



The University of the State of New York

The State Education Department State Review Officer

No. 08-093

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:

Greenberg Traurig, LLP, attorneys for petitioner, Caroline J. Heller, Esq., of counsel

Advocates for Children, attorneys for petitioner, Matthew Lenaghan, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which granted respondent's (the district's) motion to dismiss the parent's claim for compensatory education services from the Lindamood-Bell Learning Processes Center (Lindamood-Bell) for the last four months of the 2007-08 school year on the grounds of *res judicata*. The appeal must be sustained.

At the time of the impartial hearing, in June 2008, the student had recently been withdrawn from his tenth grade classes at the Smith School, the private school that he had attended during the eighth and ninth grades (IHO Decision at p. 2). It appears from the hearing record that the student was not attending school at the time of the impartial hearing (*id.* at p. 6). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (*see* 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student's educational history was discussed in Application of a Student with a Disability, Appeal No. 08-050, decided on July 23, 2008, and will not be repeated here in detail.

The parent filed a due process complaint notice (Hearing 1) on February 8, 2008 seeking payment for tuition at the Smith School for the 2007-08 school year and funding for 480 hours of

services at Lindamood-Bell (Dist. Ex. 1). Specifically, the parent alleged that the district's offered placement was inappropriate (id. at p. 2).¹

While Hearing 1 was pending regarding the March, 14 2007 IEP, the CSE prepared an interim service plan (ISP) dated March 19, 2008, in response to the parent's March 10, 2008 letter which advised the Committee on Special Education (CSE) chairperson that the student was no longer attending the Smith School (Parent Ex. A).² The letter also requested a new placement for the student (id.). The March 19, 2008 ISP provided for 1:1 home instruction two periods per day for five days per week (Parent Ex. B at p. 1). The ISP recommended related services of one 45-minute 1:1 individual counseling session per week, one 45-minute 3:1 group counseling session per week, four 45-minute sessions of 1:1 occupational therapy (OT) per week, and three 45-minute 3:1 speech-language therapy sessions per week (id. at pp. 1-2). The ISP stated that the projected date that these interim services would be initiated was April 2008 (id. at p. 1).

On March 20, 2008, the CSE reconvened in order to discuss the student's educational program and to create an individualized education program (IEP) for the time period of April 2008 through April 2009 (Parent Ex. C). The CSE recommended a 15:1 special class in a community high school, one 45-minute 1:1 individual counseling session per week, one 45-minute 3:1 group counseling session per week, four 45-minute sessions of 1:1 OT per week, and three 45-minute 3:1 speech-language therapy sessions per week (id. at pp. 1, 13). The recommended program and services were to start in April 2008 (id. at p. 2). Both the March 19, 2008 ISP and the March 20, 2008 IEP were made part of the hearing record in Hearing 1.

On or about March 25, 2008, the CSE chairperson sent a Final Notice of Recommendation (FNR) to the parent's attorney recommending placement at an identified district school (Dist. Ex. 18).³

Hearing 1 began on March 26, 2008 and concluded on April 2, 2008, after two days of testimony (Dist. Ex. 2). A decision was rendered by an impartial hearing officer (Hearing Officer 1) on April 28, 2008 (id.). Hearing Officer 1 found, among other things, that the parent had failed to establish entitlement for the relief sought because she failed to prove that the Smith School was appropriate for the time period that the student attended the school and failed to prove that Lindamood-Bell services were appropriate (id. at pp. 6-8).

¹ Although the parent did not specify in her February 8, 2008 due process complaint notice which individualized education program (IEP) the disputed placement was offered under, it is clear in the decision rendered in Hearing 1, that the disputed placement was offered under the IEP dated March 14, 2007 (Dist. Ex. 2 at p. 2).

² Although the parent's June 10, 2008 due process complaint notice that is at issue in this appeal stated that the interim service plan (ISP) was created on March 20, 2008, the ISP itself reflects a date of March 19, 2008 (compare Dist. Ex. 3 at p. 2, with Parent Ex. B at p. 1). For ease of reference in this decision, the March 2008 ISP will be referred to herein as "the March 19, 2008 ISP."

³ While the FNR was dated March 24, 2008, a cover sheet attached to the FNR reflects that it was sent to the parent's attorney on March 25, 2008, one day before Hearing 1 began (Parent Ex. D; see Dist. Ex. 2).

Subsequent to the conclusion of Hearing 1, an additional FNR dated April 24, 2008 concerning the March 20, 2008 IEP was sent to the parent offering a different district school than the one that was first offered by the district in the March 25, 2008 FNR (Parent Ex. E).⁴

The parent filed another due process complaint notice on June 10, 2008 requesting an impartial hearing (Hearing 2) contending that the district's March 19, 2008 ISP recommending home instruction for the student had not been implemented (Dist. Ex. 3 at p. 2). The parent further alleged that the three 15:1 placements offered by the district were not appropriate for the student (*id.*). The parent asserted that since the student had left the Smith School in March 2008, the district had not offered him an appropriate placement or home instruction, resulting in the student receiving no educational services since the "end of February" 2008 (*id.*). The parent sought payment for compensatory services in the form of tutoring at Lindamood-Bell and the cost of transportation for the final four months of 2007-08 (*id.*).

No testimony was taken regarding the June 10, 2008 due process complaint notice. Instead, the district submitted a motion to dismiss to the impartial hearing officer (Hearing Officer 2) on June 30, 2008, arguing that the parent's claims were barred by the doctrine of res judicata (Dist. Motion to Dismiss at p. 11; IHO Decision at pp. 3-4). The parent responded to the district's motion to dismiss by submitting a reply on July 9, 2008 (Parent Reply to Motion To Dismiss at p. 11; IHO Decision at pp. 4-5). Hearing Officer 2 rendered his decision on July 30, 2008 and granted the district's motion to dismiss, finding that the parent's claims were barred by res judicata (IHO Decision at p. 8). Hearing Officer 2 found that the "facts and circumstances" in the parent's June 10, 2008 due process complaint notice were "identical to those considered by the previous IHO" (*id.* at pp. 6-7). More specifically, Hearing Officer 2 identified two facts as identical to the parent's prior claim: (1) that the student was not attending any school, and (2) the parent's request for funding for Lindamood-Bell services (*id.* at p. 7). Hearing Officer 2 held that "couching the parent's instant request as limited to 'the final four months of the 2007-2008 school year' does not negate the obvious fact that the student's placement at [Lindamood-Bell] was litigated and considered by the previous IHO in his decision" (*id.*). Hearing Officer 2 went on to find that it was "unlikely, without further information, that the [district's] alleged failure to provide home instruction for a period of four months...would meet the standard for an award of compensatory services" (*id.*). However, Hearing Officer 2 noted that there was no hearing record before him which would allow for a complete review of the parent's request for compensatory services (*id.* at pp. 7-8). Lastly Hearing Officer 2 found that "the appropriate venue for the parent's instant request is before the State Review Officer by way of an appeal" (*id.* at p. 8). Hearing Officer 2 granted the district's motion and dismissed the parent's June 10, 2008 due process complaint notice.

The parent appeals, contending that Hearing Officer 2 erred in dismissing her June 10, 2008 due process complaint notice and in finding that the claims contained in that complaint were barred by res judicata. The parent alleges that the claims addressed in Hearing 1 were only those that were contained in her February 8, 2008 due process complaint notice and that those claims differed from those contained in the June 10, 2008 due process complaint notice. The parent further contends that Hearing Officer 2 erred in finding that the claims arising out of the March 2008 ISP and IEP were litigated during Hearing 1. The parent also alleges that the decision

⁴ It appears that at some point subsequent to Hearing 1, a third district school was verbally offered to the parent by the district; however, the hearing record is unclear as to when and by what means the offer was conveyed to the parent (*see* Dist. Ex. 3 at p. 2; *see also* Parent Reply to Motion to Dismiss at p. 8)

rendered in the appeal of Hearing 1 (Application of a Student with a Disability, Appeal No. 08-050), found that the decision in Hearing 1 did not address any claims pertaining to the March 2008 ISP and IEP. The parent requests that a State Review Officer reverse Hearing Officer 2's decision and remand the matter to a new impartial hearing officer, alleging that Hearing Officer 2 demonstrated bias against the parent.

The district submitted an answer asserting that Hearing Officer 2 correctly determined that the parent's claims raised in her June 10, 2008 due process complaint notice were barred by res judicata. The district contends, in the alternative, that the parent's appeal should be dismissed under the principles of collateral estoppel and/or mootness. Lastly, the district asserts that the parent is impermissibly attempting to engage in "judge shopping" (Answer ¶ 70), and that Hearing Officer 2 did not demonstrate any bias against the parent. The district requests that Hearing Officer 2's decision be affirmed and that the parent's appeal be dismissed with prejudice. In the alternative, the district seeks a finding that the parent's appeal be dismissed with prejudice on the basis of collateral estoppel, mootness and/or because of the parent's attempt at judge shopping.

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the Individuals with Disabilities Education Act (IDEA) resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at *1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at * 10 [2d. Cir. Oct. 9, 2008][upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Claims pertaining to the March 14, 2007 IEP and claims pertaining to the formulation and substantive content of the March 20, 2008 IEP were resolved by the unappealed decision in Application of a Student with a Disability, Appeal No. 08-050. The decision in Application of a Student with a Disability, Appeal No. 08-050 did not annul Hearing Officer 1's determination that the Smith School was not appropriate, but it did dismiss any pending claims pertaining to the

formulation and the substantive content of the March 20, 2008 IEP.⁵ The decision in Application of a Student with a Disability, Appeal No. 08-050 also determined that the student was not eligible for 480 hours of Lindamood-Bell services under pendency from the date that the student stopped attending Smith (March 3, 2008) through the end of the 2007-08 school year because the Lindamood-Bell program, in isolation, was not "substantially similar" to the program that had been awarded by a prior impartial hearing officer. In the instant matter, the parent is seeking an unspecified number of hours of additional compensatory services at Lindamood-Bell based on an allegation that the district failed to properly implement both the March 19, 2008 ISP and the March 20, 2008 IEP through the end of the 2007-08 school year (Dist. Ex. 3 at p. 2).

More specifically, the dispute in this matter concerns the implementation of the March 19, 2008 ISP and the appropriateness of the specific district schools offered by the district where the March 20, 2008 IEP would be implemented. Hearing Officer 2 determined that the parent's claims were precluded by res judicata. Although Hearing Officer 2 applied the correct legal standard in this matter, I find that given the circumstances of this case in which claims arose subsequent to Hearing 1, he erred in determining that res judicata precluded the parent's specific claims raised in her June 10, 2008 due process complaint notice.

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 Student with a Disability, Appeal No. 08-076; 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).

Here, at the time of Hearing 1, the March 19, 2008 ISP and March 20, 2008 IEP had been formulated and the district was in the process of identifying a school site in which to implement the IEP. Both the March 2008 ISP and IEP stated that the recommendations contained therein would be implemented beginning in April 2008 (Parent Exs. B at p. 1; C at p. 2). In Application of a Student with a Disability, Appeal No. 08-050, it was noted that the parent had not objected to the March 20, 2008 IEP during Hearing 1; therefore, the parent's claims with regard to the special

⁵ During Hearing 1, the parent testified that she was in agreement with many of the program recommendations contained in the March 20, 2008 IEP (Dist. Ex. 5 at p. 179). I note that if, at the time of Hearing 1, the parent had any objections to the formulation of the March 20, 2008 IEP or any of the substantive recommendations contained therein, she could have raised those claims at Hearing 1 and is precluded from doing so in the instant case.

education program and related services recommended on the March 20, 2008 IEP were waived, but for any claims pertaining to implementation (Application of a Student with a Disability, Appeal No. 08-050 at p. 12; see Dist. Ex. 5 at p. 179). As of the date of this decision, neither party appears to have appealed the decision in Application of a Student with a Disability, Appeal No. 08-050 and that decision did not rule on or preclude the parent from raising implementation issues from being raised in a subsequent due process complaint notice, nor did it preclude the parent from raising issues that arose subsequent to the conclusion of Hearing 1.

The district argued in Hearing 2 and argues on appeal that the parent's claims contained in her June 10, 2008 due process complaint notice could have been raised at Hearing 1. That argument is supported by the hearing record pertaining to claims related to the propriety of the formulation and the appropriateness of the content of the March 19, 2008 ISP and March 20, 2008 IEP. The argument is not supported by the hearing record pertaining to issues surrounding the implementation of the two programs subsequent to the closure of the hearing record in Hearing 1. The hearing record reveals that two different district schools were offered to the parent as recommended placements for her son for the remainder of the 2007-08 school year subsequent to the conclusion of Hearing 1, giving rise to potential new, but limited, issues that could not have been raised by the parent during Hearing 1 (Parent Ex. E; see Dist. Ex. 3 at p. 2; see also Parent Reply to Motion to Dismiss at p. 8). Furthermore, the March 2008 ISP and IEP indicated that they would not be implemented until April 2008 (Parent Exs. B at p. 1; C at p. 2). The hearing record reveals that Hearing 1 concluded on April 2, 2008 (Dist. Exs. 2; 5 at p. 233). Therefore, the parent's claims regarding implementation would not have been ripe at the time of Hearing 1. Lastly, and in contrast to Hearing Officer 2's finding otherwise, I find that while some of the facts may overlap between the claims raised in the parent's February 2008 and June 2008 due process complaint notices, they are not factually identical and raise different substantive issues, (e.g., whether agreed upon home instruction services were provided pending placement).⁶

Under the circumstances of this case, I find that Hearing Officer 2 erred in finding that the doctrine of res judicata precluded the parent from asserting claims pertaining to implementation of the March 19, 2008 ISP and March 20, 2008 IEP. Accordingly, I will remand the matter for an impartial hearing on the merits of whether the March 19, 2008 ISP and March 20, 2008 IEP were appropriately implemented. Upon remand, the impartial hearing officer should determine whether a FAPE was offered from March 2008 to June 30, 2008, and if not, whether additional compensatory services are appropriate. If it is determined that compensatory services are

⁶ I note that Hearing Officer 1 determined that the student's progress at Lindamood-Bell was "minimal," and in some cases regressive, as shown by test scores dated October 9, 2006 and August 30, 2007, when the student had just completed 200 hours of Lindamood-Bell services (Dist. Ex. 2 at pp. 7-8). Hearing Officer 1 further found that the student's attendance at the Lindamood-Bell program violated least restrictive environment (LRE) requirements as the student would only receive 1:1 instruction without any opportunity to interact other students, whether disabled or non-disabled (id. at p. 8). Therefore, Hearing Officer 1 determined that at that time, the "isolation of the student at Lindamood-Bell" was inappropriate (id.). These determinations are final determinations and may be considered as relevant by the impartial hearing officer upon remand. I note; however, that while Hearing Officer 1 found that Lindamood-Bell was not appropriate as a placement for the 2007-08 school year, in the instant matter the parent seeks compensatory services at Lindamood-Bell to be delivered currently as a remedy for an alleged violation of FAPE under the March 2008 ISP and IEP. Therefore, I find that the parent is not barred, in the instant matter, from raising the issue of whether services at Lindamood-Bell would now be an appropriate remedy as compensatory services.

appropriate, the impartial hearing officer should then determine what compensatory services would remedy the deprivation of services.

Next, I note that the parent requested that her claims be remanded to a new impartial hearing officer, alleging that Hearing Officer 2 demonstrated bias by sua sponte raising the merits of the parent's claims in his decision without having heard any evidence and without a fully developed hearing record (IHO Decision at pp. 7-8). The hearing record does not support the parent's claim of bias and I will therefore remand the case to the same impartial hearing officer who heard the case below. I note that Hearing Officer 2 specifically stated that he did not have a hearing record before him which would allow for a complete review of the parent's request for compensatory services; therefore, he did not make a determination on the merits of the parent's claim (*id.*). I further note, as stated above, that once the hearing record has been fully developed upon remand, if it is shown that the district failed to deliver appropriate services to the student such that a FAPE was denied, such a failure may give rise, at a minimum, to an award of additional compensatory services designed to remedy the deprivation. Hearing Officer 2 should ensure that the hearing record is developed such that, if need be, he can fashion appropriate relief, taking into consideration proposed compensatory services resolutions from both parties.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's July 30, 2008 decision is annulled; and

IT IS FURTHER ORDERED that this matter is remanded to the same impartial hearing officer who issued the decision that is the subject of this appeal for a new impartial hearing to determine whether the March 19, 2008 ISP was implemented, whether the district offered an appropriate class site in which to implement the March 20, 2008 IEP, and whether the student is entitled to additional compensatory services for the time period of March 20, 2008 through June 30, 2008; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the new impartial hearing be held within 30 days from the date of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the July 30, 2008 decision is not available to conduct the new impartial hearing, a new impartial hearing officer shall be appointed.

Dated: Albany, New York
October 23, 2008

PAUL F. KELLY
STATE REVIEW OFFICER