The University of the State of New York

The State Education Department
State Review Officer

No. 07-062

Application of a CHILD 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 Arlington Central School District

Appearances:
Kuntz, Spagnuolo & Murphy, P.C., attorney for respondent, Vanessa M. Gronbach, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which determined that respondent was not required to convene a Committee on Special Education (CSE) meeting. The appeal must be dismissed.

At the time of the impartial hearing on April 12, 2007, petitioner's son was 14 years old and attending respondent's school (IHO Ex. 6 at p. 1). The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this appeal (8 NYCRR 200.1[zz][10]). On a procedural note, petitioner requested an impartial hearing on October 11, 2006 (IHO Ex. 1), and while that hearing was in progress, petitioner requested a second impartial hearing on March 30, 2007, at which the same impartial hearing officer presided (IHO Exs. 6; 15). In a letter dated April 10, 2007, the impartial hearing officer granted petitioner's request to "consolidate" the issues raised in petitioner's October 2006 and March 2007 due process complaint notices (IHO Ex. 15 at p. 4). Issues related to petitioner's March 2007 claims have been raised in this appeal.

The record in this appeal is sparse regarding the student's educational history. The student's individualized education program (IEP) for the 2005-06 school year (eighth grade) notes that the student has significant cognitive and language deficits and has been diagnosed with attention deficit hyperactivity disorder (ADHD) (Pet. Ex. 4 at p. 4).

During the course of the impartial hearing regarding petitioner's October 2006 claims, the student was involved in an incident that occurred in February 2007 (Tr. pp. 1034-35; IHO Ex. 17). This incident prompted petitioner to contact the student's teacher later that month and request that she take extra precaution when supervising the student at school (Tr. pp. 854, 857, 886-88). On

February 28, 2007, another pupil made verbal comments with regard to the incident within earshot of the student (Tr. pp. 857-58, 889, 979-82). Petitioner decided to keep the student at home from that point forward, and he requested that respondent provide home instruction to the student (Tr. pp. 863-64, 1041-43, 1064; IHO Ex. 17).

Several days later, petitioner's advocate requested a meeting with respondent's school officials regarding the February 2007 incident, and a meeting was conducted on March 2, 2007 (Tr. pp. 866, 933, 985). The meeting was attended by petitioner, petitioner's advocate, the student's grandmother, a state police trooper, as well as respondent's psychologist, assistant principal, director of special education, attorney and the student's teacher (Tr. pp. 931, 985-86). On March 30, 2007, petitioner submitted the aforementioned due process complaint notice, alleging that respondent had failed to convene a CSE meeting and violated its "child find" obligations (IHO Ex. 6 at pp. 6-7). Petitioner sought a CSE meeting, and additional evaluations to address the impact of the February 2007 incident on the student's education (id.). Through his due process complaint notice, petitioner also requested that the CSE address the student's homebound instruction and the goals and objectives in the IEP (id.).

The impartial hearing commenced on April 13, 2007 and concluded on April 19, 2007, after three days of testimony. By decision dated May 7, 2007, the impartial hearing officer dismissed all of the claims in petitioner's March 2007 due process complaint notice (IHO Decision at pp. 20-21). Among other things, the impartial hearing officer determined that respondent did not violate any federal or state regulations when it did not schedule a CSE meeting prior to receiving petitioner's March 2007 due process complaint notice (id. at p. 14). The impartial hearing officer also determined that a CSE meeting was not required when the student was placed on home instruction, finding that the district's acquiescence to the parent's request for home instruction was temporary and did not effectuate a change in the student's pendency placement (id. at pp. 14-19). The impartial hearing officer also concluded that respondent did not violate the "child find" regulations or improperly fail to conduct new evaluations of the student (id. at pp. 19-20).

Petitioner appeals, asserting that the impartial hearing officer erred by finding that petitioner did not request a CSE meeting at the March 2, 2007 meeting. Petitioner also contends that, by placing the student on home instruction, respondent was required to convene a CSE because a change in placement had occurred. Petitioner also asserts that the parties agreed to change the student's placement to home instruction. Among other things, petitioner argues that respondent failed to provide the student with related services such as counseling, and that the impartial hearing officer erred by failing to find that the "child find" regulations required respondent to convene a CSE meeting.

Respondent answers, arguing that petitioner's appeal should be dismissed for lack of jurisdiction and alleges that there is no issue in controversy. Respondent also asserts that the student was offered counseling services while on home instruction, and contends that the impartial hearing officer correctly concluded that there was no clear agreement to change the student's pendency placement and that the remainder of the impartial hearing officer's decision should be upheld in its entirety. In his reply, petitioner opposes respondent's request that the appeal be dismissed for lack of jurisdiction, and also asserts that respondent incorrectly asserts that the appeal is moot and that there is no issue in controversy.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[1] is to ensure that students with disabilities have available to them a free appropriate public education (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]).[2] 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];[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, at 419 [S.D.N.Y. 2007]). The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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[1] On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

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

(20 U.S.C. § 1401[9]).

[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

First I will address the parties' procedural contentions. Respondent alleges that this appeal, involving petitioner's March 2007 claims, should be dismissed without a determination of the merits because the impartial hearing officer rendered a decision on May 7, 2007 during an ongoing hearing of petitioner's October 2006 claims. Consequently, respondent, citing the regulations of the Commissioner of Education, characterized the impartial hearing officer's May 2007 decision as an "interim order" that petitioner may not appeal (8 NYCRR 279.10[d]).

I disagree with respondent's contention that the appeal should be dismissed for lack of jurisdiction. While the impartial hearing officer's April 10, 2007 letter may be construed as conveying his intention to merge the issues raised in the two hearing requests into a single hearing at that point in time (Tr. p. 820; IHO Ex. 15), the record shows that this did not transpire and the impartial hearing officer continued to treat the two hearing requests separately. I note that in his decision, the impartial hearing officer and the parties agreed to expedite the impartial hearing and determine the issues raised in the March 2007 hearing request (IHO Decision at p. 3). After three days of testimony, the impartial hearing officer notified the parties that the record was closed with regard to the issues raised in the March 2007 hearing request (Tr. p. 1111; see 8 NYCRR 200.5[j][v]). His May 2007 decision was a final determination that dismissed all of petitioner's March 2007 claims on the merits and notified the parties of their right to appeal the decision to a State Review Officer (IHO Decision at pp. 20-23). While interim orders rendered by impartial hearing officers will not generally be reviewed in the context of an interlocutory appeal, under these circumstances, I decline to construe the impartial hearing officer's May 2007 decision as an "interim order" within the meaning of the regulations of the Commissioner of Education's regulations (8 NYCRR 279.10[d]). Moreover, the May 2007 decision purports to render a determination with regard to the student's pendency placement (IHO Decision pp. 18-19). Even if I had construed the May 2007 decision as an interim order, the pendency aspect of the decision is nevertheless appealable (8 NYCRR 279.10[d]). Accordingly, jurisdiction lies over petitioner's appeal, and respondent's contention is without merit.

Turning next to petitioner's contention that respondent failed to conduct a CSE meeting, I find that the parties have conducted a CSE meeting since the impartial hearing officer issued his decision, and, therefore, as more fully described below, this issue has 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]; Application of the Bd. of Educ., Appeal No. 07-047; Application of the Bd. of Educ., Appeal No. 07-031). In general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome (Murphy v. Hunt, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (Christopher P. v. Marcus, 915 F.2d 794, 802 [2d Cir. 1990]). Consistent with the mootness doctrine, State Review Officers have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60).

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]; Application of the Bd. of Educ. Appeal No. 03-075). 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.).

Here, petitioner and respondent allege that a CSE meeting was conducted on May 15, 2007 and that a clinician familiar with the student and the February 2007 incident attended the meeting (IHO Ex. 17; Pet. ¶¶ 43-44; Answer ¶ 43; Reply ¶ 26). The parties do not dispute that after the impartial hearing officer issued his decision on May 7, 2007, the actual relief sought by petitioner at the impartial hearing, that a CSE meeting be convened, was granted by respondent. However, matters raised by the parties at the May 15, 2007 CSE, which occurred after the impartial hearing was conducted, are not properly before me in this appeal (Application of the Bd. of Educ., Appeal No. 07-031). There is no longer a live dispute between the parties with regard to petitioner's March 2007 claim that respondent failed to convene a CSE meeting, and no meaningful relief may be granted with respect to this issue (Application of the Bd. of Educ., Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-109; Application of a Child with a Disability, Appeal No. 03-050). Consequently, the issue of whether respondent should have convened a CSE meeting has been rendered moot. Moreover, the record indicates that, when respondent understood from petitioner's March 2007 due process complaint notice that petitioner was seeking a CSE meeting (Tr. pp. 837, 886, 952; IHO Ex. 6), respondent scheduled a CSE meeting (IHO Exs. 18; 19). The evidence in the record does not persuade me that respondent declined to conduct a CSE meeting. I also note that petitioner elected to waive the resolution session (IHO Exs. 11; 13), and there is no evidence presented that petitioner has been precluded from requesting a CSE meeting, seeking further evaluations of the student or exercising other procedural safeguard protections afforded him by the IDEA. Under the circumstances presented here, I find that the exception to the mootness doctrine does not apply.

Turning next to petitioner's argument that respondent violated its "child find" obligations with regard to the student, the IDEA places an affirmative duty on state and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the state (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

Here, petitioner's reliance on the "child find" provisions is misplaced because the purpose of the "child find" provisions of the IDEA are to identify, locate and evaluate those students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 436 F.3d 52, 65 [2d Cir. 2006] [holding that the purpose behind the "child find" provisions is to locate children with disabilities who are eligible for special education services who might otherwise go undetected]). The allegations in petitioner's March 2007 due process complaint notice allege that the student has been classified for a long period of time (IHO Ex. 6), and the parties do not dispute that the student has already been located and identified as a student with a disability and that, for all time periods relevant to this case, the student has been eligible for special education and related services. The record shows that petitioner has disputed which special education and related services are appropriate for the student rather than whether respondent has provided special education and related services (see e.g., IHO Ex. 1 at p. 4). Furthermore, there is no evidence in the record that respondent does not have adequate "child find" procedures in place. I concur with the impartial hearing officer's conclusion that respondent has not violated the "child find" provisions of the IDEA.

Lastly, with regard to petitioner's contention that the student's placement was impermissibly changed, I find that the impartial hearing officer correctly determined that there was no agreement among the parties to change the student's pendency placement. The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law § 4404[4]). Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Drinker v. Colonial Sch. Dist., 78 F.3d 859 [3d Cir. 1996]; Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297 [4th Cir. 2003]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and strip schools of the unilateral authority they had traditionally employed to exclude students with disabilities from school (Honig v. Doe, 484 U.S. 305, 323 [1987]). It does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). It may or may not turn out to be the same placement that is determined to be the appropriate educational placement for the child after the conclusion of a hearing on the merits of the recommended program for that year. The U.S. Department of Education has opined that a child's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v.

Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]; Drinker, 78 F.3d at 867 [last functioning IEP]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 [9th Cir. 1987]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, at 1189 n.3 [S.D.N.Y. 1996]; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]).

Here, the record reveals that petitioner did not wish the student to attend school after February 28, 2007, the day that the verbal comments were made about the February 2007 incident within earshot of the student (Tr. p. 1100). Consequently, at respondent's request, the student was temporarily placed on home instruction for a short period of time based on medical need (Tr. pp. 863-64, 884, 1041-43, 1064; IHO Ex. 17). The evidence in the record persuasively shows that, based on the information available to it, respondent intended that the student's absence would be temporary (Tr. pp. 1043-44, 1090-91; IHO Ex. 17). Furthermore, petitioner's advocate stated that she had not had any discussion with respondent with regard to changing the student's pendency placement (Tr. p. 1067). I do not agree with petitioner's assertion that there was an agreement between the parties to change the student's pendency placement for the duration of the proceedings. Having found that respondent has not changed the student's pendency placement, petitioner's claim that a CSE meeting should have been conducted because of the alleged change in the student's pendency placement also fails.

I have considered petitioner's remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 2, 2007

PAUL F. KELLY
STATE REVIEW OFFICER