The University of the State of New York

The State Education Department
State Review Officer
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No. 10-064

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Advocates for Children of New York, attorneys for petitioner, Randi Levine, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2009-10 school year was appropriate. The appeal must be sustained in part.

During the impartial hearing, the student attended a State-approved nonpublic school (Parent Ex. A at p. 1; see 8 NYCRR 200.1[d], 200.7). The student has diagnoses of an emotional disturbance, a pervasive developmental disorder, an attention deficit disorder, and an oppositional defiant disorder (Dist. Ex. 1 at p. 3). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (id. at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

In a due process complaint notice dated June 25, 2009, the parent requested that the district continue to provide the student with 10 hours per week of home-based applied behavior analysis (ABA) therapy (Parent Ex. A at p. 3). The parent asserted that the district erroneously determined that the student would not receive home-based ABA services for the 2009-10 school year and that the district's decision was contrary to the student's needs and the recommendations of those most familiar with him (id. at pp. 1-2).

The impartial hearing began on October 7, 2009, and after three days of testimony, the impartial hearing officer issued an interim order on pendency dated March 10, 2010 (IHO Interim Decision at pp. 1, 3). The impartial hearing officer ordered that the student continue to receive 10 hours per week of home-based ABA therapy (id. at p. 3). The impartial hearing continued on May 3, 2010 and concluded on May 20, 2010, after two days of proceedings (IHO Decision at pp. 1, 4). By decision dated June 15, 2010, the impartial hearing officer found that the student was not entitled to home-based ABA services as requested by the parent (id. at p. 8).[1] Specifically, the impartial hearing officer determined that the provision of home-based ABA services was not essential to the student's progress and that the student was receiving the services he required to meet his academic, emotional, social, and management needs in the school setting (id. at pp. 8-9). Thus, the impartial hearing officer denied the parent's request for home-based ABA services (id. at p. 9).

The parent appeals and asserts that the impartial hearing officer erred by denying the parent's request for home-based ABA services. The parent alleges that the impartial hearing officer erred by failing to discuss the evidence that was available at the time of the April 2009 CSE meeting and improperly relying on evidence that was subsequent to the April 2009 CSE meeting. The parent also alleges that the district created a predetermined individualized education program (IEP). The parent further asserts that the impartial hearing officer's decision relies upon erroneous findings.

The parent next asserts that the impartial hearing officer erred by failing to address the substantive and procedural violations that constituted the district's failure to provide the student with a free appropriate public education (FAPE). Specifically, the parent contends that the impartial hearing officer erred by failing to address her additional procedural and substantive claims, including the lack of a parent member at the April 2009 CSE meeting, the district's failure to discuss or recommend parent training, the infringement of the parent's right to participate in the formation of the April 2009 IEP, and the inadequacy of the student's April 2009 IEP goals. The parent alleges that the impartial hearing officer erred by failing to address the parent's claim for compensatory services of occupational therapy (OT) and speech-language therapy. The parent requests, among other things, a reversal of the impartial hearing officer's decision, an order directing the district to add 10 hours per week of home-based ABA therapy to the student's IEP, and an order directing the district to provide compensatory OT and speech-language therapy to the student.

In its answer, the district asserts that the petition should be dismissed because the student does not require home-based ABA services. The district contends that the parent did not challenge the student's classification as emotionally disturbed or his placement at the State-approved nonpublic school. The district argues that the parent's claims which were not raised in her due process complaint notice were not properly raised at the impartial hearing and should not be considered on appeal. The district also alleges that the impartial hearing officer's determination that the student does not require home-based ABA services because his needs are being met at the State-approved nonpublic school should be upheld. The district further alleges that the parent

[1] The impartial hearing officer's second corrected decision was dated July 16, 2010 (IHO Decision at pp. 1, 9).

failed to establish a record regarding her compensatory services claim, and that this claim should be denied.

The district next asserts that this appeal is not moot. The district further alleges that a decision on the merits is necessary because of the possibility that the parent could obtain "prevailing party" status and attorney's fees. The district contends that rendering this case moot is not equitable because a year elapsed from the date of the due process complaint notice to the conclusion of the impartial hearing; thus, this case is capable of repetition yet evading review. The district also argues that a single unfavorable decision could obligate the district to pay under pendency in perpetuity. The district requests the dismissal of the petition in its entirety.

In her reply, the parent asserts that the issues of CSE composition, sufficiency of the IEP's annual goals, the IEP's lack of a recommendation for parent training, and her claim for compensatory services were sufficiently raised below and are now properly before a State Review Officer.

Turning first to the district's argument that because this proceeding was lengthy, future proceedings would perpetually maintain the student's pendency services, 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 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 the impartial hearing officer 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 and the parent jointly consented to extensions during the impartial hearing (Tr. pp. 4, 120, 206, 318, 320, 487). Accordingly, I find that both parties contributed to the delay of the impartial hearing.

Turning next to the district's argument regarding the possibility of the parent obtaining prevailing party status, I note that the Individuals with Disabilities Education Act (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]; see also B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009]; Application of the Bd. of Educ., Appeal No. 09-081).

Next, I find that regardless of whether the district offered the student a FAPE for the 2009-10 school year, no meaningful relief can be granted to the parent because the parent is legally entitled to all of the relief she was seeking at the impartial hearing pursuant to pendency, and thus, the parent's appeal regarding the merits of this case 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 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 did not offer 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 10 hours per week of home-based ABA services for the 2009-10 school year by virtue of pendency (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 parent'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).

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]). Accordingly, 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).

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 10 hours per week of home-based ABA services for the 2009-10 school year pursuant to pendency.

Lastly, I turn to the parent's claim for compensatory OT and speech-language therapy for missed sessions due to provider unavailability at the State-approved nonpublic school during the 2009-10 school year. A district's violation of the IDEA's "stay put" or pendency provisions in regard to an educational placement or the provision of related services may give rise to an equitable award of compensatory education or additional services (see, e.g., Mr. C. v. Maine School Administrative Dist. No. 6, 538 F. Supp. 2d 298 [D. Me. 2008]). According to the pendency provisions in federal regulations, a school district "must provide those special education and related services that are not in dispute between the parent" and the district (34 C.F.R. § 300.518[c]; see J.H. v. Los Angeles United Sch. Dist., 2010 WL 1261544, at *2, *6 [C.D. Cal. March 29, 2010]). Although the hearing record supports the parent's contention that the student missed some related services that he was entitled to receive pursuant to pendency during the impartial hearing (Tr. pp. 61, 79, 240-41, 304-08, 444-49; Dist Ex. 8 at pp. 1-3, 10-11; Parent Exs. AA1-AA6), I concur with both parties' arguments on appeal that there is insufficient evidence in the hearing record to determine the number of sessions of speech-language therapy and OT that the student missed due to the temporary unavailability of related services providers at the State-approved nonpublic school during the 2009-10 school year. Accordingly, I will order the CSE to convene to determine and provide the amount of missed related services that the student was entitled to receive pursuant to pendency as additional compensatory services.

In light of my decision herein, it is not necessary to address the parties' remaining arguments.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, unless the parties otherwise agree, the CSE convene within 30 days of the date of this decision to determine the amount of speech-language therapy and OT that the student missed due to provider unavailability during the 2009-10 school year; and

IT IS FURTHER ORDERED that the district provide additional compensatory related services to the student that the parent was unable to obtain, but that the student was entitled to pursuant to pendency.

Dated: **Albany, New York**
September 14, 2010

PAUL F. KELLY
STATE REVIEW OFFICER