The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 09-080

Application of a STUDENT WITH A DISABILITY, by her parent, 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:
Law Offices of Lauren A. Baum, P.C., attorneys for petitioner, Lauren A. Baum, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her daughter's tuition costs at the Aaron School for the 2008-09 school year. The appeal must be sustained in part.

The parties do not dispute the relevant facts underlying the limited issues raised in this appeal. Procedurally, the case was initiated by a due process complaint notice dated January 28, 2009, in which the parent alleged, among other things, that the district failed to appropriately evaluate the student, develop an appropriate individualized education program (IEP), or offer the student an appropriate educational placement and related services for the 2008-09 school year (Parent Ex. A). For relief, the parent sought reimbursement for the costs of her daughter's tuition at the Aaron School for the 2008-09 school year, related services, and transportation services (id. at p. 2). The Aaron 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 and related services as a student with a speech or language impairment is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

At the time that the impartial hearing convened in March 2009, the student was attending the Aaron School (Tr. p. 5; Parent Ex. D at p. 1). During the course of the impartial hearing, the parent submitted a written motion for default judgment, in which she alleged that the district had

not provided the parent with prior written notice and that the district's response to the due process complaint notice consisted of a general denial that was not consistent with State and federal regulations (IHO Ex. I at pp. 1-3; see 34 C.F.R. § 300.508[e][1]; 8 NYCRR 200.5[i][4][i]).[1, 2] In opposition to the parent's motion, the district asserted that its response to the due process complaint notice complied with State and federal regulations and that the impartial hearing officer lacked authority to grant a default judgment (IHO Ex. II). In an interim decision, the impartial hearing officer denied the parent's motion for default judgment (Tr. p. 46; see Pet. ¶ 16; Answer ¶ 40).[3]

In April 2009, the district submitted a motion to the impartial hearing officer seeking dismissal of the parent's claim for tuition reimbursement, and the parent thereafter filed a brief in opposition to the district's motion (IHO Exs. III; IV). In its motion to dismiss, the district asserted that the Individuals with Disabilities Education Act (IDEA) (see 20 U.S.C. §§ 1400-1482) and attendant federal regulations provide that under certain conditions, a parent may seek reimbursement for tuition costs for unilaterally placing a student at a private "elementary school" or "secondary school," which are both defined in the IDEA as a "nonprofit institutional day or residential school" (20 U.S.C. §§ 1401[6], [27]; see IHO Ex. III at pp. 2-3). The district alleged that the parent sought reimbursement for tuition costs at the Aaron School, which is a "for-profit school" that did not meet the statutory definition of an elementary or secondary school and, therefore, the parent lacked standing and was precluded from obtaining reimbursement relief for the tuition costs she incurred for the student's enrollment at that school (IHO Ex. III at pp. 1, 3-4). In response to the district's motion to dismiss, the parent conceded that the Aaron School was operated on a for-profit basis; however, the parent argued that her allegations that the district denied the student a free appropriate public education (FAPE)[4] were sufficient to confer standing to commence an impartial hearing and that under the IDEA, remedies for a district's denial of a FAPE were not limited solely to tuition reimbursement at not-for-profit private elementary or secondary schools (IHO Ex. IV at pp. 2-5). The parent also asserted that the Aaron School had been operating at a loss since its inception (id. at pp. 5-6).

---

[1] The parties submitted the following six documents to the impartial hearing officer for his consideration, but they were not identified in the hearing record with exhibit numbers: (1) Parent's Motion for Default Judgment dated March 23, 2009; (2) District's Letter Brief in Opposition to Motion for Default Judgment dated March 30, 2009; (3) District's Motion to Dismiss dated April 24, 2009, (4) Parent's Brief in Opposition to Motion to Dismiss dated May 2, 2009; (5) District's Reply to Parent's Brief in Opposition dated May 11, 2009; and (6) Parent's Letter regarding Reply dated May 26, 2009. In this decision, I will refer to the documents as Impartial Hearing Officer Exhibits I-VI, respectively (see IHO Exs. I-VI).

[2] In the alternative, the parent sought to preclude the district from presenting evidence at the impartial hearing outside of the scope of its response to the due process complaint notice (IHO Ex. I at pp. 8-9).

[3] A copy of the impartial hearing officer's interim decision is not included in the hearing record.

[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]; see 34 C.F.R. § 300.17).

In a decision dated June 5, 2009, the impartial hearing officer determined that the district failed to establish that the parent lacked standing and denied that portion of the district's motion to dismiss (IHO Decision at p. 2). With respect to the district's "for-profit" defense, the impartial hearing officer determined that the parent had failed to state a claim for which relief could be granted, finding that tuition reimbursement was "limited to non-profit institutions under the applicable statutes" (id.). The impartial hearing officer dismissed the parent's tuition reimbursement claim and closed the case (id. at pp. 2-3).

The parent appeals, contending that the impartial hearing officer incorrectly denied the parent's motion for default judgment because an impartial hearing officer has the authority to efficiently manage the hearing processes. The parent further argues that the impartial hearing officer erred in dismissing the parent's tuition reimbursement claim because relief under the IDEA is not limited to the statutory sections relied upon by the district. For relief, the parent seeks a determination that: (1) the district is limited to the matters raised in its response to the due process complaint notice and cannot carry its burden of persuasion with regard to the provision of a FAPE; (2) the impartial hearing officer erred in dismissing the parent's claim because the Aaron School is a for-profit school and failed to conduct a Burlington/Carter analysis;[5] and 3) the parent is entitled to reimbursement for the costs of the student's tuition at the Aaron School for the 2008-09 school year. In the alternative, the parent seeks an order remanding the case for an impartial hearing that includes a Burlington/Carter analysis by a different impartial hearing officer.

In its answer, the district denies the parent's allegations that the impartial hearing officer erred in denying the parent's motion for default judgment and granting the district's motion to dismiss. Accordingly, the district requests that the impartial hearing officer's decision dismissing the parent's tuition reimbursement claim at the Aaron School be upheld. If the matter is remanded to an impartial hearing officer, the district alternatively requests that the case be returned to the same impartial hearing officer due to his familiarity with the case and the evidence adduced thus far.

Two purposes of the IDEA 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 Committee on Special Education (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]).

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

[5] See 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).

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). 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 (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

With respect to the issues presented in this case, I will first address the threshold question of whether the parent may seek relief in the form of reimbursement for tuition at the Aaron School. In support of its argument that the parent is ineligible to seek the tuition reimbursement relief she requested, the district points to the express language of the IDEA, which in pertinent part, provides that:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment

(20 U.S.C. § 1412[a][10][C][ii] [emphasis added]; see 34 C.F.R. § 300.148[c]). An "elementary school" is defined in the IDEA as a "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law" (20 U.S.C. § 1401[6]; see 34 C.F.R. § 300.13). A "secondary school" is defined as "a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12." (20 U.S.C. § 1401[27]; see 34 C.F.R. § 300.36).[6] However, in Forest Grove Sch. Dist. v. T.A (129 S.Ct. 2484 [2009]), the United States Supreme Court held that the statutory clause upon which the district has rested its argument in this case, clause (ii) of § 1412(a)(10)(C), is phrased permissively and does not foreclose tuition reimbursement in other circumstances (id. at 2493). The Supreme Court further indicated that clause (ii) lists "factors that may affect a reimbursement award" and that "[t]he clauses of § 1412(a)(10)(C) are . . best read as elucidative rather than exhaustive" (id.; see Frank G. v. Bd. of Educ., 459 F.3d at 364, 368 [2d Cir. 2006]). In Forest Grove, the Supreme Court reaffirmed its holding in Burlington that hearing officers and courts have the authority to "grant such relief as the court determines appropriate" (20

[6] The district relies upon Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ., 464 F.3d 1003 (9th Cir. 2006) and Letter to Chapman, 49 IDELR 163 (OSEP 2007) to support its argument that the parent is not entitled to reimbursement; however, those authorities addressed how a state educational agency or school district may administer funds under federal programs when FAPE is not at issue. In contrast, this case involves whether a court or a hearing officer is prohibited by § 1412(a)(10)(C)(ii) from awarding a parent tuition reimbursement when FAPE is at issue and that statutory section is not addressed in Arizona State Bd. or Letter to Chapman.

U.S.C. § 1415[i][2][C][iii]; see Forest Grove, 129 S.Ct. at 2494, 2496; see also Frank G., 459 F.3d at 368-69). The Supreme Court further explained that if a district failed to provide a FAPE and the parent's unilateral placement was appropriate for the student, with respect to relief, the hearing officer must "consider all relevant factors . . . in determining whether reimbursement for some or all of the cost of the child's private education is warranted" (Forest Grove, 129 S.Ct. at 2496; see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 415-16 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). In this case, although the parties do not dispute that the Aaron School is a for-profit entity, in view of the statutory text and the case law discussed above, I cannot conclude that the parent is categorically barred by § 1412(a)(10)(C)(ii) from seeking relief in the form of tuition reimbursement at a for-profit school (Application of a Student with a Disability, Appeal No. 09-085). Accordingly, the impartial hearing officer's determination that "tuition reimbursement is limited to non-profit institutions" by statute must be annulled (IHO Decision at p. 2). Because the impartial hearing was not concluded and further hearing dates had been scheduled (Tr. p. 182), I will remand the case for completion of the evidentiary phase of the impartial hearing and will order the impartial hearing officer to analyze the parties' arguments on the issues presented in the due process complaint notice and render a determination regarding those issues.[7]

With regard to the parent's contention that the impartial hearing officer should have granted a default judgment in favor of the parent because the district's response to the due process complaint notice did not meet federal and State requirements, I note that the district's response to the due process complaint notice is not consistent with State and federal regulations because it did not contain, for example, an adequate explanation of why the agency proposed or refused to take the action raised in the due process complaint notice pertaining to the student's speech-language services and reading program (Parent Exs. A-B; see 20 U.S.C. § 1415[c][2][B][i][I]; 34 C.F.R. § 300.508[e][1][i]; 8 NYCRR 200.5[i][4][i][a]; see Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008]). However, in the most recent IDEA case cited by the parent in support of her default judgment argument, Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261 (D.D.C 2007), the Court determined that a default judgment was not the appropriate remedy for the district's failure to conform to the requirements for a response to the parent's due process complaint notice (Sykes, 518 F. Supp. 2d at 267; see Parent Mem. of Law at pp. 6-7).[8] Moreover, the evidence in the hearing record does not support a determination that the procedural inadequacy in the district's response to the due process complaint notice rose to the level of denying the student a FAPE (Jalloh, 535 F. Supp. 2d at 20 [D.D.C. 2008] [finding that a district's failure to appropriately respond to a due process complaint notice did not affect the student's substantive rights]; Application of a Student with a Disability, Appeal No. 08-151; Application of a Student with a Disability, Appeal No. 08-013; see also Heather S. v. State of Wis., 125 F.3d 1045, 1059 [7th

[7] The parent requests that the case be remanded to a different impartial hearing officer; however, the parent has not alleged any reason why the case should not be heard by the same impartial hearing officer.

[8] The United States Department of Education, in discussing 34 C.F.R. § 300.508(e) in its Official Analysis to Comments in the Federal Register, noted that the IDEA "does not establish consequences" for parents for the failure to respond to a due process complaint notice and that either party's failure "to respond to or to file, the requisite notices could increase the likelihood that the resolution session meeting will not be successful in resolving the dispute and that a more costly and time consuming due process hearing will occur" (Filing a Due Process Complaint, 71 Fed. Reg. 46699 [August 14, 2006]).

Cir.1997] [holding that the alleged procedural violation during an impartial hearing did not result in the loss of educational opportunity]; James D. v. Bd of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 2009 WL 2178431 at *7 n.11 [N.D. Ill. July 22, 2009]). I therefore decline to annul the impartial hearing officer's determinations denying the parent's motion for default judgment and denying the parent's alternative motion to limit the district's introduction of evidence at the impartial hearing. However, a district may be directed to comply with the IDEA's procedural requirements (34 C.F.R. § 300.513[a][3]; 8 NYCRR 200.5[j][4][ii]). Accordingly, I will direct the district, upon remand, to provide the parent and the impartial hearing officer with an amended response to the due process complaint notice that conforms with the requirements set forth in 34 C.F.R. § 300.508(e) and 8 NYCRR 200.5(i)(4)(i).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the part of the impartial hearing officer's decision dated June 5, 2009 which determined that the parent was precluded from seeking relief in the form of tuition reimbursement at the Aaron School is annulled; and

IT IS FURTHER ORDERED that the district, if it has not already done so, shall provide the parent and the impartial hearing officer with an amended response to the due process complaint notice that is consistent with the directive in body of this decision at least five days prior to the continuation of the impartial hearing; and

IT IS FURTHER ORDERED that this matter is remanded to the same impartial hearing officer who issued the June 5, 2009 decision that is the subject of this appeal to continue the impartial hearing within 20 days of the date of this decision and render a decision on the issues raised in the parent's due process complaint notice; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the June 5, 2009 decision is not available to continue the impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
September 17, 2009

PAUL F. KELLY
STATE REVIEW OFFICER