The University of the State of New York

The State Education Department
State Review Officer
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No. 09-085

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 Neal H. Rosenberg, attorneys for petitioner, Karen Newman, 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 by respondent (the district) for her daughter's tuition costs at the Aaron Academy for the 2008-09 school year. The appeal must be sustained.

The parties do not dispute the relevant facts underlying the limited issues in this appeal. Procedurally, the case was initiated by a due process complaint notice dated November 12, 2008, in which the parent alleged, among other things, that the district failed to hold an appropriately composed Committee on Special Education (CSE) meeting, develop an appropriate individualized education program (IEP), or offer the student an appropriate educational placement and related services for the 2008-09 school year (Dist. Ex. 1). For relief, the parent sought reimbursement for the costs of her daughter's tuition at the Aaron Academy for the 2008-09 school year, related services, and transportation services (id.). The Aaron Academy 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 learning disability is not in dispute in this appeal (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

At the time the impartial hearing convened in May 2009,[1] the student was attending the Aaron Academy (Tr. p. 4; Parent Exs. A; B at p. 4). During the course of the impartial hearing, the district moved to dismiss the parent's claim for tuition reimbursement and the parent filed a memorandum of law in opposition to the district's motion (IHO Exs. I-II). 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 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], 1401[27]; see IHO Ex. I at pp. 2-3). The district alleged that the parent sought reimbursement for tuition costs at the Aaron Academy,[2] 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 tuition costs she incurred for the student's enrollment at that school (IHO Ex. I at pp. 1, 3-4). In response to the district's motion to dismiss, the parent argued that the parent had standing, and if the district had denied the student a free appropriate public education (FAPE),[3] then under the IDEA the parent may be granted "such relief as the court determines is appropriate" (IHO Ex. II at pp. 1-2, 4-6). Therefore, the parent argued that dismissal of the parent's reimbursement claim was not appropriate solely because the parent chose a "for-profit" school as a unilateral placement (id. at pp. 1-2). The parent asserted that the definitions cited by the district in the IDEA refer to public elementary secondary schools and do not apply to private elementary and secondary schools (id. at pp. 2-3). Among other things, the parent also argued that the district's motion to dismiss was untimely because the district did not raise the issue in its response to the parent's due process complaint notice, in a prehearing conference, or prior to the start of the impartial hearing (id. at p. 8).

In a decision dated June 24, 2009, the impartial hearing officer found 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. 3). The impartial hearing officer further determined that there was no statutory or judicial authority to support the parent's argument that the district's motion to dismiss

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[1] I note that the hearing record contains no explanation whatsoever for the inordinate delay in convening the impartial hearing. While the parent's due process complaint notice is dated November 12, 2008, the hearing record indicates that the impartial hearing did not convene for over six months (Tr. pp. 1, 4; Dist. Ex. 1). I caution the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

[2] The district identified the "Aaron School" as the parent's unilateral placement in its motion to dismiss; however, the parties later clarified that the student was actually placed at the "Aaron Academy," which is an affiliate of the Aaron School under the same parent entity and that both schools are "for-profit" entities (Tr. pp. 124, 129, 130-31; see IHO Decision at p. 2). .For consistency, in those instances in which the hearing record refers to the "Aaron School," I will refer to the "Aaron Academy "in this decision.

[3] 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).

was untimely (id. 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. at p. 3). The impartial hearing officer dismissed the parent's tuition reimbursement claim and closed the case (id.).

The parent appeals, contending 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. The parent further argues that the district should have been precluded from raising its "for profit" defense because it failed to raise it in its response to the due process complaint notice and failed to challenge the due process complaint notice as insufficient. The parent also asserts that the procedural safeguards notice provided to the parent in accordance with State regulations does not include language that restricts parents from unilaterally placing a student at a for-profit school and seeking reimbursement from a district. According to the parent, tuition reimbursement at a for-profit school is available as a remedy and the impartial hearing officer should have conducted an analysis of whether the district offered the student a FAPE and offered the parent the opportunity to be heard as to whether the Aaron Academy was appropriate for the student. For relief, the parent seeks a determination that: (1) the parent's decision to send the student to the Aaron Academy, a for-profit school, does not preclude her from seeking reimbursement for the costs of the student's tuition for the 2008-09 school year; and (2) the matter should be remanded to a new impartial hearing officer to determine whether the student was denied a FAPE, whether the parent has chosen an appropriate school, and whether equitable considerations favor the parent. The parent also seeks legal fees for the costs incurred related to the impartial hearing and this appeal.

In its answer, the district denies the parent's allegations that the impartial hearing officer erred in granting the district's motion to dismiss. With respect to the lack of a notice of insufficiency and the lack of restrictive language in the procedural safeguards notice alleged by the parent in the petition, the district contends, among other things, that the parent failed to raise these matters before the impartial hearing officer and that; therefore, a State Review Officer should not consider them on appeal. Accordingly, the district requests that the impartial hearing officer's decision dismissing the parent's tuition reimbursement claim at the Aaron Academy be upheld. If the matter is remanded to an impartial hearing officer pursuant to the parent's request, 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. The district attaches additional evidence to its answer for consideration by a State Review Officer.

In her reply, the parent objects to the district's submission of three additional exhibits with its answer. The remainder of the parent's reply responds to the points raised by the district in its answer.

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 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 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 (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).

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 law 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).

At the outset two procedural matters must be addressed. First, 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; see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the parent's reply did respond to the additional evidence offered with the district's answer, but the reply also contained additional arguments directed at the substantive arguments interposed by the district in its answer. Therefore, I will consider the reply for the limited purpose of addressing the additional evidence submitted by the district, and the remainder of the parent's reply will not be considered (see 8 NYCRR 275.14[a], 279.6; Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009).

With respect to the second procedural matter, as noted above, the district submitted additional evidence together with its answer in the form of three additional exhibits. 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. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the three exhibits offered by the district were all available at the time of the impartial hearing and none of them are necessary in order to render a decision. Accordingly, I decline to consider them.

Turning to the merits of the issues presented by the parties, I will first address the threshold question of whether the parent may seek relief in the form of reimbursement for tuition at the Aaron Academy. 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).[4] 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 authority to "grant such relief as the court determines appropriate" (20 U.S.C. § 1415[i][2][C][iii]; see Forest Grove, 129 S.Ct. at 2494, 2496; see also Frank G., 459 F.3d

[4] 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.

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 Academy is a for-profit entity (Pet. ¶ 28; Answer ¶ 31), 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. 09-080). 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. 3). Because the impartial hearing was not concluded and further hearing dates had been scheduled (Tr. pp. 139-40), 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.[5]

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.

IT IS ORDERED that the part of the impartial hearing officer's decision dated June 24, 2009 which determined that the parent was precluded from seeking relief in the form of tuition reimbursement at the Aaron Academy is annulled; and

IT IS FURTHER ORDERED that this matter is remanded to the same impartial hearing officer who issued the June 24, 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 24, 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

[5]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.