



The University of the State of New York

The State Education Department State Review Officer

No. 07-093

**Application of a CHILD WITH A DISABILITY, by her parent,
for review of a determination of a hearing officer relating to the
provision of educational services by the Board of Education of
Valley Stream Central High School District**

Appearances:

Sanford S. Stevens, PC, attorney for petitioner, Sanford S. Stevens, Esq., of counsel

Guercio & Guercio, attorney for respondent, Tara E. Kahn, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which dismissed with prejudice her July 2007 amended due process complaint notice seeking tuition reimbursement for her placement of her daughter at Winston Preparatory School (Winston) for the 2005-06 school year. The appeal must be sustained.

At the time that petitioner re-filed her due process complaint notice in March 2007, the student was enrolled in Winston (Application of the Dep't of Educ., Appeal No. 07-046 at p. 1; Application of a Child with a Disability, Appeal No. 07-066 at p. 2).¹ Winston has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's eligibility and classification as a student with a speech-language impairment are not in dispute in this proceeding (Pet. Ex. D at p. 2; see 8 NYCRR 200.1[zz][11]).

The procedural history surrounding the instant case is complex. On August 18, 2005, petitioner commenced an impartial hearing seeking tuition reimbursement for Winston for the 2005-06 school year from respondent's district (Pet. Ex. C at p. 16; Pet. ¶ 6). On September 16, 2005, an

¹ The student's educational history is set forth in Application of the Dep't of Educ., Appeal No. 07-046 and will not be repeated here.

impartial hearing convened before the first impartial hearing officer (Impartial Hearing Officer 1) (Pet. Ex. C at p. 16). On November 2, 2005, petitioner withdrew her request for an impartial hearing (id.).

By letter dated September 25, 2006 to Impartial Hearing Officer 1, petitioner renewed her request for an impartial hearing for tuition reimbursement for Winston (Pet. Ex. A at p. 2).² By letter dated October 8, 2006, Impartial Hearing Officer 1 declined jurisdiction in the matter against respondent and advised petitioner that because she had withdrawn her due process complaint notice, the matter had been marked "closed" (id.).

By due process complaint notice dated October 7, 2006, petitioner requested an impartial hearing seeking tuition reimbursement for Winston for the 2005-06 and 2006-07 school years (Pet. Ex. B at p. 10; see Application of the Dep't of Educ., Appeal No. 07-046).³ An impartial hearing was held in January 2007 before a newly appointed impartial hearing officer (Impartial Hearing Officer 2). By corrected decision dated March 26, 2007, Impartial Hearing Officer 2 determined that, with respect to the 2005-06 school year, petitioner failed to establish that the student resided in the school district against whom petitioner had filed her due process complaint notice and accordingly, denied her request for tuition reimbursement for Winston for the 2005-06 school year (Pet. Ex. B at p. 4). However, with respect to petitioner's request for tuition reimbursement for Winston for the 2006-07 school year, Impartial Hearing Officer 2 found that the school district in that case had denied the student a free appropriate public education (FAPE),⁴ that Winston was an appropriate placement, and that equitable considerations supported her claim for tuition reimbursement (id. at pp. 6-7). The school district appealed the March 2007 decision to a State Review Officer (Application of the Dep't of Educ., Appeal No. 07-046).

By due process complaint notice dated March 27, 2007, petitioner renewed her request for an impartial hearing against respondent seeking tuition reimbursement and related costs for Winston with respect to the 2005-06 school year (Pet. Ex. A at p. 2). A third impartial hearing officer (Impartial Hearing Officer 3) was appointed. On April 13, 2007, respondent moved to dismiss petitioner's due process complaint notice on the grounds of insufficiency, among other things (Pet. Ex. D at p. 2). By letter dated May 3, 2007, Impartial Hearing Officer 3 granted petitioner leave to amend the March 2007 due process complaint notice by May 21, 2007 (Pet. Exs. A. at p. 2; D at p. 3). Although petitioner asserted that on May 15, 2007 she served an amended due process complaint notice by regular mail, neither respondent nor Impartial Hearing Officer 3 received petitioner's amended due process complaint notice (Pet. Ex. A at p. 2; Pet. ¶ 15). Consequently, by

² It is not clear from the hearing record whether this request for tuition reimbursement for Winston pertained to the 2005-06 school year.

³ Petitioner's October 7, 2006 due process complaint notice was not filed against respondent, but was filed against another school district.

⁴ The term "free appropriate public education" means special education and related services that-
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. § 1401[9]).

decision dated May 31, 2007, Impartial Hearing Officer 3 dismissed petitioner's due process complaint notice without prejudice for failure to comply with her May 21, 2007 order (Pet. Ex. A at p. 2).

On June 7, 2007, petitioner filed an amended due process complaint notice against respondent seeking tuition reimbursement for Winston for the 2005-06 school year (Answer Ex. B at p. 2). A fourth impartial hearing officer (Impartial Hearing Officer 4) was appointed. In response to petitioner's June 2007 complaint, respondent moved to dismiss on the grounds that it failed to comply with the statutory notice requirements as set forth by the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) (*id.*).⁵

On June 13, 2007, Application of the Dep't of Educ., Appeal No. 07-046 was issued. That decision annulled Impartial Hearing Officer 2's March 2007 decision in its entirety. It found that Impartial Hearing Officer 2 erred in determining that petitioner's October 2006 due process complaint notice complied with the IDEA's sufficiency requirements and that Impartial Hearing Officer 2 erred in permitting new issues to be raised during the impartial hearing (see Application of the Dep't of Educ., Appeal No. 07-046).

By decision dated June 22, 2007, Impartial Hearing Officer 4 dismissed petitioner's June 2007 amended due process complaint notice on the grounds of insufficiency (Answer Ex. B at p. 3). Despite her decision to dismiss the June 2007 due process complaint notice, Impartial Hearing Officer 4 granted petitioner leave to amend the June 2007 due process complaint notice until July 6, 2007 (*id.*). On July 4, 2007, petitioner filed a second amended due process complaint notice before Impartial Hearing Officer 4 (Answer Ex. C).⁶

By decision dated July 16, 2007, Impartial Hearing Officer 4 dismissed petitioner's July 4, 2007 amended due process complaint notice with prejudice (Pet. Ex. A at p. 8). She concluded that based upon the principles of collateral estoppel and res judicata, petitioner was precluded from claiming that she was a resident of respondent's district (*id.* at p. 7). Impartial Hearing Officer 4 further found that, since August 2005, the instant case had been brought before four different

⁵ A due process complaint notice must meet the requirements of federal and state law relating to the sufficiency of the content of the complaint (see 20 U.S.C. § 1415[b][7][A]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). A due process hearing may not proceed unless the due process complaint satisfies the sufficiency requirements (see 20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]). In pertinent part, a due process complaint notice shall include the name and address of the child and the name of the school which the child is attending, a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem (20 U.S.C. § 1415[b][7][A][ii], 34 C.F.R. § 300.508[b], 8 NYCRR 200.5[i][1]). The Senate Report pertaining to this new amendment to the IDEA noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (*id.*).

⁶ Petitioner refers to the second amended due process complaint notice dated July 4, 2007 as the "Final Amendment to Request for Impartial Hearing" (Answer Ex. C).

impartial hearing officers in two different jurisdictions (id.). She correctly noted that State Review Officers have consistently taken a strong position against improper acts of judge shopping by either school districts or parents (id.).

This appeal ensued. Petitioner asserts that the Impartial Hearing Officer 4 erred in dismissing her July 2007 amended due process complaint notice on the grounds of collateral estoppel and res judicata. Respondent submitted an answer with affirmative defenses requesting that the petition be dismissed in its entirety.

The impartial hearing officer dismissed the instant matter based on principles of collateral estoppel and res judicata (IHO Decision at p. 7). For reasons set forth below, petitioner's appeal must be sustained. The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450 at *6 [N.D.N.Y. Dec. 19, 2006]; Application of a Child with a Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099).

The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

(In re Hunter, 4 N.Y.3d 260, 269 [2005]).

"[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] [quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450 at *6). Here, the impartial hearing officer found that petitioner was collaterally estopped from claiming that she was a resident of respondent's district in light of a prior decision of an impartial hearing officer (IHO Decision at p. 7; Pet. Ex. B at p. 4). The impartial hearing officer noted that petitioner did not appeal the prior ruling to a State Review Officer (IHO Decision at p. 7). However, the decision was appealed and a State Review Officer annulled the prior impartial hearing officer's order in its entirety thus giving petitioner leave to litigate her claims on the merits (see Application of Dep't of the Educ., Appeal No. 07-046). As a result, principles of res judicata and collateral estoppel do not apply in this matter.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated July 16, 2007 is hereby annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, within 30 days from the date of this decision respondent shall schedule a new impartial hearing before the impartial hearing officer, who issued the decision that is the subject of this appeal, for a determination of petitioner's claims with respect to the 2005-06 school year; and

IT IS FURTHER ORDERED that, if the impartial hearing officer who issued the decision that is the subject of this appeal is not available to conduct the new impartial hearing, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
 September 24, 2007

PAUL F. KELLY
STATE REVIEW OFFICER