The University of the State of New York

The State Education Department
State Review Officer
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No. 09-068

Application of a STUDENT WITH A DISABILITY, by his 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:
The Law Offices of Melvyn W. Hoffman, attorneys for petitioner, Melvyn W. Hoffman, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied his request to be reimbursed for his son's home tutoring costs for the 2008-09 school year. The appeal must be sustained.

At the time the impartial hearing convened in May 2009, the student was being educated by the parent pursuant to an individualized home instruction plan (IHIP) and was receiving speech-language therapy at respondent's (the district's) expense through a related service authorization (RSA) provided by the district (Tr. pp. 80-81; Parent Ex. E; see 8 NYCRR 100.10). The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute in this appeal (Parent Ex. I at p. 1; 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The hearing record is sparse with regard to the student's educational history. According to a private neuropsychological evaluation report dated July 3, 2008, the student was born with a cleft palate and "disordered ear drums" and he had surgical operations involving his retinas and repair of his cleft palate (Parent Ex. M at p. 1). The evaluator noted that the student may have received a diagnosis of "Marshall-Smith Syndrome;" however, he also noted that the student's medical records were unavailable (id.; see Parent Ex. I at p. 5). The student reportedly had hearing loss in both ears and wore bifocal glasses (Parent Ex. M at p. 1). According to the evaluation report, the student attended a private school in New York State from kindergarten through fourth grade, and the evaluator reviewed an individualized education program (IEP) that was prepared for the student

for the 2008-09 school year, which indicated that the student's reading skills were at the "Upper Emergent Level," his language skills were significantly delayed, and his math skills were in the low average range (id. at pp. 2-3).[1] According to the evaluation report, the student could identify many, but not all of the letters and could pronounce a few short words that appear very often in print (id. at p. 5). The student could write various upper and lower case letters, but was unable to write any punctuation marks (id.). The evaluator indicated that the student could add and subtract single and double digits, but was unable to multiply single digits (id.). He had difficulty with vocabulary which undermined his success with word problems, such as his inability to remember the word "nickel" (id.) At times, the student misread numerals, but occasionally caught his errors (id.). He confused the significance of the hour and second hands on a clock (id.) The evaluation report indicated that the student could attend in a 1:1 setting with minimal fidgeting, had variable motor skills, and uneven language skills (id. at p. 6). Among other things, the evaluator recommended individual tutoring, speech-language therapy, occupational therapy, a teacher for the visually impaired, a small classroom of no more than 12 students and no fewer than two teachers, an FM unit, a reader, and a scribe (id. at pp. 8-9).

In late August 2008, the student and his father relocated and began residing in the district (Tr. pp. 50, 58). In a letter to the district's Committee on Special Education (CSE) dated September 11, 2008, the parent indicated that he planned to home school the student for the 2008-09 school year and sought special education services from the district (Parent Ex. D).[2] The parent notified the district that he had recently moved from another in-State school district, which had provided the student with services at a private school (id.). The parent provided test scores from the July 2008 private neuropsychological evaluation report and indicated that he was willing to bring the student to the district for additional evaluations, if necessary (id.). The parent further indicated that he wished to know the services for which the student was eligible and that he wanted the student to begin speech-language therapy "as soon as possible" (id.).[3] In September 2008, the student began receiving 25 hours per week of home schooling, consisting of 20 hours from a private tutor and five hours from the parent (Tr. p. 38; Parent Ex. Q).

In a report to the CSE prepared on November 5, 2008, the student's home tutor indicated that he and the parent worked with the student four hours per day and one hour per day, respectively, and that they were "on track" for meeting the home schooling instructional hour requirements (Tr. p. 29; Parent Ex. K at p. 3). The tutor provided a narrative description of the student's functioning in the areas of reading, writing, math, communication, attention/concentration, social/emotional, and attendance, in which he reported that the student

[1] The IEP reviewed by the evaluator is not contained in the hearing record.

[2] State regulation refers students who are receiving "home instruction" (8 NYCRR 100.10); however, upon reviewing the hearing record as a whole, I note that the parties and the impartial hearing officer often used the terms "home instruction" and "home schooling" interchangeably (see, e.g., Tr. pp. 13, 16-17, 23-25, 31, 63; IHO Decision at pp. 3, 6). Although the parties use the terms interchangeably, it is apparent from the hearing record that their dispute focuses on the provision of services to a student that was home schooled by the parent (8 NYCRR 100.10), rather than a student who received "home and hospital instruction" while enrolled in a district school (8 NYCRR 200.6[i]) and, therefore, I will use the term home schooling.

[3] In a letter to the district's "Home Schooling Department" dated September 26, 2008, the parent also sought assistance in completing the student's IHIP (Dist. Ex. 3 at p. 1)

was below average with respect to age and grade level expectations in all areas except attention/concentration and attendance (Parent Ex. K at pp. 1-3).

On November 19, 2008, the CSE convened and developed an IEP for the student (Parent Ex. I). CSE meeting attendees included a school psychologist who also acted as a district representative, a special education teacher, an additional parent member, a social worker, an audiologist, the parent, the student's home schooling tutor, and the student (id. at p. 2).[4] In the resultant IEP, the CSE recommended that the student be placed in a 12:1 special class in a community school with related services consisting of individual speech-language therapy five times per week for 45 minutes and hearing education services two times per week for 60 minutes (id. at pp. 1, 15).

In a letter to the parent dated November 25, 2008, the district representative sought consent to implement the services recommended in the November 2008 IEP at a specific district community school (Parent Ex. H). In a letter to the CSE dated December 4, 2008, the parent noted that he was home schooling the student, preferred that the student receive services in the home, and that he did not consent to having the district provide special education services in the community school (Parent Ex. C). The parent also requested information regarding how to obtain RSAs for the student and referrals to service providers (id.).

In a letter to the CSE dated January 29, 2009, the parent stated that he was home schooling the student and that he had made initial contact with the CSE to obtain speech-language therapy for the student (Parent Ex. B). According to the parent, he was told during the CSE meeting that the district must first offer the student a placement in a public school, after which, the parent could decline and seek an RSA for speech-language therapy at home and that the parent had done as he was instructed (id.). The parent also indicated that he had visited the community school classroom recommended by the district and believed that the reading level and "likely the levels in other subjects" of the other students in the class were too high for the student and that the student would be left behind (id.).

In a due process complaint notice dated February 24, 2009, the parent, through his attorney, alleged that the November 2008 IEP was procedurally and substantively flawed because the annual goals were "not realistic" and the recommended 12:1 special class was not appropriate for the student because he was significantly delayed and had both physical and learning disabilities, which prevented him from being educated in the public school system at that time (Parent Ex. A). The parent indicated that RSAs were not provided to the student until December and that appropriate providers "have not been found" (id.). The parent further indicated that the student required individual instruction and that he was seeking "[r]eimbursement for tutoring, therapies and related services for the student in the home" for the 2008-09 school year (id.).

An impartial hearing was conducted on May 13, 2009. At the impartial hearing, the district conceded that it failed to offer the student an appropriate program (Tr. p. 12). However, the district also asserted that the parent was not entitled to the relief sought because it was responsible for providing related services only to the student and RSAs had been provided to the parent (Tr. pp. 13-14). During the remainder of the impartial hearing, documentary evidence was received from

[4] Another participant attended the CSE meeting, but the individual's title is illegible on the copy of the IEP that was made part of the hearing record (Parent Ex. I at p. 2).

the parties, and the student's home schooling tutor and the parent testified (Tr. pp. 1-102; Dist. Exs. 1-4; Parent Exs. A-M; O-R).

In a decision dated May 20, 2009, the impartial hearing officer determined that the parent's request for reimbursement should be dismissed because the parent failed to offer evidence with regard to the expenses of therapies or related services for the student (IHO Decision at p. 4). The impartial hearing officer noted that the district conceded that it failed to offer the student an appropriate program and he determined that the tutoring services obtained by the parent were appropriate for the student based upon the student's IHIP, the tutor's report to the November 2008 CSE, and three quarterly progress reports prepared by the tutor (id. at p. 5; see Parent Exs. E; G; K; O; P). The impartial hearing officer next addressed the district's argument that it cannot provide educational services to a home schooled student or be compelled to reimburse a parent for such services, finding that the district was incorrect and that a district may, upon a timely request, be required to develop a individualized educational services program (IESP) for an eligible home schooled student (IHO Decision at pp. 6-7). However, the impartial hearing officer determined that in this case, the parent was required to request special education services for the student for the 2008-09 school year no later than August 6, 2008, and that the parent had failed to do so in a timely manner (id. at p. 7). Lastly, the impartial hearing officer examined equitable considerations and found that the parent "repeated often" to the CSE that he was seeking speech-language therapy and that, therefore, the parent had obtained "exactly what he sought" from the district when it issued the RSA for speech-language therapy (id.). Consequently, the impartial hearing officer dismissed the parent's reimbursement claim for home tutoring services (id. at p. 8).

The parent appeals, contending that the impartial hearing officer erred in concluding that the parent's request for special education services for the student was untimely. The parent notes that the tutoring costs paid by the parent were set forth in an exhibit in the hearing record. The parent further argues that the impartial hearing officer erred in determining that equities do not favor the parent because among other things, the parent timely contacted the CSE within 30 days after moving into the district and cooperated with the CSE. For relief, the parent requests reimbursement for the student's tutoring services for the 2008-09 school year.

In its answer, the district concedes on appeal that the impartial hearing officer misapplied the State requirements for requesting home school services and agrees with the parent that his request for special education services for the student was submitted in a timely manner. However, the district asserts that the impartial hearing officer correctly denied the parent reimbursement for the tutoring services because the parent requested RSAs for speech-language therapy and hearing education services only. The district argues that the parent failed to request 1:1 tutoring in his letters to the CSE and that his request for reimbursement for the money paid to the student's tutor in his February 24, 2009 due process complaint notice was untimely. The district further alleges that 20 hours per week of 1:1 home tutoring is not typically provided to students attending public and nonpublic school who are at the student's grade level and that the parent failed to establish that the 1:1 tutoring was comparable to a special education program offered to a public or nonpublic school student within the district. According to the district, the services provided by the student's tutor are not special education services and; therefore, are not "compensable" as a special education service.

The Individuals with Disabilities Education Act (IDEA) confers no individual entitlement to special education or related services upon students who are enrolled by their parents in

nonpublic schools. Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 C.F.R. §§ 300.134, 300.137[a], [c], 300.138[b]). With regard to students that are home schooled (see 8 NYCRR 100.10), the Official Analysis of Comments to the revised IDEA regulations indicates that:

> "[a] few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.
>
> Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools."

(Expenditures, 71 Fed. Reg. 46594 [August 14, 2006]).

This analysis is consistent with and further clarifies the guidance previously issued by the United States Department of Education Office of Special Education Programs (OSEP), which occurred prior to both the 1999 federal regulations implementing IDEA 1997 and the 2006 federal regulations implementing IDEA 2004 (Letter to Sarzynski, 29 IDELR 904 [OSEP 1997]; Letter to Williams, 18 IDELR 742 [OSEP 1992]). Thus, the IDEA, as implemented by the United States Department of Education, provides that home schooled students shall receive special education services to the same extent that other parentally-placed private school students receive services if home schools are recognized under state law as private elementary (34 C.F.R. § 300.13) or secondary schools (34 C.F.R. § 300.36).

Under New York State law, a student with a disability whose parent has submitted an IHIP for home schooling the student pursuant to State regulations is deemed to be a student enrolled in and attending a nonpublic school for the purpose of receiving special education services (Educ. Law § 3602-c[2-c]; 8 NYCRR 100.10). In New York State, a district is required to provide special education services to students with disabilities who are enrolled by their parents in nonpublic schools provided that a request for such services is filed with the board of education on or before the first day of June preceding the school year for which the request is made (Educ. Law § 3602-c[2][a]; see generally Board of Educ. v. Kain, 60 A.D.3d 851, 852 [2d Dep't 2009]; Application of the Bd. of Educ., Appeal No. 04-079). An exception to the June 1 deadline for filing a written request for special education services for a home schooled student provides that a parent may request services within 30 days after a change of the district of residence or 30 days after being identified as a student with a disability (Educ. Law § 3602-c[2-c]).

The CSE of the school district of location is required to review a timely request for special education services and develop an IESP for a student with a disability "based on the student's

individual needs in the same manner and with the same contents as an individualized education program" (Educ. Law § 3602-c[2][b][1]). The CSE must

> assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district

(id.). A parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

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 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 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).

In this case, the district admits on appeal that: 1) the impartial hearing officer misapplied the State requirements regarding the parent's request for special education services from the district for a home schooled student; 2) the parent's written request for special education services as a dually enrolled home schooled student pursuant to Education Law § 3602-c was timely; and 3) the district failed to follow the procedures for developing an IESP for the student and instead, issued an IEP recommending placement in a public school (Pet. ¶¶ 34, 53, 58-59). I also note that at the impartial hearing, the district affirmed that there were no facts in dispute and did not offer the testimony of any witnesses (Tr. pp. 17-18). In view of the forgoing, I find that the district failed to meet its burden to prove that the student was offered appropriate special education services in accordance with Education Law § 3602-c.

Turning next the district's allegations that: 1) 1:1 home tutoring is not typically provided to public and nonpublic school students; 2) the parent failed to establish that the 1:1 tutoring was comparable to a special education program offered at a public or nonpublic school student within the school district; and 3) the parent failed to establish that the services provided by the student's tutor constituted special education instruction, I note that these allegations address the issue of

whether the tutoring services obtained by the parent were appropriate special education services under the second Burlington/Carter criterion. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). After the parent initiated this appeal, the district did not interpose a cross-appeal challenging the impartial hearing officer's decision that the tutoring services obtained by the parent were appropriate and this determination has become final and binding upon the district (IHO Decision at pp. 5-6). Therefore, I decline to address the merits of the district's argument that the services obtained by the parent were not appropriate because that argument has been waived and I will not disturb the impartial hearing officer's decision on this issue (see Application of the Dep't of Educ., Appeal No. 09-046; Application of the Dep't of Educ., Appeal No. 09-033; Application of the Dep't of Educ., Appeal No. 09-027; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

With regard to the impartial hearing officer's determination that the parent's reimbursement claim must be dismissed for failure to submit any evidence regarding the expenses incurred for the "therapies or related services" for the 2008-09 school year (IHO Decision at p. 4), I note that the parent submitted an exhibit detailing the home tutoring expenses for the student for the 2008-09 school year through the week of April 27, 2009, including the hourly rate, number of hours for each week, amounts paid, amounts outstanding, and an estimate of expenses for the remainder of the school year (Parent Ex. Q). I find that this evidence is sufficient to determine the cost of the student's home tutoring expenses and the impartial hearing officer's finding in this regard must be annulled. I now turn to the issue of whether equitable considerations should limit or preclude an award reimbursing the parent for the tutoring services.

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]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-*14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement 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 C.F.R. § 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] abrogated in part on other grounds by Forest Grove School Dist. v. T.A., 129 S. Ct. 2484, 2490 [2009]). 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; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at *13 [E.D. Pa. Oct. 22, 2007]).

With regard to the parent's challenge to the impartial hearing officer's determination that the parent was not entitled to reimbursement for the student's tutoring services because the parent requested only speech-language therapy, I do not agree with the impartial hearing officer's determination on this issue.[5] The impartial hearing officer relied on the parent's January 29, 2009 letter to the district to support his conclusion that the parent repeatedly requested only speech-language therapy from the district (IHO Decision at p. 7; see Parent Ex. B). However, upon reviewing the parent's earlier letters, to which he refers in his January 29, 2009 letter, the parent explained to the district in September 2008 that he understood that the public school system "provides additional help" for home schooling students that have special needs and that he was seeking a CSE meeting to determine "what services the student may be eligible for" while he was home schooling his son and how to engage such services (Parent Ex. D; see Wolfe, 167 F. Supp. 2d at 535). In a letter to the district dated September 26, 2008, the parent explained the nature of the student's deficits and his belief that they have "likely impeded his learning until this point" so that the student would benefit from private individual instruction (Dist. Ex. 3). I also note that in November 2008, the student's home tutor provided a report to the CSE and participated in the CSE meeting (Parent Exs. I at p. 2; K). Shortly after the CSE meeting, the parent reiterated that he wished to home school the student, that he did not consent to the public school placement offered by the district, and that he was trying to determine how to obtain services in the home such as "Audio/Speech therapists and teachers for the hearing impaired" (Parent Exs. B; C).

While the parent clearly identified speech-language therapy as a service that he was trying to quickly obtain for the student (Parent Ex. D), I find that the hearing record as a whole does not support the impartial hearing officer's conclusion that the parent repeatedly sought speech-language therapy exclusively. Moreover, the hearing record does not contain information demonstrating that the parent was uncooperative with the district. In view of the forgoing evidence, I find that the impartial hearing officer's conclusion that the parent should be denied

[5] I note that the district did not raise the issue of compliance with the notice of unilateral placement provisions at the impartial hearing and does not allege such a violation on appeal (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]).

reimbursement because the parent received "exactly what he sought from the [the d]istrict when he first made contact with it and its CSE" must be annulled.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the potions of the impartial hearing officer's decision dated May 20, 2009 which dismissed the parent's claim for reimbursement for tutoring services due to: 1) the parent's failure to submit evidence of tutoring expenses; 2) the failure of the parent to timely request special education services from the district; and 3) equitable considerations is annulled; and

IT IS FURTHER ORDERED that the district shall, upon proof of payment provided by the parent, reimburse the parent for the cost of home tutoring expenses for the 2008-09 school year.

Dated: **Albany, New York**
August 12, 2009

PAUL F. KELLY
STATE REVIEW OFFICER