The University of the State of New York

The State Education Department
State Review Officer

No. 08-043

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for reimbursement of past and future tuition and transportation payments at St. Ursula's Learning Center (St. Ursula's) beginning January 2008 of the 2007-08 school year, as well as "compensatory" tutoring services at Sylvan Learning Center (Sylvan). The appeal must be dismissed.

Respondent (the district) asserts as an affirmative defense in its answer that the petition for review was untimely served. A petition for review by a State Review Officer must comply with the timelines specified in the State regulations (see 8 NYCRR 279.2). The petition must be served upon the respondent within 35 days from the date of the impartial hearing officer's decision sought to be reviewed (8 NYCRR 279.2[b]). If the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). In the instant case, the impartial hearing officer's decision is dated April 10, 2008 (IHO Decision at p. 4). Accordingly, the last day to serve the petition was May 20, 2008. The petition, however, was served on May 21, 2008 (see Parents Aff. of Service dated May 22, 2008).

A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The good cause for failure to timely seek review must be set forth in the petition (id.). A careful review of the petition reveals no assertions as to the reason for untimeliness. On June 16, 2008, subsequent to service of the district's answer, the student's father submitted a letter to the Office of State Review.[1] There is no legal authority providing for such a supplemental submission. Since the submission references the district's affirmative defense of untimely service, it appears that this submission is

[1] It should be noted that the student's father did not submit an affidavit of service with the letter, although the bottom of the letter indicates that the district was sent a copy by mail.

intended as a reply to the district's answer and will be treated as such. However, the reply does not comply with State regulations which require all pleadings, including a reply, to be verified (see 8 NYCRR 279.7). At the discretion of a State Review Officer, an unverified reply may not be considered in rendering a decision (see Application of a Student with a Disability, Appeal No. 08-039). Even if the reply were considered, the assertions contained therein do not constitute good cause for the untimely service of the petition. In the reply, the student's father asserts that the time period for filing the petition was computed based upon his receipt of the impartial hearing officer decision on April 18, 2008. State regulations mandate that the time for serving a petition for review is calculated from the date of the impartial hearing officer's decision, not the date of receipt of that decision (8 NYCRR 279.2[b], [c]). Notably, the impartial hearing officer decision provided notice of the time requirements for filing an appeal at the end of the decision (IHO Decision at p. 4). This information is in bold and under the caption "PLEASE TAKE NOTICE," which is also in bold and underlined (id.). Accordingly, there is no basis upon which to excuse the delay (see Application of a Child with a Disability, Appeal No. 07-085 [delays in obtaining appeal forms and computer problems do not constitute good cause]; Application of a Child with a Disability, Appeal No. 05-048 [uncertainty as to whether or not to file appeal and attorney unavailability do not constitute good cause]; Application of a Child with a Disability, Appeal No. 02-065 [mistake of inadvertence does not constitute good cause]).

Based upon the above, the parents have not properly initiated an appeal due to the failure to effectuate proper service of the petition in a timely manner in violation of section 279.2 of the State regulations, and the parents have not alleged good cause for the untimeliness. Therefore, the petition must be dismissed (8 NYCRR 279.13; see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at pp. *5-6 [N.D.N.Y. Dec. 19, 2006]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006, (S.D.N.Y. Jan. 24, 2006); see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding the dismissal of a late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Although the petition is dismissed as untimely, a review of the hearing record and merits of the parents' appeal reveals that the conclusions of the impartial hearing officer are consistent with appropriate standards and should be upheld.[2]

At the time of the impartial hearing, the student was in the seventh grade at St. Ursula's (Tr. pp. 30, 50; Dist. Exs. 7 at pp. 1, 2; 13 at p. 1). St. Ursula's is a school which has not been approved by the Commissioner of Education 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 as a student with a learning disability is not in dispute in this proceeding

[2] The impartial hearing officer's decision is devoid of any specific cites to transcript pages, exhibit numbers, as well as any statutory, regulatory or case law to support his conclusions. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision. I note also that the failure to cite with specificity facts in the hearing record and law on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists to appeal. The impartial hearing officer is cautioned to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts, referencing applicable law, in support of his conclusions.

(see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]; Dist. Exs. 7 at p. 1; 13 at p. 1). The results of standardized testing reveal that the student's overall cognitive ability is in the average range (Dist. Exs. 7 at p. 3; 13 at p. 3; 14 at p. 2). The hearing record indicates that the student has weaknesses in reading comprehension, written expression and applied problem solving (Dist. Exs. 6 at p. 1; 7 at pp. 3, 4; 13 at p. 3; 14 at pp. 3, 4). In addition, he demonstrates poor organizational skills and has difficulty focusing (Dist. Ex. 16). The student is perceived as lacking initiative with regard to school-related tasks (Dist. Exs. 6 at p. 1; 14 at p. 2).

Prior to attending St. Ursula's, the student attended another private parochial school where he received no special education services, from kindergarten through December 2007 (Tr. p. 80; Dist. Exs. 7 at p. 2; 14 at p. 1). The student had been allotted 140 hours of tutoring services from Sylvan at the district's expense pursuant to a May 10, 2007 decision of an impartial hearing officer; however, that order expired at the end of November 2007 and the parents had not used 40 of the allotted hours before the expiration date (Tr. pp. 73, 98, 99; IHO Ex. I at p. 6). The impartial hearing officer who issued the May 10, 2007 decision had determined that 140 hours of tutoring was an appropriate remedy for the denial of a free appropriate public education (FAPE) for the 2006-07 school year (IHO Ex. I at pp. 5, 6).

Prior to attending St. Ursula's, the Committee on Special Education (CSE) met on October 5, 2007 to review the student's educational program for the 2007-08 school year (Dist. Ex. 13). The following individuals were present at the October 2005 meeting: the parents; an additional parent member; a school psychologist, who also acted as the district representative; the student's then current private school principal, who was also the student's regular education teacher; and a special education teacher (id. at p. 2). The CSE recommended changing the student's special education program from general education with Special Education Teacher Support Services (SETSS) with an 8:1 student to teacher ratio to a Collaborative Team Teaching (CTT) class with a 13:1 student to teacher ratio (id. at pp. 1, 2). The CSE further recommended that the student receive counseling services one time per week for 40-minute sessions in a group of three (id. at p. 11).

A second CSE meeting was held on January 16, 2008 after the student had begun attending St. Ursula's (Dist. Ex. 7). The following individuals were present at the January 2008 meeting: the student's father; an additional parent member; a school psychologist, who also acted as the district representative; a social worker; the principal of the private school that the student attended prior to St. Ursula's (via teleconference); a regular education teacher, who also acted as the special education teacher; and the student's special education teacher from St. Ursula's (via teleconference) (id. at p. 2). The CSE recommended that the student attend a CTT class with a student to teacher ratio of 13:1 (id. at p. 1). The CSE also removed the related service of counseling from the student's individualized education program (IEP) (id. at p. 9).

The parents filed a due process complaint notice on or about February 4, 2008 (Dist. Ex. 1). The parents requested "an impartial hearing to determine eligibility for reimbursement of past and future tuition payments to St. Ursula's and transportation costs" (id.). The parents also requested "compensatory services" at Sylvan for after school and summer sessions "for the remainder of grade school" (id.).

The hearing took place on April 8, 2008. By decision dated April 10, 2008, the impartial hearing officer determined that the district offered the student a FAPE for the 2007-08 school year and that the student was not entitled to a new award of compensatory services (IHO Decision at p. 3). The impartial hearing officer also extended the time limit for provision of the forty remaining hours of tutoring services under the prior impartial hearing officer's decision until the end of the

2008-09 school year (id. at pp. 3-4). Since this extension of time awarded by the impartial hearing officer is not being appealed by any party, it shall be deemed a final order. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][5][v]); see Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013).

Initially, it must be noted that claims for future tuition reimbursement or tutoring services beyond the school year at issue (2007-08) are improper and must be denied. Under the Individuals with Disabilities Education Act (IDEA) and New York State Education Law, the "CSE must review each child's educational program at least once each year to determine its adequacy and recommend an educational program for the next school year" (8 NYCRR 200.4[f]). Since the district may only be required to reimburse the parents for the cost of enrollment in a private school if the district has not made a FAPE available to the student in a timely manner prior to that enrollment, an award of tuition reimbursement for future school years would circumvent the intent and purpose of the IDEA. Likewise, a request for future additional services, where no IEP has yet been proposed, cannot be considered (see Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 [1st Cir. 2006] [parents could not be reimbursed for "anticipated" expenses for private tuition and related services]; see also Application of the Dep't of Educ., Appeal No. 07-037; Application of the Bd. of Educ., Appeal No. 04-034; Application of a Child with a Disability, Appeal No. 00-039 [upholding the denial of request for prospective relief because the district had not had the opportunity to recommend the student's educational programs for those years]).

Review of the due process complaint notice reveals that it lacks specificity and development of parental concerns regarding the student's IEP (Dist. Ex. 1). Notably, the complaint does not allege that the district failed to offer the student a FAPE for the current school year (id.). The same lack of specificity and development of concerns is apparent in the hearing transcript and petition for review. At the impartial hearing, the parents did not allege insufficiency of the IEP for the current school year. Specifically, the student's father testified "[w]e never said that CSE didn't go by the timelines or the CSE did anything improper" (Tr. p. 95). The student's father also testified that "I think the CSE did follow their rules and comply with the timelines" (id.). Similarly, in the petition for review, specifically referencing the impartial hearing officer's discussion regarding the appropriateness of the district's placement, the parents state "[w]e never sought to discredit [the district's] placement and did not attempt to prove that St. Ursula's program was superior" (Pet. ¶ 10). The parents explain that "[w]hat we did attempt to convey was that St. Ursula's provides a good academic program, small class size and a Catholic education and is therefore a more appropriate placement" (id.). This same reasoning was articulated at the impartial hearing. The student's father explained "[w]e were impressed with St. Ursula's. It was a small school and it was a Catholic school, so we were very impressed with it and we decided that was the best fit. . . ." (Tr. p. 75). Accordingly, the due process complaint notice, hearing record and petition for review fail to allege inadequacy or inappropriateness of the district's public school placement or the student's IEP.

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 student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

I agree with the impartial hearing officer that the IDEA does not contemplate tuition reimbursement under the facts of the instant case. The parents point to the small class size at St. Ursula's and their preference for a Catholic education in support of their tuition reimbursement claim (Tr. p. 75). Neither of these factors warrant tuition reimbursement in this case. As to class size, the facts in this case do not demonstrate that a small class size is required for this student to receive a FAPE. Furthermore, the fact that the class at St. Ursula's is a smaller class size than the public school class offered by the district does not mean that St. Ursula's is an "appropriate" school warranting tuition reimbursement.[3] At the impartial hearing, the student's teachers indicated that he had benefitted from the small group setting (Tr. pp. 30, 33, 58). One teacher, when asked if the student had made progress since attending his class, stated "[y]es, I believe so. I think the small classroom setting does help" (Tr. p. 33). When stating that the student occasionally needed to be redirected and sometimes refocused, the teacher said "[s]o the small classroom setting is very appropriate for [the student]" (Tr. p. 30). Another teacher from St. Ursula's testified that "[h]e definitely needs a smaller class setting" (Tr. p. 58).

Notably, the principal of the private school attended by the student prior to St. Ursula's (who was also the student's math teacher) indicated that the student "may benefit from an inclusion class" in the student's school report dated October 2, 2007 (Dist. Ex. 6 at p. 2). Also, while the student was recommended for a CTT class as a result of the CSE meetings, the student would have no opportunity for interacting with general education students at St. Ursula's, which is a school for the learning disabled (Tr. p. 36). In addition, one of the student's teachers at St. Ursula's stated that he could not say that the student would not have made the same progress in another program (Tr. p. 43).

Generalized statements by teachers that a small classroom setting helps or is appropriate, are insufficient to show that a small class size is needed to provide the student with a FAPE. Likewise, the conclusion by a teacher that a small class is needed, without more, is insufficient (see Application of a Child with a Disability, Appeal No. 06-069; compare Application of the Bd. of Educ., Appeal No. 07-103). In this case, the hearing record does not show that this particular student required a small class size to meet his established special education needs.

As to the parents' preference for a private parochial school, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *8 [S.D.N.Y. 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054).

[3] The principal of the recommended public school reported the proposed class was taught by two teachers; one regular education and one special education teacher (Tr. p. 14). The principal also stated that the number of students in a class ranged from 24 to 30 (Tr. p. 24). According to the class profile, the proposed class included 31 students between 12 and 15 years old (Dist. Ex. 5). Eleven of the students in the class were classified as students with disabilities (id.). At St. Ursula's, a school for learning disabled students, the class was comprised of 15 students and two teachers (Tr. pp. 30, 32, 36).

While it is evident that the parents believe placement of their son at St. Ursula's is in the student's best interests, the statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 132 [2d Cir. 1998], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 379 [2d Cir. 2003]). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Bd. of Educ. v. Rowley, 458 U.S. 189, 199 [1982]; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *15 [S.D.N.Y. Feb. 9, 2007]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). 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 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132). Accordingly, based upon a review of the facts in this case and the law, the parents are not entitled to tuition reimbursement.

Regarding the claim for "compensatory" education or "additional services," the parents stated in their due process complaint notice, "as [the student] received only minimal services since his initial IEP in 3rd grade, we request compensatory services at Sylvan Learning Center for both after-school and summer sessions . . . for the remainder of grade school" (Dist. Ex. 1). At the impartial hearing, the student's father stated that the parents wanted compensatory services in the form of tutoring at Sylvan, or a comparable service with a private tutor because the student "really received very little services over the years" (Tr. p. 76). In the petition, the parents allege that the district failed to assure "continuous special education services" (Pet. ¶ 13). In the same paragraph of the petition, the parents state "[w]e believe that this pattern continues with the [district's] latest denial of services" (id.). The parents support this statement by again referring to past services. Quoting the student's father's testimony at the impartial hearing, the parents reiterate their concern in the petition: "'[h]e only got 140 hours'" (Pet. ¶ 13, quoting Tr. p. 104). The student's father's testimony continued: "'I'd say from second grade on, that's very little in my estimation.'" (id.).

Although not clearly stated in their due process complaint notice, at the impartial hearing, or in their petition, the parents are apparently claiming that the district failed to provide the student with a FAPE during earlier school years, and that they should now be awarded tutoring at Sylvan as a remedy for this denial of a FAPE. Regarding claims of entitlement to "compensatory" or additional services for prior school years, such claims are barred in this case by the doctrine of res judicata, which holds that a final judgment on the merits of an action precludes parties from relitigating issues that were, or could have been raised in prior proceeding (see Grenon, 2006 WL 3751450 at *6; see also Application of a Child with a Disability, Appeal No. 05-056). Accordingly, the parents cannot now challenge the impartial hearing officer's determination in the May 10, 2007 decision, that 140 hours of tutoring was an appropriate remedy for the denial of a FAPE for the 2006-07 school year. Also, any claims as to the denial of a FAPE for earlier school years could have been raised in the proceeding underlying the May 10, 2007 decision, or at an earlier impartial hearing.[4] Therefore, the parents are barred by res judicata from receiving an award of compensatory or additional services in this case. I find that the impartial hearing officer properly limited the request for "compensatory" services to the 2007-08 school year (IHO Decision

[4] According to the hearing record, an earlier impartial hearing decision was rendered on February 2, 2005 (Tr. p. 72; Dist. Ex. 24; IHO Decision at p. 2).

at p. 3), and there has been no showing that additional services from Sylvan are necessary for the student to receive a meaningful benefit from his educational program. Thus, no additional services are warranted.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 15, 2008

PAUL F. KELLY
STATE REVIEW OFFICER