The University of the State of New York

The State Education Department
State Review Officer
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No. 11-076

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, attorneys for petitioner, Neha Dewan, 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 fund her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Rebecca School (Tr. p. 20). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. pp. 19-20).

Background and Due Process Complaint Notice

On May 17, 2010, the Committee on Special Education (CSE) convened to develop an individualized education program (IEP) for the student's upcoming 2010-11 school year (Dist. Exs.

4; 5).[1] The CSE recommended that the student attend a 6:1+1 special class in a special school with related services and a paraprofessional for three months while the student transitioned from private to public school (id.). The parent disagreed with the CSE's recommendations and consequently filed a due process complaint notice dated July 20, 2010, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year due to numerous procedural and substantive errors that were detailed in the complaint (Dist. Ex. 1). As a remedy, the parent requested that the district pay for the student's tuition and transportation to the Rebecca School for the 2010-11 school year (id. at p. 7). The parent also stated that until there was a "final order," she "invoke[d] [the student's] pendency entitlements" pursuant to an April 5, 2010 prior impartial hearing officer decision that had been affirmed on appeal on different grounds by a State Review Officer in a July 7, 2010 decision (id. at p. 2; see Application of the Dep't of Educ., Appeal No. 10-041; Parent Exs. B; C).[2]

Impartial Hearing Officer's Decision

An impartial hearing convened on August 16, 2010 to determine the student's pendency (stay put) placement (Tr. pp. 1-15). In an interim decision dated September 20, 2010, the impartial hearing officer determined that pursuant to the July 7, 2010 State Review Officer decision, the student's pendency placement was at the Rebecca School, including transportation to and from the school, as part of a 12-month program effective July 20, 2010 "until the final resolution of the case" (IHO Interim Decision at p. 2). The impartial hearing officer stated in her decision that the parties did not dispute that the student's pendency placement arose from the prior State Review Officer's decision (id.).

The impartial hearing reconvened on September 22, 2010, and concluded on February 16, 2011, after seven days of proceedings (Tr. pp. 16-1297). By decision dated May 25, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2010-11 school year because: (1) it did not conduct adequate or timely evaluations to assess his levels and needs in all relevant areas, and teacher estimates were "not included as one of the accepted methods of evaluation" for determining a student's current functional levels; (2) it did not conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); (3) it did not include parent training or counseling as a related service on the student's IEP; (4) the recommended 6:1+1 program with a transitional paraprofessional for three months did not provide sufficient support for the student; and (5) the assigned school it offered was inappropriate to meet the student's needs (IHO Decision at pp. 36-40). The impartial hearing officer also found that the Rebecca School was an appropriate placement for the student because it provided education specifically designed to meet the unique needs of the student (id. at pp. 40-43). Regarding equitable considerations, the impartial hearing officer found that the parent fully cooperated with the CSE and that she was entitled to prospective funding for the unpaid portion of the tuition at the

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[2] The parent alleged at the impartial hearing that the student's pendency included tuition and placement at the Rebecca School, as well as transportation to and from the school, as part of a 12-month program (Tr. p. 6).

Rebecca School (id. at pp. 43-44). The impartial hearing officer ordered that the district reimburse the parent for the tuition she paid to the Rebecca School for the student for the 2010-11 school year; directly pay the Rebecca School for the remainder of the outstanding 2010-11 school year tuition; and conduct updated evaluations in all of the student's areas of suspected disability, including an FBA (id. at p. 44). The impartial hearing officer further ordered that if the parent had recently obtained updated evaluations, the CSE could adopt them as its own (id.).

During the course of the impartial hearing, and subsequent to the impartial hearing officer's September 2010 interim decision regarding pendency, the parent informed the impartial hearing officer that the district had sought judicial review of the July 7, 2010 State Review Officer decision in Application of the Dep't of Educ., Appeal No. 10-041 in the United States District Court and asserted the continuation of the student's pendency placement due to that proceeding (IHO Decision at pp. 3-5 n. 1, 2; see Tr. pp. 853-55, 1095-96).

Appeal for State Level Review

This appeal by the district ensued. The district alleges the impartial hearing officer's decision should be overturned because: (1) tuition reimbursement for the Rebecca School is improper because it is a for-profit business; (2) the district offered the student a FAPE inasmuch as it relied upon sufficient evaluative material in developing the student's May 2010 IEP and offered an appropriate program, related services, and placement to the student; (3) the Rebecca School is inappropriate for the student; and (4) the equities favor the district because the parent never seriously intended for the student to attend a public school. The district also alleges that the parent failed to demonstrate that she had the financial resources to pay the student's tuition and, therefore, prospective funding should not be ordered. In a footnote, the district alleges that although the parent has received all of the relief she requested by virtue of pendency, the appeal is not moot.

In her answer, the parent denies many of the substantive allegations of the district and asserts that the impartial hearing officer's decision should be upheld because she properly found that the district failed to meet its evidentiary burden regarding the appropriateness of the program and services it offered the student. The parent further alleges that the Rebecca School was appropriate for the student and that the equities favor the parent.

The district subsequently notified the Office of State Review of the decision in New York City Dep't of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011), which was rendered after the petition was filed in this appeal.

Applicable Standards and Discussion

Mootness

Turning first to the district's argument that the matters decided by the impartial hearing officer should be continue to be reviewed notwithstanding the fact that the parent has already received all of the relief she requested in this proceeding, upon careful review of the evidence contained in the hearing record, I find that regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2010-11 school year, no further meaningful relief can be granted to the parent because she is entitled to receive, if she has not already received,

all of the relief she was seeking at the impartial hearing either pursuant to the impartial hearing officer's September 2010 interim pendency decision or the federal court case appealing the July 7, 2010 decision by a State Review Officer, and thus, the district's appeal of the impartial hearing officer's decision regarding the merits of this case has now become moot. I have also carefully considered the District Court's reasoning in New York City Dep't of Educ. v. V.S. (2011 WL 3273922) as requested by the district and find, as further discussed below, that it does not compel a different result.[3]

As other State Review Officers have long held in administrative reviews of impartial hearing officer decisions, 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 the Dep't of Educ., Appeal No. 10-066; Application of a Student with a Disability, Appeal No. 10-064; 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). 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 concerning such issues arising out of school years that have 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, an exception provides that 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]). First, 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

[3] If this was a matter involving the 2009-10 school year in which the District Court had opted to remand the matter for further consideration by an administrative hearing officer after determining that the principles of mootness doctrine were inapplicable, the doctrine of law of the case would dictate strict application of the law set forth by the court; however, this is a new proceeding regarding the parent's claims attendant to the 2010-11 school year and, therefore, the doctrine of law of the case is not squarely applicable.

Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, 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 and program offered by the district for the 2010-11 school year. I find that even if I were to determine that the district did not offer the student a FAPE for the 2010-11 school year, in this instance, it would have no actual effect on the parties because the 2010-11 school year expired on June 30, 2011, and the student remained enrolled at the Rebecca School for the 12-month 2010-11 school year by virtue of pendency. Accordingly, I need not address the parent's claims for the 2010-11 school year in this appeal. 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).

With regard to the District Court's decision in V.S. (2011 WL 3273922), the court held that in Application of the Dep't of Educ., Appeal No. 10-041, the State Review Officer correctly determined that the parent's request for funding for the school year that was the subject of that appeal was no longer at issue where the student was educated at public expense at a private school chosen by the parents for the duration of the school year pursuant to a pendency order (V.S., 2011 WL 3273922, at *9).[4] Noting that a decision in favor of the district in that matter would not affect its obligation to pay the costs of the student's private school tuition, the Court nevertheless determined that the district sought redress regarding the collateral issue of the student's ongoing pendency placement for future proceedings and that had a decision been rendered by a State Review Officer on the merits it would have affected the student's placement (id.). After careful consideration and for several reasons described below, I respectfully decline to adopt the reasoning as set forth in V.S.[5]

[4] I note that the student in V.S. is the same student as the one in the instant appeal and that the school year at issue in the federal court case (2009-10) was the one immediately prior to the school year at issue in the instant appeal (2010-11) (V.S., 2011 WL 3273922; see Application of the Dep't of Educ., Appeal No. 10-041).

[5] Although State Review Officers endeavor to adhere as closely as possible to the legal guidance provided by the courts, in rare instances such as this, where conflicting authorities regarding statutory interpretation are present,

First, the sole reason that the District Court held that Application of the Dep't of Educ., Appeal No. 10-041, was not moot was because the parties required resolution of the merits of their dispute to establish the student's pendency placement in future proceedings (V.S., 2011 WL 3273922, at *10);[6] however, this rationale regarding future pendency may be read so broadly as to apply to virtually any and all Individuals with Disabilities Education Act (IDEA) proceedings involving the educational placement or services to be provided to a student, and other courts in New York have not adopted this broad approach (see Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F.Supp.2d 449, 457 [S.D.N.Y. 2005] [determining the matter was moot and declining to resolve the merits of the parties dispute when the pendency provision provided an independent basis for doing so]; see also Murphy v. Arlington Cent. School Dist. Bd. of Educ., 297 F.3d 195 [2d Cir. 2002] [ruling that the pendency provision formed a basis for awarding relief without addressing the merits of the parties' dispute]; Bd. of Educ. of Pawling Central School Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002] [rejecting the district's argument that a dispute must be resolved on the merits rather than on the basis of the pendency provision]; Patskin, 583 F. Supp. 2d at 428-29 [holding that the matter was moot where the school year at issue had passed, and stating that the relevant controversy was whether the IEP that the student was provided with was an appropriate placement and that there was no reasonable expectation that the student would be subjected to that particular IEP again]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 273, 278-80 [E.D.N.Y. Aug. 25, 2010] [dismissing the case as moot and noting that the parents were receiving full compensation for their private school expenditures and that the proceeding was brought to obtain legal fees]; J.N., 2008 WL 4501940, at *3-*4 [upholding a State Review Officer's determination that the case was moot]; Bd. of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L., 89 F.3d 464, 468-69 [7th Cir 1996] [holding that it was not necessary to determine which party would prevail on the merits when the stay put provision controlled for the duration of the dispute and the proposed public school IEP was no longer applicable to the student]; see generally New York City Dep't of Educ. v. S.S., 2010 WL 983719 [S.D.N.Y. Mar. 17, 2010]).[7] Additionally, the Ninth Circuit has explicitly rejected this rationale, holding that the stay put provision cannot be relied upon as the basis for a live controversy when the issue of liability on the substantive issues has been rendered moot (Marcus I. v. Dep't of Educ., 2011 WL 1979502, at *1 [9th Cir. May 23, 2011] [explaining that stay put provision 20 U.S.C. § 1415[j] is designed to allow a child to remain in an educational institution pending litigation, but

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such authority may not be binding upon the State Review Officer (see Application of the Bd. of Educ., Appeal No. 05-074 [holding that a student need not have previously received special education services from a public agency to be eligible for reimbursement when the District Court had previously ruled to the contrary]).

[6] Regardless of which party the District Court had found in favor of, the district and the parent have been in continuous unbroken litigation since at least July 1, 2009, and in that proceeding an unappealed impartial hearing officer decision dated December 9, 2008 formed the basis for the student's pendency placement, which he has remained in to this day. Although infrequent, it is not unheard of for a student to remain in a pendency placement for years, even after administrative and court decisions have been issued multiple times (see, e.g., B.J.S. v. State Educ. Dep't/Univ. of State of New York, 2011 WL 3610099, *1 [W.D.N.Y. Aug. 11, 2011] [acknowledging that the student remained in a 2003-04 pendency placement despite numerous subsequent adjudications regarding the students educational placement]).

[7] I also disagree with the interpretation that the District Court in M.N. v. New York City Dep't of Educ. (700 F.Supp.2d 356 [S.D.N.Y. Mar. 25, 2010]) ruled that the State Review Officer erred in dismissing the case on mootness grounds (V.S., 2011 WL 3273922, at *10). The Court in M.N. only acknowledged the State Review Officer issued the decision on mootness grounds and did not further comment.

does not guarantee a child the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]).[8] Second, I am concerned with adjudicating rights unnecessarily, particularly when it will not affect the claims that a party alleged at the outset of the due process proceeding and especially under a statutory scheme like the IDEA, which envisions that parents and districts will continue to convene on at least an annual basis to review a student's current IEP or educational placement, share their concerns with one another, and cooperatively and affirmatively engage in efforts to develop a new appropriate plan designed to offer the student a FAPE in the public schools (see 20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). This process usually works best when it is as free as possible from acrimonious relationships that often develop after continued litigation.[9] Third, I believe that the automatic nature of the pendency provision set forth in the IDEA (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]), and if necessary, the speed with which parties may obtain a State-level pendency placement reviews on an interlocutory basis under New York's regulatory scheme (see 8 NYCRR 279.10[d]) strongly diminishes the need to establish future pendency placements for future school years; such determinations are better left until the proceedings under which the right arises are commenced and the issue of the student's pendency placement is actually in dispute. Lastly, while I appreciate the Court's comment that a decision on the merits in V.S. would be useful (2011 WL 3273922, at *10), I am also concerned that the decision has the effect of removing the much needed discretion of administrative hearing officers to focus on both fairly and efficiently resolving disputes while retaining the discretion of how best to allocate their adjudicative resources to address ever growing dockets.[10] For the forgoing reasons, I decline to find that the parent's claim for tuition reimbursement for the 2010-11 school year continues to be a live controversy.

Exception to Mootness

With regard to the mootness exception, I note that neither party argues that it applies here. Moreover, the due process proceeding commenced when the parent's July 20, 2010 due process complaint notice was filed with the district and did not conclude until February 16, 2011 (Tr. pp. 1-1297). The hearing record demonstrates that impartial hearing officer did not render her decision until May 25, 2011, approximately ten months after the due process complaint notice was filed in this case (compare Dist. Ex. 1, with IHO Decision at p. 45). Multiple extensions were granted throughout the impartial hearing and posthearing period prior to issuance of a written decision by

[8] I also note what appears to be a discrepancy between the views of the Marcus I Court and the decision in Pawling Cent. Sch. Dist. v. New York State Educ. Dept. (3 A.D.3d 821 [3d Dep't 2004]) regarding future pendency placements.

[9] Moreover, this is also not a case in which particularly new or novel issues have been presented on the merits. Both State Review Officers and courts have previously provided frequent guidance regarding the types of claims raised in this case.

[10] The Second Circuit has determined that an exhaustive analysis by the impartial hearing officer is not mandated in every administrative proceeding and that in appropriate circumstances summary disposition procedures may be employed (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

the impartial hearing officer (IHO Decision at pp. 3-4; see 8 NYCRR 200.5[j][3][xiii], [5]). Due to the delay in the proceedings and issuing of the decision, the appeal in this matter is occurring after the completion of the student's 2010-11 school year. While it may be theoretically possible that the parties will disagree again in the future regarding the student's special education services, there is no evidence in the hearing record to support a conclusion that the issues raised in the parent's due process complaint notice, including, among other things, the process followed by the May 2010 CSE and recommendations made in the resultant IEP, would reoccur in following years (see Dist. Ex. 1). Moreover, according to the evidence contained in the hearing record, the student would age out of the public school to which the district had assigned the student for the 2010-11 school year and that the parent found objectionable, rendering even more remote the likelihood of repetition (Tr. pp. 375-76, 514-515, 1173). In view of the foregoing, I find that the exception to the mootness doctrine does not apply in this case.

Updated Evaluations

In addition to ordering reimbursement and direct payment for the student's tuition at the Rebecca School for the 2010-11 school year, the impartial hearing officer ordered the district to conduct updated evaluations in all of the student's areas of suspected disability, including an FBA, if it has not already done so or does not want to adopt updated evaluations that may have been recently obtained by the parent. According to the May 2010 IEP, the recommendations made for the student were to be initiated on July 1, 2010 and to be effective for one school year, until June 30, 2011 (Dist. Ex. 4 at p. 2).

I find that any evaluations conducted pursuant to the May 25, 2011 order of the impartial hearing officer would pertain to the student's 2011-12 school year, which was not at issue in this case. Additionally, as the district has not appealed the portion of the order of the impartial hearing officer regarding updated evaluations, I will not disturb it. In any event, I note that State regulations require that the CSE "shall arrange for an appropriate reevaluation of each student with a disability if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation" (8 NYCRR 200.4[b][4]).

Conclusion

In light of my determination herein, I find that it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 25, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER