The University of the State of New York

The State Education Department
State Review Officer
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No. 09-133

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 Florida Union Free School District

Appearances:
Littman Krooks LLP, attorneys for petitioners, Adrienne J. Arkontaky, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Family Foundation School (Family Foundation) for the 2008-09 school year. The appeal must be dismissed.

During the 2008-09 school year, the student attended 11th grade at Family Foundation—a nonpublic school—which the Commissioner of Education has not approved as a school with which districts may contract to instruct student with disabilities (see 8 NYCRR 200.1[d], 200.7; Dist. Ex. 1 at p. 1; Parent Ex. I). The student's educational history has been discussed in a previous appeal and thus, will not be repeated here (see Application of the Bd. of Educ., Appeal No. 09-087 [finding, among other things, that the district properly declined to classify the student as a student with a disability at a January 2007 Committee on Special Education (CSE) meeting, and thus, the

student was not eligible to receive special education programs and services]; Dist. Ex. 3).[1, 2]

In February 2007, the parents withdrew the student from the district and enrolled him in a private school without proper notice to the district, and the student has not attended the district since that time (Dist. Ex. 3 at p. 4; Parent Exs. C; D at pp. 8, 45; see Tr. pp. 25, 29, 82-83, 85-86). The parents initially placed the student at Family Foundation in October 2007, without proper notice to the district, after he was asked to leave another private school he had attended between February 2007 and August 2007 (Dist. Ex. 3 at pp. 4-6; see Tr. pp. 82-87; Parent Exs. C; D at pp. 48, 74).[3] During the 2007-08 school year, the parents did not refer the student to the district for an evaluation or for the provision of special education programs and services; similarly, the hearing record contains no evidence that the parents referred the student to the district of location for an evaluation or for the provision of special education programs and services during the 2007-08 school year (Parent Ex. D at pp. 74-75; see Tr. pp. 25-26; Dist. Ex. 1 at pp. 1-5; Parent Ex. H).

By letter dated August 7, 2008, the parents notified the district of their intent to continue the student's enrollment at Family Foundation for the 2008-09 school year due to the district's alleged failure to address the student's "academic, social, behavioral and emotional needs" (Parent Ex. H). The parents indicated that the letter served as their "notification of unilateral placement" of the student and their intent to pursue reimbursement for the costs of the student's tuition at Family Foundation for the 2008-09 school year (id.). By notice dated August 19, 2008, the district acknowledged receipt of the parents' referral of the student for an initial evaluation to determine whether the student was eligible to receive special education programs and services (see Parent Exs. F at p. 1; G at pp. 1-2; see also Tr. pp. 51-52). The district forwarded a consent form for the parents' signatures with the August 19, 2008 notice in order to proceed with the student's initial evaluation (Parent Exs. F at p. 2; G at pp. 3, 6). In a separate letter dated August 19, 2008, the

[1] At all times throughout this decision, the term "district" refers to the student's district of residence.

[2] At the time of the impartial hearing and the instant appeal, the decision rendered in Application of the Bd. of Educ., Appeal No. 09-087, dated September 2, 2009, had not been appealed to federal court (Tr. pp. 10-11, 14-15). To the extent that the parents attempted to raise claims related to the 2007-08 school year in the present matter, those claims are barred by res judicata since the decision rendered in Application of the Bd. of Educ., Appeal No. 09-087 concerned the 2007-08 school year. 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. 09-025; Application of a Student with a Disability, Appeal No. 08-093; 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).

[3] Family Foundation is not located within the student's district of residence, but rather, is located within another school district, which will be referred to as the "district of location" in this decision (see Tr. pp. 9, 17-18, 20-21).

district advised the parents the district would process the parents' referral and also, since Family Foundation was located in the district of location, the parents could opt to have the student's initial evaluation conducted by the district of location (Parent Ex. G at p. 1).[4] The district also requested that the parents sign and return the enclosed consent form if they wanted the district to conduct the student's initial evaluation (id.). The letter also noted that if the parents had any questions or concerns, they should not hesitate to contact the district's director of pupil personnel services (id.). The parents did not execute the consent form to allow the district to conduct the student's initial evaluation (see id. at p. 6; Tr. pp. 16-18; Parent Ex. J). During the 2008-09 school year, the parents did not communicate to the district any intention to remove the student from Family Foundation (see Tr. pp. 15-18, 29-30).

On October 21, 2008, the parents provided consent to the district of location to conduct the student's initial evaluation for special education programs and services (Parent Ex. J at p. 1). The district of location evaluated the student and conducted a CSE meeting on January 21, 2009, where the CSE found the student eligible for special education programs and services as a student with an emotional disturbance (id. at pp. 1-2). The district of location's CSE developed an individualized education service program (IESP)[5] for the 2008-09 school year, identified the student's placement as "parentally placed in a non-public school," and offered counseling as

[4] According to an interpretive guidance memorandum published by the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and titled "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," (VESID guidance memorandum) dated September 2007, "[i]f a district of residence receives a request for an evaluation of a student suspected of having a disability who is parentally placed in a nonpublic school in another district, and the parent is not seeking to enroll the student in the public school, the district of residence should notify the parent of his/her right to request an evaluation from the district of location and the development of an IESP from the district of location. The district of residence, with parental consent to share information, should facilitate the referral to the district of location" (Dist. Ex. 4 at p.10).

[5] Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities, such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs. (Educ. Law §§ 3602-c[2][a], [2][b][1] as amended by L.2007, c. 378, § 27, subd. d; L.2005, c. 352, § 22). The CSE is also required to assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

equitable services (id. at pp. 1-5).[6] In late February 2009, the district learned about the action taken by the district of location's CSE classifying the student with an emotional disturbance through subpoenaed documents produced for the impartial hearing related to the 2007-08 school year, which formed the basis of the appeal in Application of the Bd. of Educ., Appeal No. 09-087 (Tr. pp. 18, 32-33; see Dist. Ex. 3 at pp. 1-19).

By due process complaint notice dated July 28, 2009, the parents, through their attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE)[7] for the 2008-09 school year based upon the following: failing to identify the student as a student with a disability; failing to develop an individualized education program (IEP); violating "Part B" of the Individuals with Disabilities Education Act (IDEA) "in a manner that continue[d] to deprive the student of educational benefits and opportunities;" depriving the parents of "meaningful participation in the development and implementation of the IEP by ignoring their requests to identify [the student] as a student with disabilities;" failing to explore therapeutic day support programs for the student; failing to arrange for further evaluations of the student; and failing to timely recommend an appropriate placement for the student "when it became apparent that he was a student entitled to the protections" of the IDEA (Dist. Ex. 1 at p. 5). As relief, the parents requested an order directing the district to classify the student as a student with a disability, reimbursement for the costs of the student's tuition at Family Foundation for the 2008-09 school year, and other relief deemed appropriate (id.). The district responded to the parents' due process complaint notice by letter dated September 10, 2009, contending that the parents were not entitled to tuition reimbursement for the student's attendance at Family Foundation for the 2008-09 school year because the district was not obligated to develop an IEP for the 2008-09 school year for the

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[6] According to the IESP, the student had been "parentally placed" at a nonpublic school (Family Foundation) (Parent Ex. J at p. 2). With respect to child find requirements and the provision of special education programs and services to students parentally placed in private schools within the district of location, the VESID guidance memorandum notes, in pertinent part, the following:

> The district of location is responsible for child find for students who are parentally placed in nonpublic schools located in their geographic boundaries.
>
> The CSE of the district of location must develop the IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic . . . schools located in the geographic boundaries of the public school.
>
> The IESP must be developed in the same manner and with the same contests as an IEP is developed**.**

(Dist. Ex. 4 at pp. 4-5).

[7] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

student because: (1) up until January 21, 2009, he had not been determined eligible for special education; and (2) subsequent to January 21, 2009, the parents "consistently maintained their intent to keep [their son] enrolled at the Family Foundation" (Dist. Ex. 2 at p. 1).

On September 18 and October 8, 2009, the parties convened for an impartial hearing (Tr. pp. 1, 75). At the conclusion of the parents' attorney's opening statement, the district's attorney argued in his opening statement that the district was not responsible for reimbursing the student's tuition costs at Family Foundation during the 2008-09 school year for two reasons: first, during the student's enrollment at Family Foundation from July 2008 through January 21, 2009, the student had not been identified as a student with a disability, and thus, the district was not obligated to offer the student a FAPE for that time period; and second, from January 21, 2009 through June 30, 2009, the district was similarly not obligated to offer the student a FAPE because according to the facts of the case and the interpretive language contained in the VESID guidance memorandum, dated September 2007, the district "'need not make FAPE available'" to a student who had been parentally placed in a private school in the district of location and who has been evaluated and classified by the district of location (Tr. pp. 11-24; see Dist. Ex. 4 at p. 10). The district's attorney specifically referred to the following question and answer in the VESID guidance memorandum as support for its position:

> 11. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?
>
> U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

(Dist. Ex. 4 at p. 10). The district's attorney asserted that in this case, the parents made their intent clear that the student would remain enrolled at Family Foundation, i.e., parentally placed in a private school located within the district of location for the 2008-09 school year; the parents referred the student to the district of location; the student had been evaluated by the district of location pursuant to the district of location's child find obligations; and the student had been found eligible for special education programs and services by the district of location; and thus, pursuant to the VESID guidance memorandum, the district—as the district of residence—need not make a FAPE available to the student and could not be found responsible for tuition reimbursement (Tr. pp. 11-25, 47-65, 81-82, 85-88, 90-92, 93-100; see Dist. Ex. 4 at p. 10).

On October 5, 2009, the parties submitted hearing briefs on these issues to the impartial hearing officer (see Dist. Post Hr'g Br.; Parent Post Hr'g Br.). The impartial hearing officer rendered her decision on October 17, 2009, which ultimately concluded that the parents were not entitled to reimbursement for the costs of the student's tuition at Family Foundation for the 2008-09 school year by the district and granted the district's motion to dismiss the parents' due process complaint notice (IHO Decision at pp. 5-8). The impartial hearing officer based her conclusion

upon the facts of the case, finding that the student was "a parentally placed student", and the interpretive language set forth in the VESID guidance memorandum submitted into evidence (id.).

On appeal, the parents argue that the impartial hearing officer erred in granting the district's motion to dismiss the due process complaint notice. The parents assert that the student's placement at Family Foundation during the 2008-09 school year arose as a result of the district's continued failure to identify the student as a student with a disability, and thus, constituted a denial of a FAPE for the 2008-09 school year. As such, the parents contend that the impartial hearing officer improperly relied on the VESID guidance memorandum because the student had been parentally placed at Family Foundation for the 2008-09 school year as a result of the district's denial of a FAPE, and the VESID guidance memorandum does not apply to this group of students. As relief, the parents seek an order stating that the district was obligated to offer the student a FAPE for the 2008-09 school year, that the district was obligated to identify and evaluate the student under State and federal laws and regulations, and that the district was responsible for defending the parents' due process complaint notice. Further, the parents ask that this matter be remanded to a new impartial hearing officer for a determination regarding whether the student was denied a FAPE for the 2008-09 school year.

In its answer, the district seeks to uphold the impartial hearing officer's decision as a matter of law, asserting that the impartial hearing officer correctly determined that the district was not legally responsible for providing the student with a FAPE for the 2008-09 school year. Alternatively, the district asserts as an affirmative defense that the parents' petition should be dismissed because it fails to conform to the practice regulations. The parents prepared and served a reply, which reargues points raised in the petition for review and responds to the district's affirmative defense.

Upon due consideration and an independent review of the hearing record, I find that the impartial hearing officer properly dismissed the parents' due process complaint notice. Initially, I note that although the hearing record reflects that the parents' August 7, 2008 letter to the district referred to a "unilateral placement" of the student for the 2008-09 school year, the parents subsequently did not provide consent to the district to conduct an initial evaluation, but did subsequently provide consent to the district of location to conduct an initial evaluation of the student. I also note that the hearing record reflects that the parents did not disagree with the district of location's CSE's January 2009 eligibility determination or with the services recommended in the district of location's IESP developed for the student for the latter portion of the 2008-09 school year. Based upon a review of the entire hearing record, the evidence supports the impartial hearing officer's determination that the student was parentally placed at the nonpublic school and the district's argument that FAPE was not at issue. Moreover, as the parents accepted the January 21, 2009 IESP developed by the district of location and the parents did not give the district of residence parental consent to evaluate the student and develop an IEP for the 2008-09 school year, the hearing record does not support a conclusion that parents were entitled to a concurrent education plan, via an IEP, from the district of residence. Thus, the hearing record does not support the parents' argument that they may pursue a tuition reimbursement claim against the district based upon an alleged denial of a FAPE for the 2008-09 school year.

In addition to the foregoing, I concur with the district's additional argument that the parents should not prevail in their tuition reimbursement claim for the period prior to the January 2009 finding that the student was eligible for special education, because the district did not violate its obligation to locate, identify, and/or evaluate the student when the district did not pursue the initial

evaluation after the parents did not provide consent for the district to conduct an initial evaluation of the student (see 34 C.F.R. §300.300[a][3][ii]; 8 NYCRR 200.5[b][1], [3-4]; see also 34 C.F.R. §§300.111, 300.301-300.311; 8 NYCRR 200.2[a], 200.4[b-c]). Therefore, I find no reason to disturb the impartial hearing officer's order of dismissal.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 30, 2009

PAUL F. KELLY
STATE REVIEW OFFICER