



The University of the State of New York

The State Education Department State Review Officer

No. 07-110

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the North Colonie Central School District

Appearances:

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorney for respondent, Kenneth S. Ritzenberg, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which determined that the educational program respondent's Committee on Special Education (CSE) recommended for their son for the 2006-07 school year was appropriate. Respondent cross-appeals those portions of the impartial hearing officer's decision which denied its motion to dismiss for lack of jurisdiction and directed respondent's CSE to reconvene to consider the student's current functional skills. The appeal must be dismissed. The cross-appeal must be sustained.

At the commencement of the impartial hearing, the student attended respondent's high school in a combination of regular education and self-contained classrooms with the assistance of a full-time 1:1 aide, and related services in accordance with his 2006-07 individualized education program (IEP), dated April 5, 2007 (Tr. pp. 151-53; see IHO Ex. I at pp. 5, 16, 29; see also Dist. Ex. 18 at pp. 1-3; Parent Exs. D; FF at pp. 1-3).^{1, 2} The student's eligibility for special

¹ It should be noted that the April 5, 2007 IEP included in both parties' exhibits bears a "meeting date" of "August 7, 2006" (Dist. Ex. 18 at p. 1; Parent Ex. FF at p. 1). It was explained during the impartial hearing that the "August 7, 2006" date was a computer error that carried over onto all of the IEPs drafted for the student during the 2006-07 school year (Tr. pp. 928-34, 958; see also Tr. p. 70; Dist. Ex. 17 at p. 1).

² Although petitioners' due process complaint notice, dated April 2, 2007, requested that their son continue in his pendency placement as described in his 2004-05 IEP, petitioners explained during the impartial hearing that they did not want the impartial hearing officer to return their son to that pendency placement (Tr. pp. 151-53; see Parent Ex. DD at p. 2).

education programs and services and classification as a student with autism are not in dispute in this appeal (see 8 NYCRR 200.1[zz][1]). The student's educational history is set forth in a recent appeal, Application of a Child with a Disability, Appeal No. 06-136, dated February 7, 2007, and will not be repeated here.³ The facts that form the basis of the instant appeal arose shortly after respondent received the February 7, 2007 State Review Officer decision.

By letter dated March 6, 2007, respondent invited petitioners to attend a CSE meeting on March 26, 2007 to review and discuss the enclosed draft copy of the student's proposed 2006-07 IEP, which memorialized respondent's "compliance to the program recommendation set forth in the decisions of both the Impartial Hearing Officer and the State Review Officer" (Dist. Ex. 9 at p. 1). At the March 26, 2007 CSE meeting, respondent advised petitioners that the "purpose of the meeting was to formalize the IEP for the 2006-07 school year based on the [State Review Officer] decision" (Tr. p. 938; Dist. Ex. 10 at p. 1). Petitioners acknowledged receipt of a draft copy of the 2006-07 IEP prior to the CSE meeting (id.). The CSE reviewed the recommendations set forth in the IEP, and petitioners indicated that they "disagreed with the [State Review Officer] decision and may go to the next level" (id.; see Dist. Ex. 11). The CSE meeting concluded with an "agreement . . . [to] finalize the IEP presented" (Dist. Ex. 10 at p. 2).

On or about March 28, 2007, respondent implemented the 2006-07 IEP (see Dist. Ex. 13).⁴ Respondent advised petitioners that the Board of Education accepted the CSE's recommendations; in addition, respondent informed petitioners that since it was not aware of any pending litigation regarding Application of a Child with a Disability, Appeal No. 06-136, respondent was obligated to implement the IEP prepared at the March 26, 2007 CSE meeting, which was "consistent with decisions and orders of the Impartial Hearing and State Review Officers who have ruled in this case" (Dist. Ex. 14).⁵

By due process complaint notice dated April 2, 2007, petitioners requested an impartial hearing alleging that the 2006-07 IEP "exceed[ed] the ruling of the State Review Officer and Impartial Hearing Officer" (Parent Ex. DD at pp. 1-2).

³ Application of a Child with a Disability, Appeal No. 06-136, affirmed in all relevant respects the impartial hearing officer's decision, dated October 29, 2006, which found that respondent's recommended special education programs and services set forth in the student's 2005-06 IEPs offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (see Application of a Child with a Disability, Appeal No. 06-136; Dist. Ex. 1 at pp. 1-68). The student's 2005-06 IEPs offered the student a special education program that allowed him to attend both regular education and self-contained classrooms with the assistance of a full-time 1:1 aide and related services, but reduced the student's participation in the regular education setting as compared to the 2004-05 school year by placing the student in a self-contained classroom for social studies (Application of a Child with a Disability, Appeal No. 06-136 at pp. 4-10, 13). In addition, the student's 2005-06 IEPs added a more functional curriculum to address the student's significant social and communication needs (id. at pp. 5-8, 13).

⁴ The student's 2006-07 IEP provided for special education programs and services that concluded on or about June 22, 2007, at the end of the 2006-07 school year (Dist. Ex. 11 at p. 1).

⁵ Petitioners officially filed a complaint dated May 3, 2007, in the Northern District of New York appealing Application of a Child with a Disability, Appeal No. 06-136 (Tr. pp. 212-14; see Ritzenberg Aff. Ex. B).

On April 5, 2007, respondent convened a CSE meeting to address petitioners' concerns (Dist. Ex. 17 at p. 1). Although the April 5, 2007 CSE acquiesced in amending the March 26, 2007 IEP to accommodate petitioners' request to return the student to a regular education setting for science and to include state and local assessments for testing, the CSE advised petitioners that they would not agree to change their recommendations regarding a functional curriculum for social studies and reading and language, participation in a functional curriculum, or pull-out services for speech and counseling because the IEP would no longer be compliant with the decisions of the impartial hearing officer and Application of a Child with a Disability, Appeal No. 06-136 (id. at pp. 1-2; Tr. pp. 961-63; compare Dist. Ex. 18 at pp. 1-3, with Dist. Ex. 11 at pp. 1-5; see Dist. Exs. 17 at p. 2; 21 at p. 1). The CSE advised petitioners that their due process complaint notice remained active, a resolution session would be scheduled, and an impartial hearing officer would be appointed (Dist. Ex. 17 at pp. 2-3). By letter dated April 11, 2007, respondent notified petitioners of the resolution session scheduled for April 17, 2007, and enclosed a copy of petitioners' procedural safeguards (Dist. Ex. 19 at p. 1). The parties did not resolve this matter at the resolution session and proceeded to an impartial hearing (Dist. Ex. 21 at pp. 1-2).

On May 3, 2007, the first day of the impartial hearing, respondent presented a written motion to dismiss asserting that the impartial hearing officer lacked jurisdiction over the present matter (Tr. pp. 13-15; see Ritzenberg Aff. Ex. A at pp. 3-6; IHO Ex. I at pp. 30-32). Respondent argued that petitioners' "primary objection is the implementation of the SRO's determination" and as such, the matter should be dismissed because the impartial hearing officer lacked the authority and jurisdiction to implement a prior impartial hearing officer's decision or a State Review Officer's decision (Tr. pp. 89-99). Respondent also stated that if petitioners disagreed with Application of a Child with a Disability, Appeal No. 06-136, then the appropriate remedy was to seek an appeal in either state or federal court (Tr. pp. 99-100; see Ritzenberg Aff. Ex. A at p. 6; IHO Ex. I at pp. 20-32). In addition, respondent argued that if petitioners disagreed with the implementation of the previous impartial hearing officer's decision or Application of a Child with a Disability, Appeal No. 06-136, then the appropriate remedy was to seek review in either state or federal court, or to file a complaint with the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) (Tr. p. 100; see Ritzenberg Aff. Ex. A at pp. 1-6).

On May 17, 2007, the second day of testimony, respondent advised the impartial hearing officer that petitioners had appealed Application of a Child with a Disability, Appeal No. 06-136, and based upon this new information, raised the issue of whether the present impartial hearing was moot (Tr. pp. 212-16). Without the impartial hearing officer making a determination on that issue, the impartial hearing continued (Tr. pp. 216-391). Toward the end of testimony, the impartial hearing officer denied respondent's motion to dismiss (Tr. pp. 391-93).

The impartial hearing continued. By decision dated August 22, 2007, the impartial hearing officer reiterated her denial of respondent's motion to dismiss, determined that respondent did not "inappropriately" change the student's classes, denied all of petitioners' requested relief, and directed respondent's CSE to reconvene to consider updated information regarding the student's functional curriculum (IHO Decision at pp. 5-22).

On appeal, petitioners assert that the impartial hearing officer erred in her decision and request that a State Review Officer find that respondent denied their son a FAPE by failing to provide credit bearing courses, failing to provide an IEP that addressed the student's unique needs, and failing to provide transitional support services. As relief, petitioners seek tutoring services to assist their son's access to the Regents curriculum and for respondent to prepare an IEP that offers exposure to the "regular High School education curriculum" in English and social studies.

In its answer, respondent contends that the impartial hearing officer correctly found in favor of respondent and properly denied all of petitioners' requested relief. However, respondent cross-appeals those portions of the impartial hearing officer's decisions that denied its motion to dismiss for lack of jurisdiction and directed respondent's CSE to reconvene to consider updated information regarding the student's functional curriculum because the record was devoid of evidence to establish that the student's functional skills had "appreciably changed" since the conclusion of the former impartial hearing.

I will first address respondent's cross-appeal. After a review of the entire hearing record, I find that the crux of petitioners' alleged concerns regarding the student's proposed 2006-07 IEP embodies an attempt to prevent respondent from implementing the previous decisions of the impartial hearing officer, dated October 29, 2006, and of the State Review Officer in Application of a Child with a Disability, Appeal No. 06-136, dated February 7, 2007, and to seek an impermissible review of a State Review Officer's decision via an impartial hearing. Petitioners, as the aggrieved party in both the impartial hearing officer's decision and in Application of a Child with a Disability, Appeal No. 06-136, could only prevent the implementation of either of those decisions by an appeal to the next level of review (20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law §§ 4404[3], 4404[4]; 8 NYCRR 200.5[m]). As respondent properly notes, an impartial hearing officer does not have the authority or jurisdiction to hear an appeal of a State Review Officer's decision (20 U.S.C. § 1415[i][1][B]; 34 C.F.R. § 300.516; Educ. Law § 4404[3]; 8 NYCRR 200.5[k][3]) and in this case, petitioners' request for an impartial hearing constituted an attempt to seek review of a State Review Officer's decision in a further attempt to thwart the implementation of that decision. Therefore, I concur with respondent that the impartial hearing officer improperly denied its motion to dismiss for lack of jurisdiction, and I annul the impartial hearing officer's decision in its entirety.⁶

⁶ In addition, respondent argued that the impartial hearing officer did not have jurisdiction to enforce or implement a previous impartial hearing officer's decision or a previous State Review Officer's decision. I find that although this argument is accurate, it is misplaced in this circumstance because petitioners did not seek to enforce a determination favorable to their position. However, it is well settled that the enforcement of an impartial hearing officer's order can properly be sought by filing an administrative complaint with the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) pursuant to applicable federal and state regulations, or in federal court under 42 U.S.C. § 1983 (see 34 C.F.R. §§ 300.151-300.153; 8 NYCRR 200.5[l]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7 [E.D.N.Y. 1998]; Blazewski v. Bd. of Educ., 560 F. Supp. 701 [W.D.N.Y. 1983]; Application of a Child with a Disability, Appeal No. 06-130; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 99-004); see generally A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005] [noting that impartial hearing officers have no enforcement mechanism of their own]; Application of a Child with a Disability, Appeal No. 04-100; Application of a Child with a Disability, Appeal No. 04-007 [recognizing that enforcement of prior orders of an impartial hearing officer and/or a State Review Officer are not properly determined by a State Review Officer]; Application of a Child Suspected of Having a Disability, Appeal No. 03-071 [holding that petitioner's enforcement remedies include judicial enforcement pursuant to

Although I have sustained respondent's cross-appeal, which is dispositive of the instant appeal, I have reviewed the merits of petitioners' appeal and find that the substantive portion of this appeal has now been rendered moot. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes are moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations and is severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (*id.*). In the instant case, the IEP challenged on appeal provided for special education programs and services to conclude on or about June 22, 2007, which has since expired, and the 2006-07 school year has ended. Moreover, an appeal from an impartial hearing officer's decision regarding a student's IEP may become moot because the IEP has been replaced (Robbins v. Maine Sch. Admin. Dist. No. 56, 807 F. Supp. 11 [D. Me. 1992]; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 93-27). In light of the absence of any live controversy relating to the relief requested by petitioners on appeal, I find that even if I were to make a determination that the program offered to the student for the 2006-07 school year was inappropriate, in this instance, it would have no actual effect on the parties. Consequently, petitioners' claims have been rendered moot by the passage of time, as the 2006-07 IEP has expired. Accordingly, petitioners' claims will not be further addressed here. A State Review Officer is not required to make a determination which will have no actual impact upon the parties

CPLR Article 78, an action in federal court, or VESID administrative complaint procedure]; Application of a Child with a Disability, Appeal No. 01-086 [holding that petitioner's enforcement request was not properly before a State Review Officer; petitioner's remedy was to seek judicial enforcement of the impartial hearing officer's tuition reimbursement award]; Application of the Bd. of Educ., Appeal No. 99-4 [holding that respondent's remedy was to seek enforcement in state or federal court] [citing Blazejewski, 560 F. Supp. 701; A.T., 1998 WL 765371).

(Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Therefore, even without addressing respondent's cross-appeal, I would have dismissed petitioners' appeal as moot.

I have reviewed the parties' remaining contentions and find that in light of my determinations, I need not reach them or they are without merit.

THE APPEAL IS DISMISSED. THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled in its entirety.

Dated: Albany, New York
November 21, 2007

PAUL F. KELLY
STATE REVIEW OFFICER