The University of the State of New York

The State Education Department
State Review Officer
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No. 10-102

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 Board of Education of the Wantagh Union Free School District

Appearances:
Ingerman Smith, L.L.P., attorneys for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied the parent's request for tuition reimbursement from respondent (the district) for his daughter's attendance at the Girls Leadership Institute (GLI) during summer 2009. The appeal must be dismissed.

The student's educational programs have been the subject of two previous appeals from impartial hearing officer determinations (see Application of a Student with a Disability, Appeal No. 08-155; Application of a Student with a Disability, Appeal No. 07-008); therefore the parties' familiarity with the student's prior educational history is presumed and will not be repeated here in detail.

At the time the parent filed the due process complaint notice in July 2009, the student had been unilaterally placed at GLI, a two week program (Tr. p. 173; IHO Ex. A at p. 4).[1] The student's eligibility for special education services as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][7]; 8 NYCRR 200.1[zz][8]).

On June 19, 2009 the Committee on Special Education (CSE) convened for the student's annual review (Dist. Ex. 17). Attendees included the CSE chairperson, a district psychologist, a

[1] During the 2008-09 school year the student attended a private school where she had been unilaterally placed by her parents (see Dist. Ex. 17 at p. 1). The student had also received private services from a different "supplement[al] service provider" (Dist. Ex. 3 at p. 2). During the 2009-10 school year the student again attended the private school where she was unilaterally placed by her parents (Dist. Exs. 1; 19; IHO Ex. A at p. 3).

district social worker, the social worker who provided the student's counseling services at the private school, a district reading supervisor/teacher, a district speech-language pathologist, a speech therapist with whom the district had contracted to provide summer 2009 speech-language therapy services, the student's private school resource room teacher, and a district special education teacher (Tr. pp. 73-84, 158-59, 241-43; Dist. Ex. 17 at p. 9; IHO Ex. B at pp. 151-52). An additional parent member participated by telephone (Tr. pp. 83-84; Dist. Ex. 17 at p. 9). The parents did not attend the June 19, 2009 CSE meeting (Dist. Ex. 17 at p. 9).[2] According to the comments included in the student's June 19, 2009 individualized education program (IEP), among other discussions, the CSE noted that the student was going to attend a two week "sleep away" summer camp to improve her social interaction skills (id.). The private school social worker recommended that during summer 2009 the student receive group counseling services (Tr. p. 202). For summer 2009, the June 19, 2009 CSE recommended that the student receive one session per week of group counseling services, and three sessions of group speech-language therapy per week (Dist. Ex. 17 at p. 2).

By a letter to the district dated June 26, 2009, the parent requested that the student attend the GLI program for two weeks in July 2009 "to stop the regression of her socialization skills" (Parent Ex. A). According to the parent, the district did not respond to this request (IHO Ex. A at p. 3). The student attended the GLI program from July 12, 2009 through July 26, 2009 (IHO Ex. B at pp. 235-36).

On July 15, 2009 the CSE convened for a program review pertaining to the student (Dist. Exs. 5 at p. 3; 18 at p. 1). Attendees included the CSE chairperson, a district psychologist, a district social worker, the parents, and the student's private school resource room teacher (Tr. pp. 74-75, 77, 82; Dist. Exs. 5 at p. 11; 18 at p. 9). The student's private school social worker, the speech therapist with whom the district had contracted with to provide the student's summer 2009 speech-language therapy services, an individual who appears to have been a "[r]eading [s]pecialist" from the student's supplemental service provider, and another individual identified only as being from the student's private school participated by telephone (Tr. pp. 78, 158-59, 172; Dist. Exs. 5 at p. 11; 18 at p. 9; IHO Ex. B at pp. 151-52, 241-43). The resultant July 15, 2009 IEP in effect during summer 2009, indicated that the student demonstrated difficulty with attention, and her developmental language disorder and auditory processing difficulties significantly affected her acquisition of basic academic skills (Dist. Ex. 5 at p. 6). She exhibited significant delays in reading decoding and comprehension; math calculation and concepts; and written expression (id.). Additionally, deficits in visual-motor and visual-spatial skills "affect[ed]" her performance (id.). Socially, the student's language processing difficulty interfered with her comprehension and expression of needs, and her non-verbal communication skills and its effect on others were described as "challenging" (id. at p. 9). The July 2009 IEP further indicated that the student had "a [l]earning [d]isabilty, [an a]uditory [p]rocessing [d]isorder, [d]yscalculia, [d]yslexia, [an

[2] The hearing record reflects that the parents were unable to attend the June 19, 2009 CSE meeting due to family medical reasons (Dist. Ex. 6). It further reflects that the parents requested that the district reschedule the CSE meeting to permit them to attend (id. at p. 1). The hearing record reflects that the district declined to reschedule the meeting because there was "no availability for the members" during the week requested by the parents, and the "meeting had to take place in order to provide the annual review in a timely manner" (Dist. Ex. 10; see also Dist. Exs. 6 at p. 1; Dist. Ex. 7 at p. 1).

attention deficit hyperactivity disorder] ADHD, and [a pervasive developmental disorder, not otherwise specified] PDD-NOS" (id. at p. 3).

According to July 15, 2009 CSE meeting minutes taken by the parents, they "requested [that the district] consider sending [the student] to the [GLI] to address the significant deficits" identified during the student's vocational assessment, and that the district "denied the parent's request without even questioning the program's details, focus or objectives" (Dist. Ex. 9 at p. 4). According to the comments contained in the July 2009 IEP, the CSE stated that the district was not recommending the GLI program for the student (Dist. Exs. 5 at p. 11; 18 at p. 9). The July 2009 IEP reflected that the private school social worker stated that group counseling sessions would be appropriate for the student during summer 2009 (id.). For summer 2009, the July 2009 CSE continued its recommendation that the student receive one session per week of group counseling services, and three group sessions of speech-language therapy per week (Dist. Exs. 5 at p. 4; 18 at p. 2).

The parent filed a due process complaint notice dated July 15, 2009 requesting an impartial hearing pertaining to the student (IHO Ex. A at pp. 3-4). In the due process complaint notice, the parent alleged that the parents had requested that the student attend the GLI program as part of her summer 2009 "services" and that on July 15, 2009 the district denied the parents' request (id. at p. 3). The parent stated that the student began attending the GLI program on July 12, 2009 at the parents' expense (id. at p. 4). The parent requested that an impartial hearing officer find that the GLI program was appropriate for the student and award the parents tuition reimbursement for the cost of the student's attendance at that program (id.).

An impartial hearing convened on March 1, 2010 and concluded on May 13, 2010 after three days of proceedings (Tr. pp 1-249). In a decision dated September 10, 2010, the impartial hearing officer found that the district sought to reargue a motion to dismiss the parent's July 15, 2009 due process complaint notice on res judicata grounds that he had previously denied (IHO Decision at pp. 1, 5; see IHO Ex. E).[3] The impartial hearing officer reconsidered the district's motion to dismiss and determined that the complaint before him in this case and the complaint before another impartial hearing officer involved two separate claims relating to the provision of a free appropriate public education (FAPE) for the student during summer 2009 (id.). He determined that the complaint before the other impartial hearing officer pertained to the implementation of an IEP and, more specifically, the district's alleged failure to provide counseling services that had been ordered pursuant to a third litigation before yet another prior impartial hearing officer, and the district's alleged failure to provide transportation services to and from the student's speech-language therapy sessions (id.). The impartial hearing officer then determined

[3] I note that there were multiple due process complaint notices filed, impartial hearings held, and decisions issued regarding the student during 2009 and 2010. Specifically, the hearing record reflects a hearing in June 2009 with a resultant Agreement and Order dated July 17, 2009 from one impartial hearing officer (Dist. Exs. 1; 11-14; IHO Exs. A at pp. 5-10; C); a due process complaint notice dated July 28, 2009 on which a hearing was held and a decision dated February 3, 2010 was issued by another impartial hearing officer (Dist. Ex. 1; IHO Exs. A at pp. 5-22; B); a due process complaint notice dated July 15, 2009 on which a hearing was held and a decision dated September 10, 2010 issued by a third impartial hearing officer, which decision is the subject of this appeal (IHO Ex. A at pp. 3-4); and a due process complaint notice dated September 9, 2009 on which a seemingly related impartial hearing was held in October 2009 by a fourth impartial hearing officer (Dist. Ex. 19; Parent Ex. B; see also Tr. pp. 129-31).

that the complaint before him in this matter pertained to a reimbursement issue (id.). The impartial hearing officer indicated that while the parent's "approach to special education litigation does not foster judicial economy, there is no authority to the effect that a parent (or [d]istrict) is forbidden from bringing multiple litigations relating to the same time period" (IHO Decision at p. 5).

As to the merits of the matter, the impartial hearing officer determined that the district denied the student a FAPE because the district "significantly impeded the parents' right to participate in the decision making process regarding the [GLI] program" (IHO Decision at p. 8). With regard to the summer 2009 program, he also determined that the parent failed to meet "his burden to show that the [GLI] program was appropriate to meet [the student's] special education needs" and, therefore, denied the parent's application for reimbursement (id. at pp. 10, 11).

Regarding whether the program at the GLI was appropriate for the student, the impartial hearing officer determined that the parent did not present any witnesses from the GLI to describe the staff's qualifications or how special education services are delivered by the staff (IHO Decision at p. 9). The impartial hearing officer noted that the parent presented a sole witness who indicated that the student "'might have' regressed" had she not attended the program (id.). The impartial hearing officer considered the witness' testimony that she had experience with other "young women" who had attended the program at the GLI, but that the hearing record did not indicate that the witness had ever conducted an observation at the GLI and that the evidence showed that she had only been to the program on the day of the student's graduation (id.). The impartial hearing officer also noted that the parent did not provide any documentary evidence from the GLI program that described the teaching techniques, the provider's credentials, or how the program addressed the student's IEP goals (id. at p. 10).

This appeal ensued. The parent argues that he is entitled to reimbursement for the cost of the student's attendance in the program at the GLI as the district failed to provide the student with a FAPE; that the program at the GLI was appropriate to meet the student's social/emotional needs, conferred an educational benefit on the student, prevented regression, and enabled her to progress socially and emotionally; and that equitable considerations favor an award of tuition reimbursement to the parent. The parent requests that the decision of the impartial hearing officer be reversed and that the district be ordered to reimburse the parent for the cost of the student's attendance at the summer 2009 GLI program.

The parent alleges, among other things, that the impartial hearing officer erred in his findings, failed to use the preponderance of evidence standard, did not explore the evidence, and did not address the parent's argument that no services were in place for the student by the start of summer 2009 and that the GLI program was a "recommended program by all." The parent argues that the district failed to present any argument pertaining to the GLI program, but instead relied on a previous decision issued by a different impartial hearing officer. Further, the parent alleges that the program selected by the parent "conferred an educational benefit on [the student], was designed to meet [the student's] unique needs and enabled her to not regress, socially and emotionally."

In its answer, the district denies many of the parent's allegations. The district alleges that the parent chose not to attend the June 2009 CSE meeting and asserts that it disagrees with the portion of the impartial hearing officer's decision pertaining to the district's res judicata and collateral estoppel arguments. The district alleges that the impartial hearing officer correctly

determined that the parent failed to establish the appropriateness of the GLI program and that the impartial hearing officer's decision to deny tuition reimbursement should be upheld. The district states that the impartial hearing officer "could also have denied the [p]arent's request for tuition reimbursement based upon the doctrine of res judicata."

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 [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).

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 offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 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 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying

exceptions]). 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 [citing 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 specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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; see Frank G., 459 F.3d at 364-65).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Initially, I note that the parent has alleged in the petition several reasons why the impartial hearing officer's conclusion that the district failed to offer the student a FAPE should be upheld.[4] I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor

[4] The parent's allegations include that the district failed to provide a social/emotional group early in the summer which would have caused the student to regress, failed to include the parents in the decision making process at the June 2009 CSE meeting, and failed to consider the parents' request for the GLI program by not replying to a letter the parent sent to the district on June 26, 2009.

is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the parent is not aggrieved by the impartial hearing officer's determination that the district failed to offer the student a FAPE and, therefore, it is unnecessary to further review the parent's supplemental arguments with regard to the district's failure to offer the student a FAPE. I note the district has not cross-appealed the impartial hearing officer's determination that the district denied the student a FAPE (see 8 NYCRR 279.4[b]). Although the district asserts that it disagrees with the determination and that the impartial hearing officer could also have denied the parent's request for tuition reimbursement based on res judicata, the district also has not cross-appealed his determination with respect to the issue of res judicata (id.). 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]). Accordingly, the impartial hearing officer's finding that the district denied the student a FAPE and those aspects of the decision pertaining to the issue of res judicata are final and binding upon the parties and, therefore, I decline to consider them.

I now turn to a review of the appropriateness of the parent's unilateral placement of the student at the GLI program. According to the private school social worker, the GLI program is an out-of-state "two week summer program that helps girls develop a sense of self" (Tr. pp. 172-73, 184). She testified that college-aged women, who are "directed" by psychologists, conduct group activities that encourage participants to "develop their talents and strengths, respect each other, [and] learn how to deal with a bully" (Tr. pp. 184-85). Examples she provided of group activities included dramatic presentations; creative art and music presentations; sessions with a group leader and therapists to develop the students' self-esteem; and development of a DVD in which the students "share[d] what they learned and their interests, and deal[t] with the specific topics of issues that girls face . . . peer pressure, identity, image" (Tr. pp. 185-86, 194). The student's private school social worker further stated that GLI students are "randomly put together" into groups and are not grouped by ability, but are "treated individually" to work on their own "sense of self" (Tr. pp. 185-86). According to the private school social worker, a GLI psychologist worked "very, very closely" with the student and encouraged the student to develop her talents (Tr. p. 187).

The student's private school social worker recommended that the student attend the GLI program due to the student's lack of "sense of self" (Tr. p. 182). The private school social worker further stated that the group activities at the GLI would have provided the student with "all of the necessary skills that she needed" (Tr. p. 185). Regarding progress, the private school social worker stated that she had never seen the student "grow" as much as she had during the two weeks she spent at the GLI, in that the student shared her feelings, exhibited more confidence, and confronted people who "violate[d] her space," which the private school social worker indicated was a "direct result" of the student's experience at the GLI (Tr. pp. 187-88).

Additionally, a district social worker testified that the GLI was "a great program for any young girl" and a district special education teacher testified that the GLI program "would be appropriate for any young lady to go to" (Tr. pp. 208, 220). However, the district's special education teacher also testified that she was "not too familiar" and did not "know that much" about the GLI program (Tr. p. 220).

Although the GLI program may have benefited the student, the relevant issue here is whether the program provided educational instruction specifically designed to meet the unique needs of the student (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). The hearing record supports the impartial hearing officer's determination that the parent did not sustain his burden to show that his daughter's summer 2009 attendance at the GLI was appropriate to meet her special education needs. The evidence shows that the private school social worker contacted the GLI prior to the student's attendance only to recommend that she attend (Tr. p. 201). The private school social worker testified that she did not participate in any of the GLI activities during the student's attendance, and that her "sole involvement" with the GLI was her attendance at the end of the student's graduation ceremony, which supports the impartial hearing officer's finding that the hearing record does not indicate that the private school social worker had conducted an observation at the GLI (Tr. p. 195). The private school social worker testified that the GLI program was appropriate for the student because she knew the program and its goals, and that she had experience with other students who had attended the GLI (Tr. pp. 183-84). However, as the impartial hearing officer indicated, the hearing record lacked testimonial and documentary evidence that explained how special education services, if any, were delivered to the student by the GLI staff, that described the GLI staff qualifications and teaching techniques, and that identified how the GLI program addressed the student's special education needs (see IHO Decision at p. 10).[5] Additionally, the private school social worker's statement that the student "might have" regressed during summer 2009 had she not attended the GLI does not suffice as objective evidence that explains how the student may have progressed at the GLI through efforts to address her special education needs (Tr. p. 174; see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; Application of a Student with a Disability, Appeal No. 08-021). This point was underscored by the district's special education teacher, who testified that the GLI program would be appropriate for "any young lady" and that she did not know if the GLI program was appropriate for this student in particular (Tr. pp. 218-21).

Having determined that the parent did not establish that the GLI was appropriate for the student, it is unnecessary to reach the issue of whether equitable considerations warrant reimbursement of tuition expenses (see C.G. v. New York City Dept. of Educ., 2010 WL 4449386 at *3 n2 [S.D.N.Y. 2010]; Pinn v. Harrison Central Sch. Dist., 473 F.Supp.2d 477, 483 [S.D.N.Y. 2007]).

Upon review and due consideration of the entire hearing record in this matter and for the reasons set forth above, I find that there is no reason to disturb the impartial hearing officer's determination that the parent did not meet his burden to show that the GLI program was appropriate to meet the student's special education needs.

[5] I note that the impartial hearing officer stated that it was not clear how the GLI program would address the "student's IEP goals" (IHO Decision at p. 10)

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 17, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER