The University of the State of New York

The State Education Department
State Review Officer
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No. 09-081

Application of the BOARD OF EDUCATION OF THE CARMEL CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Mayerson & Associates, attorneys for respondent, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse respondent for her son's tuition costs at the Connecticut Center for Child Development (CCCD) for the 2007-08 school year. The appeal must be dismissed.

Procedurally, the instant appeal began by due process complaint notice dated August 13, 2007, in which the parent requested that the district provide tuition reimbursement for the student's tuition costs at CCCD for the 2007-08 school year, alleging that the district failed to offer the student a free appropriate public education (FAPE) based upon both procedural and substantive violations (Joint Ex. I.A). In her due process complaint notice, the parent invoked the student's pendency rights pursuant to the Individuals with Disabilities Education Act (IDEA) and requested the district's continued payment of tuition and transportation costs associated with her son's placement at CCCD in accordance with an unappealed State Review Officer's decision in Application of the Bd. of Educ., Appeal No. 05-031 (id. at p. 2).

In the district's answer to the due process complaint notice dated August 20, 2007, the district acknowledged that CCCD was the student's pendency placement and agreed to continue to fund the placement and provide transportation during the pendency of this proceeding (Joint Ex. I.B at p. 6).

An impartial hearing began on December 19, 2007 and concluded on January 30, 2009, after 13 days of testimony (IHO Decision at pp. 1-5). The hearing record reveals that one impartial

hearing officer (Hearing Officer 1) conducted the first 11 days of the impartial hearing, and a second impartial hearing officer (Hearing Officer 2), who rendered the decision in this case, conducted the last two days of the impartial hearing (Tr. pp. 1, 237, 453, 677, 828, 1008, 1247, 1513, 1757, 2053, 2274, 2389, 2640; IHO Decision at p. 71). In a lengthy decision dated May 29, 2009, Hearing Officer 2 found that the district failed to offer the student a FAPE, the unilateral placement of the student at CCCD was appropriate to meet the student's needs, and equitable considerations supported the parent's claim (IHO Decision at pp. 64-70). The district was ordered to reimburse the parent for the student's tuition costs at CCCD from August 31, 2007 until June 30, 2008 (id. at p. 70).

The district appeals and alleges that Hearing Officer 2's findings are legally and factually incorrect. Specifically, the district argues that it complied with the IDEA's procedural requirements; the August 2007 IEP was substantively appropriate because it was reasonably calculated to address the student's educational needs and to confer educational benefits to the student; and the parent failed to meet her burden to show that CCCD was an appropriate placement. The district requests findings that the CSE's recommended program was appropriate and that CCCD was an inappropriate placement for the student.

In her answer, the parent contends that the district's petition should be dismissed because it was improperly served and the district's claims have been rendered moot since a determination of the underlying merits would have no actual effect on the parties.[1] In the alternative, the parent requests that the decision of Hearing Officer 2 be affirmed.

The district asserts in its reply that it effectuated proper service, and that its appeal is not moot.[2] Specifically, the district argues that the parent's attorney intends to seek "prevailing party status," which is a "real and live" issue that will have an actual effect on the parties. The district also contends that, if its petition is dismissed as moot, it "would amount to [the parent's] perpetual entitlement to maintain a pendency program by the simple act of delay." The district further argues that the exception to the mootness doctrine applies in this case.

As an initial matter, I find that the parent's contention that the district failed to properly serve the parent because the process server was an employee of the district is without merit. In a case where, as here, the named party in the proceeding is the board of education of a school district, a district's employee is not a party and is permitted to serve pleadings if such employee is over the age of 18 years (8 NYCRR 275.8[a], 279.2[c]; see East Lincoln Realty Center v. Isley, 170 A.D.2d 574, 575 [2d Dep't 1991]; Grid Realty Corp. v. Gialousakis, 129 A.D.2d 768 [2d Dep't 1987]).

Turning to the district's argument that the parent delayed this proceeding in order to perpetually maintain the student in his pendency program, I find that it is not persuasive under the circumstances of this case. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the

[1] In response to the district's petition, the parent's attorney attempted to file a motion to dismiss with the Office of State Review, which was not accepted or considered, nor was the district's response to the parent's motion to dismiss. I remind the parent's attorney that, pursuant to 8 NYCRR 279.6, no pleading other than the petition or answer will be accepted or considered by a State Review Officer, except a reply by the petitioner (8 NYCRR 279.1[a]).

[2] After the district's reply was filed, the parties submitted additional correspondence for review, which will not be accepted as additional pleadings or considered by a State Review Officer (8 NYCRR 279.6).

applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). In this case, the impartial hearing was unnecessarily lengthy. I remind and caution Hearing Officer 1, Hearing Officer 2, and both parties in this matter that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

> "(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]). The hearing record reveals that the district made joint requests for extensions during the impartial hearing (Tr. pp. 6, 229, 449, 680, 1508-09, 2244, 2385-86, 2635-37, 2725). Accordingly, I find that the district contributed to the delay of the impartial hearing.[3]

Turning next to the district's argument regarding the parent's prevailing party status, I note that the IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party; and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005].

Next, I agree with the parent's contention that regardless of whether the district offered the student a FAPE for the 2007-08 school year, no meaningful relief can be granted to the district, and thus, the district's appeal is dismissed as 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 [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

[3] It appears from the parties' pleadings that they agreed to postpone a proceeding to determine the parent's challenge to the 2008-09 IEP while litigating this proceeding (Answer ¶ 46; Pet'r Reply ¶ 5). It is unclear why the district did not proceed with the impartial hearing process as required by federal and State regulations or move for consolidation during the impartial hearing of the instant case.

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).

I am not persuaded by the district's argument that the exception to the mootness doctrine applies to this case. Although the district contends that this case is capable of repetition, yet evading review, there is no evidence in the hearing record or an offer of additional evidence to support this contention. I decline to find that the district has shown that the exception to the mootness doctrine applies to this case solely based upon the allegations in the parties' pleadings. Additionally, as discussed in detail above, the district contributed to the delay of the impartial hearing, which further does not support the district's argument that the exception to the mootness doctrine applies (see Torres v. State, 15 A.D.3d 742 [3d Dep't 2005]).

Moreover, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the parents and the district 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; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his or her current educational placement, "unless the State or local educational agency and the parents otherwise agree" (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes

funding that placement (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]; see also 20 U.S.C. § 1415[j]; Educ. Law § 4404[4][a]; 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). Under these circumstances, I conclude that a determination of the underlying merits would have no actual effect on the parties given that the district has already funded the student's placement at CCCD for the 2007-08 school year pursuant to pendency.

Given that no meaningful relief can be granted, a review of the underlying merits regarding whether the district did or did not offer the student a FAPE for the 2007-08 school year would have no actual effect on the parties, and the district's appeal is moot.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 31, 2009

PAUL F. KELLY
STATE REVIEW OFFICER