The University of the State of New York

The State Education Department
State Review Officer

No. 07-032

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 child with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida M. Alvy, Esq., of counsel

Educational Advocacy Service, attorney for respondent, Anton Papakhin, Esq., of counsel

DECISION

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer, which found that it failed to offer an appropriate educational program to respondent's son and ordered respondent to directly pay Bay Ridge Preparatory School (Bay Ridge) the costs of the student's tuition for the 2005-06 school year. Respondent cross-appeals from the impartial hearing officer's finding that respondent encountered no financial risk in placing the student at Bay Ridge for the 2005-06 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the commencement of the impartial hearing on July 19, 2006, the student was 16 years old and had just completed tenth grade at Bay Ridge (Tr. pp. 1, 17, 18). Respondent unilaterally placed the student in the Bridge program at Bay Ridge for the 2005-06 school year, where he has been attending school since sixth grade (Tr. pp. 18, 30; IHO Ex. I at p. 2). From kindergarten to fifth grade, the student attended respondent's public schools (Tr. pp. 18, 30-31). The Commissioner of Education has not approved Bay Ridge as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services and classification as a student with a learning disability are not in dispute (8 NYCRR 200.1[zz][6]).

On June 2, 2005, petitioner's Committee on Special Education (CSE) developed the student's individualized education program (IEP) for the student's tenth grade (2005-06) school

year, which recommended a special class with a 15:1 staffing ratio (Dist. Ex. 1). Respondent testified that she told the CSE at the June 2, 2005 meeting that she considered the proposed program inappropriate (Tr. p. 24; see Tr. p. 55). Petitioner issued a Final Notice of Recommendation on June 8, 2005 (Dist. Ex. 6). On August 15, 2005, respondent entered into a contract with Bay Ridge for the student's enrollment for the 2005-06 school year (Parent Ex. B). On September 8, 2005, the student started classes at Bay Ridge (Parent Ex. C).

On or about January 12, 2006, respondent filed a due process complaint notice alleging that petitioner failed to offer the student a free appropriate public education (FAPE) for the 2005-06 school year on procedural and substantive grounds (IHO Ex. I at p. 1). Respondent indicated that she had "re-enrolled" the student in the Bridge program at Bay Ridge for the 2005-06 school year (id. at p. 2). She sought an impartial hearing to obtain an order directing petitioner to pay the student's tuition costs directly to Bay Ridge (id.).

An impartial hearing was held on July 19, 2006, September 14, 2006, and December 19, 2006 (Tr. pp. 1, 63, 181).[1] In a decision dated March 2, 2007, the impartial hearing officer concluded that petitioner's CSE failed to offer the student a FAPE for the 2005-06 school year (IHO Decision at pp. 6-7), that Bay Ridge was an appropriate placement (id. at p. 8), and that respondent cooperated with petitioner (id.). The impartial hearing officer found that at the time of the impartial hearing, the student had already completed his tenth grade school year and no tuition was paid to Bay Ridge (id. at pp. 9, 11). He also concluded that respondent incurred no financial obligation to pay her son's tuition because the enrollment contract expressly provided that Bay Ridge assumed the risk that the parent would not recover prospective payment from the Department of Education (id. at pp. 9-10). After reasoning that it is appropriate to award tuition payment to a third party that assumes a parent's financial risk when a parent has otherwise satisfied the criteria for an award of tuition reimbursement, the impartial hearing officer ordered petitioner to directly pay Bay Ridge the student's tuition costs for the 2005-06 school year (id. at pp. 10-12).

On appeal, petitioner asserts that respondent lacked standing to commence this proceeding because she incurred no financial obligation for the student's tuition. Petitioner further argues that respondent did not have a claim for prospective tuition at the time of the impartial hearing because the student had already completed the 2005-06 school year. As alternative arguments, petitioner asserts that it offered the student a FAPE and that equitable considerations preclude an award of tuition funding.

Respondent filed an answer and cross-appeal, asserting that the impartial hearing officer erred in finding that respondent incurred no financial risk in placing the student at Bay Ridge for the 2005-06 school year. Respondent further asserts that petitioner raises affirmative defenses that were not raised or considered by the impartial hearing officer, and requests that petitioner's appeal be dismissed in its entirety.

[1] The record indicates that numerous adjournments requested by both parties delayed the impartial hearing originally set to commence in April 2006 and delayed subsequent hearing dates (see IHO Decision at p. 2; Tr. pp. 4, 60, 66, 178, 183).

Petitioner filed an answer to the cross-appeal and a reply to respondent's procedural defense. Petitioner contends that the impartial hearing officer correctly found that respondent assumed no financial risk. Petitioner further argues that it is proper to raise on appeal the parent's lack of standing because the impartial hearing officer addressed the standing issue as part of the proceedings below.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[2] is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17;[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).[4] 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 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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 (Sch. Comm. of Burlington v.

---

[2] On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Some of the relevant events in the instant appeal took place prior to the effective date of the 2004 amendments to the IDEA, and therefore the provisions of the IDEA 2004 do not apply. The newly amended provisions of IDEA 2004 apply to the relevant events that took place after the July 1, 2005 enactment date. Citations in this decision are to the newly amended statute unless otherwise noted.

[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

[4] The term "free appropriate public education" means special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

With respect to equitable considerations, the IDEA allows that tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]; see Application of a Child with a Disability, Appeal No. 05-098).

I find no reason to disturb the impartial hearing officer's decision with respect to the first Burlington criterion. With respect to the second Burlington criterion, I note that petitioner has not appealed the impartial hearing officer's finding that Bay Ridge is an appropriate placement for the student, and therefore I do not review this aspect of this decision.

Turning to petitioner's arguments that the equities preclude an award of the cost of tuition at Bay Ridge, I note that there is no evidence in the record to indicate that respondent provided timely notice of her rejection of the public school placement and her intent to enroll the student in a private placement at public expense. Although respondent testified that she informed the June 2, 2005 CSE that she considered the proposed program inappropriate (Tr. p. 24; see Tr. p. 55), there is no indication in the record that she informed the June 2, 2005 CSE that she would not send the student to petitioner's school or informed the CSE that she would seek to enroll the student at Bay Ridge at public expense. Respondent received the Final Notice of Recommendation on or about June 8, 2005 recommending a special class placement at James Madison High School (Dist. Ex. 6). On August 15, 2005, respondent entered into a contract with Bay Ridge for the student's enrollment for the 2005-06 school year (Parent Ex. B). On September 8, 2005, the student started classes at Bay Ridge (Parent Ex. C). Respondent visited the proposed public school program around October 15, 2005. She testified that she rejected the proposed program upon her observation in October 2005 by telling her advocate, but neither respondent nor her advocate contacted the CSE to inform them of her rejection and intent to seek tuition costs (Tr. pp. 54-56). The due process complaint notice dated January 12, 2006 is the only written notice contained in the record where respondent informed petitioner that she had enrolled the student at Bay Ridge for the 2005-06 school year and would be seeking direct tuition payment (IHO Ex. 1). I find that such written notice, some four months after the student began attending classes, does not comply with 20 U.S.C. § 1412[a][10][C][iii][I]. Under these circumstances, I find that respondent failed to provide the notice required by the IDEA. I therefore find that the impartial hearing officer erred by finding that respondent prevailed on her claim seeking the costs of tuition at Bay Ridge.

Even if I had found that petitioner had prevailed with respect to the Burlington criteria, I find that the impartial hearing officer erred by awarding tuition costs directly to Bay Ridge. The IDEA provides "children with disabilities and the families of such children access to a [FAPE]" (20 U.S.C. § 1400[c][3]). Parents may present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child" (20 U.S.C. § 1415[b][6][A]; see 8 NYCRR 200.5[j]). Parents are entitled to an impartial due process hearing on their complaint (20 U.S.C. § 1415[f][1][A]). Parents who are aggrieved by the findings of fact and the decision of an impartial hearing officer may appeal to a State Review Officer of the State Education Department (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k]). Accordingly, I find that respondent, the natural parent of a student eligible for special education services under the IDEA, has standing to challenge the appropriateness of her son's IEP.

In this case, respondent requests an order directing petitioner to pay her son's tuition costs directly to Bay Ridge for the 2005-06 school year. It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the school district do so at their own financial risk (Burlington, 471 U.S. at 373-74). The United States Supreme Court in Burlington held that retroactive reimbursement of private educational expenses is appropriate as an available remedy under the IDEA (Burlington, 471 U.S. at pp. 370-71; see also Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988 at *6 [2d Cir. May 30, 2007] [explaining that parents who believe that their child has been denied a FAPE may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school]; Daz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 32, 40 [1st Cir. 2006] [concluding that reimbursement under the IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses]; Cerra, 427 F.3d at 192 [noting the availability of "retroactive tuition reimbursement" under the IDEA]; Muller v. Comm. on Special Educ. of East Islip, 145 F.3d 95, 106 [2d Cir. 1998] [holding that compensation for "out of pocket expenses" was appropriate]). The IDEA provides that "a court or a hearing officer may require the [school district] to reimburse parents for the cost of [private school] enrollment if the court of hearing officer finds that the [school district] had not made a [FAPE] available to the child in a timely manner prior to that enrollment" (20 U.S.C. § 1412[a][10][C][ii]; see 34 C.F.R. 300.148[c]).

Here, the record indicates that respondent has not suffered any out-of-pocket loss for the services provided by Bay Ridge. By the time the impartial hearing commenced in July 2006, the student had completed his tenth grade year at Bay Ridge without paying any tuition. After reviewing the record, I find no support for respondent's assertion in her cross-appeal that she incurred financial responsibility for the student's tuition at Bay Ridge for the 2005-06 school year, and accordingly I will dismiss her cross-appeal.[5] Although respondent answered "yes" when asked

[5] I will not consider the additional documentation submitted by respondent for the first time on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Child with a Disability, Appeal No. 06-081). Here, petitioner has objected to the additional documentation and I find that the additional exhibits are not necessary for my review. I am also not persuaded that this evidence was unavailable at the time of the impartial hearing.

if she signed a contract with Bay Ridge that held her responsible for the student's tuition (Tr. p. 56), she also testified that Bay Ridge "knew [the student's] situation" and understood "that there's no funding . . . unless we are funded from the Board of Education" (id.). I also concur with the impartial hearing officer's reading of the plain language of the contract, which stated that Bay Ridge assumed the risk of nonpayment if respondent agreed to cooperate in efforts to secure funding from petitioner (IHO Decision at pp. 9-10; Parent Ex. B).

Under these circumstances, I find that Bay Ridge, who is not a party and is not entitled to relief under the IDEA, incurred a financial burden in this matter, not respondent or the student. Respondent cannot assert a claim for relief on behalf of Bay Ridge, a private entity that lacks standing under the IDEA to maintain a claim against petitioner in its own right (see Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]); see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]). For these reasons, I find that the impartial hearing officer erred by awarding the costs of tuition to Bay Ridge.

In view of the foregoing, I will annul the impartial hearing officer's decision to the extent that he determined that the equities favored respondent and directed petitioner to pay tuition to Bay Ridge. As a final note, the record indicates that respondent's son can be appropriately educated in a public school setting and there is no evidence suggesting that petitioner cannot meet the student's special education needs. Accordingly, a CSE should reconvene as soon as possible, if it has not already done so, and offer the student an appropriate special education program and placement for the 2007-08 school year consistent with the requirements of the IDEA.

In light of my decision, it is not necessary for me to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that he determined that the equities favored respondent and directed petitioner to pay tuition to Bay Ridge.

Dated: **Albany, New York**
July 5, 2007

PAUL F. KELLY
STATE REVIEW OFFICER