the 1993-94 and 1994-95 school years. Winston Preparatory 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 children placed in the school.

At the hearing in this proceeding on May 11, 1995, petitioner sought reimbursement for tuition costs resulting from her unilateral placement of the child at the Winston Preparatory School for both the 1993-94 and 1994-95 school years. Petitioner was represented at the hearing by her attorney. Respondent was represented at the hearing by the chairperson designee of the CSE of Community School District No. 3, which had apparently assumed jurisdiction over the child. Five exhibits were introduced into evidence. Respondent submitted an individualized education program (IEP) dated October 13, 1993, a final notice of recommendation dated October 13, 1993, and a PSF-1 notice dated November 9, 1993. Petitioner submitted individual educational reports for the 1993-94 and 1994-95 school years. Respondent's representative acknowledged that the CSE had failed to make any recommendation for the child's educational program during the 1994-95 school year.

With regard to the 1993-94 school year, respondent's representative argued that petitioner was precluded from seeking tuition reimbursement because she had unilaterally placed the child in the private school, and had rejected the MIS-I placement which respondent had offered to her. He relied upon a note which petitioner wrote on the notice of the CSE's recommendation. She wrote as follows: "Please note: [child] will be attending Winston Preparatory school this year. I am requesting bus transportation." Petitioner also signed a copy of respondent's PSF-1 Notice, which is a form on 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). The PSF-1 Notice is a request for transportation to a private school. 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 petitioner's tuition reimbursement claim was barred by the equitable doctrine of laches.

Ms. Roberta S. Michaels, Head of School at the Winston Preparatory School, testified about the child's educational needs and progress. Ms. Michaels testified that the child had special education needs in the areas of sequential memory, abstract concepts and structural analysis, which hindered the child's ability to read and write and his proficiency in mathematics. She testified that the boy's reading decoding deficits were addressed in the 1993-94 school year, and that his writing deficits were being addressed during the 1994-95 school year. She also testified that the child's math skills had improved, but not as

dramatically as his reading skills. The child received instruction in small groups, ranging from eight children in English to five children in language arts. Ms. Michaels testified that the child was appropriately grouped. He also received speech/language therapy while at the Winston Preparatory School. Petitioner submitted educational reports from the private school relating to both the 1993-94 and 1994-95 school years.

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 either the 1993-94 or the 1994-95 school year. The hearing officer further found that petitioner had met her burden of proving that the services provided by the Winston School were appropriate for both school years. She ordered respondent to pay for the cost of the child's tuition at the Winston School during the 1994-95 school year. However, she denied petitioner's tuition reimbursement request for the 1993-94 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 she "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 1993-94 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 selected 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 Winston 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. 2d 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 1993-94 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 1993-94 school year were appropriate for the child.

With regard to the second Burlington criteria, the hearing officer found that the Winston School was appropriate during the 1993-94 school year. Respondent argues that petitioner failed to meet her burden of proving the appropriateness of the educational

services she obtained for her child. However, respondent has neither appealed nor cross-appealed from the hearing officer's decision, and her decision with respect to the appropriateness of the Winston School's services is final (Hiller v Brunswick CSD, *supra*). Consequently, petitioner has prevailed with respect to the second Burlington criterion.

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 Parrish 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.

In her decision, the hearing officer found that there was no express statute of limitations prescribing the time within which the petitioner was required to assert her claim for tuition reimbursement. (see Application of a Child with a Disability, Appeal No. 95-30; Application of a Child with a Disability, Appeal No. 95-31). However, the hearing officer found that petitioner's claim was barred by the equitable doctrine of laches, because petitioner did not attempt to assert her claim for reimbursement "within a reasonable time after the CSE review." 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.

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 her dissatisfaction with the CSE's recommendation. 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 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 her due process rights was given to petitioner? When did the petitioner become aware, or when should she have become aware, of her right to obtain reimbursement for the placement of her 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 1993-94 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 1993-94 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 issue of whether equitable considerations support petitioner's claim for tuition reimbursement for the 1993-94 school year.

Dated: Albany, New York
September 14, 1995


ROBERT G. BENTLEY