



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-097

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of an impartial hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Gary S. Mayerson, Esq., Mayerson & Associates, for petitioners

Brian J. Reimels, Esq., for Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, for respondent

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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the McCarton School (McCarton) for the 2012-13 school year. The appeal must be sustained in part.

II. Factual and Procedural History

While it is unnecessary to provide a detailed recitation of the factual history giving rise to the parties' instant dispute, the following undisputed facts are presented for context. Briefly, the student resided with her parents in another State prior to the 2012-13 school year (Tr. p. 45). The student began the 2011-12 school year attending a public general education preschool program in her out-of-State school district; shortly after the beginning of the school year the parents began to have concerns that the student required special education services and the student was evaluated both privately and by the out-of-State district (Tr. pp. 46, 49-55). The student was offered a diagnosis of an autism spectrum disorder, after which the out-of-State district convened the equivalent of a Committee on Special Education (CSE) to review the evaluative data and develop

a program for the student (Tr. pp. 53-57).¹ Around this time, in January 2012, the parents determined to place the student at McCarton, located in the respondent district (Tr. pp. 57-58).

In April or May 2012, the parents sign a contract with McCarton for the student's attendance for the 2012-13 school year (Tr. p. 80).² Sometime thereafter, in June or July 2012, the parents determined to move to the district (Tr. p. 100). On August 15, 2012, the parents wrote the district, notifying the district that they would be moving into the district on August 20, 2012, providing their address in the district, and requesting that the district develop an individualized education program (IEP) to provide the student with special education services "as soon as possible" (Parent Ex. C at p. 1). The district never responded, and on October 31, 2012, the parents followed up with the district, indicating that they intended to seek public funding for the costs of the student's tuition at McCarton, as well as for transportation to and from school (Parent Ex. B at p. 1). The district again did not respond and, by due process complaint notice dated November 30, 2012, the parents requested an impartial hearing (Parent Ex. A). As relevant here, the parents alleged that the district had not convened a CSE meeting or developed an IEP for the student for the 2012-13 school year (*id.*).

An impartial hearing was convened on February 6, 2013 and concluded on March 21, 2013 after two days of proceedings (Tr. pp. 1-318). By decision dated May 1, 2013, the IHO found that the district had no obligation to offer the student a FAPE until sometime after the October 2012 letter, which the IHO held to be the parents' initial referral of the student for an evaluation and determination of the student's eligibility for special education (IHO Decision at pp. 15-18). The IHO also found that McCarton was an appropriate placement for the student, but that equitable considerations did not support the parents' request for relief (*id.* at pp. 18-21).

The parents now appeal from the IHO's determinations that the district was not required to offer the student a FAPE prior to the filing of the due process complaint notice and that equitable considerations do not favor their request for relief. I was appointed to hear this matter on October 29, 2014 and, upon a full review of the hearing record, find that the district improperly failed to develop an IEP and denied the student a FAPE.

III. 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]).

¹ Although it is undisputed that the out-of-State district developed an IEP for the student, it was not entered into evidence at the impartial hearing.

² The April or May contract was not included in the hearing record. The parents subsequently executed a written contract on August 10, 2012 (Parent Ex. D).

A FAPE is offered to a student when (a) the district 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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., 694 F.3d at 184-85; T.P., 554 F.3d at 252). The burden of proof during an impartial hearing is on the school district, 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).

IV. Discussion

A. Obligation to Develop an IEP

Although the parties couch the issue on appeal with regard to the district's child find and prior written notice obligations, the issue is more properly viewed as part of the district's general obligation to ensure that each student with a disability within its jurisdiction has an IEP in effect at the beginning of the school year (34 CFR 300.323[a]; see 71 Fed. Reg. 46682 [stating that the IDEA "is clear that at the beginning of each school year, each [district] must have an IEP in effect for each child with a disability in the agency's jurisdiction. Therefore, public agencies need to have a means for determining whether children who move into the State during the summer are children with disabilities and for ensuring that an IEP is in effect at the beginning of the school year"]). In addition, as the hearing record reflects that the student had attended McCarton, within the geographical limits of the district, since February 2012, the district's child find obligation was long past by the time the parents moved into the district and the student became a resident. Accordingly, despite that the hearing record does not reflect that the parents attempted to enroll the student in the public schools of the district at any time subsequent to the time they became residents of the district, their August 2012 letter to the district was sufficient to put the district on notice of its obligation to develop an IEP for the student. Therefore, the IHO's determination that the district was not obligated to offer the student a FAPE prior to the filing of the due process

complaint notice is reversed. The district having failed to take any steps toward its obligation to ensure that an IEP was in place for the student prior to the beginning of the school year constituted a denial of a FAPE for the 2012-13 school year (District of Columbia v. Vineyard, 901 F. Supp. 2d 77, 87 [D.D.C. 2012] [collecting cases holding that a district may not condition its development of an IEP for a parentally-placed student on the student's enrollment status in the district]; see, e.g., Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055-56 [9th Cir. 2012]; N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 [9th Cir. 2008]; see also 20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d 356, 371 [2d Cir. 2006]), and the district not having cross-appealed the IHO's determination that McCarton was an appropriate unilateral placement for the student, it is now necessary to determine whether equitable considerations support the parents' request for relief.

B. Equitable Considerations and Relief

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice, either at the most recent CSE meeting prior to removing the student from public school or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

Under the circumstances presented herein, I agree with the IHO that the hearing record supports a conclusion that the parents made only minimal attempts to provide the district with information relevant to its obligation to develop an IEP for the student. The IHO opined that it was improper for the parents to submit a bare request for an IEP to be developed and then "wait it out" until after they believed the district's time to conduct evaluations had expired before

contacting the district to notify it of their intention to unilaterally place the student at McCarton and seek public funding therefor (IHO Decision at p. 21). I do not disagree with the IHO's conclusion that this constituted a form of "parental gamesmanship" (*id.*); however, the district's obligation to provide an appropriate program for all students with disabilities within its borders is not conditioned on full parental cooperation. I therefore depart from the IHO's conclusion that the parents' actions in this matter warranted a complete denial of reimbursement and apply a reduction to the relief awarded for the reasons set forth below.

Initially, the parents have explicitly limited their requested relief to "the McCarton tuition for the time period between August 20, 2012 and November 30, 2012, as well as reimbursement for [the student's] transportation costs" (Amended Pet. p. 20). It appears that because the parties stipulated that the IHO did not have jurisdiction over events post-dating the filing of the due process complaint notice (Tr. pp. 39-40), counsel for the parents is not seeking reimbursement for the student's tuition at McCarton subsequent to that time in this proceeding. Presumably, if the parents wish to seek reimbursement for their tuition obligations for latter time periods, they will initiate a separate proceeding by way of a timely filed due process complaint notice.³

Next, the IHO found that the parents failed to provide the district with timely notice of their intention to hold the district liable for the costs of the student's unilateral placement (IHO Decision at p. 21). I agree. The August 2012 letter the parents sent prior to moving into the district contains no indication that the parents would seek public funding for the costs of a unilateral placement (Parent Ex. C). However, I am loath to find that the parents were required to provide the district with notice "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; *see* 34 CFR 300.148[d][1]) prior to the time the district convened a CSE meeting or proposed any such placement. However, because the parents did not follow up with the district in any manner between their August 2012 and October 2012 letters, and because State regulations provide a 60-day period between a student's referral for special education and the time an IEP must be implemented, I find that it is reasonable under the circumstances to exclude from the parents' request for reimbursement the student's tuition for the period of 60 days after the parents' initial request for services (until mid-October 2012).

Furthermore, the hearing record reflects that the parents initially signed an enrollment contract for the student's attendance at McCarton for the 2012-13 school year sometime in April or May 2012, indicating a tuition obligation of \$125,000 (Tr. pp. 80, 94, 109). However, on August 10, 2012, the parents signed another contract for the 2012-13 school year representing a tuition obligation of \$137,500 (Parent Ex. D). The hearing record is devoid of any explanation for this ten percent rise in the cost of tuition other than the father's testimony that McCarton "raised the tuition" because of a financial shortfall sometime in June 2012 (Tr. pp. 80, 109-10) and there is no evidence of any additional benefit provided to the parents or the student under the contract as consideration for this modification. Although the IHO found that either amount was "arbitrary and unreasonable" (IHO Decision at pp. 21-22), the hearing record contains no evidence of the tuition

³ As the question is not before me, I express no opinion as to whether any such proceeding would be permissible under State regulations.

costs of other nonpublic schools in the area providing similar services.⁴ Accordingly, I award the parents tuition reimbursement for the period from mid-October 2012 through November 30, 2012 in the amount of \$15,000.⁵

Finally, the parents provide no argument why the district should be required to fund the costs of the student's transportation to and from McCarton and a review of the hearing record does not reflect a need for special education transportation. To the extent the district is otherwise required to provide the student with transportation to McCarton, this decision should not be construed to hold otherwise (see Educ. Law § 3635).

V. Conclusion

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 1, 2013 is modified, by reversing so much as determined that the district did not have an obligation to offer the student a FAPE prior to the filing of the due process complaint notice and that equitable considerations weighed against any award of relief; and

IT IS FURTHER ORDERED that the district shall reimburse the parents, within 60 days of the date of this order, for the costs of the student's tuition at McCarton for the 2012-13 school year in the amount of \$15,000.

Dated: **Albany, New York**
 November 28, 2014

NICHOLAS A. STEINBOCK-PRATT
STATE REVIEW OFFICER

⁴ Although the parents submit several affidavits annexed to their petition as additional evidence regarding the reasonableness of the costs of McCarton, absent some evidence in the hearing record that there were other, equally appropriate, nonpublic schools that were less expensive, the IHO's finding that the tuition costs at McCarton were unreasonable cannot be sustained. Accordingly, I have not considered the additional evidence proffered by the parents on appeal.

⁵ I have reduced the amount of reimbursement awarded downward slightly from one and one-half times the average monthly cost of the student's McCarton tuition to reflect that the parents did not provide the district with the 10-day notice contemplated by statute (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).