The University of the State of New York

The State Education Department
State Review Officer
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No. 11-001

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 Board of Education of the Shenendehowa Central School District

Appearances:
Law Offices of H. Jeffrey Marcus, P.C., attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for respondent, Susan T. Johns, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied the parent's request that respondent (the district) be directed to fund an independent educational evaluation (IEE) of the student[1] at a cost that exceeded a limit established by the district. The appeal must be dismissed.

Background

During the 2008-09 school year, the student attended third grade at a private school that was located outside of the district (Tr. p. 44). Due to the parent's concerns about the student's academic progress, particularly in the areas of reading and writing, the parent requested a neuropsychological evaluation that was paid for by the district (Dist. Exs. 9 at p. 1; 10). From August through November 2008, a pediatric neuropsychologist conducted a neuropsychological evaluation over the course of seven dates (Dist. Ex. 9 at p. 1). She administered testing to assess the student's cognitive ability, executive skills, memory, attentional capacity, motor skills, academic skills, and behavior (id. at pp. 3-11). The pediatric neuropsychologist provided a diagnosis of a reading disorder (dyslexia) (id. at p. 12).

[1] The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

For the 2009-10 school year, the student attended fourth grade in the district (Tr. p. 43). On September 17, 2009, the district's Committee on Special Education (CSE) convened for the purpose of conducting a "transfer student review" and developing an individualized education program (IEP) for the student (Dist. Ex. 7; see Tr. p. 46). The CSE continued the student's classification as a student with a speech or language impairment and recommended a consultant teacher language arts class five times per week for one hour and a 15:1 special class for reading for two hours per week (Dist. Ex. 7 at pp. 1-2). The CSE further recommended a multisensory reading program and group speech-language therapy two times per week for thirty minutes (id.).

On April 15, 2010, the CSE convened for the student's annual review (Dist. Ex. 16). The CSE discussed the student's present levels of performance in academic areas and his academic progress (Tr. p. 51; Dist. Exs. 16; 17). According to the CSE chairperson, the parent disagreed at the CSE meeting with the description of the student's progress in decoding and encoding as well as the implementation of the Wilson reading program (Tr. pp. 56-57). The parent requested that the district fund an IEE of the student to be conducted by the same pediatric neuropsychologist who had evaluated the student in 2008 (Dist. Exs. 16 at p. 1; 17 at p. 1; see Dist. Ex. 32 at p. 1). The district approved the parent's request subject to an $1,800 limit to the amount that the district would pay for the evaluation pursuant to district policy (id.).[2] The district also requested that the parent submit her request for an IEE in writing (id.).

By letter to the CSE chairperson dated April 19, 2010, the parent stated that she disagreed with the student's IEP for the 2010-11 school year and that the CSE had agreed to her request for an independent neuropsychological evaluation of her son (Dist. Ex. 26). The parent requested that the district make necessary arrangements with the pediatric neuropsychologist to conduct an evaluation (id.).

By letter to the pediatric neuropsychologist dated April 22, 2010, the district requested a neuropsychological evaluation for the student and advised that it had agreed to pay for the requested IEE (Dist. Ex. 18). The April 22, 2010 letter also indicated that district procedures limit payment to "an amount not to exceed $1,800" (id.).

Staff in the pediatric neuropsychologist's office informed the parent that the requested evaluation by the pediatric neuropsychologist would cost between $500 and $700 more than the $1800 limit approved by the district (Dist. Ex. 32 at p. 2). The evaluation by the pediatric neuropsychologist did not occur (id.). The hearing record does not indicate whether the parent sought an exception to the district's cost limitation criteria for IEEs.

[2] The hearing record shows that on August 14, 2007, the district's Board of Education adopted a policy that administrative procedures on IEEs would be developed consistent with federal and State regulations (Dist. Ex. 3). On January 12, 2010, the Board of Education promulgated revised administrative procedures that set forth the district's criteria for IEEs (Dist. Ex. 4). The criteria provide, among other things, that the district "may refuse to pay, or provide reimbursement for, any evaluation which exceeds $1,800" (id. at p. 2). The district's administrative procedures further provide that exceptions to the district's "reasonable cost criteria will be made only when the parent/guardian can demonstrate that unique circumstances justify an independent evaluation that does not fall within the District guidelines" (id. at p. 3).

Due Process Complaint Notice

By due process complaint notice dated July 8, 2010, the parent requested an impartial hearing (Dist. Ex. 1). The parent alleged that the district had approved her request for an IEE; however, the requested evaluation exceeded the $1,800 limit imposed by the district and thereby the district had effectively denied her the right to obtain an IEE at public expense by refusing to pay the total cost of the evaluation (id.). The parent further alleged that the April 2010 CSE had agreed that the requested IEE would be used in lieu of a required triennial evaluation and that the district violated its obligation to reevaluate the student every three years (id.). The parent sought an order directing the district to pay the full cost of the requested evaluation (id.).

On or about July 22, 2010, the district submitted a response to the due process complaint notice (Dist. Ex. 2). According to the district, the parent did not have a right to an IEE pursuant to regulation because the parent did not disagree with an evaluation conducted by the district (id.). The district stated that it had agreed to honor the parent's request to have an evaluation conducted by an independent evaluator provided that such evaluation did not exceed the cost that the district's Board of Education had previously adopted as part of its criteria for IEEs (id.). In the alternative, the district argued that if the parent's request for an IEE is deemed as a request that was made pursuant to regulation, then the district agreed to the request provided that the IEE was performed consistent with its criteria (id.). In response to the parent's allegation that the district failed to reevaluate the student, the district alleged that the student was scheduled for a reevaluation in summer 2010, that the CSE would consider any evaluation obtained by the parent, that the CSE had agreed to not conduct duplicative testing of the student, and the district was "ready and willing" to perform its own evaluations as determined necessary and consistent with regulations (id. at pp. 1-2).

Impartial Hearing and Decision

The parties proceeded to an impartial hearing on September 14, 2010 (Tr. p. 1). At the impartial hearing, the parent argued that the district had approved her request for an IEE and was thereby estopped from arguing that the parent has no right to an IEE due to an alleged failure to disagree with a district evaluation. The parent further argued that the district imposed an unreasonable and arbitrary cap on the amount of money that the district would reimburse the parent for an IEE. The district argued that its Board of Education promulgated procedures setting forth criteria for IEEs, including that an IEE shall not exceed $1,800 unless there are unique circumstances. The district alleged that the parent did not indicate to the district any unique circumstances to justify an evaluation that exceeds the $1,800 cost criteria. The district also alleged that the parent did not disagree with an evaluation obtained by the district.

In a decision dated November 22, 2010, the impartial hearing officer summarized the parties' positions and the evidentiary and testimonial evidence proffered during the impartial hearing (IHO Decision at pp. 2-8). He found that there was no requirement that the student undergo a reevaluation at the time of the April 2010 CSE meeting, that the parent did not provide

consent for a further evaluation, and that there was no evidence to support the parent's claim that the requested IEE "would be used in lieu of a required district triennial evaluation" (id. at p. 2).[3]

The impartial hearing officer further found that the parties had an "agreement" for an IEE that "seem[ed] to have unraveled regarding the 'cost' of the evaluation" (IHO Decision at p. 14). He determined that the parent had no right to an IEE because she did not disagree with a district evaluation (id. at pp. 12, 14, 17). He further found that the district had no obligation to request an impartial hearing "when it was unwilling to pay more than $1,800.00 for the IEE" because the parent did not disagree with a district evaluation (id. at p. 14). He determined that he did not need to specifically address the parent's argument that the district was estopped from arguing that the parent does not have a right to an IEE, but noted that "estoppel would not lie against the school district" (id. at n.57). According to the impartial hearing officer, once the parent learned that the requested neuropsychological evaluation would cost more than $1,800, the parent should have provided the district with written notice identifying the district evaluation with which she disagreed and requesting a neuropsychological evaluation at public expense (id. at p. 17). The impartial hearing officer found that the parties' exchange at the April 2010 CSE meeting did not have "the same legal effect as a written notice of a disagreement with a particular District evaluation and a request for an IEE at public expense" (id.). He concluded that the parent was not entitled to a neuropsychological evaluation by the pediatric neuropsychologist to the extent that such evaluation would exceed $1,800, which the district had already agreed to pay (id.).

Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges that the impartial hearing officer erred in finding that she had not disagreed with a district evaluation and did not have a right to an IEE. The parent argued that the impartial hearing officer erred in not addressing her estoppel defense. According to the parent, the district should be estopped from denying the parent's right to an IEE because the district agreed to the parent's request for a neuropsychological evaluation. In her memorandum of law in support of the petition, the parent asserts that she disagreed with a district evaluation, namely the April 2010 IEP which the parent asserts represents "the embodiment of the CSE's evaluation" (Parent Mem. of Law at pp. 6-9). The parent asserts that the district should have paid the full cost of the requested evaluation or initiated an impartial hearing. The parent further contends that the district's attempt to limit payment violates the plain, unambiguous language of federal and State regulations governing IEEs. As alternative arguments, the parent asserts that the district failed to establish the reasonableness of its cap on the amount of money it will pay for IEEs and that the parent demonstrated that the cost of the evaluation by the pediatric neuropsychologist was reasonable. The parent requests that a State Review Officer annul the impartial hearing officer's decision and order the district to pay the full cost of a neuropsychological IEE by the pediatric neuropsychologist.

In its answer, the district denies many of the parent's assertions and seeks to sustain the impartial hearing officer's decision. The district asserts that the impartial hearing officer correctly found that the parent did not disagree with a district evaluation. The district also asserts that at no time did the parent suggest any basis to show that any unique circumstances justify an independent evaluation at public expense in excess of the district's cost criteria. The district argues that the

[3] The parent does not appeal these findings and therefore they are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; see Application of a Student with a Disability, Appeal No. 08-046).

matter has been rendered moot because, upon information and belief, as of August 2010 the student was parentally placed in a private school located outside of the district and that school district of location would be responsible for conducting evaluations under New York Education Law section 3602-c. The district further contends that the parent did not raise in her due process complaint notice or during the impartial hearing that she disagreed with a district evaluation and therefore cannot assert for the first time in her memorandum of law in support of the petition that she disagreed with the recommended April 2010 IEP. According to the district, disagreement with the IEP itself does not equate to disagreement with an evaluation for the purpose of federal and State regulations governing IEEs. The district further asserts that the impartial hearing officer correctly determined that where the parent did not disagree with a district evaluation, the district did not have an obligation to request an impartial hearing. The district asserts that "estoppel" does not apply. Finally, as an alternative argument, the district asserts that its criteria for an IEE are consistent with the parent's right to an IEE.

The parent submitted a reply to the district's procedural defenses raised in the answer. The parent denies that the case is moot. According to the parent, the district should not be permitted to argue that the matter is moot when it did not present this argument at the impartial hearing.[4] The parent also submits that there is no evidence in the hearing record concerning the school that the student attended at the time of the impartial hearing. In addition, the parent alleges that she presented to the impartial hearing officer that she disagreed with a district evaluation and did not raise a new issue that was not identified in her due process complaint notice as claimed by the district.

Applicable Standards

Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 C.F.R. § 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii];[5] 8 NYCRR 200.5[g][1][iv]; see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F.

[4] Even assuming for the sake of argument that a district of location rather than a district of residence is responsible for evaluating a student, the hearing record does not contain evidence that the student is now attending a school located outside of the district and neither party has submitted additional documentary evidence with respect to this issue for consideration on appeal. Accordingly, I decline to find that the case has been rendered moot.

[5] The Analysis of Comments accompanying the federal regulations implementing the provisions for an IEE state that "[a]lthough it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

Discussion

Here, notwithstanding the undisputed fact that the district agreed to fund an IEE of the student subject to the reasonable costs criteria adopted by the district, I find that the district was not precluded from asserting that the parent was not entitled to an IEE pursuant to federal and State regulations because she did not disagree with an evaluation obtained by the district.[6] I also concur with the impartial hearing officer's finding that there is nothing in the hearing record that identifies what, if any, evaluation conducted by the district or any other public agency with which the parent disagreed (see IHO Decision at pp. 12, 14, 17). During the impartial hearing, the parent's attorney further clarified the nature of the parent's claim insofar as she did not disagree with an evaluation, but had requested an IEE that was approved by the district (Tr. p. 53). The parent attested that she verbally requested an IEE for the student to be performed by the pediatric neuropsychologist that was approved by the district subject to an $1,800 limit (Dist. Ex. 32 at p. 1). At the impartial hearing, the parent testified that she was disagreeing with the April 2010 CSE's recommended placement (Tr. p. 101). The CSE chairperson testified that during the April 2010 CSE meeting, the parent disagreed with the description of the student's progress in decoding and encoding as well as the implementation of the Wilson reading program (Tr. pp. 56-57; see Dist. Exs. 16; 17). Although the parent claims on appeal that she expressed disagreement at the April 2010 CSE meeting, and that she disagreed with the April 2010 IEP which she asserts represents "the embodiment of the CSE's evaluation," the hearing record does not indicate that the parent disagreed with an evaluation obtained by the school district as required by federal and State regulations that govern when a parent is entitled to an IEE at public expense (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144).

I also decline to adopt the parent's argument that the term "evaluation" be construed so broadly as to encompass an IEP. Federal regulations define an "evaluation" as those "procedures used in accordance with §§ 300.304 through 300.11 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs" (34 C.F.R. § 300.15; see 8 NYCRR 200.11[aa] [defining "individual evaluation" as those "procedures, tests or assessments used selectively with an individual student, . . . and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability

[6] To hold otherwise in this case would discourage districts from working cooperatively with parents by proactively agreeing to provide for additional evaluations of a student (see L.K. v. Department of Educ., 2011 WL 127063, *8 [E.D.N.Y. Jan. 13, 2011]).

and the extent of his/her special education needs, but does not include basic tests administered to, or procedures used with, all students in a school grade or class."]). Contrasting from the term evaluation, the Individuals with Disabilities Education Act (IDEA) and State regulations define the term "individualized education plan" as a written statement for each student with a disability that is developed, reviewed, and revised by a CSE and which includes, among other things, statements regarding the student's present levels of performance, measurable annual goals, and the special education and related services to be provided to the student (20 U.S.C. § 1414[d][1][A]; 34 C.F.R. § 300.320; 8 NYCRR 200.1[y], 200.4[d][2]). When developing recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation of the student (8 NYCRR 200.4[d][2]). Consequently, I find that the student's IEP was not an "evaluation" with which the parent may disagree for purposes of seeking an IEE (Dist. Ex. 16).

In addition, the impartial hearing officer correctly concluded that the district had no obligation to initiate an impartial hearing when it was unwilling to pay more than $1,800.00 for the IEE because no district evaluation existed upon which to trigger this duty (see IHO Decision at p. 14; see also 34 C.F.R. § 300.502[b][2][i]; 8 NYCRR 200.5[g][1][iv]; R.L., 363 F. Supp. 2d at 235).

Conclusion

Based on the foregoing, I find that the impartial hearing officer correctly determined that the parent was not entitled to an IEE.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 23, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER