The University of the State of New York

The State Education Department
State Review Officer
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No. 25-016

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gil Auslander, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition at the Big N Little: Tiferet Torah Program (Tiferet Torah Program) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative review, which related to the 2022-23 school year (Application of a Student Suspected of Having a Disability, Appeal No. 23-257). The parties' familiarity with that matter is presumed, and, therefore, the student's educational history leading up to that matter will not be recited here in detail.

Briefly, the evidence in the hearing record shows that the student attended the Tiferet Torah Program for the 2022-23 school year (10th grade) (see Parent Ex. I at p. 1). At that time, the student had not been found eligible for special education as a student with a disability and, as of August 5, 2022, the parent confirmed to the district that she did not wish to continue with a referral

of the student for special education (Dist. Ex. 1 at pp. 1-2).[1] On August 23, 2022, the student underwent a private psychoeducational evaluation (see Parent Ex. I at p. 1).

Approximately a year later, in a letter dated August 31, 2023, the parent stated that "[i]t ha[d] become clear" that the student's "academic, social, and behavioral needs . . . c[ould not] be met in a general education classroom" and requested that the district evaluate the student and place him in a full-time special education classroom for the 2023-24 school year (Parent Ex. B at p. 2). The parent further advised the district that "if these issues [we]re not timely addressed," she intended to unilaterally place the student in a private special education program for the 2023-24 school year and seek tuition funding and/or reimbursement from the district (id.).[2]

On the same date as the letter to the district, August 31, 2023, the parent signed an unconditional contract for the student to attend Tiferet Torah for the 2023-24 school year (11th grade) from September 2023 to June 2024 (Parent Ex. D at pp. 1-2, 9).[3] The student began attending the Tiferet Torah Program for the 2023-24 school year on September 1, 2023 (Parent Ex. G).

In a second letter to the district, dated October 30, 2023, identified in boldface type as a "FOLLOW UP TEN DAY NOTICE," the parent indicated that, despite her August 2023 letter, "to date" the district had not evaluated the student or "offered him any placement" (Parent Ex. C at p. 2). The parent again requested that the district evaluate the student, develop an IEP, and place him in a full-time special education classroom for the 2023-24 school year and stated that, if the district failed to address "these issues," the parent would "continue to unilaterally place" the student in the Tiferet Torah Program and seek tuition funding or reimbursement from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at pp. 1, 2). The parent asserted that, by letters dated August 2023 and October 2023, she "requested that the [district] evaluate [the student] and place him in a full-time special education classroom" for the 2023-24 school year and notified the district of her intentions to

[1] According to the parent, by letters dated July 2022, February 2023, and April 2023, she "requested an IEP and special education classroom" for the student for the 2023-24 school year and notified the district of her intentions to unilaterally place the student at Big N Little and to seek funding or reimbursement for the costs of the student's tuition from the district if the matter was not otherwise resolved (Parent Ex. A at p. 1). Letters from July 2022, February 2023, and April 2023 were not included in the hearing record in this matter; however, such letters were discussed in the prior matter involving the student, which found no basis to reverse the underlying IHO's determination that the district did not receive any of the referenced letters (Application of a Student Suspected of Having a Disability, Appeal No. 23-257; see IHO Ex. I at pp. 12-13)

[2] The parent's name is typed on the letter and, at the bottom, the letter states that the parent authorized her attorney's law firm to pursue a due process proceeding (Parent Ex. B at p. 2). The letter is accompanied by a fax cover sheet but not a fax confirmation page (see id. at p. 1).

[3] The Tiferet Torah Program at Big N Little has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see Parent Ex. E at p. 1; see also 8 NYCRR 200.1[d], 200.7).

unilaterally place the student in the Tiferet Torah Program and to seek funding or reimbursement for the costs of the student's tuition from the district if the matter was not otherwise resolved (id. at pp. 1-2). According to the parent, the district did not respond to these letters and the district "did not evaluate, create an IEP, or offer the Student a public school placement for the 2023-2024 school year" (id. at p. 2). As relief, the parent requested an order directing the district to directly fund or reimburse the parent for the costs of the student's tuition for the Tiferet Torah Program for the 2023-24 school year (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

After a prehearing conference on August 8, 2024, an impartial hearing continued before the Office of Administrative Trials and Hearings (OATH) on November 6, 2024 (see Aug. 8, 2024 Tr. pp. 1-7; Nov. 6, 2024 Tr. pp. 1-62).

In a decision dated November 26, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year because it was undisputed that the district failed to develop an IEP for the student for the 2023-24 school year (IHO Decision at p. 4). The IHO further found that the unilateral placement selected by the parent was appropriate (id. at p. 5). As to equitable considerations, however, the IHO found that the parent did not provide the district with timely notice of her concerns regarding the student's education and that this justified full denial of the parent's request for tuition funding (id.). The IHO found that the district had no obligation to evaluate the student prior to the 2023-24 school year because the parent affirmatively withdrew her request for special education services in August 2022 (id.). The IHO also indicated that the August 2023 letter was dated "on the eve of a holiday weekend and just four business days before the start of the school year" and, therefore, did not provide the district "with adequate time to address her concerns" (id.). The IHO also expressed doubts about whether the district ever received the August 2023 letter (id. at p. 5 n.2).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that equitable considerations warranted a denial of relief. The parent contends that her August 31, 2023 letter to the district was not untimely, as the district had 60 days from the date of the letter to respond and failed to do so. The parent asserts that she fully cooperated with the district and did not interfere with its obligation to provide a FAPE. Finally, the parent states that "[a]s a general rule, a school district may not argue that the equities are in its favor once it has failed to provide a FAPE or concedes that it has not." The parent requests that the district be required to fund the student's tuition for the Tiferet Torah Program for the 2023-24 school year less a portion of the tuition attributable to religious instruction.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. The district argues that, in addition to the untimeliness of the parent's August 2023 notice and the question of transmittal of such notice to the district, the hearing record also reflects that the parent had no intention of considering a public school placement. In the alternative, in the event equitable considerations are found to weigh in favor of an award of tuition funding, the district argues that such award should be reduced pro rata to reflect that, assuming the August 2023 letter was transmitted to the district and communicated a referral

of the student for special education, the district would have had 10 days thereafter to secure consent and 60 school days to arrange for the provision of special education to the student. The district also requests that such award be reduced for the portion of tuition attributable to religious instruction, consistent with the parent's request.

V. Applicable Standards

Two purposes of the 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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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; see 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 CFR 300.148).

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 R.E., 694 F.3d at 184-85).

VI. Discussion

Initially, neither party has appealed the IHO's findings that the district failed to offer the student a FAPE for the 2023-24 school year or that the Tiferet Torah Program was an appropriate unilateral placement for the student for the 2023-24 school year (see IHO Decision at pp. 4-5). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The sole issue for determination on appeal relates to the final criterion for a reimbursement award, which 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; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 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"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). 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]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The process under the New York State Education Law, the IDEA, and the implementing regulations contemplates that, upon receipt of a written request of a referral, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1]-[3]; 8 NYCRR 200.4[a][1]-[2]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). State regulations do not prescribe the form that a referral by a parent must take but do require that it be in writing (8 NYCRR 200.4[a]). Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).[4]

Leading up to the 2023-24 school year at issue, the student attended the Tiferet Torah Program (see Parent Ex. I at p. 1), and the parent knew the student had not been classified as student with a disability having informed the district in August 2022 that she did not wish to pursue a referral of the student for special education at that time (see Dist. Ex. 1); yet, prior to the August 31, 2023 letter, the parent did not effectively contact the district through her attorney during the 2022-23 school year, and there is no evidence in the hearing record that the parent attempted to directly communicate with the district, such as through email despite previously communicating with the district through this means in the past (see id.).[5]

[4] A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

[5] As noted above, in the due process complaint notice, the parent also claimed that, prior to and after her August

Just prior to the beginning of the 2023-24 school year, the parent's August 31, 2023 letter, sent to the district via facsimile, requested an evaluation of the student and a referral for special education (Parent Ex. B at p. 2).[6] Assuming the district received the parent's August 2023 communication, the district is correct that it would have had until early December 2023 to arrange for the provision of special education to the student (8 NYCRR 200.4[e][1]). However, the parent entered into an unconditional contract with the Tiferet Torah Program on the same date she contacted the district requesting an evaluation (see Dist. Ex. D at pp. 1-2). Further, the parent's notice to the district of her intent to unilaterally place the student was sent in the same letter that requested the district conduct an evaluation (Parent Ex. B at p. 2).

To be sure, that the Second Circuit has held that even when parents have no intention of placing a student in a public school program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840). However, as the IHO noted (see IHO Decision at p. 5), reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement, either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]).

With respect to the 10-day notice, the IHO is correct that the August 31, 2023 letter was not dated more than 10 business days prior to the first day the 2023-24 school year (see Parent Ex.

2022 email communication to the district that she did not want to pursue a referral of the student for special education, she sent letters to the district in July 2022, February 2023 and April 2023 (see Parent Ex. A at p. 1; Dist. Ex. 1); however, in the prior matter involving the student, it was found that the district did not receive these letters (Application of a Student Suspected of Having a Disability, Appeal No. 23-257; see IHO Ex. I at pp. 12-13). It would have tended to support a finding of unreasonableness on the part of the parent that the parent—or perhaps, more likely, the parent's attorney (see Nov. 6, 2024 Tr. p. 44)—attempted to communicate with the district in August 2023 and October 2023 via facsimile (see Parent Exs. B-C) after not having received a response from the district to earlier letters purportedly sent by facsimile, and, at least as to the October 2023 letter, after having an IHO determine in a decision dated October 13, 2023 that this method of communication via facsimile was not effective (IHO Ex. I at pp. 7, 13 [noting evidence that the letters were not received and testimony that the district had not regularly communicated with parents via facsimile since before the COVID-19 pandemic]). Nor did not parent's attorney attempt to offer proof of transmission of the August 2023 and October 2023 facsimiles at the November 6, 2024 impartial hearing despite the IHO raising a question about transmittal and despite the discussion in the prior IHO and SRO decisions that transmission confirmation reports would support the parent's claim that the facsimiles were, in fact, delivered to the district and (Nov. 6, 2024 Tr. p. 59; see IHO Ex. I at p. 13; Application of a Student Suspected of Having a Disability, Appeal No. 23-257 [issued December 20, 2023]). Ultimately, however, while the district questions transmittal of the letters in its answer on appeal, it did not claim during the impartial hearing in the present matter that it did not receive the August 2023 and October 2023 facsimiles and did not, upon the IHO's invitation, offer the district's events log for the student to demonstrate that the district did not have record of receiving the facsimiles (see Nov. 6, 2024 Tr. p. 59).

[6] Upon the IHO's request for proof that the fax number reflected on the fax cover sheets accompanying the parent's letters to the district belonged to the district (see Tr. p. 59), the parent submitted a guide published by the district related to the transition of students from early intervention to preschool services (IHO Ex. II). The guide does include the fax number at issue as a means to contact "CSE 3" along with mailing addresses, phone numbers, and email addresses (compare Parent Ex. B at p. 1, and Parent Ex. C at p. 1, with IHO Ex. II at p. 47).

B). Rather the hearing record shows that the student began attending the Tiferet Torah Program the very next day on September 1, 2023 (Parent Ex. G). The parent argues that the letter was timely given that the district failed to respond in 60 days; however, the parent does not deny that the letter was dated the less than 10 business days before the student began attending the unilateral placement for the 2023-24 school year.

Overall, the phrasing and timing of the August 2023 letter referring the student for special education reflects a lack of genuine cooperation, as the parent removed the student before the initial evaluation process had even begun (Parent Ex. B at p. 2). In preempting the district, the parent did not give the district an opportunity to engage in evaluations and review of the student's eligibility for special education before the student was removed and unilaterally placed in Tiferet Torah Program for the 2023-24 school year.

As a final matter, the parent argues that equitable considerations may not be found to weigh against her because the district failed to provide a FAPE. However, it has been held that such an argument "conflates the first and third prongs" (Mejia v. Banks, 2024 WL 4350866, at *8 [S.D.N.Y. Sept. 30, 2024]; Landsman v. Banks, 2024 WL 3605970, at *5 [S.D.N.Y. July 31, 2024]). Indeed, "[t]here would be no need for a third prong—the equities—if it were the case that a finding of a denial of FAPE and an appropriate unilateral placement (the first two prongs) precluded denial or reduction of reimbursement costs for families" (Donohue v. New York City Dep't of Educ., 2021 WL 4481344, at *10 n.4 [S.D.N.Y. Sept. 30, 2021]; Melendez v. Porter, 2023 WL 4362557, at *9 [E.D.N.Y. July 6, 2023] [noting that, even if a district conceded it denied the student a FAPE, a review of the record to separately weigh the equities is required]).

In determining that an award of tuition funding should be denied on equitable grounds, the IHO found the actions of the parent to be unreasonable (20 U.S.C. § 1412[a][10][C][iii]). Under the IDEA, courts enjoy broad discretion in considering equitable factors relevant to fashioning relief (Gagliardo, 489 F.3d 105, 112), and the courts have generally accorded similarly broad discretion to IHOs when fashioning equitable relief (L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 [D. Conn. July 7, 2017]). The IHO acted within that broad discretion in determining that a denial of relief was appropriate, after he analyzed and weighed the equities based on his review of the hearing record.

Based on the foregoing, I find insufficient basis to disturb the IHO's denial of the parent's requested relief on equitable grounds.

VII. Conclusion

Having found no basis to disturb the IHO's determination that equitable considerations warranted a denial of the parent's request for direct funding and reimbursement for the student's

tuition at the Tiferet Torah Program for the 2023-24 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 2, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER