The University of the State of New York

The State Education Department
State Review Officer
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No. 10-041

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn Thompson, Esq., of counsel

Mayerson and Associates, attorneys for respondent, Gary S. Mayerson, Esq. and Brianne N. Dotts, 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 the parent for her son's tuition costs at the Rebecca School for the 2009-10 school year and to fund the remainder of her son's tuition costs at the Rebecca School for the 2009-10 school. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Rebecca School (Tr. p. 5; Parent Exs. A at pp. 1, 4; GG; HH). The student's placement at the Rebecca School constitutes the student's pendency placement pursuant to the impartial hearing officer's July 29, 2009 "Order on Pendency" (IHO Decision at p. 3; Pet. ¶¶ 11, 64). [1] The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special

[1] The July 29, 2009 Order on Pendency is not part of the hearing record. The hearing record reflects that the Order on Pendency was based upon a prior unappealed impartial hearing officer decision dated December 9, 2008 (Tr. pp. 5-6; see Parent Ex. B). The July 29, 2009 Order on Pendency directs the district to pay for the cost of the student's tuition at the Rebecca School during the proceedings in this case (Pet. ¶ 11).

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]).

In a due process complaint notice dated July 1, 2009, the parent, through her advocate, challenged the student's May 20, 2009 individualized education program (IEP) (Parent Ex. A). The parent asserted that the student's IEP for the 2009-10 school year was inappropriate because: (1) the goals and objectives did not reflect all of the student's educational, social, and emotional needs; (2) the goals and objectives were not developed at the May 20, 2009 Committee on Special Education (CSE) meeting; and (3) the parent was not given a copy of the student's IEP at the CSE meeting (id. at p. 2). The parent further asserted that the CSE had predetermined the program recommendation; that the CSE was not duly constituted; that the CSE failed to timely recommend an appropriate program for the student; that the parent was denied meaningful participation in the placement process; and that the CSE failed to ensure that there was a valid IEP and appropriate placement prior to the start of the school year on July 1, 2009 (id. at pp. 2-3). The parent also asserted that the recommended program was not appropriate because the teaching methodology at the proposed placement was inappropriate; the size of the school building was not appropriate; and the behavior management plan in the classroom was inappropriate (id. at p. 2). As relief, the parent sought prospective payment of tuition for the Rebecca School for the 2009-10 12-month school year (id. at pp. 4-5).

An impartial hearing began on July 20, 2009 (Tr. p. 1). During the first day of the impartial hearing, a pendency hearing was conducted, which resulted in the impartial hearing officer's July 29, 2009 Order on Pendency discussed above (Tr. pp. 5-10; IHO Decision at p. 3; Pet. ¶¶ 11, 64). The impartial hearing continued on September 24, 2009 and concluded on January 22, 2010, after five days of proceedings (Tr. pp. 12, 39, 160, 258, 274). In a decision dated April 5, 2010, the impartial hearing officer determined that the student's May 2009 IEP was not reasonably calculated to enable the student to make "measurable gains" (IHO Decision at p. 13). The impartial hearing officer found that the recommended 6:1+1 class was not sufficient based upon the student's "significant needs for support and supervision" (id.). The impartial hearing officer further found that the student needed a small setting that provided structure and "constant" supervision to address his "cognitive deficits, significant language delays, attentional problems, low frustration tolerance, extreme sensory issues and temptation to ingest non-food items" (id.). In addition, the impartial hearing officer found that the general education school where the recommended 6:1+1 class was located would cause "sensory overload" for the student, which would interfere with the learning of the student and his classmates (id.). Addressing the appropriateness of the Rebecca School for the student, the impartial hearing officer found that the school provided an appropriate program for the student (id. at p. 14). In support of his finding, the impartial hearing officer determined that the 2:1 adult-to-student ratio at the school provided the "significant support and supervision" needed by the student "to learn and to be safe" (id.). The impartial hearing officer also found that the methodology used at the Rebecca School appropriately addressed the student's communication needs and provided 1:1 instruction to address his attention difficulties (id.). The impartial hearing officer found that during the past school year at the Rebecca School, the student had improved in the areas of language skills, self-regulation, social skills, and academics (id.). Addressing equitable considerations, the impartial hearing officer found that the equities favored reimbursement.. The impartial hearing officer ordered that the district reimburse the parent tuition paid to the Rebecca School for the 2009-10 school year and that the district pay the Rebecca School

the remainder of the 2009-10 tuition after receipt of a school affidavit of attendance (id. at pp. 15-16).

On appeal, the district asserts that the impartial hearing officer's decision should be overturned because the district offered the student a free appropriate public education (FAPE) for the 2009-10 school year, the Rebecca School is inappropriate for the student, and the equities favor the district. The district further asserts that tuition reimbursement is improper because the Rebecca School is a "for-profit" entity, that an award of prospective tuition payment is improper, and that the parent should reimburse the district for its pendency payments, if the district prevails on appeal.

In an answer, the parent asserts that the impartial hearing officer's findings are supported by the hearing record. Specifically, the parent asserts that the district arbitrarily decided that the student needed a 6:1+1 classroom setting; that the parent could not meaningfully contribute to the IEP meeting; that the students at the recommended district school were grouped according to age, not functioning level; that chemicals at the school were easily accessible; that there was no speech-language therapy room; that the school would not have addressed the student's sensory needs; that the lunch room would have been inappropriate for the student; that there was no usable quiet room for student; and that the change would have been harmful to the student. The parent further asserts that the district's pendency recoupment claim and the district's "for-profit" argument are improper and that the district failed to prove that it was able to properly implement the proposed IEP. The parent further asserts that the Rebecca School provided a program that was reasonably calculated to provide the student with meaningful educational benefits and that the equities favor the parent.[2]

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits

[2] In the answer, the parent requests that I recuse myself from deciding this matter. I have considered the parent's request and find that I am able to impartially render a decision and that there is no basis for recusal (see Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 [2009]; 8 NYCRR 279.1).

(20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and

persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

With respect to the issues presented in this case, I will first address a threshold question of whether the claims by the district are now moot because the parent is legally entitled to all of the relief she was seeking at the impartial hearing pursuant to pendency. 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 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 placement or program offered by the district for the 2009-10 school year. I find that even if I were to make a determination that the district offered the student a FAPE for the 2009-10 school year, in this instance, it would have no actual effect on the parties because the 2009-10 school year expired on June 30, 2010, and the student remains entitled to tuition at the Rebecca School for the 2009-10 school year by virtue of pendency until these proceedings are concluded (see Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). Accordingly, the district's claims for the 2009-10 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Additionally, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; 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).

Under the circumstances presented here, I decline to review the merits of the district's appeal and it is not necessary to discuss the impartial hearing officer's determinations on the merits of the parent's claims for the 2009-10 school year.

Lastly, although the district seeks 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 Bd. of Educ. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; Dep't of Educ. v. S.S., 2010 WL 983719, at *8-*12 [S.D.N.Y. March 17, 2010]; 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]; see also Application of a Student with a Disability, Appeal No. 09-077; 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). Moreover, the district's responsibility for the payment of the student's tuition during a due process challenge pursuant to pendency is not conditional upon a finding of whether or not the district offered the student a FAPE and is not subject to recoupment (see Schutz, 290 F.3d at 484; S.S., 2010 WL 983719, at *8-*12).

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. 09-077; 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, the district is not entitled to reimbursement of the 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, and the district's request for recoupment of funds does not, therefore, impact my finding that the matter is moot (see 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518[a]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 7, 2010

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PAUL F. KELLY
STATE REVIEW OFFICER