The University of the State of New York

The State Education Department
State Review Officer
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No. 11-131

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to pay respondents (the parents) for their daughter's tuition costs at the New Haven Residential Treatment Center (New Haven) and at Sunrise Residential Treatment Center (Sunrise) for relevant periods during the 2009-10 and 2010-11 school years. The appeal must be sustained in part.

At the time the impartial hearing began in May 2011, the student was enrolled in a therapeutic boarding school in Vermont (Tr. pp. 10, 28). The student's eligibility for special education programs and services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

Background

The hearing record is relatively sparse regarding the student's educational history prior to November 2009. The student attended a district school from kindergarten through the beginning of fifth grade (Tr. p. 28; Parent Ex. O at p. 2). [1] She began to have difficulty in school and then

[1] I note that the hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits are cited in instances where both a Parent and District exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

transferred to a private parochial school outside of the district for the balance of fifth grade (Tr. pp. 28-29; Parent Ex. O at p. 2). The student continued at that private parochial school through the end of seventh grade and returned to her previous district school at the beginning of her eighth grade school year (2007-08) (Tr. p. 29; Dist. Ex. O at p. 2). At the beginning of the student's ninth grade year in September 2008, the student enrolled in a different private parochial high school outside of the district and completed the 2008-2009 school year there (Tr. pp. 29-30; Dist. Ex. O at p. 2).

In tenth grade (2009-10), the student continued at the private parochial high school but began to have emotional and psychological difficulties shortly after the school year began and began to see a therapist and psychiatrist, who prescribed medication for depression and anxiety (Tr. pp. 30, 34-35). The student then transferred to a district high school in October 2009, and remained at that school until November 2009, when because of her emotional and psychological condition and at the recommendation of her therapist and psychiatrist, she enrolled in a hospital-based day program located outside of the district (Tr. pp. 34, 35-36, 41; see Parent Ex. D at p. 3). According to the student's mother, in November 2009 the student was admitted to a hospital due to suicidal ideation and remained there for several days (Tr. p. 36). The student thereafter returned to the hospital-based day program in December 2009 and was discharged from that program on December 23, 2009 due to violating the program rules (Tr. pp. 36-37). The student was hospitalized again on January 3, 2010, on an emergency basis because of her psychological condition (Tr. pp. 38-40, 75; Parent Ex. D at p. 2). The student was discharged and admitted to an inpatient treatment program on January 6, 2010, and after noting her receipt of a diagnosis of, among other things, a bipolar disorder she remained in that inpatient treatment facility until January 21, 2010 (Tr. pp. 76, 78; Parent Ex. D at pp. 2, 7, 9, 11). On January 25, 2010, the student began an outpatient program affiliated with the same facility and remained in that program until February 18, 2010 (Parent D at pp. 18, 20; see Parent Ex. C at p. 37).

The student was admitted to a hospital-based therapeutic school program on February 22, 2010, after an intake evaluation was conducted earlier that month (Parent Ex. C at pp. 22, 37, 113, 114, 115). According to the parents and the student's initial history prepared by the hospital-based therapeutic school program, the student came to the program by way of recommendation from one or more staff at the district's high school that the student had attended in fall 2009 (Tr. pp. 82-83; Parent Ex. D at p. 48). According to the parents, district teachers staffed the educational component of the hospital-based program (Tr. pp. 79, 81-82). A discharge summary from the hospital-based therapeutic school program indicated that between the time of the student's entry into that program and mid-April 2010, the student's psychological condition required a number of emergency room visits and the parents "had difficulty maintaining an appropriate level of structure to keep [the student] safe" (Parent Ex. C at p. 112). Additionally, the student was reported to be "non-compliant with treatment" and she exhibited "behavioral problems," but remained "clean and sober" while at the program (id.). The treatment facility concluded that the student "required [a] higher level of care" for psychiatric treatment and recommended that the student enroll in a residential treatment program (id.; see Tr. p. 80). In a letter dated April 22, 2010, the hospital-based therapeutic school program confirmed that it was officially closing the student's case as of that date; that the student's clinical treatment and education had been transferred to New Haven; that the student would attend an intake appointment on April 15, 2010 at New Haven; and that she would continue to receive clinical and academic services at New Haven (Parent Ex. C at p. 112).

At the time of the student's discharge, treatment records indicated that the student had been offered a number of diagnoses, including a mood disorder (id.).

The student began attending New Haven, which is located in Utah, on April 15, 2010 (Tr. pp. 84, 119; Parent Exs. U; V; W). A psychological evaluation completed at New Haven dated May 17, 2010, offered the student diagnoses of, among other conditions, an oppositional defiant disorder (ODD) and a major depressive disorder—recurrent, mild, in partial remission (Parent Ex. E at p. 7). The evaluation concluded, among other things, that residential treatment for the student was "warranted and essential in order for [the student] to address the concerns affecting her ability to function emotionally and academically" and that the student's conduct relating to her psychological condition should be carefully monitored (id. at p. 8).

Sometime in April or May 2010, the parents requested that the CSE evaluate the student to determine her eligibility for special education programs and related services (Tr. pp. 93, 117, 119).[2] A district bilingual school social worker interviewed the student's father and prepared a social history dated June 22, 2010 (Parent Ex. O; see Tr. p. 239). Also on June 22, 2010, the parents provided the district with written consent to evaluate the student (Dist. Ex. 3; see Tr. p. 239). The parties do not dispute that because of her emotional and psychological condition, the student was not able to appear at evaluations scheduled by the district for June 21, 2010, August 2, 2010, and August 20, 2010 at an evaluation site within the district (Pet. ¶ 61; Answer ¶¶ 21, 23, 24, 61; see Tr. pp. 95-98, 121-22, 172; Parent Ex. W at p. 2; see also Dist. Exs. 4; 5; 6; 7).

The student traveled to the district to be evaluated on September 21, 2010 (Tr. pp. 121-22, 245). At that time, a district psychiatrist and a school psychologist, respectively, conducted a psychiatric and a psychoeducational evaluation of the student (Parent Exs. Q; R; see Tr. pp. 247-48). The evaluations indicated that the school psychologist and the psychiatrist reviewed other information in the committee on special education (CSE) file with respect to the student (Parent Exs. Q at p. 2; R at pp. 1-2). The school psychologist reported that the district's evaluating psychiatrist and the student's psychiatrist at New Haven had both offered the student diagnoses of, among other things, a major mood disorder and a post-traumatic stress disorder (Parent Ex. R at p. 1; see Parent Exs. Q at p. 4; V). Upon evaluation, the district's psychiatrist found the student to be "still fragile due to her multiple diagnoses" (Parent Ex. Q at p. 4).

The CSE met on October 4, 2010 to develop the student's initial individualized education program (IEP) (Dist. Ex. 2). The October 2010 CSE determined that the student was eligible for special education programs and related services as a student with an emotional disturbance (id. at p. 1).[3] According to the minutes of the October 2010 CSE meeting, among other things, relevant materials relating to the student were reviewed by the CSE and the results of testing were explained to the parents (Parent Ex. T). The resultant October 2010 IEP included information relative to the

[2] The student's father initially reported that the request for an evaluation was made in "[l]ate April, early May" 2010 (Tr. p. 93). On cross examination, the student's father reported that he believed that the date of the written request for an evaluation was "in May some time," and later indicated that the request for an evaluation was about one month after the student had been placed at New Haven in April 2010 (Tr. pp. 117, 119). The parents' request for an evaluation is not part of the hearing record.

[3] The record reflects that the October 2010 CSE also completed an "emotional disability justification form" with respect to the student's classification as a student with a disability (see Parent Ex. S at p. 18).

student's present levels of academic performance and learning characteristics, social and emotional performance, and the student's health and physical development (Dist. Ex. 2 at pp. 3-4, 5-6, 7).[4] With respect to the student's social and emotional performance, the October 2010 IEP noted that her behavior seriously interfered with instruction, that the student's program should include counseling, and that a behavioral intervention plan (BIP) had been developed (id. at pp. 5-6, 17). The October 2010 IEP indicated that the student "require[d] a[n] emotionally supportive classroom environment with a therapeutic orientation to address her psychiatric vulnerabilities" and that the student also required "24-hour supervision" (id. at p. 5).

The October 2010 CSE minutes indicated that the student's annual goals were reviewed (Parent Ex. T). The resultant IEP included annual goals with respect to the student's anxiety; the utilization of appropriate coping strategies and self-advocacy skills; math concepts; specified writing skills; and the identification and analyzing of similar themes across literary works, during discussions, or in written work (Dist. Ex. 2 at pp. 8-11).[5] The October 2010 IEP also included a transition plan for the student that identified long-term adult outcomes and transitional services with respect to the student's instructional activities, community integration, post high school activities, and independent living (id. at pp. 15-16).

The October 2010 CSE determined that a residential placement was appropriate for the student and referred the student's placement to the district's "central based support team" (CBST) to identify a particular State-approved nonpublic school that would be "a good match" for the student (Dist. Ex. 2 at pp. 1, 13; see Tr. pp. 100-101, 235-36, 248-49). The resultant October 2010 IEP indicated that the recommendation for a residential placement was made after a consideration of less restrictive alternatives, including a day treatment program, and was appropriate "due to her emotional reactivity and history of self-destructive behavior" (Dist. Ex. 2 at p. 13). Consistent with the student's needs, the IEP further indicated that the student required an "emotionally supportive classroom environment and 24-hour [per] day supervision with a therapeutic orientation to address psychiatric vulnerabilities and to help her maintain social-emotional gains" (id.). The resultant October 2010 IEP recommended that the student to receive a 12-month educational program and individual and group counseling as related services (id. at pp. 1, 14). The IEP also recommended that the student be placed on home instruction pending placement by CBST (id. at p. 1.).

On October 6, 2010, a case manager from the district's CBST received the student's referral package for a residential placement from the CSE (Tr. pp. 270, 272).[6] The CBST case manager contacted the parents by letter dated October 8, 2010, as well as by telephone regarding the

[4] I note that the October 2010 IEP reflected information included in teacher reports and a related service provider report from New Haven, as well as information from the student's score report form on the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), which was administered to the student in July 2010 at New Haven (see Dist. Ex. 2 at pp. 3-4; Parent Exs. H; P at pp. 1-5; R at p. 1; S at pp. 3, 5).

[5] I note that relevant annual goals in the October 2010 IEP reflected goal-related information included in the teacher reports and related services provider report from New Haven (see Parent Exs. P at p. 6; S at pp. 8-11).

[6] The hearing record reflects that the referral package would have included "all the documents" that the CSE had used as part of their review including the student's social history, the psychological and educational evaluation, the psychiatric evaluation, private assessments, and information that the parents had provided to the CSE (Tr. pp. 235-36, 249, 271).

student's referral to the CBST and her assignment to that process (Tr. pp. 101-102, 273-74). The CBST case manager reported that she sent the student's referral package to 19 State-approved nonpublic schools that the case manager thought would be "most appropriate" for the student by virtue of the student's age, disability classification, cognitive ability, the educational evaluations, and least restrictive environment (LRE) considerations; all but two of which were located in New York State (Tr. pp. 274-75). Fifteen of the 19 schools subsequently advised the CBST case manager that, for a variety of reasons, they would not be able to accept the student (Tr. pp. 276-77; see Parent Ex. KK).

As a result of financial considerations, the parents requested that the student be discharged from New Haven effective October 29, 2010, and they enrolled the student in Sunrise which, according to the student's father, was a "sister school" to New Haven, and whose program costs were lower (Tr. pp. 89-90; see Parent Exs. M at p. 1; N).[7, 8] The hearing record reflects that the student attended Sunrise from October 29, 2010 to March 8, 2011 (Parent Exs. L; M at p. 1; N).

As a result of the district's referral to the CBST, four nonpublic schools located in New York State – Hillside Children's Center (Hillside), Greenburgh-North Castle, St. Anne Institute (St. Anne), and Leake and Watts — contacted the parents regarding possible enrollment of the student and indicated an interest in an in-person interview of the student (Tr. pp. 104-105; Dist. Exs. 11-16; see Parent Ex. JJ at pp. 2-3; see also Tr. pp. 122-23). The parents developed a 30-question questionnaire relating to what they believed were school characteristics relevant to an appropriate school for the student and beginning on October 28, 2010, screened the four schools by speaking to one or more representatives or staff persons from each school (Tr. pp. 104, 105-06, 109-110, 112, 124; Parent Exs. BB; CC; EE; JJ).[9] Based on the resulting information, the parents concluded that none of the four schools was an appropriate placement for the student, rejected them, and advised the CBST case manager in writing of the reasons why they believed this to be the case (Tr. pp. 108, 282, 298; Parent Exs. BB; CC; EE; see Parent Exs. GG at p. 2; JJ at p. 3; see also Dist. Ex. 13).[10] Subsequently, and when requested to do so by the CBST case manager, the hearing record reflects that the parents also visited Greenberg-North Castle, St. Anne, and Leake

[7] With respect to this, the student's father indicated that he was unemployed, that private insurance payments had been limited to 80 percent of the first two months of program costs, and that the parents had therefore been using retirement money for payments beyond what their private insurance paid (Tr. p. 89). The hearing record indicates that the student mother has been employed (Tr. p. 33, Parent Ex. O at p. 2).

[8] Sunrise is also located in Utah (see e.g., Parent Exs. J; L; N).

[9] According to the parents, they conducted "phone screenings" of Hillside on October 28, 2010; of St. Anne on November 2, 2010; of Greenburgh-North Castle on November 4, 2010; and of Leake and Watts on December 8, 2010 (Parent Ex. JJ at pp. 2-3).

[10] With respect to Leake and Watts, the parents' February 10, 2011 letter to the CBST case manager stated that they had previously advised the case manager in a letter dated December 29, 2010 that based on the parents' "phone screening and visit," they had concluded that Leake and Watts was not appropriate for the student (see Parent Ex. JJ at p. 3). The student's father also reported that he advised the CBST case manager in writing that the parents did not believe that Leake and Watts was appropriate and the district agrees that such letter was sent (Tr. pp. 106, 298). The referenced December 29, 2010 letter is not part of the hearing record.

and Watts (Tr. pp. 107-108, 279, 300, 301; Parent Ex. JJ at p. 2).[11, 12] As an alternative to making the student available for an in-person interview, the parents asked Greenburgh-North Castle, St. Anne, and Leake and Watts whether they were agreeable to an interview of the student by telephone and/or computer (Tr. pp. 106-107, 112, 123). Greenburgh-North Castle indicated that it could not facilitate this request (Tr. p. 105; Parent Exs. HH; II at p. 2; JJ at p. 2). St. Anne agreed to interview the student by telephone (Tr. pp. 106-107; Dist. Ex. 15). Although Leake and Watts also agreed to interview the student by telephone, the hearing record reflects that the school tried to reach the parents on December 22, 2010 to schedule such an interview and the parents did not respond (Dist. Ex. 14). The student's father reported that when the student was home for Christmas, they contacted Leake and Watts for an in-person interview, but were told that it was not possible to schedule at that time because the school was closed due to the holidays (Tr. pp. 108-109, 123; Parent Ex. JJ at p. 3).

By letter dated February 2, 2011, the CBST case manager advised the parents that "New York State approved nonpublic schools require that the student interview with the school before the school makes a determination regarding acceptance" (Dist. Ex. 16). The CBST case manager also advised the parents that according to information it had received from Hillside, Greenburgh-New Castle, St. Anne, and Leake and Watts, the parents had not cooperated with those schools to facilitate such interviews (id.).[13] The CBST case manager further advised the parents that the district would no longer attempt to contact the parents regarding placement of the student in a State-approved nonpublic school and that the district would consider their "refusal to cooperate as a declination of services" recommended in the student's October 2010 IEP (id.).

The parents responded to the CBST case manager by letter dated February 10, 2011 (Parent Ex. JJ). Among other things, the parents contended that they had "fully cooperated" with the district and that they "would have been happy to place [the student] in a [New York State] approved school" had any of the recommended schools been appropriate (id. at pp. 1, 4). The parents also recited in detail the actions that they had taken regarding the placement process, including much of what is set forth above (id. at pp. 2-3).

Due Process Complaint Notice

In a due process complaint notice dated March 29, 2011, the parents asserted that the district had denied the student a free appropriate public education (FAPE) and requested an

[11] The student's father reported that the CBST case manager asked the parents to visit Hillside, but the hearing record does not indicate that they did so (Tr. p. 112).

[12] The student's father reported that St. Anne indicated they would be willing to interview the student on the telephone if the parents first visited the school, which is not located in the district; the student's father then visited St. Anne prior to the student being interviewed over the telephone (Tr. p. 113). He reported that thereafter, because they "hadn't heard anything in a timely manner," the parents sent another rejection letter setting forth their belief that the school wasn't an appropriate program for the student (id.).

[13] I note that as indicated above, St. Anne had agreed to interview the student over the telephone and the telephone interview had taken place (Dist. Ex. 15).

impartial hearing (Parent Ex. A at pp. 1, 2).[14] The parents contended, among other things, that upon her discharge from the hospital-based school program, the doctors and therapists recommended that the student be placed in a residential treatment center, and "[g]iven the gravity of the situation," the parents had "no choice" but to place her at New Haven from April 15, 2010 until October 29, 2010 (id. at p. 2). The parents further contended that their placements of the student at New Haven and subsequently at Sunrise were appropriate (id. at pp. 2, 4). Lastly, the parents alleged that they cooperated with the CSE, asserting that they notified the CSE prior to the October 2010 meeting as well as at that meeting that the student would remain at New Haven until an appropriate placement was found and that they would seek tuition reimbursement at the public's expense (id. at p. 3). The parents further asserted that that they flew the student from Utah to the district to be evaluated "in spite of this being contraindicated by the therapists and clinicians" who were working with the student (id. at p. 4).

As a proposed resolution, the parents requested that the impartial hearing officer find, among other things, that the CSE failed to offer the student a FAPE "on both a procedural and substantive basis," that the placements selected by the parents were appropriate for the student, and that the parents cooperated with the district's CSE and "in no way impeded the CSE from offering the student a FAPE" (Parent Ex. A at p. 4). The parents requested that the impartial hearing officer find that they were entitled to reimbursement for tuition for New Haven from April 15, 2010 through October 29, 2010; reimbursement for tuition for Sunrise from October 29, 2010 through March 8, 2011; the cost of evaluations; and the cost of transportation.

Impartial Hearing Officer Decision

The impartial hearing began on May 5, 2011 and concluded on July 20, 2011, after four days of proceedings (see Tr. pp. 1, 45, 179, 224, 314-15). In a decision dated September 12, 2011, the impartial hearing officer concluded that the district had "policies and procedure[s] in effect to identify and evaluate a student with a disability" (IHO Decision at p. 12; see. 20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]). However, she further concluded that during the time the student was receiving academic instruction from the district's teachers when she attended the hospital-based therapeutic school program in 2010, district staff "at that point" could have identified the student as a student with a disability and could have requested an evaluation, but that the student was "somehow overlooked" (IHO Decision at p. 12). The impartial hearing officer rejected the district's argument that the parents' consent to an evaluation of the student was "'merely illusory'" because the parents did not produce the student to be evaluated until September 2010 when the student's psychiatrist approved her to travel (id. at p. 11). The impartial hearing officer also concluded that the district was not relieved of its obligation to provide the student with a FAPE because of its argument that the parents refused to produce the student for in-person interviews with the State-approved nonpublic schools that had indicated an interest in interviewing her, because she would have had to "fly across the country contrary to the advice of her therapists and psychiatrist" (id. at pp. 10-11). The impartial hearing officer also found that both New Haven and Sunrise were appropriate placements for the student and that the student made progress at both

[14] The parents' due process complaint notice reflects that at the time of the complaint, the student was attending a private boarding school in Vermont, having been discharged from Sunrise on March 8, 2011 to enroll in that school (Parent Ex. A at p. 1; see Parent Ex. M at p. 2).

schools (id. at p. 11). Finally, the impartial hearing officer concluded that there was nothing in the hearing record indicating that the parents had not cooperated with the district (id.).[15]

Based on the above, the impartial hearing officer found that the parents were entitled to tuition reimbursement for both New Haven and Sunrise during the relevant portions of the 2009-10 and 2010-11 school years (IHO Decision at pp. 11, 12).[16] The impartial hearing officer further ordered the district to make direct payment to New Haven and Sunrise of the balance still due for the student's tuition costs (id. at p. 12).

Appeal for State-Level Review

The district appeals, requesting that the portion of the impartial hearing officer's decision granting reimbursement be reversed on the basis that the equities favor the district.[17] In particular, the district asserts that the impartial hearing officer erred in finding that there was nothing in the hearing record to indicate that the parents had not cooperated with the district. More specifically, the district asserts that the parents prevented it from providing a placement for the student by moving the student to an out-of-State facility prior to requesting that the district conduct evaluations of the student and by refusing to produce the student for interviews at Hillside, Greenburgh-North Castle, St. Anne, and Leake and Watts, as well as by unilaterally rejecting the student's possible placement at those schools. The district additionally contends that the parents did not intend to place the student at a State-approved nonpublic placement; rather, they intended to have the student remain in the private schools that they had selected.

In their answer, the parents assert that the impartial hearing officer's decision should be affirmed and deny that the impartial hearing officer erred in her determination that the hearing record does not support a finding that the parents did not cooperate with the district. The parents further assert that equitable factors only limit reimbursement for a parental placement in circumstances where a parent's failure to cooperate has obstructed the placement process and that the parents did not engage in such conduct here. The parents assert that the district "presented no evidence that the parents wrongfully took the position that [the student] was unable to travel to New York for an evaluation in June through August 2010." The parents also contend that "there was no reason for the parents to present [the student] for an interview at a school when [the] parents rejected the school because it was inappropriate." The parents allege that the fact that they sent letters to every school that accepted the student and visited the schools demonstrated their cooperation in the CBST process. The parents argue that the district failed to prove that the parents' failure to produce the student for an interview at Hillside, St. Anne, Leake and Watts, and

[15] A review of the testimony at the impartial hearing and the closing briefs of the parties indicate that the parents' claims raised in their March 2011 due process complaint notice relating to the adequacy of the October 2010 IEP and the interim recommendation for home instruction were not at issue during the impartial hearing.

[16] The impartial hearing officer did not find that the district should be required to reimburse payments made to New Haven from the parents' insurance policy (IHO Decision at p. 11).

[17] The district does not appeal the impartial hearing officer's findings that the district did not offer the student a FAPE or that New Haven and Sunrise were appropriate placements for the student for the relevant portions of the 2009-10, 2010-11 school years. As noted by the parents in their answer, the district does not appeal the impartial hearing officer's findings that district did not satisfy its child find obligations and these findings are final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Answer at pp. 14-15).

Greenburgh-North Castle "inhibited its ability to provide her with a [FAPE]" and that there was no evidence that those schools would have been appropriate for the student. The parents also contend that "a parent's intention to send their child to a chosen school is not reason to deny reimbursement" based on equitable considerations absent a showing that the parent prevented the district from providing a FAPE to the student. Moreover, the parents assert that they were open to other educational placements for the student had an appropriate one been offered by the district. The parents further contend that any failure on their part to cooperate with the CSE was due to the district's "procedural failures." Lastly, they state that the district concedes in its petition that the student was "too fragile" to be evaluated form June through September 2010; therefore, the district "unreasonably delayed" her evaluation by failing to consent to having her evaluated "on site" at the private school.

Applicable Standards – Tuition Reimbursement and Equitable Considerations

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).

With respect to the remaining disputed issues in this case, 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).

Equitable considerations may not support an award of tuition reimbursement where parents have failed to cooperate with a school district or have otherwise frustrated a district's attempt to offer a FAPE (see Bettinger, 2007 WL 4208560, at *6 [stating that a "major consideration" in deciding whether equitable considerations are satisfied is whether the parents have cooperated with the district throughout the process to ensure that the student receives a FAPE]; Carmel, 373 F. Supp. 2d at 411, 417 [stating that numerous courts have held that parents who refuse to cooperate with the CSE equitably forfeit their claim for tuition reimbursement]). Moreover, equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (see Bettinger, 2007 WL 4208560 at *7-*8; see also Application of a Child with a Disability, Appeal No. 06-025; Application of a Child with a Disability, Appeal No. 05-075).

Discussion

As indicated above, the district does not appeal the impartial hearing officer's conclusions that it denied the student a FAPE and that the parents' unilateral placements were appropriate. Therefore, the sole issue before me is whether equitable considerations support the parents' request for the tuition costs of the student's placement at New Haven and Sunrise during the relevant portions of the 2009-10 and 2010-11 school years.

For the reasons set forth below, I find that the parents should be reimbursed for the balance due for the student's tuition costs at New Haven from April 15, 2010 to October 28, 2010 –the time period that the student attended that school. With respect to the payment for the student's tuition costs for the period prior to the date of the October 4, 2010 CSE meeting, under the circumstances of this case, I disagree with the district's argument that because the parents moved the student to an out-of-State placement prior to the time they requested an initial evaluation by the CSE in April or May 2010, this prevented the district from offering a placement to the student. The hearing record reflects that the student was being educated by district staff at the hospital-based therapeutic school program from February 22, 2010 to April 22, 2010; however, the district did not identify the student as a student suspected of having a disability and did not refer her to the CSE to be evaluated, notwithstanding her psychological and emotional condition and when she would have been more easily accessible to the district, one factor in this case which weighs in favor of the parents. With respect to the student's ability to travel to New York State in order to be evaluated by the CSE after she had enrolled in New Haven, I note that on appeal the district does not dispute that the student's emotional and psychological condition precluded her from returning to New York State after she had enrolled in New Haven until September 21, 2010, when she attended the CSE evaluations at a district location (see Pet. ¶¶ 21, 23, 24, 61).[18] I also note that the parents offered to pay the costs of district staff evaluating the student in Utah at New Haven, but that the district decided not to accept this offer (see Tr. pp. 98, 246-47; Dist. Ex. 8). Under the circumstances of

[18] I note that once the student was enrolled in New Haven, the school district where the student was located was responsible for child find obligations and responsibilities (34 C.F.R. § 300.131[f]). Notwithstanding that, upon the parents' request, the district of residence retained the obligation to offer the student a FAPE (Letter to Eig, 52 IDELR, 136 [OSEP 2009]). I note here, however, that this did not preclude the district from considering whether it wished to make arrangements with staff of the district of location to provide it with evaluative data with respect to the student; an approach that would not have been inappropriate for it to consider in light of the student's inability to travel to New York State for evaluations by district personnel.

this case, I find that the parents' efforts to have the student evaluated by the district outweigh the districts' efforts from the perspective of equitable considerations.

However, based on a review of the evidence, I also find that beginning on October 28, 2010, the parents efforts to fully cooperate with the district during the CBST placement process in attempting to locate an appropriate State-approved nonpublic school for the student began to fade after the evaluation process was complete and the process for obtaining publicly funded services for the student began. I therefore disagree with the impartial hearing officer's decision to order tuition reimbursement to the parents and direct payment to Sunrise for tuition costs with respect to the student's enrollment at that school, which the student attended from October 29, 2010 to March 8, 2011 (see IHO Decision at pp. 11, 12; Parent Exs. L; M at p. 1; N). In particular, I find that the hearing record reflects that commencing on October 28, 2010, the parents declined offers from Hillside and Greenburgh-North Castle for an in-person interview of the student, which impeded the district's ability to offer the student a FAPE. Regarding Hillside, the hearing record reflects that the parents indicated to the CBST case manager by letter dated October 28, 2010 that they would not be pursuing a placement of the student at Hillside, notwithstanding that the school was willing to offer the student an intake interview (Dist. Ex. 12; see Parent Exs. BB; JJ at p. 3). Similarly, the hearing record reflects that the parents would not accept an intake interview with the student at Greenburgh-North Castle and rejected the placement (Tr. pp. 104-105; Dist. Exs. 13; 16; see Parent Ex. JJ at p. 2). With respect to Leake and Watts, while that school indicated that it was agreeable to the parents' preference for a telephone interview of the student instead of an in-person intake interview, there is no evidence that the parents accepted the school's offer of a telephone interview and, as a consequence, that school was not able to make a decision whether to accept or reject the student (Dist. Ex. 14; see Parent Ex. JJ at pp. 2-3; see also Tr. pp. 106-07, 108-09, 122-23).

The hearing record reflects that the expressions of interest in the student from Hillside, Greenburgh-North Castle, and Leake and Watts followed their receipt of a packet of current evaluative data with respect to the student (Tr. p. 274; see Tr. pp. 236, 249, 271).[19] Moreover, the hearing record reflects that the student's medical condition had improved such that she was able to travel to the district on September 21, 2010 for her CSE evaluation and that there is no evidence in the hearing record to indicate that subsequent to that time, she was not able to travel to an in-person interview at the possible nonpublic schools due to her emotional and psychological condition (Tr. pp. 121-22, 245).[20] The hearing record reflects that when the student returned to the district and was at home for at least three days in December during the holiday period, the parents did not make any attempt to communicate with Hillside or Greenberg-North Castle with respect to scheduling an in-person interview at either of those schools (Tr. pp. 123-24). In light of

[19] The hearing record also reflects that Hillside advised the district that the student "met [its] utilization management criteria" (Dist. Ex. 12). Likewise, Greenburgh-North Castle advised that "upon review of the referral, [the student] was deemed to be a potential candidate" for one of the school's programs (Dist. Ex. 13).

[20] The hearing record does not support the finding of the impartial hearing officer that the student's therapists and psychiatrist had advised that the student was not able to travel to New York State for an intake interview in the time period after the CBST had referred the student to Hillside, Greenburgh-North Castle, St. Anne, and Leake and Watts (IHO Decision at p. 10). Nor does the hearing record support the impartial hearing officer's finding that each of these schools "insisted" on an in-person intake interview with the student (see id.). As discussed above, both St. Anne and Leake and Watts were agreeable to a telephone intake interview of the student.

these facts, I find that in this case, commencing on October 28, 2010, the parents withheld the student from required intake interviews and impeded the district's ability to offer a FAPE to the student; therefore, the equities do not favor an award of reimbursement for that time period (see Bettinger, 2007 WL 4208560 at *7-*8). While I can appreciate the parents' desire to prescreen the remaining possibilities for a residential setting, they cannot do so to the exclusion of the district's own efforts to complete its process of providing a placement for the student in concert with the nonpublic schools.[21]

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall, upon proof of payment provided by the parents, reimburse the parents for the student's tuition costs at New Haven for the period April 15, 2010 to October 28, 2010; and

IT IS FURTHER ORDERED that that the portion of the impartial hearing officer's decision dated September 12, 2011 that found that the parents had cooperated with the district subsequent to October 28, 2010 and ordered the district to pay the student's tuition costs at Sunrise, is annulled.

Dated: **Albany, New York**
December 16, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

[21] If the parents remained dissatisfied with the district's selection of a particular residential placement for the student, once the process of selecting the nonpublic school was completed, they would have remained free to decline the services and assert their claims.