The University of the State of New York

The State Education Department
State Review Officer
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No. 24-088

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:
Kerben Law Group, PLLC., attorneys for petitioner, by Janaya S. Kerben, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 daughter's privately-obtained special education services delivered by SPED Tutoring Services, Inc., (SPED Tutoring) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law

provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE

convened on April 4, 2022 to develop an IESP for the student with a projected implementation date of April 11, 2022 and a projected annual review date of April 4, 2023 (see Parent. Ex. B). Finding the student eligible for special education as a student with a learning disability, the April 2022 CSE recommended group special education teacher support services (SETSS) to be provided for three periods per week (id. at pp. 1, 9). On or about May 31, 2023, the parent notified the district of her intent to place the student in a nonpublic school and requested that the district continue to provide special education services to the student for the 2023-24 school year (Parent Ex. C).[1] On September 1, 2023, the parent executed a contract with SPED Tutoring for delivery of three hours per week of SETSS to the student for the 2023-24 school year at specified rates (Parent Ex. G). The contract specified that the parent was responsible for the costs of the SETSS services if the services were not otherwise paid for by the district (id.).

In a due process complaint notice, dated October 24, 2023, the parent alleged that the district "failed to provide and implement a program for the student for the 2023-24 school year" and that the student's April 2022 IESP which recommended three periods a week of SETSS continued to be the services that the student required for the 2023-24 school year (Parent Ex. A at p. 1). The parent also alleged that she could not locate a special education provider who could deliver the services to the student at the district's standard rate but had located a provider who could deliver the services at an enhanced rate (id. at p. 2). Among other relief, the parent sought an order directing the district to directly fund three periods per week of SETSS at an enhanced rate for the student's 10-month 2023-24 school year (id.).

After a prehearing conference held on December 13, 2023 and a status conference on January 3, 2024, an impartial hearing convened on January 25, 2024 before an IHO (see IHO Decision at p. 4; Tr. pp. 1-33). While the parent's representative appeared at all three dates, the district only appeared at the January 3, 2024 status conference (see Tr. pp. 1, 8, 14). The district did not submit any documentary evidence or present any testimony at the impartial hearing on January 25, 2023 (see Tr. pp. 14-46).

In a decision dated February 5, 2024, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE), failed to convene a CSE meeting, and failed to provide equitable services for the student for the 2023-24 school year (IHO Decision at pp. 9-10). The IHO further found that the parent satisfied her burden to show that the privately-obtained SETSS were tailored to meet the student's special education needs and that the student made progress (id. at p. 9). In addition, the IHO found that equitable considerations favored the parent (id.). However, the IHO declined to award the parent her requested relief of direct funding because the IHO found that the parent did not show that she lacked the financial means to pay for the student's SETSS, and instead, the IHO awarded the parent reimbursement for the costs of the SETSS for the entirety of the 2023-24 school year at a specified rate for a maximum of three periods per week (id. at p. 10).

[1] The hearing record does not contain an IESP for the 2023-24 school year, and there is no indication that the CSE convened for an annual review sometime in April 2023.

IV. Appeal for State-Level Review

The parent appeals. The parent alleges that the IHO erred by failing to award direct funding for the student's SETSS for 2023-24 school year. In an answer, the district responds to the parent's allegations and agrees that the parent's requested relief should be granted.

V. Applicable Standards

Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under the IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]).

The parent's request for district funding of privately-obtained SETSS must be assessed under this Burlington-Carter framework. Thus, 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 (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; 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]).[2] 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).

Moreover, courts have determined that it may be appropriate to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad

[2] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from SPED Tutoring (Educ. Law § 4404[1][c]).

spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

In light of this authority, SROs in the past have required parents seeking direct funding relief to show that parents lacked the financial resources to pay the costs of the nonpublic school tuition (see, e.g., Application of a Student with a Disability, Appeal No. 11-049; Application of the Dep't of Educ., Appeal No. 11-041). However, recently, the District Court for the Southern District of New York has ruled in certain cases that such proof is not required before direct funding may be ordered (see Mondano v. Banks, 2024 WL 1363583, at *12 [S.D.N.Y. Mar. 30, 2024]; Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]). In Cohen, the court acknowledged the prior language in the decisions discussed above, noting that all of the courts which awarded direct funding "mentioned a parent's financial inability to pay tuition" (Cohen, 2023 WL 6258147, at *4, citing E.M., 758 F.3d 442 at 453 n.14; Mr. & Mrs. A, 769 F. Supp. 2d at 406; Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998]; A.R., 2013 WL 5312537, at *11). However, the court found that language about parents' financial risk, arose in "cases where the Burlington prerequisites had not yet been satisfied," whereas in instances "where it has already been established that the district has failed to provide a child with a FAPE and (2) the private educational services obtained by the parents were appropriate, an award for direct retrospective payment would merely require the district to pay 'expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen, 2023 WL 6258147, at *5, quoting E.M., 758 F.3d at 453 [internal quotations omitted]). The court further discussed the potential pitfalls of a different requirement, including "disparate requirements for parents of disabled children based on financial resources, notwithstanding the IDEA's requirement that all children with disabilities are entitled to a free education" (Cohen, 2023 WL 6258147, at *5 [emphasis in the original]).

As the court in Cohen noted, there may be disparate levels of access to tuition reimbursement relief based on parents' financial means (Cohen, 2023 WL 6258147, at *5). However, as another SRO recently observed:

> The approach of requiring proof of financial need to obtain direct funding of private school tuition, instead of reimbursement, seemed the middle ground that permitted more equitable access to this type of relief. But doing away with the requirement for showing financial

> need seems to most directly benefit parents [who] have financial means rather than broadening access to the relief to parents of less means as administrative hearing officers in due process proceedings were already routinely providing direct funding relief to those who lacked the resources to pay the tuition and seek reimbursement.

(see Application of a Student with a Disability, Appeal No. 23-216). Nevertheless, given the shift in authority within the District Court for the Southern District of New York in favor of awarding direct payment, appropriate equitable relief may under certain circumstances include direct funding notwithstanding a lack of evidence about a parent's financial need, so long as there is evidence of financial risk. The district explained its concerns to the court in Mr. & Mrs. A, arguing that private schools and agencies who absorb the risks would artificially inflate costs beyond reasonable market rates and the court responded that "where there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (Mr. & Mrs. A, 769 F. Supp. 2d at 429-30).

VI. Discussion

A review of the allegations in the parent's appeal, together with the district's answer, reveals that the parties generally agree that the IHO's decision contained an error with respect to the relief ordered (see Req. for Rev. pp. 1, 3-5; Answer ¶ 5).[3] In support of her argument that the IHO erred in denying her request for direct funding for the SETSS, the parent cites the recent decision in Cohen and argues that the contract she submitted into evidence demonstrates that she incurred financial risk to obtain SETSS services (Req. for Rev. at pp. 4-6.). The parent's contract with SPED Tutoring indicates the parent "would be held responsible" if the district did not pay for the services (see Parent Ex. G). In its answer, the district did not dispute the parent's argument that she is entitled to direct payment, stating in pertinent part that "[t]he IHO erred in denying the [p]arent's request for direct funding of the requested services and thus the SRO should modify the IHO's order" (Answer ¶ 5). As a result, the district "respectfully request[ed] that the Office of State Review sustain the petitioner's appeal" (id. at p. 3).

Based on the parties' assertions on appeal, neither party disputes that the IHO's decision should have included the parent's requested relief for an order directing the district to fund the student's SETSS for three periods per week, at the requested rate for the 2023-24 school year (see generally Req. for Rev.; Answer).

[3] The district does not appeal the IHO's findings that it denied the student a FAPE for the 2023-24 school year, that the parent demonstrated that the privately-obtained SETSS were appropriate for the student, and that equities favored the parent. Therefore, these determinations 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]).

VII. Conclusion

Given the parties' respective positions, the necessary inquiry is at an end an no further analysis of issues is required.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 5, 2024, is modified to require that upon, proof of delivery, the district directly fund the costs of up to three periods per week of SETSS delivered to the student by SPED Tutoring during the 2023-24 school year.

Dated: **Albany, New York**
May 14, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER