The University of the State of New York

The State Education Department
State Review Officer
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No. 13-086

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to fund, among other things, sixty-seven percent of the student's tuition costs at the Ha'or Beacon School (Beacon) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render

an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on May 9, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Parent Ex. D). The parents disagreed with the recommendations contained in the May 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of their intent to unilaterally place the student at Beacon (see Parent Ex. H). In an amended due process complaint notice, dated July 16, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. B).

An impartial hearing convened on September 4, 2012 and concluded on February 14, 2013 after five days of proceedings (Tr. pp. 1-480). In a decision dated April 12, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Beacon was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 10-14). As relief, the IHO ordered the district to: reimburse the parents for 67 percent of the cost of the student's tuition at Beacon for the 2012-13 school year; reimburse the parents the cost of the student's tuition and enrollment fees for summer 2012 placement at Camp Chaverim; fund 22 hours per week of 1:1 special education itinerant teacher (SEIT) services and four hours per week of after-school social skills sessions for the 2012-13 ten-month school year; fund related services including five 60-minute sessions of individual speech-language therapy per week and three 30-minute sessions of individual occupational therapy (OT) per week for the 12-month 2012-13 school year; and fund up to ten hours of 1:1 SEIT services for the summer of 2012 (IHO Decision at pp. 15-16).[1]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer thereto is also presumed and will not be recited in full here. The district does not appeal the IHO's determination that it failed to offer the student a FAPE or that equitable considerations favor the parents, and these determinations are now final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The gravamen of the parties' dispute on appeal is whether the unilateral placement along with the SEIT and related services, were appropriate to meet the student's special education needs.

[1] Tuition reimbursement was limited to 67 percent of the cost of the student's tuition at Beacon, which represents the portion of the program devoted to non-religious matters (IHO Decision at p. 13).

V. Applicable Standards

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 Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; 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 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]; R.E. v. New York City Dep't of Educ., 694 F.3d 167,184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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; see 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 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419[S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34

CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]).

On appeal, the district alleges that the IHO erred in addressing two requests for relief because they were not raised in the due process complaint by the parents, including: (1) ordering the district to fund four hours per week of after-school social skills sessions, and (2) ordering the district to fund 22 hours per week of 1:1 SEIT services for the ten-month school year and up to ten hours of 1:1 SEIT services for the summer of 2012. The district misreads the requirements for a due process complaint notice. While the complaining party must identify the range of issues in the due process complaint and the relief requested to the extent known, it was not an error for the IHO to formulate equitable relief in this fashion particularly when the services were to be provided by virtue of pendency.[2]

As another preliminary matter, the district makes much of the fact that the 1:1 instruction provided to the student was referred to as "SEIT" services (a service identified in State regulation as a preschool service) and therefore inappropriate because the student had reached school-age see Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]). That is the extent of the district's argument which largely elevates form over substance under the particular circumstances in this case. The service remained 1:1 special education instruction by a certified special education teacher. Moreover, it was required to be funded under pendency (stay-put), and the pendency principle does not require that the SEIT continue to provide the instruction in a particular site or location or that the services be delivered at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16; see Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90). The constraint regulates school districts when proposing a public placement; it does not regulate parents who have selected a unilateral placement and exercised their right under the statute to stay put.

B. Unilateral Placement

Turning to the second Burlington criterion, for the reasons described below, the hearing record supports the IHO's finding that Beacon, combined with SEIT and related services, was appropriate to meet the student's special education needs.

In this instance, although the student's needs are not in dispute, a brief discussion thereof provides context for the discussion of the disputed issue to be resolved; namely, whether the student's unilateral placement at Beacon, combined with SEIT and related services, was appropriate. The student's disability classification of autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student was described as a sweet cooperative child; however, he was noted to be extremely distractible and have a limited attention span, in addition to having deficits in the areas of language, cognition, academics, motor, and social skills (Tr. pp. 125, 214-15, 309; Parent Ex. D at pp. 1-3). When introduced to a new skill, the student required constant teacher direction until he mastered the skill (Parent Ex. D at p. 2). The student required

[2] The district was ordered to provide the student 30 hours of ABA services per week in the pendency order dated September 4, 2012 (Interim IHO Decision at p. 2). The IHO chose to separate the particular components of the ABA/SEIT services and direct separate awards for such services (see IHO Decision at p. 15).

1:1 teaching support because everything had to be broken down in small steps for him to obtain skills and he could not learn in a class (Tr. pp. 298, 333-34). The November 2012 progress report from the SEIT provider indicated that if the student "was left alone or in an unstructured environment, he tended to revert to inappropriate behaviors, and therefore could not learn basic skills from his environment unless a trained ABA therapist was assisting him" (Parent Ex. N at p. 4).

The district's argument regarding summer services is misplaced. The student was in fact placed in the summer program the district recommended at the May 2012 CSE meeting and it is disingenuous for the district to argue that the parents did not create an alternative parallel summer program (Tr. pp. 112-13; Parent Ex. D at p. 9).

With regard to the parties' dispute over whether the Beacon School was appropriate to address the student's needs, Beacon was described as a self-contained school for students in grades one through eight, with small special education classes and low teacher-to-student ratios (Tr. p. 294). The district does not argue that the special class at Beacon with a certified special education teacher is inappropriate for the student. The district is correct that it is unclear how much the Beacon services are being utilized, with the 1:1 SEIT provider and other therapists occupying so much of the student's attention; however, this would more properly be an argument with respect to equitable considerations, which the district has conceded (see C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011] [explaining that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs) . . . ."]).[3] Most important is that the district does not point to a special education need that is not being addressed, it merely quibbles with who is addressing the student's needs. The SEIT provider indicated that Beacon was a good placement for the student to generalize skills in the classroom (Tr. p. 247). According to testimony, the Beacon staff was not trained in autism spectrum disorder or ABA methodology and the paraprofessional in the classroom was not trained to meet the student's needs without the SEIT provider present (Tr. pp. 247-48). I am hard pressed to accept the district's argument that Beacon was inappropriate because staff were not trained where evidence shows the Beacon teachers were certified special education teachers and the district did not recommend a specific teaching methodology in the May 2012 IEP (Tr. p. 305).

The student's speech-language therapy and OT were also provided by outside agencies instead of Beacon staff because the student received related service authorizations (RSAs) from the district pursuant to pendency (Tr. pp. 336-37).[4]

[3] According to the student's schedule, the student was involved in either 1:1 ABA instruction, speech-language therapy, or religious instruction throughout the day, with the exception of a half-hour lunch period on Monday and Friday, a half-hour period at the end of the day on Thursday, and a two-hour block of time every other Friday (compare Parent Ex. K at p. 3, with Parent Ex. O at pp. 2-3, and Tr. pp. 322-23, 376).

[4] At least one district court in New York has found that services provided by a district should not be considered in determining the appropriateness of a unilateral placement (K.S. v. New York City Dep't of Educ., 2012 WL 4017795, at *8-*9 [S.D.N.Y. Aug. 8, 2012]; but see F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 522-23 [S.D.N.Y. 2013] [district's provision of a 1:1 paraprofessional at private school negated need for the private school to provide one and did not render the private school inappropriate]).

The district argues that the parents failed to present adequate objective evidence of progress; however, progress is not dispositive and it is not required to show quantifiable success to find a placement appropriate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364)..[5] Rather, the test is whether the unilateral placement offered specialized instruction to address the student's unique needs. The record reflects that the student received 22-24 hours per week of 1:1 applied behavioral analysis (ABA) instruction, both in and out of the classroom, from two SEIT providers who supported him behaviorally, socially, and academically at Beacon (Tr. pp. 188, 194, 196, 216-19).[6] New skills were introduced and explained in a 1:1 setting and a behavior system was put into place to reward the student when he exhibited the new behavior (Tr. p. 217). The SEIT provider worked 1:1 with the student in the classroom with a behavior chart (Tr. p. 218). She stated that she would "back out" for a few minutes and then remind the student of what he was expected to do on an ongoing basis throughout the day (id.). Although not dispositive, the record reflects that the student made some progress commensurate with his abilities during the 2012-13 school year (Tr. pp. 222, 246; Parent Ex. N).

C. Relief

The district also alleges that it cannot be compelled to pay the student's tuition costs at Beacon and the costs of the private providers because the parents were not legally obligated to pay the tuition pursuant to the contract. However such facts do not warrant a determination that the parent was not obligated under the contracts (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 457-58 [2d Cir. 2014] [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). This is especially true where, as here, the contracts explicitly provide that the parents were responsible for the full payment of the tuition and cost of services due under these contracts (see Parent Exs. K at p. 1; O at p. 1).[7] Accordingly, under the circumstances of this case, I find that the parent is entitled to direct funding of the student's tuition at Beacon and related services for the 2012-13 school year, as ordered by the IHO, under the factors described in (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]).

[5] The district is on dangerous grounds suggesting that a particular level of educational benefit must be achieved, for whatever standard applies to a parent would also apply to the district (see Gagliardo, 489 F.3d at 112).

[6] The SEIT services were provided by certified special education teachers from a private agency (Tr. pp. 181, 206-07).

[7] The district's argument that the Beacon contract was invalid because a representative from Beacon did not sign the document is also unpersuasive in this instance because it is the parent's obligation that the district challenges and the student's attendance at Beacon (and therefore Beacon's performance under the contract) is not disputed.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the Beacon School with the other related services was an appropriate unilateral placement, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 6, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER