



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-001

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 student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Law Office of Michele Kule-Korgood, attorneys for respondents, Tamara J. Roff, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that it failed to offer an appropriate educational program to the student and ordered it to reimburse respondents (the parents) for the student's tuition costs at the Rebecca School for the 2007-08 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending the Rebecca School (Parent Exs. A at p. 2; B at p. 1; H at p. 1; P at p. 1). The Rebecca School has not been approved by the Commissioner of Education as a school with which 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 autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record reveals that the student first received a diagnosis of autism at age two (Dist. Ex. 6 at p. 1; see Tr. p. 296). At age five, the student was given diagnoses of an attention deficit hyperactivity disorder (ADHD) and a bipolar disorder (Tr. p. 297; Dist. Ex. 6 at p. 1; Parent Ex. D at p. 1). From kindergarten through the second grade, the student attended public school (Tr. pp. 317-18). During the third grade, the student began attending a New York State approved non-public school where he received counseling, occupational therapy (OT), and speech-language therapy (Tr. pp. 319-20; Dist. Exs. 2 at p. 1; 3; 6 at p. 1; see Tr. pp. 300, 318). The student attended this school for four years until the 2006-07 school year when the student was unilaterally placed by his parents at the Rebecca School (Tr. pp. 266, 307, 309, 320; Dist. Ex. 2 at p. 2). The student

also has a history of asthma, sleeping difficulties, psychiatric difficulties and behavioral difficulties (Tr. pp. 221-22, 329; Dist. Exs. 3 at p. 2; 6 at pp. 1-2). He has more recently received a diagnosis of Asperger's Syndrome (Tr. p. 303; Dist. Ex. 3 at p. 2; Parent Ex. D at p. 1).

During the first half of 2006, the student underwent a psychological evaluation (Dist. Ex. 6 at p. 1).¹ To evaluate the student's cognitive functioning, the student was administered the Stanford-Binet Intelligence Scales – 5th Edition (SB-5) (id. at pp. 4-5). The student's verbal ability score was determined to be within the low average range and his nonverbal ability score was within the borderline range (id. at p. 15). The student achieved verbal comprehension scores in the average range (id.). His full scale IQ score was determined to be within the borderline range (id.). To evaluate his academic achievement the student was administered the Wechsler Individual Achievement Test – Second Edition (WIAT-II) (id. at pp. 10-11). Results from this testing revealed that the student functioned "well below average" in most of the areas assessed and that he exhibited significant deficits in reading, mathematics and spelling skills (id. at pp. 15-16). During this assessment, the student exhibited anxiety about his performance, low frustration tolerance, and fatigue (id. at p. 15). The report noted that the student exhibited limited social skills, low self-esteem, occasionally misinterpreted social interactions, and exhibited oppositional and negativistic behaviors (id. at p. 16). In addition, the student was "vulnerable to disorganized thinking and impairments in reality testing" (id.). Recommendations included a continuation in a therapeutic special education setting with a high teacher to student ratio in order to address the student's socialization skills and to provide "teaching geared to [the student's] learning style" (id.). Continuation of psychotherapy was also recommended to assist the student in dealing with depressive feelings, disorganized thinking, and interpersonal difficulties (id.).

In May 2007, the student underwent a private educational update evaluation that included the administration of "several components" of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH) and the Gray Oral Reading Tests, Fourth Edition (GORT 4) (Dist. Ex. 4 at pp. 1, 2). The student was found to be "deficient for his age" on all components of the WJ-III ACH except for oral language development and word knowledge (id. at p. 2). On the GORT 4, the student achieved low rate, accuracy and fluency scores and demonstrated poor performance when reading aloud (id.). In summarizing the student's reading skills, the evaluator noted that although the student's semantic abilities were in the average range, his decoding skills were at the low end of the average range, and his orthographic skills were severely deficient (id.). The evaluator recommended that the student receive daily reading and written language remediation and recommended utilizing a multisensory and research based method "such as the methods of Lindamood-Bell" (id. at p. 3).

The student's teacher from the Rebecca School completed a district evaluation form dated August 1, 2007 (Dist. Ex. 8 at p. 1). The teacher estimated that the student's reading and math skills were at a third grade level (id.). The teacher reported that the student had progressed "a lot in terms of productivity and doing the work" (id.). The teacher rated the student's ability to accept transitions as "good/fair," and his overall classroom performance and his relationships with adults as "fair" (id. at p. 2). The teacher rated the student's performance as "fair/poor" in the following categories: "Motivated to do well," "Works Independently," "Relationships with peers," and "Self Control" (id.). The teacher rated the student's performance as "poor" in the following categories:

¹ The student was seen for a total of 13 sessions in connection with this evaluation (Dist. Ex. 6 at p. 1).

"Homework," "Completes Assignments on Time," "Engages in Group Work," "Classroom Participation," "Follows classroom rules," "Follows directions," "Attention Span," "Self Esteem," and in "Accepts criticism" (id.). The teacher opined that the student's current school placement at the Rebecca School was appropriate (id.).

On August 2, 2007, a school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 2). Administration of the WJ-III ACH yielded the following cluster/test standard (and percentile) scores: oral language 86 (17), listening comprehension 95 (36), broad reading 72 (3), broad math 50 (<0.1), math calculation 55 (0.1), academic skills 56 (0.2) and academic fluency 69 (2) (id. at p. 3). The school psychologist reported that the student demonstrated significant delays in his academic achievement in all areas except oral language and listening comprehension (id. at p. 2). On these two subtests, the student achieved standard scores in the low average and average range respectively (id.). The psychologist compared the student's testing results with the results from the prior year and noted that the student had made "negligible improvement" and that his "rate of learning ... [had] ... remained constant over the past year ..." (id. at p. 3). The school psychologist found that the student was performing at a third grade level in reading and at a second grade level in math (id. at p. 4). He reported that despite the student's classification as a student with autism, "few signs of this disorder were evident during this testing" and that the student presented as a "socially related youngster" (id.). The school psychologist opined that "the primary factor involved in [the student's] slow academic progress, despite his average verbal intelligence, appears to be related to processes that interfere with smooth cognitive functioning and learning" (id.). The school psychologist concluded that the student's difficulty in processing social information "appears to be a less significant factor in explaining his slow educational progress than is a learning disability" (id.). As such, the school psychologist recommended that consideration be given to changing the student's classification to learning disabled (id.). The school psychologist also recommended that the student receive academic instruction that emphasized the direct teaching of discrete academic skills and further that the student be provided with educational experiences consistent with his average verbal reasoning abilities as well as be presented with information from a variety of sources including books on tape, educational television and radio, class lectures/discussions, and field trips (id.). The school psychologist also recommended an educational environment composed of students with typically developing language skills (id.).

On August 10, 2007, the Committee on Special Education (CSE) convened for the student's annual review (Dist. Ex. 1 at p. 1). Attendees included: a district school psychologist, a district social worker, a district special education teacher, a district regular education teacher, another district psychologist (who also functioned as a funding coordinator for private school students), both parents, an additional parent member, the student's Rebecca School special education teacher, and the student's Rebecca School social worker (id. at p. 2). The resultant individualized education program (IEP) contained the academic achievement assessment results and many of the recommendations from the August 2, 2007 psychoeducational evaluation report referenced above (compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 2 at pp. 2-3). The "Social/Emotional Performance" portion of the IEP indicated that the student had difficulty managing his frustration, tended to "shut down" for periods of time, exhibited difficulty reading social cues and tended to become "overwhelmed" by his difficulty in understanding social experiences (Dist. Ex. 1 at p. 5). The IEP also indicated that, at the time of the CSE meeting, the student was receiving psychiatric care and had been prescribed psychotropic medications (id. at p. 6).

Ultimately, the CSE recommended that the student receive a 12-month 6:1+1 special class program with related services of two 45-minute sessions of 1:1 OT per week, two 30-minute sessions of speech-language therapy in a group of 5:1 per week, one 30-minute session of 1:1 counseling per week, and one 30-minute session of counseling in a group of 5:1 per week (Dist. Ex. 1 at pp. 1, 24). Prior to making these recommendations, the CSE considered and rejected a general education program with related services and two different 12:1+1 special class programs (*id.* at p. 23). The CSE developed annual goals and short-term objectives to develop the student's skills in the areas of language, reading, writing, physical fitness, mathematics, social/emotional interaction and development, behavioral self-regulation, and physical self-care (*id.* at pp. 7-21). The CSE also recommended various testing accommodations for the student and developed a transition plan (*id.* at pp. 24-25). The CSE deferred the placement decision to the Central Based Support Team (CBST) to determine an appropriate placement for the 2007-08 school year (Dist. Exs. 1 at p. 1; 7).

By letter dated August 21, 2007, the parents' attorney advised the CSE Chairperson that the student would be starting the 2007-08 school year at the Rebecca School (Parent Ex. P at p. 1). The letter indicated that the parents had made this decision because "the CSE ha[d] failed to provide an appropriate IEP/placement recommendation" (*id.*). The letter also requested transportation to the Rebecca School and further advised that the parents intended to request an impartial hearing to seek public funding for this placement (*id.*).

In September 2007, the student resumed classes at the Rebecca School (Dist. Ex. 9). During September and October, the student's parents were contacted by three public schools (Tr. pp. 177, 180-82; Parent Ex. I). The parents contacted all three schools and the student and his father visited two of the schools (Tr. pp. 151, 179, 181).² Neither of these two schools offered the student a placement (Tr. pp. 179, 181). Thereafter, on October 18, 2007, the student's father signed an enrollment contract with the Rebecca School for the period of September 10, 2007 to August 2, 2008 (Tr. p. 338; Parent Ex. H). On October 30, 2007, the parents paid the Rebecca School a \$1,000 deposit toward the student's tuition for the 2007-08 school year (Parent Ex. G).

By due process complaint notice dated May 22, 2008, counsel for the parents requested an impartial hearing (Parent Ex. A). The parents asserted that the district failed to offer the student a placement and that the August 10, 2007 IEP was inappropriate because it contained incomplete goals and failed to include the student's present levels of performance "as they relate to transition from school to post-school activities or a transition plan with measurable postsecondary goals" (*id.*). The parents sought a declaration that the district had failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) and requested "funding" for the Rebecca School for the 2007-08 school year (*id.* at p. 2).

The impartial hearing began on September 18, 2008 and concluded on October 21, 2008, after three days of testimony (Tr. pp. 1, 125, 356, 421). The impartial hearing officer rendered her decision on November 26, 2008 (IHO Decision at p. 29). She determined that the district failed to offer a FAPE to the student because it had failed to make any formal permanent placement offer and also failed to develop any interim placement for the student (*id.* at pp. 23, 25). The impartial hearing officer also determined that the parents had established that the Rebecca School was an

² On one of the school visits, the student and his father were accompanied by the student's social worker from the Rebecca School (Tr. pp. 151, 179).

appropriate placement (*id.* at p. 26). The impartial hearing officer found that the program at the Rebecca School was tailored to the student's sensory processing, attentional, behavioral, academic, language, communication, social, and motor needs (*id.*). Moreover, the impartial hearing officer found that the Rebecca School program had resulted in "substantial progress" for the student, both academically and socially (*id.*). In addressing equitable factors, the impartial hearing officer found that the parents had cooperated in good faith at all times, had notified the district by letter that they were re-enrolling the student at the Rebecca School, and had acted reasonably in re-enrolling the student when the district had failed to offer a timely and appropriate placement (*id.* at pp. 27-28). The impartial hearing officer determined that under the circumstances of this case, where she had determined that the district had denied the student a FAPE and had failed to prove that it offered any appropriate placement recommendation, the parents were entitled to an award of the student's tuition costs (*id.* at p. 28). The impartial hearing officer ordered that, upon being presented with billing invoices, the district was to provide funding for the balance of the Rebecca School tuition for the 2007-08 school year (*id.*). She also ordered that the parents were to be reimbursed for transportation expenses to and from the Rebecca School for the period of September 2007 to August 2008 (*id.*). She further ordered that the district convene a CSE meeting to issue a new IEP for the 2008-09 school year that would reflect, at a minimum, an appropriate placement (*id.*).

The district appeals and asserts that the impartial hearing officer erred in determining that it had failed to offer a placement, that the parents had established that the program at the Rebecca School was appropriate, and that the equities favor the parents. With respect to the equities, the district asserts that the parents failed to return telephone calls from the Executive Director of the Association in Manhattan for Autistic Children, Inc. (AMAC School), which was a possible placement option for the student. The district also asserts that the parents failed to note their disagreement with the goals and objectives at the CSE meeting and therefore their subsequent decision to pursue litigation amounts to a failure to exhaust administrative remedies. The district further asserts that prospective tuition is not an available remedy to the parents. The district argues that federal law prohibits using public IDEA funding toward "for-profit" schools, such as the Rebecca School and requests that a State Review Officer consider two documents attached to its petition. Finally, the district asserts that the impartial hearing officer erred in reimbursing transportation expenses because the parents' due process complaint notice failed to request such relief.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer a FAPE to the student because the district never made a placement offer or provide any interim service plan for the student. The parents also dispute the district's assertion that the parents' failure to cooperate with the CBST school placement process (specifically with the AMAC School) precluded the district from offering a placement. The parents assert that their cooperation was evidenced by the fact that they visited two potential placements and that those schools ultimately did not have a space available for the student. Regarding the AMAC School, the parents assert that the student's father cooperated with the AMAC School and twice returned telephone calls from the AMAC School. Moreover, the parents assert further that the district failed to establish at the impartial hearing that the AMAC School program was offered to the student and would have been appropriate for the student. The parents also assert in their answer that the student's program at the Rebecca School was appropriate, that the equities should not bar relief, and that the impartial hearing officer properly awarded funding for the student's tuition at the Rebecca School. Finally, the parents object to the district's argument that tuition reimbursement cannot be awarded for a "for profit" school and to the district's

submission of two additional exhibits in support of this argument. The parents assert that the district failed to raise this issue at the impartial hearing, that the documents are unsubstantiated and prejudicial, and further that one of the submitted documents is partially illegible.

In its reply, the district argues that a State Review Officer should consider that the two additional items of documentary evidence submitted with its petition.

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 Student with a Disability, Appeal No. 08-129; Application of a Student with a Disability, Appeal No. 08-030). In this case, the parents object to this additional documentation. Moreover, I am also not persuaded that this evidence was unavailable at the time of the impartial hearing. Accordingly, I will not consider the additional documentary evidence submitted by the district with their petition.

Two purposes of the Individuals with Disabilities Education Act (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 FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). The student's recommended program must also be provided in the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

Preliminarily, I note that the parents assert in their answer that they are not seeking transportation reimbursement (Answer ¶ 18). As such, I will annul the impartial hearing officer's decision to the extent that she determined that the parents were entitled to transportation expenses.

In reviewing the hearing record, I agree with the impartial hearing officer's finding that the district failed to offer the student a FAPE because it failed to make any formal placement offer for the student (IHO Decision at pp. 23, 25; see Tr. pp. 376, 378). I also agree with the impartial hearing officer's finding that the Rebecca School was an appropriate placement for the student for the 2007-08 school year (IHO Decision p. 26). A review of the hearing record demonstrates that the Rebecca School addressed the student's social/emotional, communication, sensory, motor, and academic needs through small classes, specially designed instruction, and through the provision of related services (Tr. pp. 143, 145-47, 150, 205-07, 208, 210-12, 271; see Parent Exs. B; C; E; F; J; K; L). The hearing record further demonstrates that the student benefited from this instruction and these related services (Tr. pp. 151, 205-10, 321-27; see Parent Exs. B; C; E; F; J; K; L). Additionally, I agree with the impartial hearing officer's findings that the parents cooperated with the district, participated at the CSE meeting, visited proposed placements, and notified the district in writing that they were re-enrolling the student at the Rebecca School when no placement was offered by the district (Tr. pp. 21, 151, 179-82, 205, 207, 252-53, 311-14, 376, 378; Dist. Ex. 1; Parent Exs. I; P).

The hearing record reflects that, for the 2007-08 school year, the Rebecca School tuition was \$84,900 (Tr. p. 240; Parent Ex. H at p. 1). On October 18, 2007, the parents entered into a contract with the Rebecca School agreeing to assume responsibility for this tuition (Parent Ex. H). The hearing record also reflects that the parents have paid \$1,100 of this \$84,900 tuition cost; \$1000 on October 30, 2007, and another \$100 on September 5, 2008 (Tr. p. 245; Parent Ex. G). In fall 2008, the parents and the Rebecca School entered into an installment payment plan whereby the parents agreed to pay the balance of the 2007-08 school year tuition in \$100 monthly payments (Tr. pp. 245-46, 344, 346). At the impartial hearing, the program director at the Rebecca School testified that the parents are liable for the full tuition amount and if the parents were unable to make the payments, the Rebecca School would take legal action against them (Tr. pp. 246, 350; see Tr. pp. 400-01). The hearing record does not show that the parents have made further payments or that the Rebecca School has taken legal action against them.

It is well settled that parents who 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 Carter, 510 U.S. at 14-15; see also Gagliardo, 489 F.3d at 111 [2d Cir. 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]). While the IDEA provides that a court shall grant such relief that is determined to be appropriate (20 U.S.C. § 1415[i][2][C][iii]), the IDEA does not expressly provide for payment of tuition costs in the circumstance herein. The IDEA does provide that "a court or a hearing officer may require the [school district] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the [school district] had not made a [FAPE] available to the child in a timely manner prior to that

enrollment" (emphasis added) (20 U.S.C. § 1412[a][10][C][ii]; see 34 C.F.R. § 300.148[c]; see also Application of the Dep't of Educ., Appeal No. 07-032).³

I note that at the hearing, the parents specifically limited the relief they sought to funding of the student's tuition at the Rebecca School for the 2007-08 school year (Tr. pp. 6, 12). Under the circumstances of this case, where the parents are not requesting reimbursement for out-of-pocket costs or direct payment for compensatory education services, I find that the parents are not entitled to funding of the student's tuition (20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.403[c]; see generally Burlington, 471 U.S. 359; Carter, 510 U.S. 7; Gagliardo, 489 F. 3d at 111 [2d Cir. 2007]; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 07-032). I find that the cases cited by the parents are distinguishable and fail to support their claim for relief. In view of the foregoing, I will annul the impartial hearing officer's decision to the extent that she determined that the parents were entitled to funding of the student's tuition costs at the Rebecca School for the 2007-08 school year.

I have examined the parties' remaining contentions and find that they need not be addressed in light of my determination.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled insofar as the decision found that the parents were entitled to reimbursement for transportation expenses to and from the Rebecca School for the period of September 2007 to August 2008.

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled insofar as it awarded the parents funding for the student's tuition at the Rebecca School for the 2007-08 school year.

Dated: Albany, New York
March 2, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

³ I do note however that the United States Court of Appeals for the Second Circuit has determined that under the pendency doctrine, school districts may be required to directly fund pendency placements (see Bd. of Educ. v. Schutz, 290 F.3d 476, 482-84 [2d Cir. 2002]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 200-01 [2d Cir. 2002]), and that courts have awarded "prospective payment" to afford access to compensatory education (see, e.g., Streck v. Bd. of Educ., 2008 WL 2229141 [2d Cir. May 30, 2008]).