The University of the State of New York
The State Education Department
State Review Officer

No. 07-047

Application of the BOARD OF EDUCATION OF THE DEPEW UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:
Hodgson Russ LLP, attorney for petitioner, Jeffery J. Weiss, Esq., of counsel

Law Office of Andrew K. Cuddy, attorney for respondents, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Depew Union Free School District, appeals from that portion of a decision of an impartial hearing officer which found that the provision of services by petitioner's aide who was assigned to respondents' son in September and October 2005 would endanger the child and ordered petitioner not to provide the child with her services. The appeal must be sustained in part.

At the commencement of the impartial hearing on December 13, 2006, the child was six years old and receiving assistive technology consultations, coordination of services, occupational therapy, physical therapy, and speech-language therapy at home (Parent Ex. 6 at p. 1). The child's classification and eligibility for special education services as a child with orthopedic impairment are not in dispute (see 8 NYCRR 200.1[zz][9]).

The record is sparse regarding the child's early educational history. When the child was two years old, he was reportedly diagnosed as having extrapyramidal cerebral palsy by a developmental pediatrician (Tr. pp. 1392-93, 1415-16). When the child was three years old, he transitioned from receiving Early Intervention Program services to receiving services through petitioner's Committee on Preschool Special Education (CPSE) (Parent Ex. 52; Parent Aff. ¶¶ 7-8).[1] As recommended by the CPSE, the child received home instruction with special education itinerant teaching and related services for the 2003-04 school year (Parent Aff. ¶¶ 8-9). The child subsequently attended a "universal pre-K" program with related services for the 2004-05 school

[1] The citations herein to "Parent Aff." refer to an affidavit submitted by the child's mother in lieu of testimony at the impartial hearing (Tr. pp. 705-06).

year, and received home instruction with special education itinerant teaching and related services for July and August 2005 (Tr. p. 715; Parent Exs. 13, 30; Parent Aff. ¶ 11).

The child began the 2005-06 school year in a regular education kindergarten class at petitioner's elementary school, but was removed from school at approximately the end of October 2005 (Tr. pp. 707, 742; Parent Exs. 10-11; Parent Aff. ¶ 23). Petitioner's Committee on Special Education (CSE) convened in November 2005 for a program review and revised the child's IEP to provide him related services at home for the remainder of the 2005-06 school year (Parent Ex. 9). Thereafter, the child's 2005-06 IEP was revised in February and March 2006 (Parent Exs. 7-8). In June 2006, petitioner's CSE recommended that the child receive related services at home for July and August 2006 (Parent Ex. 6).

Petitioner's CSE convened on August 9, 2006 to develop an IEP for the 2006-07 school year (Parent Ex. 4). The child was described in the IEP as a student with athetoid cerebral palsy, who exhibited significant motor pathology in speech, motor and language skills (Parent Ex. 4 at pp. 3-4). The IEP indicated that the child required assistive technology devices and services, including a supportive seating wheel chair at home and school, augmentative communication device at home and at school, toileting seat, changing table, food chopped up in a blender, adaptive spoons and cups, walker, adaptive scissors, name stamp and computer access with a keyboard (id. at p. 2). According to the IEP, the child also required a one-to-one aide and adapted physical education (id. at pp. 2-3). The CSE recommended that the child be placed in a regular education kindergarten class with direct and indirect consultant teacher services (id. at p. 1). The CSE also recommended assistive technology consultation and training, coordination of services, counseling, emerging needs consult, occupational therapy, physical therapy and speech-language therapy (id. at pp. 1-2).

By due process complaint notice dated September 1, 2006, respondents requested an impartial hearing and alleged that petitioner: 1) failed to provide the child a free appropriate public education (FAPE) for the 2005-06 and 2006-07 school years;[2] 2) failed to properly evaluate the child; 3) failed to provide appropriate present levels of performance in the August 2006 IEP; 4) failed to provide appropriate goals and objectives in the August 2006 IEP; 5) failed to provide appropriate assistive technology during the 2005-06 school year; 6) failed to provide appropriate accommodations; 7) failed to provide the child with properly qualified, trained and capable service providers; 8) failed to provide transportation services to the child; 9) failed to ensure the child's safety at school; and 10) failed to include the child with his peers during physical education (Parent Ex. 2 at pp. 1-5). As relief, respondents requested, as pertinent to this appeal, the provision of

[2] 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;
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> (B) meet the standards of the State educational agency;
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> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
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> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

appropriately trained and experienced staff and a properly trained one-to-one aide with experience assisting children with extrapyramidal cerebral palsy (id. at pp. 5-6). Respondents invoked pendency to continue home instruction and related services for the child in his home during the 2006-07 school year (id. at p. 6).

The impartial hearing commenced on December 13, 2006 at which time the parties entered into a settlement agreement that resolved all of the issues in the due process complaint notice except for the issue of the qualifications, training and experience of petitioner's related service providers and the child's safety at school (Tr. pp. 8-15, 32-33; IHO Ex. I). After seven days of testimony, the impartial hearing concluded on February 9, 2007. By decision dated March 29, 2007, the impartial hearing officer found that petitioner's providers of physical therapy, occupational therapy, counseling and speech-language therapy were qualified to provide services to the child (IHO Decision at pp. 11-19). In addition, the impartial hearing officer found the entirety of the testimony of petitioner's one-to-one aide to be unworthy of belief, and further found that the provision of services by her related to wheelchair use, positioning and feeding the child would endanger the child (id. at pp. 19-20). The impartial hearing officer ordered petitioner not to provide the child with the services of the aide who was assigned to him in September and October 2005 (id. at p. 21).

Petitioner appeals and requests an annulment of that portion of the impartial hearing officer's decision which found that the provision of services by petitioner's aide would endanger the child and ordered petitioner not to provide the child with her services. Petitioner argues that the aide is qualified and trained to serve as the child's one-to-one aide, and in the event that the child returns to petitioner's elementary school, she will continue to receive additional training on a frequent and ongoing basis.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[3]

Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (Slama v. Independent Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-31; Application of a Child with a Disability, Appeal No. 97-87; Application of a Child with a Disability, Appeal No. 95-50; Application of a Child with a Disability, Appeal No. 91-19; Marple

[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

Newtown Sch. Dist., 46 IDELR 295 [SEA PA 2006]). However, administrative officers have jurisdiction to review health and safety concerns that arise in the development and review of an IEP (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Bd. of Educ. of the Oakridge Pub. Schs., 40 IDELR 274 [SEA MI 2003]; Freeport Sch. Dist. 145, 34 IDELR 104 [SEA IL 2000]).

As an initial matter, 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, 397 F.3d at 84). 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 child'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 (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]).

In this case, respondents' concerns regarding the qualifications of petitioner's staff and the safety of the child at school during the implementation of the child's 2005-06 IEP were resolved when new IEPs were formulated in which petitioner's CSE recommended home instruction with related services (Parent Exs. 6-9). Thus, no meaningful relief can be granted regarding respondents' claims regarding petitioner's implementation of the August and October 2005 IEPs, and I find that such claims are moot and the exception to the mootness doctrine does not apply (Parent Exs. 10-11). After petitioner's CSE met in August 2006 and recommended that the child be placed in its elementary school for the 2006-07 school year, respondents invoked pendency (home instruction with related services) in their due process complaint notice prior to the implementation date of the 2006-07 IEP (Parent Exs. 2, 4). When the parties settled the majority of issues in dispute at the commencement of the impartial hearing, petitioner agreed to conduct new evaluations, convene its CSE and formulate a new IEP based upon the child's updated evaluations (IHO Ex. I). Thus, respondents' claims regarding petitioner's future implementation of such an IEP had not yet accrued at the time of the impartial hearing. Accordingly, I find that it was unnecessary for the impartial hearing officer to render a decision with respect to the implementation of the 2006-07 IEP.

In addition, a brief discussion is warranted of the video submitted at the hearing which had been used to train the one-to-one aide. The training video of the child's private providers demonstrating respondents' recommended seating, handling and feeding techniques to be used with the child, demonstrates the child's private physical therapist transferring the child from his wheelchair to the floor with her arm and hand over the child's shoulder and across his chest (Tr.

pp. 825-26, 828, 1114-15; Dist. Ex. 63).[4] I note that this is essentially the same arm position used by the one-to-one aide as shown in the child's class picture to which respondents strongly object (Tr. pp. 847-48, 1132-33, 1139-40; Parent Ex. 70). In addition, testimony by the child's mother and private physical therapist indicated that the one-to-one aide fed the child with his head tilted in inappropriate positions (Tr. pp. 721, 723-24, 1142).[5] However, in the training video, the child's head is unsupported and tilted to the side, and his chin is allowed to jut forward when the child's private occupational therapist places a spoonful of food into his mouth (Tr. pp. 637, 653, 825-26, 1145-46; Dist. Ex. 63; Gersley Aff. ¶ 2). I strongly urge petitioner, if it has not already done so, to obtain evaluations of the child regarding his seating, positioning and feeding needs from a United Cerebral Palsy Association or a similar organization that specializes in the provision of multidisciplinary services needed by children with cerebral palsy. I also urge petitioner to engage such organization's services for staff training and consultation specific to the needs of this child. I also remind petitioner to ensure that any one-to-one aide assigned to the child is properly trained in all safety procedures and that safety procedures are consistently implemented.

Lastly, the crux of respondents' concerns at the impartial hearing focused on the propriety of petitioner's staff assignments and training. If future disputes arise despite the previously mentioned new evaluations and IEP, I remind respondents of the availability of mediation (8 NYCRR 200.5[h]) and the state complaint procedures of the Regulations of the Commissioner of Education (8 NYCRR 200.5[l]) as alternative dispute resolution procedures which may also address IEP implementation issues.

In light of the foregoing, it is not necessary to address petitioner's remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated March 29, 2007 is annulled to the extent that it ordered petitioner not to provide the child with the services of the aide who was assigned to him in September and October 2005.

Dated: **Albany, New York**
June 15, 2007

PAUL F. KELLY
STATE REVIEW OFFICER

[4] The child's private physical therapist was also the executive director of Personal Care Therapeutics, a pediatric therapeutic practice that provided the child with related services (Tr. p. 1015; Walker Aff. ¶¶ 1, 7; Bayer Aff. ¶¶ 2, 4; Gersley Aff. ¶¶ 1-2).

[5] The child's mother testified that she attended school with the child every day during September and October 2005 to assist with training petitioner's aide and to keep the child safe at school (Tr. pp. 710-13).