The University of the State of New York

The State Education Department
State Review Officer

No. 08-076

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 Springville-Griffith Institute Central School District

Appearances:
Hodgson Russ LLP, attorneys for respondent, Jeffrey J. Weiss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed the parent's due process complaint notice related to the educational program/services recommended for her son by respondent's (the district's) Committee on Special Education (CSE) for the 2006-07 school year. The appeal must be dismissed.

The parent commenced this case though a due process complaint notice dated May 13, 2008 and an impartial hearing officer (Hearing Officer 1) was appointed to preside over the case (Ex. 1 at p. 4; see Ex. 2).[1] The due process complaint notice contained allegations describing the parties' communications and interactions regarding the student from 2002 though the 2007-08 school year, with particular emphasis on events that occurred during the course of the 2005-06 school year (Ex. 2). The parent sought relief regarding her disagreement "with the entire substantive content" of the recommendations of the CSE contained in an individualized education program (IEP) dated May 19, 2006 (id.).

In a written motion to dismiss dated May 28, 2008, the district requested that Hearing Officer 1 dismiss the parent's due process complaint notice on the grounds of (1) res judicata because the issues had been raised previously in another pending impartial hearing, (2) mootness and (3) the equitable doctrine of laches (Ex. 3 at pp. 1-4). The parent filed a written response to

[1] The hearing record on appeal does not contain numbered exhibits. In order to provide a clear and efficient means of reference to the record on appeal, the exhibits have been numbered and will be referenced herein as: Transcript of June 3, 2008 Prehearing Teleconference – Ex. 1; Due Process Complaint Notice dated May 13, 2008 – Ex. 2; District's Motion to Dismiss dated May 28, 2008 – Ex. 3; and Parent's Response to District's Motion to Dismiss dated June 16, 2008 – Ex. 4.

the district's motion dated June 16, 2008, alleging, among other things, that (1) another impartial hearing officer (Hearing Officer 2) in a separate ongoing impartial hearing had issued an interim decision on February 2, 2008 that precluded her from raising the issues in her May 2008 due process complaint notice, (2) the issues in the May 2008 due process complaint notice were not moot because they were "capable of repetition yet evading review" and (3) the due process complaint notice was brought within the applicable two-year statute of limitations and the district was not prejudiced by the timing of the complaint (Ex. 4).

Although a prehearing conference was conducted (Ex. 1 at p. 1), an impartial hearing was not convened in this case. In a decision dated June 30, 2008, Hearing Officer 1 summarized the district's position, noting its arguments that another impartial hearing had been conducted regarding the same student during February through May 2008 before Hearing Officer 2 based upon the parent's November 20, 2007 due process complaint notice, Hearing Officer 2's decision had not yet been issued, the parent could have included the matters in the instant case in her November 2007 due process complaint notice or sought to amend the November 2007 due process complaint notice prior to the hearing in February 2008, and that the doctrine of res judicata precluded the parent from asserting these claims (IHO Decision at p. 2). Hearing Officer 1 noted the district's arguments that the parent's claims regarding the 2006-07 IEP are moot because no meaningful relief could be granted (id.). Hearing Officer 1 also recounted the district's laches defense in which the district argued that it was prejudiced because it wanted to examine some witnesses who no longer work for the district (id. at pp. 2-3).

Next, Hearing Officer 1 summarized the parent's lengthy response regarding the parties' litigation involving the parent's 2005-06 school year claims, her argument that the 2006-07 school year claims are not moot, and additional assertions that the district did not implement some aspects of the May 2006 IEP and that the student is entitled to compensatory education (IHO Decision at p. 3).

Hearing Officer 1 rejected the district's laches defense (IHO Decision at p. 7). Hearing Officer 1 agreed with the district's res judicata argument, finding that a comparison of the November 20, 2007 and May 13, 2008 due process complaint notices revealed that they were "virtually identical" (id. at p. 4). He observed that the May 2008 due process complaint notice recounted much of the student's history with the school district, did not mention the May 2006 IEP until page 11, and did not allege specific factual information regarding her 2006-07 claims (id. at pp. 4-5). He also determined that all of the matters raised in the May 2008 due process complaint notice could have been raised in the November 2007 due process complaint notice and that most of the issues were actually raised, thus precluding a second hearing (id. at p. 5). Hearing Officer 1 also found that Hearing Officer 2's determination did not preclude the parent from raising issues regarding the May 2006 IEP (id. at pp. 5-6). Hearing Officer 1 concluded that the parent's claims in the May 2008 due process complaint notice regarding the 2006-07 school year IEP, which added only two additional forms of relief,[2] were moot and did not evade review because nearly all of the issues raised were the subject of another pending impartial hearing (id. at p. 6). Based upon his

[2] Hearing Officer 1 noted that the parent's new request was that the student receive credit for adaptive physical education and a Regents diploma, an issue which Hearing Officer 1 concluded that he did not have jurisdiction (IHO Decision at p. 7).

findings, Hearing Officer 1 dismissed the parent's May 2008 due process complaint notice (id. at p. 7).

The parent appeals, asserting that Hearing Officer 1 granted the motion to dismiss because "he believed that the matter in dispute had already been litigated and decided previously by [Hearing Officer 2]" (Pet. at ¶ 8). The parent contends that Hearing Officer 1 erred in determining that almost all of the issues had been raised in the November 2007 due process complaint notice and that those matters that were not previously raised should have been heard. The parent also makes several references to a decision by Hearing Officer 2 dismissing the complaint and those matters not raised.[3] Among other things, the parent also argues that Hearing Officer 1 could have fashioned appropriate relief if the relief she requested was not within his jurisdiction and that he erred in his jurisdiction determination over the award of credit for graduation. As relief, the parent requests the matters in the May 2008 due process complaint notice be remanded to an impartial hearing officer to be heard. In its answer, the district denies nearly all of the parent's allegations regarding the district's motion to dismiss and Hearing Officer 1's decision.

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 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). Res judicata applies when (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; 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).

After carefully reviewing the entire hearing record, I find that Hearing Officer 1 correctly determined that the parent's issues raised in the May 2008 due process complaint notice were precluded by the doctrine of res judicata (IHO Decision at pp. 4-7). As the impartial hearing officer noted, the parent, although claiming she was unrepresented, was represented by an advocate

[3] I note that Hearing Officer 2 issued a final decision regarding the November 2007 due process complaint notice and an appeal of that decision is currently pending before a State Review Officer.

in both proceedings and repeated virtually all of the same factual assertions in the May 2008 due process complaint notice that were asserted in the November 2007 due process complaint notice (compare Ex. 2, with Ex. 3 at Ex. A; see Praino v. Bd. of Educ., 1997 WL 196367 at *2-*3 [2d Cir. 1997] [holding that where the issues were almost identical, res judicata precluded subsequent litigation of the parent's claims]). Although the May 2008 due process complaint notice contains allegations that the district denied the student a free appropriate public education (FAPE) when it made its recommendations in the May 2006 IEP, the factual bases underlying the alleged denial of a FAPE are the same factual issues that are the subject of the November 2007 due process complaint notice (id.). There is no persuasive reasoning in the parent's response to the district's motion to dismiss or the petition for review that indicates why the parent could not have asserted the additional claims regarding the student's May 2006 IEP in her November 2007 due process complaint notice, particularly when they generally involved the same facts, the same legal arguments, the same relief, and the same issues but just extended the time period for which relief was sought. The filing of multiple due process complaint notices on the same issues would undermine the interests of judicial economy, create unnecessary duplication of time, expense, witnesses, exhibits and other resources, and place an unwarranted burden on families and school districts (see Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 04-061; see also Grenon, 2006 WL 3751450 at *6). Furthermore, there is no indication in the hearing record that Hearing Officer 1 lacked the power to award the full measure of relief on the issues that the parent later attempted to litigate before Hearing Officer 2 (M.K. v. Sergi, 2008 WL 2037752 at *4 [D.Conn May 12, 2008]).[4]

With regard to the issue of mootness, 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]; 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 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 that concern such issues that arise out of school years 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]; 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, 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).

[4] Hearing Officer 1 did not agree with the parent's contention that she was precluded by Hearing Officer 2 from including issues regarding the 2006-07 school year in the matter before Hearing Officer 2 (IHO 1 Decision at p. 5).

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]). 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). 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; 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, I note that the parent seeks compensatory education for the student as relief of the alleged denial of a FAPE for the 2006-07 school year, thus the portion of the relief sought renders the parent's claim "live" and not academic, and consequently, I do not agree with Hearing Officer 1's alternative finding that the case should be dismissed on mootness grounds (IHO Decision at pp. 6-7; Ex. 2). However, my determination with regard to mootness does not effect Hearing Officer I's previous determination and my concurrence that the parent's May 2008 due process complaint notice is barred by res judicata. Based upon my review of the entire hearing record, I find that there is no need to modify Hearing Officer 1's conclusion that the parent's May 2008 due process complaint notice should be dismissed on the ground of res judicata (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 4, 2008

PAUL F. KELLY
STATE REVIEW OFFICER