



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-159

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

Appearances:

Ingerman Smith, LLP, attorneys for respondent, Joseph E. Madsen, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed the parent's due process complaint concerning the individualized education program (IEP) that respondent's (the district's) Committee on Special Education (CSE) created for the student's 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was 20 years old and had graduated from the district with a local diploma (Tr. pp. 42-43, 46, 60).¹ Prior to graduating, the student received diagnoses of Tourette's syndrome, an attention deficit hyperactivity disorder (ADHD), an obsessive compulsive disorder (OCD), and a generalized anxiety disorder (see Application of a Student with a Disability, Appeal No. 10-109). The student's relevant educational history is set forth in Application of a Student with a Disability, Appeal No. 10-109. The parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail.

Procedural Background

¹ The student had previously been admitted to Landmark College, but as of the date of the impartial hearing, was no longer attending college (Tr. p. 85).

Briefly, the parent filed a due process complaint notice dated October 30, 2009,² an impartial hearing was conducted, and decisions were rendered by an impartial hearing officer (Hearing Officer 1) and this State Review Officer (see Application of a Student with a Disability, Appeal No. 10-109 at p. 2). Application of a Student with a Disability, Appeal No. 10-109, addressed the student's 2009-10 school year based upon the parent's petition alleging violations by the district during the student's high school career prior to his graduation in June 2010 (*id.* at pp. 5, 11). The parent subsequently sought judicial review of the State Review Officer's decision in Application of a Student with a Disability, Appeal No. 10-109 in the United States District Court for the Eastern District of New York (District Court) (Tr. pp. 44-45; Answer Ex. 1).³

Due Process Complaint Notice and Response

On August 30, 2011 the parent filed a due process complaint notice, wherein she: (1) described the district's obligations under the Individuals with Disabilities Education Act (IDEA), its implementing federal and State regulations; (2) asserted that the district failed to provide the student with a free appropriate public education (FAPE) for the 2009-10 school year; (3) alleged inadequacies with the student's 2009-10 IEP; (4) alleged that the district failed to implement the student's IEP; and (5) alleged that the student's disability was looked upon by the district's staff in such a manner, which constituted "institutional bias" and negligence "of the highest order" (IHO Ex. I at pp. 1-14).⁴

The district responded to the parent's due process complaint notice on September 9, 2011, asserting, among other things, that the student had graduated with a local diploma, and that the issues raised in the parent's August 2011 due process complaint notice had already been addressed in Application of a Student with a Disability, Appeal No. 10-109 (IHO Ex. II at pp. 1, 2, 4, 5, 6).

Impartial Hearing and Decision

On October 12, 2011, the district moved to dismiss the parent's due process complaint notice, alleging that the parent's claims had been decided previously and accordingly, were barred by res judicata (Dist. Ex. 1). The parties convened before the impartial hearing officer (Hearing Officer 2) on October 18, 2011 (Tr. pp. 1-89). Hearing Officer 2 heard argument from

² The decision in Application of a Student with a Disability, Appeal No. 10-109 misidentified the date of the parent's due process complaint notice as November 13, 2009, which was, in fact, the date of the district's response to the parent's due process complaint notice.

³ A copy of the civil complaint filed with the United States District Court for the Eastern District of New York was submitted with the answer.

⁴ The district submitted the following documents on appeal to the State Review Officer, but they were not identified or marked as exhibits during the impartial hearing: (1) the parent's due process complaint notice dated August 30, 2011; and (2) the district's response to the parent's due process complaint notice dated September 9, 2011, which included attachments consisting of a copy of Application of a Student with a Disability, Appeal No. 10-109 (submitted into evidence at the hearing and marked as Dist. Ex. 2) and a copy of the student's June 3, 2009 IEP. In this decision, I will refer to these documents as Impartial Hearing Officer Exhibits I and II, respectively (see IHO Exs. I; II).

the parties regarding the district's motion to dismiss (id.). Hearing Officer 2 determined on the record, among other things, that the matters before him regarding the 2009-10 school year had been previously ruled on by a State Review Officer and had now been appealed to a District Court; therefore, he sustained the district's motion to dismiss (Tr. pp. 70, 77-78, 81-84, 87-88). Hearing Officer 2 memorialized his ruling to dismiss the case in a letter dated November 3, 2011 (IHO Decision).

Appeal for State-Level Review

The parent appeals, asserting, among other things, that Hearing Officer 2 erred in dismissing her August 2011 due process complaint notice because Hearing Officer 2 improperly determined her claims had been adjudicated in Application of a Student with a Disability, Appeal No. 10-109. She further alleges that Hearing Officer 2 erred by relying on the district's representation that the 2009-10 school year was the subject of a civil action pending in District Court. The parent argues in the alternative that if determinations had previously been made regarding the 2009-10 school year, such determinations were beyond the scope of the parent's claims underlying Application of a Student with a Disability, Appeal No. 10-109. The parent requests, among other things, reversal of Hearing Officer 2's determination and a de novo determination regarding both the appropriateness of the district's recommended 2009-10 special education program, as well as the validity of the local diploma awarded to the student, and to provide for compensatory education to include reimbursement for college tuition for the student.^{5, 6}

In its answer, the district denies the allegations asserted by the parent in her petition, asserts that Hearing Officer 2 was correct in dismissing the parent's due process complaint notice because claims related to the 2009-10 school year were decided in Application of a Student with a Disability, Appeal No. 10-109 and further, the parent's District Court complaint alleges claims that arose between "September 2005 through June 2010" (see Answer Ex. 1 at p. 4).

Applicable Standards and Discussion – Res Judicata

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 Student with a

⁵ To the extent that the petition for review in this case may be interpreted as a request to reopen, reargue, or otherwise relitigate the matters addressed in Application of a Student with a Disability, Appeal No. 10-109, I note that an application to reopen, reargue or otherwise relitigate a prior decision of a State Review Officer is expressly prohibited by State regulations (8 NYCRR 276.8[d]; see Application of the Dep't of Educ., Appeal No. 10-058; Application of the Bd. of Educ., Appeal No. 07-074; see also, Application of the Dep't of Educ., Appeal No. 10-087).

⁶ I note that in her due process complaint notice, the parent did not challenge the validity of the local diploma the student received upon graduating from high school in June 2010 (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57; but see, Application of a Student with a Disability, Appeal No. 10-109; Application of a Student with a Disability, Appeal No. 09-056 [noting that neither an impartial hearing officer nor a State Review Officer can make a determination on the academic standards required for graduation]).

Disability, Appeal No. 09-025; Application of a Student with a Disability, Appeal No. 08-093; Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 07-093; 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; see Ross v. Board of Educ. of Tp. High Sch. Dist. 211, 486 F.3d 279, 283 [7th Cir. 2007] [describing a transaction as a "common core of operative fact"]; see also Waldman v. Village of Kiryas Joel, 207 F.3d 105, 110-11 [2d Cir. 2000] [holding that plaintiff cannot avoid the preclusive effect of res judicata by splitting a claim into various suits with overlapping facts]; Cameron v. Church, 253 F. Supp. 2d 611, 620 [S.D.N.Y. 2003]). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or someone in privity with the parties; 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).

In this case, for the reasons discussed below, I find that the elements of res judicata have been met. As for the first requirement, the merits of the parent's claims regarding the 2009-10 school year were previously addressed and decided (see Application of a Student with a Disability, Appeal No. 10-109). The evidence in this proceeding shows that the parent has continued to pursue matters related to the 2009-10 school year as part of the parent's claim in District Court, which is currently pending as of the date of this decision (Answer Ex. 1 at p 4). Consequently, I find that the first element has been satisfied insofar as the parent raised these matters in the prior proceeding and, assuming for the sake of argument that she did not raise them, they could have been raised. As for the second requirement, the parent and the district were the parties in the prior impartial hearing underlying Application of a Student with a Disability, Appeal No. 10-109, as well as in the instant proceeding regarding the parent's August 2011 due process complaint notice. As for the third requirement, the parent previously sought to uphold Hearing Officer 1's determination that the district failed to offer the student a FAPE while he was at the district and requested post-graduation compensatory education relief, and the merits of the parent's claims regarding the 2009-10 school year were addressed and decided (see Application of a Student with a Disability, Appeal No. 10-109). The evidence in this proceeding shows that the parent has continued to pursue matters related to the 2009-10 school year as part of the parent's claim in District Court, which is currently pending as of the date of this decision (Answer Ex. 1 at p 4). Consequently, I find that the third element has been satisfied insofar as parent raised these matters in the prior proceeding and, assuming for the sake of argument that she did not raise them, they could have been raised. Moreover, the parent's claims raised in her August 2011 complaint at issue in this appeal regarding "institutional bias" span several years and as such, could have been raised during the prior impartial hearing (see IHO Ex. 1 at p. 14; see also Grenon, 2006 WL 3751450 at *6 [quoting Perez, 347 F.3d at 426 [2d Cir. 2003] [internal quotations omitted] ["The doctrine of res judicata precludes parties from litigating

issues that were or could have been decided in a prior proceeding"]; Heimbach v. Chu, 744 F.2d 11, 14 [2d Cir. 1984] [noting that a claim that could have been asserted under a given set of facts in a concluded action is barred from being asserted under the same set of facts in a subsequent action]; Saylor v. Lindsley, 391 F. 2d 965, 968 [2d Cir. 1968] [stating that res judicata operates to bind the parties both as to issues actually litigated and determined in the first suit, and to those grounds or issues which might have been, but were not, actually raised and decided in that action]).

In summary, I find that that the Hearing Officer 2 properly dismissed the parent's claims based on the doctrine of res judicata. However, even assuming that the matters on appeal are not barred by res judicata, the parent's request for compensatory education after the student has become statutorily ineligible for IDEA services would fail in any event.

Applicable Standards and Discussion – Compensatory Education

Within the Second Circuit, compensatory education for a student after he or she is no longer eligible because of age or graduation to receive IDEA services has been 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 (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; see also Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]). In New York State, a student with a disability is eligible for services under the IDEA until he or she receives either a local or Regents high school diploma (8 NYCRR 100.5[b][7][iii], [vi-vii]; see 34 C.F.R. § 300.102[a][3][i]; 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 school year in which he or she turns twenty-one (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; see 8 NYCRR 200.1[zz]; see also 8 NYCRR 100.9[e]; Application of a Child with a Disability, Appeal No. 04-100). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]).⁷

Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583 [S.D.N.Y. 1998]; Application of the Bd. of Educ., Appeal No. 05-037; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 [1982]; Walczak v. Florida Union Free Sch. Dist.,

⁷ It should be noted that State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

142 F.3d 119, 130 [2d Cir. 1998] [noting that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" under the IDEA] see also Application of the Dep't of Educ., Appeal No. 11-114), the receipt of which terminates a student's entitlement to a FAPE (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]; but see, 8 NYCRR 200.4[c][5] [noting that a student may still remain eligible for special education services even though he has advanced from grade to grade]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility in order for the student to qualify for an award of compensatory education (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it would appear that it would be the rare case where a student graduates with a Regents or local high school diploma and yet still qualifies for an award of compensatory education (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [D. Conn. 1997] [where student apparently graduated and received diploma prior to the district establishing the appropriate graduation requirements, court decided student had established a prima facie case of likelihood of success on the merits on a possible award of continued compensatory education]; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037).

As in Application of a Student with a Disability, Appeal No. 10-109, the hearing record in the instant matter does not present that rare case wherein a student has graduated, received a local diploma, and remains eligible for compensatory education.⁸ The hearing record demonstrates that the student received enough credits to graduate, received a local diploma, and was accepted into college (Tr. p. 81; see Dist. Ex. 2 at p. 11).⁹ There is no suggestion by the parent that any of these facts are untrue. Assuming the parent's factual allegations as true, many of which assert procedural violations only,¹⁰ I am hard pressed to find any plausible support for the proposition that with respect to the 2009-10 school year the student was excluded or denied special education programs and services for a substantial period of time such that a gross violation of the IDEA occurred warranting an award of compensatory education services beyond the student's period of entitlement for special education services and programs (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078; Application of a Student with a Disability, Appeal No. 09-056; Application of a Child with a Disability, Appeal No. 05-089; Application of a Child with a Disability, Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of Having a Disability, Appeal No. 03-094).

⁸ I note that in her due process complaint notice, the parent did not challenge the validity of the local diploma the student received upon graduating from high school in June 2010 (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57; but see, Application of a Student with a Disability, Appeal No. 09-056 [noting that neither an impartial hearing officer nor a State Review Officer can make a determination on the academic standards required for graduation]).

⁹ As noted above, at the time of this impartial hearing the student was not attending college, although he was previously accepted into Landmark College (Tr. p. 85; see Application of a Student with a Disability, Appeal No. 10-109 at p. 1).

¹⁰ One claim arguably has substantive elements insofar as the parent alleges that the transition planning conducted by the district was inadequate, but the claim references the prior proceeding (IHO Ex. I at pp. 12-13).

Conclusion

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
January 5, 2012



JUSTYN P. BATES
STATE REVIEW OFFICER