



The University of the State of New York

The State Education Department State Review Officer

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No. 09-065

Application of a STUDENT WITH A DISABILITY, by his parents for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, Lauren A. Baum, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that it was not the responsibility of the district to continue to fund the provision of the applied behavioral analysis (ABA) services sought by the parents for their son for the 2008-09 school year.¹ The appeal must be dismissed.

At the time of the impartial hearing, the student was attending fourth grade at Yeshiva Torah Vodaath at the parents' expense (Tr. pp. 357, 383-84). He was receiving related services of speech-language therapy, occupational therapy (OT), and services the parents characterized as special education itinerant teacher (SEIT)/special education teacher support services (SETSS)/ABA (Pet. ¶ 13).² The student's related services have been paid for by the district for

¹ In their due process complaint notice dated September 15, 2008, the parents stated that they sought continuation of "S.E.I.T./S.E.T.S.S./A.B.A. services" (Parent Ex. A at p. 3). The impartial hearing officer concluded in his decision that what the parents actually sought was the continuation of ABA services (IHO Decision at p. 9). This determination does not appear to be at issue on appeal, although I note that in their petition the parents again refer to the services sought as "S.E.I.T./S.E.T.S.S./A.B.A. services" (Pet. ¶ 80).

² The Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

the 2008-09 school year pursuant to pendency (Tr. pp. 380, 431, 436-37). As the parties' familiarity with the student's educational history is presumed, it will not be discussed here in detail. The student's eligibility for special education services as a student with autism is not in dispute in this appeal (Dist. Exs. 1 at p. 1; 7 at p. 1; see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

The district's committee on special education (CSE) met on June 19, 2008 and recommended that the student be placed in an 8:1 general education class with SETSS in and out of the classroom for ten periods per week, individual OT twice per week for 45 minutes, individual speech-language therapy four times per week for 45 minutes, individual counseling once per week for 30 minutes, group counseling once per week for 30 minutes, and an individual crisis paraprofessional in and out of the classroom daily for 50 minutes (Dist. Ex. 1 at pp. 1, 14, 16). The CSE recommended that the student not participate in a 12-month school year, but that he receive speech-language therapy, OT, and counseling for July and August 2008 (id. at p. 1).

The district provided the parents with a final notice of recommendation (FNR) dated June 25, 2008, stating that the student was recommended to receive SETSS with related services of speech-language therapy, OT, counseling, and a crisis paraprofessional (Dist. Ex. 4). The FNR identified a specific public school as a placement for the student for the 2008-09 school year (id.).

In a due process complaint notice dated June 27, 2008, the parents requested an impartial hearing for the student relative to summer 2008 (Parent Ex. I). Among other things, the parents alleged that the student's June 19, 2008 individualized education program (IEP) was not reasonably calculated to provide the student with meaningful educational benefits and prevent regression, and that it failed to provide an appropriate educational program for a 12-month school year (id. at p. 1). As a resolution, the parents proposed that the district provide the student with "SEIT/SETSS/ABA" services for five hours per week during summer 2008, in addition to the already recommended ten hours per week during the ten-month school year (id. at p. 3). The parents also requested that they receive related service authorizations (RSAs) for the OT and speech-language therapy recommended by the CSE and that the "SEIT/SETSS/ABA" services be "provided/funded" by the district at the providing agency's rate of pay for such services (id.).

The CSE reconvened on June 30, 2008 in response to the parents' request for summer services and again recommended that the student be placed in an 8:1 general education class with SETSS for ten periods per week, individual OT twice per week for 45 minutes, individual speech-language therapy four times per week for 45 minutes, individual counseling once per week for 30 minutes, group counseling once per week for 30 minutes, and an individual crisis paraprofessional in and out of the classroom daily for 50 minutes (Dist. Ex. 7 at pp. 1, 14, 16). The CSE changed its recommendation for summer 2008 to include SETSS for five periods per week in addition to the previously recommended speech-language therapy, OT, and counseling for July and August 2008 (id. at p. 1).³

³ The impartial hearing officer noted in his May 7, 2009 decision that he considered the recommendations by the CSE on June 19, 2008 as establishing the student's education program for the 2008-09 school year and that there was no need to review the recommendations made by the CSE on June 30, 2008 as it related to adding "ABA services" to the student's summer 2008 educational program (IHO Decision at p. 5). This determination is not at issue in this appeal.

In a July 21, 2008 response to the parents' June 27, 2008 due process complaint notice, the district alleged that the CSE met on June 30, 2008 and held a review for the student (Parent Ex. J). The district stated that the CSE recommended SETSS for five periods per week in addition to OT, speech-language therapy, and counseling for July and August 2008, that a placement was offered for the student at a public school in a June 25, 2008 FNR, and that the placement in the FNR was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at pp. 2-3).

In a second due process complaint notice dated September 15, 2008, the parents requested an impartial hearing for the student relative to the 2008-09 school year (Parent Ex. A). Among other things, the parents alleged that neither the student's June 19, 2008 IEP nor his June 30, 2008 IEP were reasonably calculated to provide him with meaningful educational benefits and prevent regression, and that both IEPs failed to provide him with an appropriate educational program (id. at p. 1). As a resolution, the parents proposed that the district continue to provide the student with "SEIT/SETSS/ABA" services for five hours per week during summer 2008 and ten hours per week during the ten-month school year, speech-language therapy three times per week for 45 minutes, and OT twice per week for 45 minutes (id. at p. 3). The district listed the student's current school as Yeled v'Yalda (service provider) and Yeshiva Torah v'Daas (school) (id.).

In a September 22, 2008 response to the parents' September 15, 2008 due process complaint notice, the district alleged, among other things, that the CSE recommended SETSS for five periods per week with related services for summer 2008 and ten periods per week with related services during the 2008-09 school year, that ABA services were not necessary for the student to obtain educational benefit, and that the placement offered in the June 25, 2008 FNR was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 13).

An impartial hearing convened on October 16, 2008 and concluded on March 13, 2009 after four days of testimony as a result of the parents' September 15, 2008 due process complaint notice (Tr. pp. 1, 13, 205, 291). The impartial hearing officer issued an interim order on pendency dated October 17, 2008, stating that the parties agreed that during the pendency of the proceeding the student would receive individual OT twice per week for 30 minutes per session by Yeled v'Yalda, individual speech-language therapy three times per week for 30 minutes per session by Yeled v'Yalda, and ten hours of "Special Education Itinerant Teacher (SEIT) Applied Behavior Analysis (ABA) services" per week (Parent Ex. B at p. 4).⁴ By decision dated May 7, 2009, the impartial hearing officer determined that the district committed procedural violations which did not rise to a level of a denial of a free appropriate public education (FAPE) to the student (IHO Decision at p. 7). The impartial hearing officer then determined that the program offered by the district was substantively inappropriate and therefore denied the student a FAPE. However, the impartial hearing officer further found that it was not the responsibility of the district to continue to fund ABA services to the student and that the absence of those services did

⁴ I note that an impartial hearing relating to this student also convened on July 17, 2008 pursuant to the parents' June 27, 2008 due process complaint notice and resulted in an Interim Order on Pendency issued by a different impartial hearing officer and dated August 4, 2008 (Parent Ex. G). That order is not at issue in this appeal.

not necessarily amount to a denial of a FAPE to the student (id. at pp. 8-11). The impartial hearing officer ordered that the parents' due process complaint be dismissed (id. at p. 11).

The parents appeal the portion of the impartial hearing officer's decision that found that it was not the responsibility of the district to continue to fund ABA services to the student and that the absence of those services did not necessarily amount to a denial of a FAPE to the student. The parents allege, among other things, that the conclusions drawn by the impartial hearing officer were both improper and incorrect, that procedural errors amounted to a denial of a FAPE to the student, that several substantive matters amounted to a denial of a FAPE to the student, and that the impartial hearing officer's finding that the program chosen by the parents was inappropriate was based on an incorrect standard. The parents seek reversal of the part of the impartial hearing officer's decision that found that continued provision of the student's "SEIT/SETSS/ABA" services is not appropriate, that it is not the responsibility of the district to continue to fund the student's ABA services, and that the absence of those services does not amount to a denial of a FAPE to the student. The parents seek a finding that the district failed to offer the student a FAPE, that the parents' request for ten hours of "SEIT/SETSS/ABA" services was appropriate, and that a weighing of equitable considerations supports the parents' request.

In its answer, the district denies many of the parents' allegations. The district requests that this matter be dismissed as moot because the student received the requested services during the 2008-09 school year pursuant to pendency or, alternatively, that the parents' request for relief be denied on the grounds that the education program requested is inappropriate and/or because the equities do not support the parents' claim.

The parents replied to the district's answer, alleging that their claims are not moot and stating, among other things, that they retain a "personal interest" in the outcome of the litigation and that there is a reasonable expectation that the deprivation of the student's educational services are capable of repetition yet evading review.

At the outset, I will address whether the parents' claims are now moot. I note that the parents have already received all of the relief they were seeking at the impartial hearing and are seeking on appeal under pendency. 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]; Patskin v. Bd. of Educ., 583 F.Supp.2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; Application of a Student with a Disability, Appeal No. 09-032; Application of a Student with a Disability, Appeal No. 09-003; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of a Student with a Disability, Appeal No. 09-003; Application of the Dep't of Educ., Appeal No. 08-044; 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 (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989];

Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; 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, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

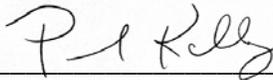
The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). 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]; see Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-15 (1980); Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). 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 (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the parties' dispute over the services offered by the district for the 2008-09 school year. I find that even if I were to make a determination that the ABA services requested by the parents for the 2008-09 school year were appropriate, in this instance, it would have no actual effect on the parties. The 2008-09 school year expired on June 30, 2009, and the student has received such services throughout the 2008-09 school year by virtue of pendency (Parent Ex. B). Accordingly, the parents' claims for the 2008-09 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; 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). Additionally, the exception alleged by the parents does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). In considering the parents' argument that the exception does not apply, I note that since he began receiving ABA services the student has made progress such that his need for those services has decreased (Pet. ¶ 23). Specifically, the parents allege that the amount of services that the student needs has decreased from 35 hours per week when he initially began receiving services to ten hours per week at the time of this appeal (id.). There is no indication in the hearing record that the student's needs next year, and the services necessary to meet those needs, will be similar to the needs and services identified and sought in this action. Rather, the hearing record demonstrates that the student's needs and the

services necessary to meet those needs have been changing such that it would be speculative to project what the student's needs will be for the next school year, what services and what level of services will be needed to address those needs, and whether or not the parents and the district will be in disagreement over the student's program (id.). Therefore, I am not persuaded that this matter is capable of repetition. Under the circumstances presented here, I decline to review the merits of the parents' appeal and it is not necessary to discuss the impartial hearing officer's rationale for reaching his determination on the merits of the parents' claims for the 2008-09 school year.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
July 23, 2009



PAUL F. KELLY
STATE REVIEW OFFICER