The University of the State of New York

The State Education Department
State Review Officer

No. 07-122

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Evans-Brant Central School District

Appearances:
Law Office of H. Jeffrey Marcus, attorney for petitioners, H. Jeffrey Marcus, Esq. and Jason H. Sterne, Esq., of counsel

Harris Beach PLLC, attorney for respondent, David W. Oakes, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which dismissed their due process complaint notice on the ground that the impartial hearing officer lacked subject matter jurisdiction over the remaining unresolved issue in the due process complaint notice. The appeal must be dismissed.

In this case, an impartial hearing was not held on the merits of petitioners' due process complaint notice. By due process complaint notice dated July 3, 2007, petitioners requested an impartial hearing alleging that: respondent had improperly declassified the student in September 2006; respondent's failure to classify the student denied him a free appropriate public education (FAPE);[1] respondent failed to implement appropriate declassification support services; and respondent failed to perform a functional behavioral assessment (FBA) and provide an appropriate

[1] 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]).

behavioral intervention plan (BIP) (IHO Ex. VIII at Ex. 1). Petitioners sought the reclassification of the student, the development of an individualized education program (IEP) with services to be provided by a named provider, additional services, and the payment of attorneys' fees and costs (id.).

In a statement of prior notice and response dated July 13, 2007, respondent denied petitioners' allegations, but agreed to reclassify the student as autistic, conduct an FBA, consider any additional evaluations, and conduct a Committee on Special Education (CSE) meeting for the purpose of creating an IEP that would include behavioral consultant services (IHO Ex. VIII at Ex. 2). A resolution session was held on July 19, 2007 (IHO Exs. III at p. 3; VIII at Exs. 2; 3).[2] By letter and email dated July 23, 2007, respondent stated its commitment to taking all of the actions concerning the student's education that were sought in petitioners' due process complaint notice and included a draft of a settlement agreement (IHO Ex. VIII at Exs. 3; 4). On July 26, 2007, petitioners emailed a counter-proposal in the form of a consent decree that was nearly identical to respondent's draft agreement regarding the student's education, except it did not purport to settle all of petitioners' issues in their due process complaint notice (IHO Ex. VIII at Ex. 5).[3] By email dated July 30, 2007, respondent reiterated its agreement to undertake the substantive actions regarding the student's education, but it did not agree to submit petitioners' consent decree to the impartial hearing officer for his signature (IHO Ex. VIII at Ex. 5). By email dated August 1, 2007, petitioners stated that respondent's settlement terms were unacceptable and requested that respondent reconsider settling the case with a consent decree (IHO Ex. VIII at Ex. 6). By email dated August 3, 2007, respondent stated that it agreed to all of petitioners' requests except for the payment of attorneys' fees and the entry of an order by the impartial hearing officer (id.).

On August 7, 2006, respondent submitted its motion to dismiss petitioners' due process complaint notice on the grounds that respondent had committed to undertaking all actions requested by petitioners with respect to the student's education and that the impartial hearing officer lacked jurisdiction to determine the parties' remaining dispute over attorneys' fees (IHO Ex. III). On August 8, 2007, the impartial hearing officer conducted a prehearing conference during which there was a discussion concerning the issues raised or expected to be raised in the parties' motion papers and a briefing schedule was set (IHO Ex. V). On August 24, 2007, petitioners submitted their cross-motion for summary judgment and respondent submitted its memorandum of law (IHO Exs. VI; VII). Respondent and petitioners submitted responses on August 31, 2007 (IHO Exs. VIII; IX).

In the meantime, the CSE convened on August 21, 2007 to undertake the actions requested by petitioners (IHO Ex. VI at Ex. A); however, petitioners notified respondent that they would not attend the CSE meeting upon the advice of counsel (IHO Exs. VI at Ex. A; IX at Marcus Aff. ¶ 8). By letter dated September 21, 2007, petitioners consented to the placement and services as offered

[2] Under the federal and state regulations governing resolution sessions, a written settlement agreement is enforceable in state or federal court (34 C.F.R. § 300.510[d][2]; 8 NYCRR 200.5[j][2][iv]).

[3] In his decision, the impartial hearing officer described most of the differences between the draft agreement and the draft consent decree (IHO Decision at pp. 2-3). The introductory paragraphs also differed slightly regarding the date that respondent received petitioners' due process complaint notice (July 3 in the consent decree versus July 5 in the agreement) and the resolution session was mentioned in the agreement, but not in the consent decree (compare IHO Ex. VIII at Ex. 3, with IHO Ex. VIII at Ex. 5).

in the August 2007 IEP, but stated that they reserved the right to challenge the IEP (Pet. Ex. E). The August 2007 IEP is not included in the hearing record.

By decision dated September 14, 2007, the impartial hearing officer granted respondent's motion to dismiss the due process complaint notice without prejudice (IHO Decision at pp. 5-6). The impartial hearing officer determined that the only remaining relief sought by petitioners concerned the issue of attorneys' fees, over which he had no jurisdiction (id. at pp. 3-5).

Petitioners appeal and assert that the impartial hearing officer erred by dismissing the due process complaint notice in the absence of a signed settlement agreement or consent decree. Petitioners argue that the dismissal deprived them of their due process rights and was contrary to the congressional intent of the Individuals with Disabilities Education Act (IDEA) regarding the resolution of disputes and entitlement to attorneys' fees. Petitioners request an order granting the relief reflected in their proposed consent decree.

Respondent requests dismissal of the petition for failure to comply with section 279.4 of the Commissioner's regulations for not clearly indicating the reasons for challenging the impartial hearing officer's decision. Respondent asserts that, although petitioners indicated that they made a cross-motion for summary judgment, their request was actually for "administrative imprimatur" of respondent's commitments. Respondent contends that the notice with petition, petition, and petitioners' memorandum of law were never properly served upon the district. In their reply, petitioners deny respondent's allegations and assert that the person who accepted service on respondent's behalf represented to the process server that he was authorized to accept such service.

For the reasons set forth below, I concur with the impartial hearing officer's decision to dismiss petitioners' due process complaint notice without prejudice.

The impartial hearing officer appropriately requested that the parties identify any issues in dispute prior to his determination of the parties' motions when it became clear, based upon petitioners' own representations, that the parties had agreed to a resolution of petitioners' substantive educational concerns raised in their due process complaint notice (8 NYCRR 200.5[j][3][xi][a]; Application of a Child with a Disability, Appeal No. 06-109; Application of a Child with a Disability, Appeal No. 04-103). Impartial hearing officers may conduct prehearing conferences to simplify and clarify the issues for the impartial hearing and may also conduct conferences during the impartial hearing if a party represents that a matter has been resolved (id.).

I note that the hearing record reveals, as the impartial hearing officer noted, that petitioners sought to obtain an order from the impartial hearing officer after the resolution session, despite the fact that respondent agreed to their substantive demands, for the primary purpose of obtaining attorneys' fees (IHO Exs. III; VII; VIII; IX; IHO Decision at pp. 4-5).

Petitioners were willing to have the impartial hearing officer issue a consent order, but were not otherwise willing to sign a settlement agreement (IHO Exs. III; VII; VIII; IX). Petitioners then sought to obtain an impartial hearing officer's order with the expressed intent of being able to seek attorneys' fees from a court (IHO Exs. VII; IX). The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party; and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]. Depending on the circumstances of a case, a parent's attorney, the state educational agency or local

educational agency may be awarded attorneys' fees by a court (20 U.S.C. § 1415[i][3]; 34 C.F.R. § 300.517[a][1]).[4] The IDEA expressly precludes attorneys' fees to be awarded for an attorney's time during the resolution process or at a CSE meeting, unless convened as a result of an administrative proceeding or judicial action (20 U.S.C. § 1415[i][3][D]; 34 C.F.R. § 300.517[c]). The IDEA also prohibits an award of attorneys' fees if the final relief obtained is not more favorable than that offered in a written offer of settlement (20 U.S.C. § 1415[i][3][D][i]; 34 C.F.R. § 300.517[c][2][i][C]). Here, petitioners were refusing an ultimate settlement of all of their substantive concerns based upon an unsettled demand for respondent to pay attorneys' fees as identified in their due process complaint notice.

Although an impartial hearing officer may issue a consent order (see, e.g., A.R. v. Dep't of Educ., 407 F.3d 65, 77-78 [2005]; O'Shea v. Bd. of Educ., 2007 WL 3238683, at *6-*7 [SDNY Oct. 31, 2007]), here, the impartial hearing officer exercised his authority to identify the issues in dispute after the resolution session and prior to the impartial hearing. The impartial hearing officer determined that the parties were no longer in dispute regarding the identification, evaluation or educational placement of the student or the provision of a FAPE to the student. Under the circumstances of this case, where the parties' remaining dispute prior to the impartial hearing concerned a matter over which the impartial hearing officer did not have subject matter jurisdiction, I find that the impartial hearing officer did not err by dismissing the due process complaint notice without prejudice. Thus, I find no reason to modify his order (Educ. Law § 4404[2]).

Petitioners' contentions regarding the August 21, 2007 CSE meeting and IEP are beyond the scope of this proceeding because they were not raised in the due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Furthermore, I disagree with petitioners' assertion that respondent circumvented their due process rights by agreeing at the resolution session to provide the student with the requested educational relief and conducting a CSE meeting to offer and implement such relief upon consent of petitioners.[5]

[4] 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

[5] Conducting CSE meetings during the course of pending litigation is not prohibited under the IDEA (Letter to Watson, 48 IDELR 284 [OSEP 2007]). Moreover, the federal and state statutes and regulations concerning the education of children with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services through the IEP process (see Schaffer v. Weast, 546 U.S. 49, 53 [2005]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]).

Lastly, petitioners' claims relating to issues that post-date the impartial hearing officer's decision may not be raised for the first time on appeal and are dismissed without prejudice (Application of the Bd. of Educ., Appeal No. 07-031).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 3, 2007

PAUL F. KELLY
STATE REVIEW OFFICER