The University of the State of New York

The State Education Department
State Review Officer
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No. 09-032

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 New York City Department of Education

Appearances:
The Law Offices of Skyer, Castro, Cutler and Gersten, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for their son for the 2008-09 school year were appropriate. In a cross-appeal, the district seeks to recoup the funds it paid during the pendency of the proceedings. The appeal must be dismissed. The cross-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]).

As relevant to the instant appeal, the CSE met on April 29, 2008 for a review to develop an individualized education program (IEP) for the student for the 2008-09 school year (Tr. p. 32; Dist. Ex. 1 at p. 1).[1] Attendees included a school psychologist (who also acted as the district representative), a regular education teacher, two special education teachers, an additional parent

[1] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only the district exhibit was cited where both a district and parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

member, and the parents (Dist. Ex. 1 at p. 2). At the time of the review, the student was receiving special education services as a preschool student with a disability (Tr. p. 33; Dist. Ex. 3 at p. 1). As a result of the review, the CSE found the student eligible for special education programs and services as a student with autism and recommended a collaborative team teaching (CTT) kindergarten program with related services (Tr. pp. 36-37; Dist. Exs. 1 at p. 1; 2).

In a due process complaint notice dated August 14, 2008, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and sought funding of the student's private preschool program until an appropriate school age program was agreed to by the parents and the district (Parent Ex. A). The impartial hearing convened on October 20, 2008 and concluded on December 23, 2008, after three days of testimony (Tr. pp. 19, 115, 195; IHO Decision at p. 3).[2] By decision dated February 4, 2009, the impartial hearing officer found that the district offered the student a FAPE (IHO Decision at p. 16). The determinations by the impartial hearing officer included: (1) that the April 2008 CSE was properly constituted; (2) that the reduction in the student's related services was appropriate and would allow the student to progress academically and socially; (3) that the CSE relied upon its own reports as well as those provided by the parents, related service providers, and the student's preschool special education teacher; (4) that the CTT class was appropriate; and (5) that the evidence did not support an additional year of preschool or a 12-month program to address the student's special education needs (id. at pp. 14-16).

Initially, I will address a procedural issue that has arisen since the parents filed the August 14, 2008 due process complaint notice. The parents state in the wherefore clause of their petition that the district has already provided and paid for the services requested in the August 14, 2008 due process complaint notice under an unappealed pendency order and that the student no longer receives such services, therefore, they assert that the issue of payment for those services is moot (Pet. at p. 17, n.2). Moreover, it appears that the services were "largely discontinued voluntarily" by the parents after enrolling the student in another program for the "latter" portion of the 2008-09 school year (Answer ¶¶ 61, 99). Notably, the parents request in their petition that a State Review Officer dismiss the appeal "without prejudice," but further request that the impartial hearing officer's finding that the April 2008 CSE offered the student a FAPE for the 2008-09 school year be set aside (Pet. at p. 17). I find that based upon the parents' assertions in their petition, the parents have received the relief that they were seeking at the impartial hearing under pendency (see Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). The parents now request in their petition that the case be deemed moot because the student no longer receives the services that the parents sought in their due process complaint notice (Pet. at p. 17; see Answer ¶¶ 61, 99). I therefore must determine whether this case has been rendered moot.

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]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714

[2] A pendency hearing took place on September 4, 2008.

[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).

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, there is no longer any live controversy relating to the parties' dispute over the services offered by the district for the 2008-09 school year. I find that even if I were to make a determination that the program offered to the student in April 2008 was inappropriate, in this instance, it would have no actual effect on the parties pertaining to the 2008-09 school year. Both the parents and the district agree that the student has received the relief that the parents sought in their due process complaint notice by virtue of pendency, and the parents contend in their petition that the student no longer receives the services requested in their due process complaint notice rendering the case moot (Pet. at p. 17, Answer ¶¶ 61, 99). Therefore, the parents' claims relating to the April 2008 IEP need not be further addressed here. A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of a Child with a Disability, Appeal No. 07-077; 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). Under the circumstances presented here, I decline to review the merits of the parents' appeal.

As to the parents' specific request that the petition be dismissed "without prejudice" (see Pet. at p. 17), I find that such would be inconsistent with the finality provisions set forth in the Individuals with Disabilities Education Act (IDEA) and its implementing regulations, which mandate that, where there is an appeal to a State Review Officer, the independent decision on review becomes final unless a party seeks judicial review of the decision (34 C.F.R. § 300.514[d]; 8 NYCRR 200.5[k][3]). Accordingly, the parents' request for dismissal "without prejudice" is denied.

As to the district's cross-appeal seeking recoupment of the funds paid during the student's pendency placement, the IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation, or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

While the district acknowledges that requests by the district to recoup funds it paid pursuant to pendency have been denied in prior appeals to a State Review Officer, the district asserts that the instant case is distinguishable because the parents in the instant case were represented by counsel throughout the hearing process and were on actual notice prior to the first day of hearings that the district would seek reimbursement of funds. In support of its claim of entitlement to reimbursement of funds paid pursuant to pendency, the district asserts public policy and fairness considerations. I have considered the district's arguments favoring recoupment of funds paid under pendency and find them to be unpersuasive (see Application of a Student with a Disability, Appeal No. 09-019; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of a Student with a Disability, Appeal No. 08-134; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Accordingly, I decline to order the parents to reimburse the district for costs incurred by the district in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of State and federal law (see Murphy v. Arlington Cent. Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 19, 2009

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PAUL F. KELLY
STATE REVIEW OFFICER