The University of the State of New York

The State Education Department
State Review Officer
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No. 08-145

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, Ayodele S.O. Rashid, Esq., of counsel

DECISION

Petitioner (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at Bay Ridge Preparatory School (Bay Ridge) for the 2006-07 school year. The appeal must be dismissed.

It is unclear from the hearing record where the student was attending school at the time of the impartial hearing in September and October 2008. However, during the school year that is the subject of this appeal (2006-07), the student attended first grade at Bay Ridge (Tr. p. 10). Bay Ridge 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 an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

On July 14, 2006, respondent's (the district's) Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2006-07 school year (Dist. Ex. 1). Participants included the parents, a district special education teacher who also acted as a district representative, and a district social worker (id. at p. 2). A regular education teacher from Bay Ridge also participated by telephone (id.). The CSE recommended that the student be placed in a general education classroom with related services of group counseling twice per week for 30-minutes per session, individual occupational therapy twice per week for 30-minutes per session, and group speech-language therapy once per week for 30 minutes (id. at pp. 1, 10).

By due process complaint notice dated July 11, 2008, the parents requested an impartial hearing seeking tuition reimbursement for the student's 2006-07 school year at Bay Ridge (IHO Ex. I). The parents alleged that the July 14, 2006 IEP lacked "appropriate measurable functional goals and objectives" to address the educational needs of the student (id.). The parents further alleged that the CSE failed to consider the parents' input and teacher observations (id.).

The impartial hearing was held on two nonconsecutive days, September 12, 2008 and October 6, 2008 (Tr. pp. 1, 45). By decision dated October 21, 2008, the impartial hearing officer determined that the district "failed to meet its burden of proving the appropriateness of the recommended program," and therefore failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year (IHO Decision at p. 7). The impartial hearing officer further determined that the parents satisfied their burden of proving that Bay Ridge provided the student with educational instruction specially designed to meet his unique needs (id. at p. 8). However, the impartial hearing officer determined that because the parents failed to provide notice to the CSE of their unilateral placement of the student at Bay Ridge at public expense, as required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I), they should not be awarded tuition reimbursement (id. at p. 9). Therefore, she denied the parents' request for tuition reimbursement (id.).

The parents appeal the impartial hearing officer's determination that they should not be awarded tuition reimbursement for the 2006-07 school year because they failed to provide the CSE with proper notice as required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The parents contend that the impartial hearing officer's decision was unsupported by the evidence because the parents informed the CSE at the July 14, 2006 meeting that they were rejecting the public school placement and continuing the student at Bay Ridge. The parents further argue that because the district failed to assert lack of notice as a defense at the impartial hearing, it cannot raise the issue on appeal. The parents also contend that there was no credible basis to assume that the CSE would have changed its recommendations, even if notice had been provided. The parents contend that the equities favor reimbursement because the impartial hearing officer determined that the district failed to prove the appropriateness of its recommended placement and the parents proved that the private placement at Bay Ridge was appropriate for their son. As relief, the parents seek reversal of the impartial hearing officer's denial of tuition reimbursement or, in the alternative, that the matter be remanded to the impartial hearing officer so that the parents can present additional evidence regarding the equities.

In its answer, the district contends that the impartial hearing officer properly denied tuition reimbursement because the parents failed to provide the district with proper notice as required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The district further maintains that the parents' statement purportedly made at the July 14, 2006 CSE meeting about placing the student at Bay Ridge was "vague," and therefore not sufficient to provide notice to the district of the parents' rejection of the placement in compliance with the Individuals with Disabilities Education Act (IDEA). The district also contends that the parents' due process complaint notice, filed almost two years after the July 14, 2006 CSE meeting, did not fulfill the notice requirements. The district requests that the parents' petition be dismissed and that the impartial hearing officer's decision be upheld in its entirety.

The parents filed a reply to the district's answer. The district subsequently filed a letter objecting to the parents' reply as improper because it attempted to "re-plead" the substantive

allegations and did not respond to any procedural defenses or address any additional evidence attached to the answer. Pursuant to State regulations, a reply is limited to procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). Here, the district did not raise any procedural defenses in its answer and the parents' reply did not respond to the additional evidence attached to the district's answer. The parents' reply simply reasserts the allegations contained in the petition. Therefore, the parents' reply is improper and will not be considered.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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; see Carter, 510 U.S. at 14-15; see also 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).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The parents appeal only the portion of the impartial hearing officer's decision which denied the parents' tuition reimbursement claim based on her determination that the parents did not provide the district with notice that they were placing the student at Bay Ridge at public expense in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii)(I) until they filed their due process complaint notice, almost two years later (see IHO Decision at p. 8). The district did not cross-appeal the portions of the impartial hearing officer's decision which found that the district did not offer a FAPE to the student for the 2006-07 school year and that the parents' placement of the student at Bay Ridge was appropriate. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Therefore, the only issue before me is whether the parents' request for tuition reimbursement is barred by equitable considerations.

Equitable considerations are relevant when fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 C.F.R. § 300.148[d], see Mr. M. v. Ridgefield Bd. of Educ., 2008 WL 926518, at *1 [D. Conn. March 31, 2008]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]). More specifically, pursuant to the IDEA, an award for tuition reimbursement may be reduced or denied if at the most recent CSE meeting prior to the removal of the student from public school, the parents did not inform the CSE that they were rejecting the proposed placement, including stating their concerns and their intent to enroll the student in a private school at public expense; or 10 business days prior to the removal of the student from public school, the parents did not give written notice to the district of their concerns with the district's recommendations and their intent to enroll the student at a private school at public expense (see 20 U.S.C. § 1412[a][10][C][iii][I][aa]-[bb]; see also 34 C.F.R. § 300.148[d]).

The parents argue that the district did not properly raise the issue of whether the parents provided notice under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) because it was not raised in the district's response to the parents' due process complaint notice (see 8 NYCRR 200.5[i][4][i]). However, the hearing record shows and the parents admit in their petition (Pet. ¶¶ 26-27, 30, 46), that at the impartial hearing the district's counsel cross-examined the student's mother on this issue and the parents did not object to that line of questioning (Tr. pp. 124-25). Furthermore, the district's counsel reiterated this argument during closing statements (Tr. pp. 147-48) and the impartial hearing officer appropriately made a determination on the issue.

In the present case, the parents assert that they provided legally sufficient notice of their unilateral placement to the district at the July 14, 2006 CSE meeting. A review of the hearing record does not support this assertion. Rather, the student's mother testified that she told a CSE member at the July 14, 2006 meeting that the parents wanted to continue the student's attendance at Bay Ridge because they had no other alternatives for him and did not want him to "go somewhere else unknown" (Tr. p. 124). She further testified that the parents "would've gone with the placement that we already knew he was progressing in" (id.). However, the hearing record does not show that the student's mother informed the CSE at the July 14, 2006 meeting that the parents would be seeking tuition reimbursement from the district for their placement of the student at Bay Ridge. The hearing record reveals that the parents did not provide notice to the district that they were rejecting the proposed special education program and placing the student at Bay Ridge for the 2006-07 school year at public expense until they filed their due process complaint notice

on July 11, 2008, almost two years later. Therefore, I agree with the impartial hearing officer that the parents did not provide notice in accordance with the provisions of 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Moreover, case law provides a further equitable basis to deny an award of reimbursement when parents have unilaterally arranged for private educational services without notifying the district (Carmel, 373 F. Supp. 2d at 416, citing Voluntown, 226 F.3d at 68 and Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]).

Lastly, the parents argue that the district did not offer proof at the impartial hearing that the parents had knowledge of the notice requirement under 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The parents did not raise this argument below and I find nothing in the hearing record to support their argument that they did not have knowledge of the notice requirement. The hearing record includes a final notice of recommendation (FNR) dated August 2, 2006 which stated that the "Notice of Rights as a Parent of a Child with a Disability," including procedural safeguards, was attached to the letter (Dist. Ex. 14). The FNR further stated that the parents should refer to the "Parent's Guide to Special Education for Children, 5-21" for a full description of their rights and that if they did not have that document, they could obtain it from the district (id.). Additionally, I note that the student's mother has taught in private and public schools in the district and is an attorney and an impartial hearing officer (Tr. p. 114; Dist. Ex. 7 at p. 1). Therefore, I find this argument to be unpersuasive.

Based on the foregoing, I affirm the impartial hearing officer's decision denying the parents' request for tuition reimbursement because they did not provide notice under 20 U.S.C. § 1412(a)(10)(C)(iii)(I).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 4, 2009

PAUL F. KELLY
STATE REVIEW OFFICER