The University of the State of New York

The State Education Department
State Review Officer
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No. 11-053

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 New York City Department of Education.

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the services the parent sought for her daughter for the 2010-11 school year were inappropriate. The appeal must be sustained in part.

Background

At the time of the impartial hearing, the student was receiving home instruction and related services as described in a February 11, 2009 individualized education program (IEP) developed by respondent (the district) (Tr. pp. 6-10, 101; IHO Interim Decision at p. 5; see Parent Ex. B). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. pp. 20-21).

Briefly, the student initially received special education and related services under the auspices of the Early Intervention Program (Tr. pp. 105-06). On February 11, 2009, a Committee on Preschool Special Education (CPSE) found the student eligible for special education and related services as a preschool student with a disability, and provided her with special education itinerant teacher (SEIT) services, occupational therapy (OT), physical therapy (PT), counseling, and speech-language therapy (Parent Ex. B at pp. 1, 2, 23). At the parent's discretion, the student continued to receive CPSE services during the 2009-10 school year (Tr. pp. 101-02; Dist. Ex. 1 at p. 1; see Parent Ex. B).

On May 11, 2010, a district special education teacher conducted a classroom observation of the student in her preschool program (Dist. Ex. 1). The teacher reported that overall, the student

was docile and easily redirected, and required prompting and explanations to complete class work and routines (id. at p. 1). The teacher also reported that conversations with the preschool staff indicated that the student would thrive in a small structured, language rich environment (id. at pp. 1-2).

On May 13, 2010, the district's committee on special education (CSE) met to review the student's eligibility for special education services and develop an IEP for the 2010-11 school year (Parent Ex. C). The CSE determined that the student was eligible for special education as a student with autism and recommended that she be placed in a 6:1+1 special class in a specialized school (id. at p. 1). The CSE recommended among other things, that the student receive the following related services: one group (2:1) 30-minute counseling session per week, two individual 30-minute PT sessions per week, 5 individual 30-minute sessions each of OT and speech-language therapy per week, and the services of a health management[1] paraprofessional for 5 individual one-hour sessions per week (id. at pp. 2, 32). The CSE considered a placement in a special class in a community school; however, rejected this placement because it would not provide the student with the requisite supports (id. at p. 31). The CSE also considered home instruction, but rejected this option as not providing an appropriate social environment for the student and also as being too restrictive (id.).

In a notice dated June 3, 2010, the district summarized the recommendations made by the May 2010 CSE and notified the parents of the student's assigned school (Dist. Ex. 2). The hearing record demonstrates that the parent visited the assigned school and subsequently rejected the district's recommended program (Tr. pp. 119, 136).

Due Process Complaint Notice

On or about June 21, 2010, the parent filed a due process complaint notice primarily asserting that the May 2010 CSE "refused" to consider "continuing [the student's] home program until an appropriate self-contained special education program where [the student] could have interaction with mainstream students was recommended" (Parent Ex. A). The parent requested that an impartial hearing officer order the district to provide the student with a "home program" comprised of 45 hours of SEIT services weekly, seven 60-minute sessions of speech-language therapy per week, seven 60-minute sessions of OT per week, and three 60-minute sessions of PT per week, as well as Tomatis Auditory Integration Therapy (id. at p. 2).[2]

Impartial Hearing Officer Decision

An impartial hearing convened on June 30, 2010 for the purpose of determining the student's pendency (stay put) placement (Tr. pp. 1-11). In a decision dated July 16, 2010, the impartial hearing officer found that the services constituting the student's pendency placement were described in the student's February 11, 2009 IEP, and she ordered the district to provide the

[1] The May 2010 IEP notes under the area of social/emotional performance that a "health paraprofessional" and a "formula paraprofessional" are recommended to provide the student with behavioral support (Parent Ex. C at p. 8).

[2] The hearing record describes Tomatis Auditory Integration Therapy as a method that "'reprograms' the ear-via sound stimulation-in order to improve its functioning" through the use of a device called the "Electronic Ear" (Parent Ex. F at pp. 1-12).

student with 25 hours of 1:1 SEIT services per week, three individual 60-minute sessions of physical therapy (PT) per week, five individual 60-minute sessions of OT per week, five individual 60-minute sessions of speech-language therapy per week, and one individual 60-minute counseling session per week (IHO Interim Decision at p. 5).

The impartial hearing reconvened on November 27, 2010, and after three hearing days, concluded on March 22, 2011 (Tr. pp. 1, 83, 94). In a decision dated April 18, 2011, the impartial hearing officer first noted that the parent did not contest any procedural deficiencies with the development of the May 13, 2010 IEP (IHO Decision at p. 14). The impartial hearing officer also determined that the specific 6:1+1 special class at the assigned school described at the impartial hearing was appropriate for the student; however, she also determined that the district failed to meet its burden to show that it offered the student a free appropriate public education (FAPE) (id. at pp. 15-16).

The impartial hearing officer then conducted an analysis of the parent's request for a different placement using the second prong of the Burlington/Carter tuition reimbursement standard (IHO Decision at pp. 16-18).[3] The impartial hearing officer found that the parent failed to meet her burden to demonstrate that home instruction was appropriate to meet the student's educational needs (id. at p. 18). The impartial hearing officer also noted that the home-based program advocated by the parent was a "carry over from the [student's] CPSE IEP, which consist[ed] of an intensive, too restrictive, one-on-one environment based in [applied behavior analysis] ABA," and that one of the student's SEITs recommended that the student would benefit from a small, structured class with exposure to peers (id. at pp. 17-18). Furthermore, the impartial hearing officer also noted that even though the parent had suggested in her due process complaint notice that she had medical support for home instruction, none was provided (id. at p. 18). Also, the impartial hearing officer determined that the parent failed to offer any explanation as to what the Tomatis Method is, or explain why the student required this method of instruction (id.). Finally, the impartial hearing officer noted that the evidence pointed to moving the student into a small, structured classroom setting, with the individual support of a health management paraprofessional, and which contains other students with whom the student can learn to socialize and generalize learned skills (id.).

Appeal for State-Level Review

On appeal, the parent asserts that the impartial hearing officer erred by applying the Burlington/Carter legal standard when analyzing the parent's claim. Specifically, the parent asserts that since she was not seeking reimbursement for expenses and did not unilaterally place the student in the home program, the impartial hearing officer should not have placed the burden on the parent to prove the appropriateness of the home instruction.

In its answer, the district asserts that the impartial hearing officer correctly applied the Burlington/Carter analysis. However, without cross-appealing, the district faulted the decision by

[3] The "Burlington/Carter" analysis refers to decisional law interpreting the Individuals with Disabilities Education Act (IDEA) which established that 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]).

the impartial hearing officer insofar as it lacked discussion of whether equitable considerations would disfavor any award of relief, and noted that that the hearing record shows that the parent never intended to place the student in a district placement.

Discussion

Unappealed Determinations - Finality

Initially, I note that neither party appealed the impartial hearing officer's determination that the district demonstrated that it appropriately offered a 6:1+1 special class at the assigned school, or her determination that the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2010-11 school year; thus, those determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).[4]

Applicability of a Unilateral Placement Analysis

I concur with the parent's contention that the impartial hearing officer erred by improperly applying a Burlington/Carter analysis to the relief requested by the parent in this case. The parent did not unilaterally place the student in a private school or seek reimbursement for her expenses related to services that she unilaterally obtained without the consent of the district. 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]). In this case, the parent requested that the district be directed to provide different special education services than those listed in the May 2010 IEP, namely the continuation of home instruction and, at increased frequencies, the program the student had previously received with the district's consent pursuant to her February 2009 IEP (Parent Ex. A at p. 2; see Dist. Ex. B at pp. 21, 23). Since the parent sought an order directing the school district to provide different services to the student, there was no basis for the impartial hearing officer to require the parent to prove that the services she sought were appropriate for the student (Educ. Law § 4404[1][c]). Accordingly, once the impartial hearing officer determined that the district failed to offer the student a FAPE, she should have next determined what appropriate remedy, if any, should be provided to the parent based upon evidence presented in the hearing record.

Conclusion

In order for an impartial hearing officer to fashion a remedy, a hearing record containing information that is relevant to the matters at issue must be developed (8 NYCRR 200.5[j][3][xii][c]-[e]). In this case, the hearing record is inadequate to meaningfully determine what programmatic services the student required. As the impartial hearing officer noted, the district did not supply documentary evidence, nor did it elicit any testimony in support of its proposed program (IHO Decision at pp. 14-15). The impartial hearing officer also noted that the parent (although as noted above, the parent did not bear the burden of proof) did not provide evidence to demonstrate that the remedy she sought was appropriate (id. at p. 18). Based on the

[4] I express no opinion on the propriety of the impartial hearing officer's analysis of whether the district offered the student a FAPE, since neither party elected to appeal that determination.

foregoing, I find that the hearing record is inadequate to determine an appropriate remedy. Therefore, I will remand this matter to the impartial hearing officer for further development of the hearing record in order to determine what, if any, remedy is appropriate to address the district's denial of a FAPE for the 2010-11 school year.

Lastly, I note that a significant portion of the relief sought by the parent with respect to her claim for the 2010-11 school year has been achieved by virtue of pendency. Consequently, the parties and the impartial hearing officer should take this into account and consider whether further litigation regarding issues related to the 2010-11 school year remains an effective means to resolve the parties' dispute. If, upon remand, further issues remain outstanding with respect to the 2010-11 school year, I encourage the parties to consider using alternative dispute resolution processes such as mediation to resolve them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's April 18, 2011 decision that determined that the parent did not meet her burden to demonstrate that home instruction was appropriate to meet the student's educational needs is hereby annulled.

IT IS FURTHER ORDERED that, unless the parties agree otherwise, the matter is remanded to the same impartial hearing officer to reconvene the impartial hearing within 30 days of the date of this decision, to develop the hearing record in order to determine what, if any, remedy is appropriate to correct the denial of a FAPE for the 2010-11 school year.

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the April 18, 2011 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed to issue a new determination which is consistent with this decision.

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

JUSTYN P. BATES
STATE REVIEW OFFICER