The University of the State of New York

The State Education Department
State Review Officer

No. 09-003

Application of a STUDENT 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 Springville-Griffith Institute Central School District

Appearances:
Hodgson Russ LLP, attorneys for respondent, Ryan L. Everhart, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which granted respondent's (the district's) motion to dismiss as moot the parents' due process complaint notice regarding the student's July 17, 2008 individualized education program (IEP). The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the district's middle school and was receiving services consistent with a November 18, 2005 IEP by virtue of pendency (IHO Ex. I at p. 7; see IHO Exs. X at p. 2; XI at pp. 6, 56; see also IHO Decision at p. 3).[1]

On June 20, 2008, an impartial hearing officer (Hearing Officer 1) issued a decision which, sustained in part the parent's December 21, 2007 due process complaint notice, annulled a November 11, 20, 2007 IEP, and directed that a Committee on Special Education (CSE) convene within 30 days (see IHO Exs. XI at pp. 23-24; XII). On July 17, 2008 a CSE convened to develop an IEP for the student in accordance with the order of Hearing Officer 1. The July 17, 2008 CSE meeting was attended by the CSE chairperson, a school psychologist, an occupational therapist, a special education teacher, a regular education teacher, an additional parent member and a "recording secretary" (IHO Ex. XXII at p. 12). The parents were not present and did not participate in the July 17, 2008 CSE meeting. The CSE found the student to be eligible for special education services as a student with an other health impairment (OHI) and recommended that he be placed

[1] See 20 U.S.C. § 1415(j) for statutory requirements pertaining to maintenance of a student's current educational placement during the pendency of due process proceedings.

in a general education setting with the related service of individual occupational therapy (OT) once per week for 30-minutes in a "regular class" (id. at p. 8). The IEP also recommended that the student receive "modifications/accommodations/supplementary aids and services" of preferential seating and use of a seat cushion, and that school personnel receive an "OT Consult-Indirect" one time per month for 30 minutes in the student's "regular class" (id. at pp. 8-9).

One day after the July 17, 2008 CSE meeting, the parents appealed Hearing Officer 1's June 20, 2008 decision to a State Review Officer (IHO Ex. XI at p. 29; see Application of a Student with a Disability, Appeal No. 08-077).[2] While that appeal was pending, the parents filed a due process complaint notice dated, August 29, 2008, alleging procedural and substantive errors in the student's July 17, 2008 IEP (IHO Ex. I). As relief, the parents requested, among other things, that the CSE develop a new IEP for the student for the 2008-09 school year that included the participation of the parents, the provision of appropriate occupational therapy services and assistive technology, an independent assistive technology evaluation, and a change in the student's classification (id. at p. 7).[3]

While the impartial hearing regarding the August 29, 2008 due process complaint notice was pending, a decision was rendered in the parents' appeal of Hearing Officer 1's decision (Application of a Student with a Disability, Appeal No. 08-077). Application of a Student with a Disability, Appeal No. 08-077, dated September 8, 2008, sustained the parent's petition, in part, and ordered the CSE "to reconvene to address the issue of whether the student is eligible for special education services, and if so, to address the student's classification within 30 calendar days of this decision." Subsequent to the issuance of Application of a Student with a Disability, Appeal No. 08-077, the CSE convened and prepared an IEP dated October 16, 2008 with parent participation (IHO Ex. XXII at p. 17).

The resultant October 16, 2008 IEP continued the student's eligibility for special education services as a student with an OHI, and continued the recommendation that the student attend a general education program and receive the related service of OT individually one time per week for 30 minutes in his "regular class" (IHO Ex. XXII at p. 17). The recommended "modifications/accommodations/supplementary aids and services" and recommendation for an "OT Consult-Indirect" remained the same as in the July 17, 2008 IEP (id. at pp. 17-18). The record does not show that the parent requested an impartial hearing or that an impartial hearing was held pertaining to the October 16, 2008 IEP. Therefore, the appropriateness of the October 16, 2008 IEP is not under review in this appeal.

No hearing was held in the instant case to determine whether the July 17, 2008 IEP was appropriate. Instead, on October 28, 2008, the district submitted a motion to dismiss the parents' due process complaint notice to the impartial hearing officer (Hearing Officer 2), arguing that the parents' claims regarding the July 17, 2008 IEP were rendered moot by the superseding October

[2] The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

[3] I note that many of the parents' claims raised in their August 29, 2008 due process complaint notice were similar, if not identical, to the claims raised in the prior impartial hearing which was the subject of Application of a Student with a Disability, Appeal No. 08-077.

16, 2008 IEP (IHO Ex. XI). The parents responded to the district's motion to dismiss by submitting a reply on November 7, 2008 (IHO Ex. XXII).

Hearing Officer 2 rendered his decision on November 24, 2008 and granted the district's motion to dismiss, finding that the parents' claims regarding the July 17, 2008 IEP were rendered moot by the subsequent October 16, 2008 IEP (IHO Decision at p. 3). Hearing Officer 2 noted in his decision that he had communicated to the parties that if the parents were to request the amendment of the parents' due process complaint notice to include allegations concerning the October 16, 2008 IEP, the impartial hearing officer would hear those claims upon consent of the district (id.). However, he further stated in his decision that the parties did not respond to his suggestion (id). Hearing Officer 2 also noted that the July 17, 2008 IEP was never implemented because the student has been receiving services under pendency due to the appeal of a prior matter (id.). Lastly, he determined that any issues regarding the October 16, 2008 IEP were not properly before him (id.). He therefore dismissed the parents' due process complaint notice dated August 29, 2008 as moot (id.).

The parents appeal, contending that Hearing Officer 2 erred in dismissing their August 29, 2008 due process complaint notice and in finding that the claims contained therein were rendered moot by a subsequent IEP. The parents allege that the October 16, 2008 IEP cannot be perceived as superseding the July 17, 2008 IEP because the October 16, 2008 IEP resulted in no new recommendations, the October 16, 2008 IEP "stayed the same" as the July 17, 2008 IEP, and the October 16, 2008 "Subcommittee" of the CSE "tabled" the discussion of the student's needs pending new evaluations. The parents also raise new allegations on appeal concerning the October 16, 2008 IEP in their petition. Lastly, the parents contend that if the October 16, 2008 IEP supersedes the July 17, 2008 IEP, they will have to file a new due process complaint notice regarding the October 16, 2008 IEP.

The district submitted an answer asserting that Hearing Officer 2 correctly determined that the parents' claims raised in their due process complaint notice were rendered moot by the superseding IEP. The district further contends that the October 16, 2008 IEP was conducted by a full CSE and not a subcommittee of the CSE, as alleged by the parents. The district also alleges that some of the issues raised in the parents' petition are beyond the scope of this appeal.[4]

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]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; 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.

[4] The district contends that the allegations contained in paragraph six of the parents' petition are not "clear and concise" as required by 8 NYCRR 275.10, in that the allegations are not divided into numbered paragraphs thus making it "practically impossible" for the district to respond to them. However, the district did not ask that the petition be dismissed for this alleged inadequacy and the district's answer was responsive to the parents' allegations raised in the petition.

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). The Individuals with Disabilities Education Act (IDEA) requires a CSE to review and if necessary revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]), and each new IEP supersedes the prior IEP in addressing the student's needs (see Application of the Bd. of Educ., Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 06-060; Application of a Child with a Disability, Appeal No. 06-046; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-063). Exceptions to the mootness doctrine apply only in limited situations and are severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). 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).

Here, I agree with Hearing Officer 2's decision that the October 16, 2008 IEP superseded the July 17, 2008 IEP, thus rendering the parents' August 29, 2008 due process complaint notice moot. The record reveals that the CSE convened on October 16, 2008 to comply with a State Review Officer's order in Application of a Student with a Disability, Appeal No. 08-077 and that the student's mother and her advocate attended the October 16, 2008 meeting by telephone (IHO Ex. XXII at p. 21). The record further reveals that the October 16, 2008 CSE discussed the student's needs and received updated progress reports and information from the student's teachers that differed from the information used in developing the July 17, 2008 IEP (compare IHO Ex. XXII at pp. 8-12, with IHO Ex. XXII at pp. 17-23). Moreover, the July 17, 2008 IEP was never implemented because the student has been receiving services under a November 18, 2005 IEP by virtue of pendency (IHO Ex. I at p. 7; see IHO Exs. X at p. 2; XI at pp. 6, 56; see also IHO Decision at p. 3). Under the circumstances presented here, a decision on the merits of the July 17, 2008 IEP would have no actual effect on the parties because it was superseded by the October 16, 2008 IEP. A State Review Officer is not required to make a determination that will have no actual impact upon the parties (see Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-061; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

Lastly, I note that Hearing Officer 2 suggested to the parents via e-mail and regular mail that they attempt to gain the district's consent to amend their due process complaint notice to include any allegations regarding the October 16, 2008 IEP (IHO Ex. XXIII). However, the parents chose not to do so. The parents are not precluded from filing a due process complaint notice to address their concerns regarding the October 16, 2008 IEP. However, I agree with Hearing Officer 2 that their claims regarding the July 17, 2008 IEP raised in their August 29, 2008 due process complaint notice have been rendered moot by the superseding October 16, 2008 IEP and I will uphold his decision in its entirety.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 4, 2009

PAUL F. KELLY
STATE REVIEW OFFICER