



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-065

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:

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which found that compensatory education was not available for the student. The appeal must be sustained in part.

Background and Procedural History

As discussed more fully below, the merits of the parent's appeal need not be addressed here because the case must be remanded to develop an adequate record upon which a decision can be made.

At the time of the impartial hearing, the student was attending an out-of-State nonpublic residential school operated by the Devereux Foundation (Devereux) (Tr. pp. 36, 37; see Dist. Ex. 4; Parent Ex. A at pp. 1, 2). Devereux is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's continuing eligibility for special education programs and related services as a student with an emotional disturbance is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

By due process complaint notice dated February 22, 2011, the parent, who was not represented by counsel, advised respondent (the district) that she "would like to appeal the recent decision" by the district that the student would "have to leave his current school placement" at the end of the 2010-11 school year because he would be turning 21 years of age prior to the end of the

school year (Answer Ex. 1A at p. 2).¹ The parent alleged that the student had not received an appropriate program "up and until last February 2010" (id.). The parent asked the district "to review [the student's] history" and contended that the district's records would "clearly show how many wrong placements and many schools [the student] had attended" (id.). Among other things, the parent asserted that the student had "finally been working and passing most of his classes" and was getting close to receiving his high school diploma (id.).

By letter addressed to the "Attention Impartial Hearing Office" and dated March 4, 2011, the parent advised that she was attaching a copy of the due process complaint notice (Answer Ex. 1A at p. 1). She further contended in her March 4, 2011 letter that the student was "finally very close to achieving his [high school] diploma," and "should be allowed to stay at [his] current placement" until he had completed and earned his diploma (id.).

The parties proceeded to an impartial hearing on April 29, 2011. In a decision dated May 9, 2011, the impartial hearing officer concluded, among other things, that "there was no testimony or evidence submitted that the student was deprived of an education at any time or that there was a gross violation of the [Individuals with Disabilities Education Act (IDEA)]" (IHO Decision at p. 4). Therefore, the impartial hearing officer concluded that compensatory education was not available for the student (id.).

The parent appeals, appearing pro se and stating, among other things, that she disagrees with the impartial hearing officer's decision. The parent requests compensatory education as a remedy to allow the student "to achieve his high school diploma."

In its answer, the district asserts, among other things, that the impartial hearing officer correctly found that there was no gross violation of the IDEA, which would allow for compensatory education for the student beyond the end of the 2010-11 school year. With respect to the parent's claim for compensatory education, the district further alleges that the parent did not raise this claim in her due process complaint notice and that this issue should therefore not be considered on appeal.

Discussion and Conclusion

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in

¹ I note that the parent's February 2011 due process complaint notice is not a part of the hearing record. The February 2011 due process complaint notice, along with a copy of a letter transmitting that document to the impartial hearing officer, is attached as an exhibit to the district's answer and marked by the district as Exhibit 1A.

which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];² 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

The district asserts in its answer that the parent's February 2011 due process complaint notice did not allege that the student was entitled to compensatory education. I disagree. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112). The parent asserted in her due process complaint notice, among other things, that the student failed to receive an appropriate program up and until February 2010, which was when the student began attending Devereux; requested that the student's history be reviewed; and asserted that the district's records would "clearly show" that the student attended "many schools" and that there were "many wrong placements" (Answer Ex. 1A at p. 2). The due process complaint notice also asserted that the student had "finally been working and passing most of his classes," was "so close" to achieving his high school diploma, and disputed the district's decision that the student's school placement at Devereux should end on July 30, 2011 (*id.*). During the impartial hearing, the parent asserted that the district had not offered the student an appropriate program since at least the eighth grade, and continued to assert that the student should be allowed to stay at Devereux to obtain his high school diploma (Tr. pp. 22, 26-28). The district did not object to such assertions by the parent and indicated that they understood that the parent was requesting that the student remain at Devereux beyond 21 years of age (Tr. pp. 17-18). Therefore, I find that the due process complaint notice may be reasonably read to include the issue of whether the student should be provided with compensatory education despite the fact that the pro se parent did not use that exact terminology (see Application of as Student Suspected of Having a Disability, Appeal No. 11-044; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-002). I

² If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

also note that the impartial hearing officer read the parent's due process complaint notice as raising the issue of compensatory education (IHO Decision at p. 4).

Having concluded that the parent properly raised the issue of compensatory education, I turn to whether the impartial hearing officer developed an adequate record upon which she could base her determination that the parent was not entitled to compensatory education. It is an impartial hearing officer's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Student with a Disability, Appeal No. 11-004; Application of a Student with a Disability, Appeal No. 10-086; Application of a Student with a Disability, Appeal No. 10-035; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92). Further, the impartial hearing officer has a responsibility to develop an adequate hearing record containing information that is relevant to the matters at issue (Application of a Student Suspected of having a Disability, Appeal No. 11-021). State regulations also provide that the impartial hearing officer has the authority to ask questions of counsel and witnesses for the purposes of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]).

In this case, the hearing record lacks evidence relating to the appropriateness of the special educational programs and related services offered or provided to the student until February 2010. As noted above, the parent was not represented by counsel below or on appeal and, although the impartial hearing officer read the parent's due process complaint notice as requesting compensatory education, she did not ask clarifying questions about the parent's allegations regarding this issue in order to develop an adequate record on which to base her determinations.

Accordingly, and upon review of the entire hearing record, I find that it is not adequate to permit a meaningful review of whether the district committed a gross violation of the IDEA such that the student should be awarded compensatory education. Therefore, I will remand the matter to the impartial hearing officer to obtain additional evidence in order to determine whether there has been a gross violation of the IDEA "up and until" February 2010 such that the student should be provided with compensatory education. With respect to this, the impartial hearing officer may wish to consider whether a prehearing conference might be helpful to simplify or clarify the issues at the impartial hearing (8 NYCRR 200.5[j][3][xi][a]). Further, the remand of this matter for an adequate hearing is made without prejudice to the rights of the parties, including but not limited to, the district's right to assert that all or part of the parent's claim is barred by the IDEA's two year statute of limitations and the parent's right to object to any such assertion (see 20 U.S.C. § 1415[f][3][C]; 34 C.F.R. 300.511[e], [f]; see also Somoza, 538 F.3d at 114).

I have considered the parties remaining contentions and find that I need not address them in light of the determinations made above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated May 9, 2011 finding that compensatory education is not available is annulled; and

IT IS FUTHER ORDERED that, unless the parties otherwise agree, this matter is remanded to the same impartial hearing officer who issued the May 9, 2011 impartial hearing officer decision to reconvene the impartial hearing within 30 days of the date this decision is received by the parties, hear additional testimony and/or receive additional evidence into the record consistent with this decision, and render a decision within the time frame set forth in the applicable State regulations at 8 NYCRR 200.5[j][5]; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the May 9, 2011 impartial hearing officer decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
 August 26, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER