



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-044

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Westbury Union Free School District

Appearances:

Jaspan Schlesinger LLP, attorneys for respondent, Carol A. Melnick, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which granted respondent's (the district's) motion to dismiss the parent's amended due process complaint notice. The appeal must be sustained in part.

Background

Due to the nature of the issues presented in this appeal, a detailed recitation of the student's educational history is unnecessary. Briefly, the Committee on Special Education (CSE) met regarding the student on August 20, 2008 and determined her to be ineligible to receive special education programs and related services as a student with a disability (Dist. Ex. 2 at ¶ 10; Parent Exs. A at ¶ 9; C at p. 2). According to the parent, at the time of the August 20, 2008 CSE meeting, he also initiated a referral of the student to the district for a determination of her eligibility for services and accommodations under section 504 of the Rehabilitation Act of 1973 (section 504)¹ (Parent Ex. A at ¶¶ 10-11). It is undisputed that the student graduated from the district high school with a Regents diploma in June 2010 (Dist. Ex. 1 at Mem. of Law at p. 1; Parent Ex. A).

Due Process Complaint Notice

The parent filed a due process complaint notice dated August 19, 2010 in which he alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. B). The parties participated in multiple prehearing telephone conferences

¹ 29 U.S.C. §§ 701-796(l) (1998); 34 C.F.R. § 300.104.

(IHO Exs. 8; 10-11; 13-15).² One of the prehearing telephone conferences related to the parent's application to amend his due process complaint notice, which application was granted by the impartial hearing officer (IHO Ex. 11). The impartial hearing officer also set a tentative motion schedule for a potential motion to dismiss by the district (id. at p. 3).

The parent filed an amended due process complaint notice dated October 29, 2010 (Parent Ex. C). The parent alleged that the student was "deemed gifted," had received diagnoses of an attention deficit hyperactivity disorder (ADHD) and an oppositional defiant disorder (ODD), and that the district erred in determining that she was ineligible for special education programs and related services under the Individuals with Disabilities Education Act (IDEA) (id. at p. 2). The parent alleged that he did not receive a copy of the procedural safeguards notice, and that the district did not arrange for special education programs and services within 60 school days of receiving the parent's consent to evaluate the student (id.). The parent further alleged, among other things, that the August 20, 2008 CSE meeting lacked the participation of an individual with knowledge about a "[g]ifted ADHD student;" that a referral under section 504 from the CSE was not timely articulated; that a complete battery of comprehensive evaluations was never conducted; that staff members serving on both the CSE and section 504 committee misrepresented the student's psychiatric evaluation, social development needs, and levels/abilities in academic/educational achievement; that there were multiple section 504 procedural violations; that the district did not provide the student with equal educational opportunities regardless of her disability; and that, as a result, the student did not receive a FAPE (id. at pp. 2-3).

As for a proposed resolution, the parent requested that the district (1) be determined to have been in violation of section 504 and/or the IDEA; (2) commit to disciplinary action against staff involved in the section 504 and IDEA violations; (3) amend information that is inaccurate, misleading, or violates the privacy or other rights; (4) "reimburse for past, and provide or pay for future . . . related educational aids and services not provided by the post secondary institution;" (5) pay for or reimburse attorneys' fees; (6) reimburse and pay for the student's education until she reaches 21 old (4 years of college); and (7) pay compensatory damages (Parent Ex. C at p. 4).

Impartial Hearing Officer Decision

Subsequent to the parent filing the amended due process complaint notice, the district made a motion to dismiss (Dist. Ex. 1; Parent Ex. C; see also Dist. Ex. 2; Parent Ex. A). The bases for the district's motion to dismiss was that the parent's complaint was not timely, that the parent failed to state a claim upon which relief could be granted, and that the impartial hearing officer does not have jurisdiction to grant the relief requested by the parent (Dist. Ex. 1). The parent submitted papers opposing the district's motion to dismiss (Parent Ex. A). The parent argued, among other things, that the student was denied appropriate services for an extended period of time and the parent sought compensatory educational services as relief for the district's "gross negligence" (id. at ¶ 45).

² In each instance, the impartial hearing officer appropriately complied with 8 NYCRR 200.5(j)(3)(xi) which requires, in part, that "[a] transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer" (see IHO Exs. 8; 10-11; 13-15).

In a decision dated March 7, 2011, the impartial hearing officer determined the matter to be moot because the student graduated from the district's high school in June 2010 with a Regents diploma (IHO Decision at p. 8). She further determined that, even if the matter was not moot, she lacked jurisdiction to award most of the relief sought by the parent (id. at pp. 8-10). Specifically, she found that she does not have jurisdiction to (1) discipline district staff; (2) amend information that is inaccurate, misleading, or violates the privacy or other rights; (3) order the district to reimburse the parent for past, and provide for future educational aids and services not provided by the student's post-secondary institution, or reimburse and pay for the student's education until she reaches the age of 21; (4) order the district to pay compensatory damages; or (5) award attorneys' fees or other costs to a prevailing party (id.). Having determined that the parent's action is moot, the impartial hearing officer declined to address the remaining issues asserted by the district in its motion to dismiss (id. at p. 10).

Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges that it was premature for the impartial hearing officer to determine that the matter is moot since the student was not classified under the IDEA and the matter involves allegations of procedural violations of interference with the student's right to a FAPE, significant interference with the parent's right to participate in the decision-making process regarding the provision of a FAPE to the student, and the deprivation of educational benefit to the student. The parent alleges that the district committed a gross violation of the IDEA resulting in the student's denial of or exclusion from educational services for a substantial period of time. The parent further alleges that "[i]t would be an injustice to apply [a] legal analysis reserved for matters revolving around a student that had an IDEA classification when [his daughter] was a student [who] was not classified with a disability" (Pet. at p. 3). The parent also disagrees with the impartial hearing officer's interpretation of the relief sought by the parent and asserts that the impartial hearing officer does not have jurisdiction to award certain requested relief. The parent requests that the impartial hearing officer's decision be reversed.

In its answer, the district denies many of the parent's allegations. The district also asserts that the hearing record supports the impartial hearing officer's determination that the matter is moot, that the impartial hearing officer lacked jurisdiction to award most of the relief sought by the parent, and that a State Review Officer may not adjudicate matters regarding section 504. The district requests that the impartial hearing officer's decision dismissing the parent's claim be affirmed and that the parent's appeal be denied in its entirety.

The parent submitted a reply to the district's answer. In his reply, the parent alleges, among other things, that the hearing record does not support the impartial hearing officer's determinations that the underlying action was moot and that she lacked jurisdiction to award the relief sought by the parent. The parent asserts that the impartial hearing officer had denied the parent of an impartial hearing where the parent would have had the opportunity to present his argument that there has been a gross violation of the IDEA resulting in the student's denial of or exclusion from educational services for a substantial period of time. According to the parent, the student's graduation does not end the inquiry of the mootness doctrine in this case since the parent is asserting a gross violation claim.

Discussion

Mootness

First, I will address the parent's argument that the impartial hearing officer erred in dismissing the matter as moot. It is well settled that 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]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in individualized educational programs (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 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 concerning such issues arising out of school years that have 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]; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *9 [E.D.N.Y. Aug. 25, 2010]; 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, an exception provides that 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]). First, 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). Second, 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., 50 N.Y.2d at 714-15; 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; M.S., 2010 WL 3377667, at *9 [noting that each year a new determination is made based on a student's continuing development]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *4 [W.D.N.Y. Sept. 30, 2008]; 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, the parent alleges a gross violation of the IDEA and seeks an award of compensatory education.³ As explained in greater detail below, compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction (20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Thus, in this case I find that the impartial hearing officer erred in dismissing the case as moot because the parent asserted claims that may be reasonably read to encompass a request for compensatory education relief in his amended due process complaint notice.⁴ The parent should have been afforded the opportunity to be heard, clarify the nature of relief requested and, if found to have alleged a viable compensatory education claim, then the parties should have been given the opportunity to present their arguments regarding whether there has been a gross violation of the IDEA that would entitle the student to post-graduation services after the student has otherwise become ineligible for services pursuant to the IDEA.⁵ Therefore, under the circumstances in this case, I find that to the extent that the parent asserted a viable compensatory education claim, this matter has not been rendered moot (see Application of a Student with a Disability, Appeal No. 09-113; Application of the Bd. of Educ., Appeal No. 08-060; Application of a Student with a Disability, Appeal No. 08-035; Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 02-030).

Jurisdiction

Compensatory Education

Having determined that a compensatory education claim asserted by the parent would not be moot, I now turn to the parent's challenge that the impartial hearing officer erred in her alternative determination that she does "not have jurisdiction to order the District to reimburse the parent for past, and provide for future educational aids and services not provided by the Student's

³ I am not persuaded by the district's contention that the parent did not request compensatory education services in his amended due process complaint notice (see Dist. Mem. of Law at p. 14). Although the pro se parent did not expressly use the term "compensatory education," I find that the amended due process complaint notice may be reasonably read to include a request for compensatory education insofar as the parent alleged that the student was excluded from course offerings and other school resources and sought payment from the district for the provision of "related educational aids and services not provided by the post secondary institution" (Parent Ex. C at p. 4).

⁴ The hearing record does not indicate whether the parent already secured services for which he seeks reimbursement.

⁵ Although the use of summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA, they should be used with caution and are appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018). As further described below, I note that the impartial hearing officer made effective use of the summary disposition procedure for most of the parent's claims, with the exception of his compensatory education claim.

post secondary institution, or reimburse and pay for the Student's education until she reaches the age of 21" (IHO Decision at p. 9).

To the extent that the parent's claim may be read as one for compensatory education services, compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁶ 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C., 916 at 69; Burr, 863 at 1071; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Here, the fact that the student graduated does not operate as a per se jurisdictional bar that precludes an impartial hearing officer from directing the district to provide post-graduation compensatory education upon a finding of a gross violation of the IDEA (Somoza, 538 at 109 n.2, 113 n.6). Given that compensatory education is an equitable remedy within the broad forms of relief on the merits that are permissible under the IDEA (see Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100 [S.D.N.Y. Apr. 7, 2011]; see also Forest Grove v. T.A., 129 S. Ct. 2484, 2490-91, 2494 n.11 [2009]), I find that the impartial hearing officer erred in determining that she lacked the jurisdiction to award the parent relief in the form of payment for educational services (Streck v. Bd. of Educ., 2010 WL 4847481 [2d Cir. 2010] [permitting compensatory education relief in the form of reimbursement for certain services at Landmark College to the extent they were tailored to remediate the district's failure to provide services which constituted the gross denial of a FAPE]; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078, reaff'd 888 F.2d 258 [2d Cir. 1989] [upholding a remedy in the form of continued secondary education services after the student's entitlement under the statute expired]; see also Application of a Student with a Disability, Appeal No. 10-109; Application of the Bd. of Educ., Appeal No. 03-010). Accordingly I will remand the matter to the impartial hearing officer for an impartial hearing.

⁶ If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

Section 504 Claims

New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, I have no jurisdiction to review any portion of the parties' claims or the impartial hearing officer's decision regarding section 504.

Other Relief Requested

I find no reason to disturb the impartial hearing officer's findings with respect to her lack of jurisdiction to discipline district staff as interpreted by the impartial hearing officer (see 20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of a Student with a Disability, Appeal No. 08-089); amend information that is inaccurate, misleading, or violates the privacy or other rights (see 20 U.S.C. § 1417[c]; 20 U.S.C. § 1232g; 34 C.F.R. §§ 300.618-621; Application of a Student with a Disability, Appeal No. 08-106); order the district to pay compensatory damages (Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Wenger, 979 F. Supp. at 152-53; Application of a Student with a Disability, Appeal No. 08-089); or award attorneys' fees or other costs to a prevailing party (see 20 U.S.C. § 1415[i][3][B]; Application of the Bd. of Educ., Appeal No. 09-081).

Conclusion

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated March 7, 2011, which determined that the matter was moot is annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's decision dated March 7, 2011, which determined, without an impartial hearing, that she lacked jurisdiction to direct the district to provide post-graduation relief is annulled; and

IT IS FURTHER ORDERED that, unless the parties agree otherwise, the matter is remanded to the same impartial hearing officer to reconvene an impartial hearing within 30 days of the date of this decision, render findings regarding the alleged acts by the district, determine whether any such acts so found constituted a gross violation under the IDEA, and determine the extent and form of compensatory education remedy, if any, should be provided to the student; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the March 7, 2011 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed to issue a new determination which is consistent with this decision.

Dated: **Albany, New York**
 June 22, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER