The University of the State of New York

The State Education Department
State Review Officer

No. 08-090

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 New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's April 20, 2008 due process complaint notices.[1] The appeal must be dismissed.

The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

By two due process complaint notices, both dated April 20, 2008, the parent submitted two requests for an impartial hearing, one submitted by e-mail to the district's impartial hearing office at 4:21 a.m. (original due process complaint notice) and the second submitted by e-mail to the district's impartial hearing office at 4:20 p.m. (amended due process complaint notice) (Tr. pp. 668, 710-12,[2] Answer Exs. 1; 2).[3] The April 20, 2008 amended due process complaint notice

[1] The due process complaint notices are identified by the district as case number 115838.

[2] The transcript from the prehearing conference dated July 16, 2008 begins with page 662.

[3] The hearing record on appeal does not include the April 20, 2008 original due process complaint notice or the amended due process complaint notice at issue in this case; however, the due process complaint notices were attached to the district's answer as exhibits 1 and 2, and I will accept them as necessary for my review. The hearing record does contain another April 20, 2008 due process complaint notice and amended due process complaint notice filed by the parent in reference to a different case and assigned case number 115837. These due process complaint notices were the subject of an appeal in Application of a Student with a Disability, Appeal No. 08-048.

alleged that during Committee on Special Education (CSE) meetings held on August 17, 2005, September 6, 2005, November 14, 2005, and October 26, 2006, State and federal policy and procedures for conducting an annual review and/or "EPC" review were not followed; the district's evaluations and/or assessments and/or information were not provided to the parent prior to the meeting; a procedural safeguards notice was not provided to the parent; and the parent's evaluations, assessments and information were not considered at the CSE meetings (Answer Ex. 2). The parent further alleges in his amended due process complaint notice that he could not file a due process complaint notice within the "timeline" because the school district withheld information that it was required to provide under Part B of the Individuals with Disabilities Education Act (IDEA) (id.). For relief, the parent requested that the district provide the written policy and procedures for an annual review, an "EPC," writing a quality individualized education program (IEP), the written district criteria for the evaluations that were used at the meeting,[4] the written minutes of the meeting, and the written criteria for changing a student's classification (id.).

In a decision dated July 25, 2008,[5] the impartial hearing officer dismissed the parent's amended due process complaint notice on the grounds that it was moot (IHO Decision at pp. 2-3, 4). The impartial hearing officer noted that the school years at issue had ended and that the requested relief did not provide a remedy for the parent's claims (id. at pp. 2-3). The impartial hearing officer also noted that "impartial hearings are not the appropriate means to get documents from a school district" and that the impartial hearing officer did not have jurisdiction over claims for denial of access to records or document requests (id. at pp. 3-4).

On appeal, the parent contends, among other things, that the impartial hearing officer erred in finding that the parent's claims were moot, that a hearing date was not timely established, that the impartial hearing officer did not communicate with the parties after appointment in a timely manner, that the impartial hearing officer's decision was not timely, that correspondence from the impartial hearing office was not sent to the parent's current mailing address, but rather to an old address, that the parent never received a letter from the impartial hearing officer informing him that the district was challenging the sufficiency of his due process complaint notice, that e-mail correspondence from the district's impartial hearing office was suspicious, that the resolution sessions and hearings were not held at a location reasonably convenient to the parent, that the parent was not able to meaningfully participate in the resolution sessions because he was not permitted to tape record the meetings, that the parent was not provided a prehearing conference despite his requests, that the lack of preparation by the impartial hearing officer impeded the parent from meaningfully participating in proceedings, that the impartial hearing officer failed to issue a written decision regarding the parent's request that the resolution sessions and hearings be conducted at a location preferred by the parent instead of the scheduled location, that the impartial hearing officer was not impartial, that the impartial hearing officer provided misleading information, that the impartial hearing officer did not assist the parent in accordance with his responsibilities, and that the appointment and recusal of impartial hearing officers in the instant case was improper.

[4] The April 20, 2008 amended due process complaint notice does not specify which meeting.

[5] The impartial hearing officer issued "Corrected Findings of Fact and Decision" dated July 30, 2008. The corrected decision did not modify the impartial hearing officer's decision dismissing the parent's claim as moot.

Essentially, the parent's petition reveals that the parent disagrees with the impartial hearing officer's decision and requests the issuance of subpoenas from a State Review Officer for the impartial hearing officer and others, a hearing to present additional documentary evidence and testimonial evidence, and the opportunity to present oral and written arguments to a State Review Officer.

The district contends in its answer that the impartial hearing officer correctly determined that the parent's claims are moot. The district further contends that the parent's claims relating to the CSE meetings held on August 17, 2005, September 6, 2005 and November 14, 2005, are time-barred by the two year statute of limitations in the IDEA and, therefore, should be dismissed. In addition, the district argues that impartial hearings are not the appropriate way to obtain documents. Moreover, the district contends that the parent's procedural claims are without merit, as they are not supported by the record "and/or" the parent has failed to demonstrate any prejudice or loss of educational benefit arising from the alleged procedural errors.

As a preliminary matter, regarding the parent's request for oral argument before a State Review Officer, such argument is authorized by the rules governing appeals to a State Review Officer only in the event that a State Review Officer determines that oral argument is necessary (8 NYCRR 279.10). I find that oral argument is not necessary in this matter, and therefore this request is denied (see Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-041; Application of a Child with a Disability, Appeal No. 03-067).

Upon reviewing this appeal, there is a threshold issue that must be addressed. I agree with the impartial hearing officer's determination that the parent's assertions regarding CSE meetings from 2005 and 2006 are moot. I note that the parent makes no claim that a deprivation of a free appropriate public education (FAPE) arose from any alleged procedural or substantive errors, or that the student is entitled to any additional services as a result of a deprivation of a FAPE. I further note that the school years at issue have ended and that, at the time that the parent filed the amended due process complaint notice on April 20, 2008, there had already been two CSE meetings held for the 2007-08 school year on June 1, 2007 and August 31, 2007.[6]

It is established that 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]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *3 (W.D.N.Y. Sept. 30, 2008); see also 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).

[6] Documents relating to these CSE meetings are not contained in the record on appeal, but were made part of the hearing records in Application of a Student with a Disability, Appeal No. 08-046 and Application of a Student with a Disability, Appeal No. 08-048.

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).

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). I find that the hearing record supports a finding that the claims raised by the parent in the instant case, in the April 20, 2008 amended due process complaint notice, are moot and further that the hearing record does not support a finding that an exception to the mootness doctrine applies.

I also note that the relief proposed by the parent in his April 20, 2008 amended due process complaint notice, that the district provide the written policy and procedures for an annual review, an "EPC," writing a quality IEP, the written district criteria for the evaluations that were used at the meeting, the written minutes of the meeting and the written criteria regarding change of classification, was substantially addressed by the district at the prehearing conference (see Answer Ex. 2). The district's attorney pointed out that the parent turned over as part of his five-day disclosures a series of documents, including one titled "Creating a Quality IEP,"[7] which is available on the district's website, as well as documents titled "School Climate and Infrastructure,"[8] "Before the Meeting,"[9] which explains effective practices for a CSE meeting and "During the

[7] This document is available at http://schools.nyc.gov/Offices/District75/Departments/IEP/forms.htm. Other documents with information about the IEP process are also available on the district's website.

[8] This document is available at http://www.vesid.nysed.gov/specialed/publications/persprep/cse/0403cse1.htm.

[9] This document is available at http://www.vesid.nysed.gov/specialed/publications/persprep/cse/0403cse2.htm.

Meeting,"[10] which provides suggestions for effective practices for CSE meetings and explains the procedures to be followed during CSE meetings under federal and State regulations (Tr. pp. 689-90, 702-05, 706-09). Also, the parent noted that he found some of those documents on the internet (Tr. p. 708). The parent stated that because he was unable to "verify the authenticity" of the documents, he wanted the impartial hearing officer to order the district to provide the documents to him (Tr. p. 708). The parent also stated that he did not have the minutes of the CSE meetings (Tr. pp. 708-09). The district indicated, however, that if written minutes of the CSE meetings existed, they would be in the student's file, and that the parent had been provided with copies of the student's entire file (Tr. p. 704).

I will next address the parent's assertion that the impartial hearing officer was not prepared and that the lack of preparation impeded the parent from meaningfully participating in the proceedings. I find this claim to be unsupported by the hearing record. At the prehearing conference, the impartial hearing officer specified the outstanding issues, including the amended due process complaint notice, the motion to dismiss, subpoenas and the parent's concern with the hearing location (Tr. pp. 666-67).

Next, addressing the parent's contention that the impartial hearing officer in this case was not impartial, by reference to him as the "non-impartial" hearing officer, I find that the record does not support this contention. An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the record (see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). A hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). I find that the hearing record supports a finding that the impartial hearing officer was fair and unbiased.

Regarding the parent's contention that, as an unrepresented party, the impartial hearing officer did not properly assist him, I first note that the hearing record does not support the contention that the parent was unrepresented. The hearing record indicates, to the contrary, that the parent was represented by a relative at the prehearing conference (Tr. pp. 662-63, 684, 685, 745). In any event, at all stages of the hearing, a hearing officer may assist an unrepresented party by providing information relating only to the hearing process, and I find that the impartial hearing officer provided the information relating to the hearing process to the parent and his representative (see 8 NYCRR 200.5[j][3][vii]).

[10] This document is available at http://www.vesid.nysed.gov/specialed/publications/persprep/cse/0403cse3.htm.

Upon careful review of the hearing record, I find that there is no evidence that the impartial hearing officer displayed bias or prejudice against the parent. Although the parent disagrees with the conclusions reached by the impartial hearing officer, that disagreement does not provide a basis for finding actual or apparent bias by the impartial hearing officer (Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75).

Addressing some of the parent's other claims, it is alleged that the district impeded the parent in the resolution sessions by not allowing audio recording. A CSE must, with certain exceptions, permit a parent to audio tape a CSE meeting regarding the student (Application of a Child with a Handicapping Condition, Appeal No. 90-18; Application of a Child with a Handicapping Condition, 30 Ed. Dep't Rep., Decision No. 12425; see Office of Vocational and Educational Services for Individuals with Disabilities [VESID], guidance on "The Use of Audio- or Video Tape Recording of CSE/CPSE Meetings" [September 2003]). Such audio recordings have previously been made part of hearing records (see Application of a Child with a Disability, Appeal No. 98-1; Application of the Bd. of Educ., Appeal No. 97-60; Application of a Child with a Disability, Appeal No. 96-58). Formal rules of evidence that are applicable in civil proceedings are generally not strictly applied in impartial hearings (see Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child with a Disability, Appeal No. 99-48; Application of a Child with a Disability, Appeal No. 99-5; see also Application of the Bd. of Educ., Appeal No. 91-14).

A parent, however, does not have a right to record resolution sessions. While a "written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties," there is no such requirement regarding resolution sessions (8 NYCRR 200.5[j][3]; see 34 C.F.R. § 300.512[a][4]). Accordingly, it was not improper for the CSE to refuse to permit the parent to record the resolution sessions.

Another matter raised by the parent concerns location of resolution sessions and the impartial hearing. Regulations provide that the hearing "shall be conducted at a time and place which is reasonably convenient to the parent and the student involved" (8 NYCRR 200.5[j][3][x]; see 34 C.F.R. § 300.515[d]). The parent contends that the location of the resolution sessions and prehearing conference were not held at a location reasonably convenient to the parent. The parent contends that all proceedings should be held at the location closest to the parent's residence. However, as pointed out by the district, the regulations do not require that the hearing be held at the location that is closest to and most convenient for the parent. I note that the parent failed to show that he was unable to attend the due process proceedings or that the location of the proceedings were not reasonably convenient. Moreover the parent did not show that the student suffered any prejudice or loss of educational benefit due to the location of the resolution session or prehearing conference, or that the parent's participation was significantly impeded.

In light of my decision herein, it is not necessary to address the parties' remaining arguments.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 19, 2008

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PAUL F. KELLY
STATE REVIEW OFFICER