



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-070

### **Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Brocton Central School District**

#### **Appearances:**

Law Office of H. Jeffrey Marcus, attorney for petitioners, H. Jeffrey Marcus, Esq. and Jason H. Sterne, Esq., of counsel

Hodgson Russ LLP, attorney for respondent, Ryan L. Everhart, Esq., of counsel

### **DECISION**

Petitioners appeal from the decision of an impartial hearing officer which dismissed their request to be reimbursed for their son's tuition and transportation costs at the Southwestern Central School District (Southwestern) for the 2006-07 school year. The appeal must be sustained.

Petitioners' son is seven years old and classified by respondent as multiply disabled (IHO Exs. A at p. 2; C at Rudnicki Aff. Ex. B, ¶ 2). By due process complaint notice dated January 26, 2007, petitioners requested an impartial hearing (IHO Ex. A). Petitioners alleged that, on multiple occasions, they expressed to respondent's Committee on Special Education (CSE) and personnel their dissatisfaction with the child's placement in an 8:1+1 Board of Cooperative Educational Services (BOCES) class and their desire to have him placed in a 12:1+1 class with opportunities for integration with non-disabled peers (IHO Ex. A at p. 2). Petitioners further alleged that on November 28, 2006, they enrolled the child at Southwestern, but on January 3, 2007, Southwestern informed them that they would have to pay nonresident tuition for their child to continue attending school there (IHO Exs. A at p. 2; F at Marcus Aff. Ex. A). Petitioners stated that they paid tuition to continue the child's attendance at Southwestern (IHO Ex. A at p. 2).

Petitioners further contended in their due process complaint notice that respondent: 1) failed to provide an appropriate placement for the child in the least restrictive environment (LRE); 2) failed to properly evaluate the child by performing an autism-specific evaluation; 3) failed to properly classify the child as autistic; 4) failed to implement the child's individualized education program (IEP) because he was not provided with mainstreaming opportunities; 5) failed to conduct

a functional behavioral assessment (FBA); 6) failed to develop a behavior intervention plan (BIP); 7) failed to consider other appropriate options such as a self-contained setting that was less restrictive than the 8:1+1 BOCES program; 8) improperly composed the CSE by omitting a regular education teacher of the child; and 9) failed to provide the child a free appropriate public education (FAPE)<sup>1</sup> for the 2005-06 and 2006-07 school years (IHO Ex. A at pp. 2-4). Petitioners alleged that their placement of the child at Southwestern was appropriate because it was a 12:1+1 class with mainstreaming opportunities and the child was successful in the program (IHO Ex. A at p. 4). As relief, petitioners requested: 1) a comprehensive autism-specific evaluation by a mutually agreed upon clinician; 2) the provision of additional services to make up for respondent's failure to provide the child with a FAPE during the 2005-06 and 2006-07 school years; 3) tuition reimbursement for the child's 2006-07 tuition at Southwestern; 4) transportation reimbursement for the 2006-07 school year; and 5) attorney fees (IHO Ex. A at p. 5).

By letter dated February 8, 2007, respondent issued its response to the due process complaint notice and denied petitioners' claims (IHO Ex. B). On March 20, 2007, respondent filed a motion to dismiss petitioners' claims for reimbursement of tuition and transportation costs, alleging that tuition reimbursement for a unilateral public school placement was not an available form of relief under the Individuals with Disabilities Education Act (IDEA) and petitioners were not entitled to this relief because they failed to comply with the written notice requirements of the IDEA (IHO Ex. C). Petitioners opposed respondent's motion to dismiss, respondent replied to petitioners' opposition and petitioners filed a sur-reply (IHO Exs. D; E; F).

A hearing was not held in this proceeding. By decision dated May 2, 2007, the impartial hearing officer dismissed petitioners' tuition and transportation reimbursement claims on the ground that such claims were limited by the IDEA to unilateral placements in private schools (IHO Ex. G). On May 16, 2007, petitioners withdrew their remaining claims relating to their requests for additional services and a comprehensive autism spectrum evaluation (IHO Ex. H). By decision dated May 23, 2007, the impartial hearing officer dismissed with prejudice all claims asserted by petitioners that were not related to their tuition and transportation reimbursement claims (IHO Decision at pp. 2-3).

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<sup>1</sup> 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, 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]).

This appeal ensued.<sup>2</sup> Petitioners contend that the impartial hearing officer erred by dismissing their tuition and transportation reimbursement claims as a matter of law without holding an evidentiary hearing. Petitioners seek a remand to an impartial hearing officer for a full evidentiary hearing on their reimbursement claims. In its answer, respondent requests affirmance of the impartial hearing officer's determination.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482) 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[d];<sup>3</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (*id.*; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Court of Appeals has applied the Burlington analysis to uphold an award of retroactive tuition reimbursement for a child's unilateral placement as a nonresident tuition student in a public school (Matter of Northeast Cent. Sch. Dist. v. Sobol, 79 N.Y.2d 598, 606-09 [1992]). Petitioners argue that Burlington and Northeast permit tuition reimbursement for a unilateral placement in a public school. Respondent contends that the 1997 amendments to the IDEA preempted Northeast because Congress codified provisions pertaining to the reimbursement

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<sup>2</sup> I note that petitioners did not appeal the dismissal with prejudice of their requests for an autism evaluation and additional services. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's dismissal of petitioners' requests for an autism evaluation and additional services is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

<sup>3</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, because all the relevant events occurred after the effective date of the new regulations, citations herein refer to the regulations as amended.

of private school tuition, not public school tuition. In response, petitioners assert that the IDEA's 1997 amendments did not establish private school tuition reimbursement as an exclusive remedy.

Petitioners argue that the impartial hearing officer erred by concluding that 20 U.S.C. § 1412(a)(10)(C) precluded them from receiving an award of tuition and transportation reimbursement as a matter of law. I agree. Although the availability of tuition reimbursement for a unilateral placement to the parents of a child who has not previously received special education and related services from a school district is not at issue in this appeal, the Official Analysis of Comments to both the 1999 and 2006 federal regulations implementing 20 U.S.C. § 1412(a)(10)(C) are instructive because they contemplate the continuation of the authority of courts and hearing officers to fashion equitable tuition reimbursement remedies in appropriate circumstances. The Official Analysis of Comments to the federal regulations implementing this provision, as added by the 1997 amendments to the IDEA, states that:

hearing officers and courts retain their authority, recognized in Burlington and [Carter], to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.<sup>4</sup>

(Placement of Children by Parent if FAPE is at Issue, 64 Fed. Reg. 12602 [Mar. 12, 1999]; see also Letter to Luger, 33 IDELR 126 [OSEP 1999] ["We do not view § 612(a)(10)(C) as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of the public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances"]). Similarly, the Official Analysis of Comments to the federal regulations implementing this statutory provision as reauthorized by Congress in 2004 states that the authority to award tuition reimbursement for a unilateral placement in such instances "is independent of the court's or hearing officer's authority under section 612(a)(10)(C)(ii) of the Act to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency" (Placement of Children by Parent if FAPE is at Issue, 71 Fed. Reg. 46599 [Aug. 14, 2006]).

These commentary and guidance indicate that the equitable remedy of tuition reimbursement may be awarded pursuant to section 1415(i)(2)(C)(iii) of the IDEA, subject to the three-part Burlington analysis (Application of a Child with a Disability, Appeal No. 06-091; Application of a Child with a Disability, Appeal No. 06-041). I note that 20 U.S.C. § 1415(i)(2)(C)(iii), which authorizes courts to grant appropriate relief, was not amended by Congress to limit such relief. Furthermore, the Second Circuit Court of Appeals has recently held that 20 U.S.C. § 1415(i)(2)(C), as construed in Burlington, provides an ample basis for an award of tuition reimbursement aside from 20 U.S.C. § 1412(a)(10)(C) (Frank G. v. Bd. of Educ., 459

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<sup>4</sup> Sections 612 and 615 of the Act were codified in 20 U.S.C. §§ 1412 and 1415, respectively.

F.3d 356, 368-73, 376 [2d Cir. 2006]). In the absence of controlling legal authority that limits tuition reimbursement claims to unilateral placements in private schools, I conclude that, in appropriate circumstances, the IDEA permits an award of tuition reimbursement for the unilateral placement of a child in a public school (see 20 U.S.C. § 1415(i)(2)(C)(iii); Educ. Law § 4404[2]; Burlington, 471 U.S. at 370-73; Northeast, 79 N.Y.2d at 606-09). Accordingly, I will remand this case for a hearing on the merits.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated May 2, 2007 is hereby annulled; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, within 30 days from the date of this decision respondent shall schedule a new impartial hearing before the impartial hearing officer, who issued the decision that is the subject of this appeal, for a determination of petitioners' tuition and transportation reimbursement claims; and

**IT IS FURTHER ORDERED** that, if the impartial hearing officer who issued the decision that is the subject of this appeal is not available to conduct the new impartial hearing, a new impartial hearing officer shall be appointed.

**Dated:**            **Albany, New York**  
                         **August 2, 2007**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**