The University of the State of New York

The State Education Department
State Review Officer
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No. 11-082

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, Diane da Cunha, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Sonia Mendez-Castro, 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 respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of their daughter's tuition at the Rebecca School for the 2010-11 school year.[1] The appeal must be dismissed.

Background and Procedural History

Upon review and consideration of the hearing record and as discussed more fully below, this decision will not include a full recitation of the student's educational history or address the merits of the district's appeal because the issues in controversy are no longer live and no meaningful relief can be granted, thereby rendering the instant appeal moot.

Briefly, the Committee on Special Education (CSE) convened on February 2, 2010 to conduct the student's annual review and to develop her individualized education program (IEP) for the 2010-11 school year (Dist. Exs. 5-6). Based upon its discussions and review of available information, the CSE recommended placing the student in a 12-month program in an 8:1+1 special

[1] The Commissioner of Education has not approved the Rebecca School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

class in a specialized school with the following related services: two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of small group speech-language therapy; two 30-minute sessions per week of individual physical therapy (PT); one 30-minute session per week of small group PT; three 30-minute sessions per week of individual occupational therapy (OT); two 30-minute sessions per week of individual counseling; one 30-minute session per week of small group counseling; and a full-time, 1:1 health services paraprofessional (Dist. Ex. 5 at pp. 15-18; see Dist. Ex. 6). The student's IEP also contained annual goals and short-term objectives to address the student's identified needs in the following areas: reading, mathematics, writing, PT, OT, speech-language, social/emotional, and with regard to the 1:1 health paraprofessional (Dist. Ex. 5 at pp. 6-14).[2]

In a notice, dated June 7, 2010, the district summarized the CSE's recommended special education programs and related services for the student for the 2010-11 school year, and advised the parents of the school to which the district assigned the student (Dist. Ex. 3; see Dist. Ex. 2 at p. 3). By letter dated June 15, 2010, the parents—through their attorneys—notified the district of their intent to unilaterally place the student at the Rebecca School for the 2010-11 school year, noting their "disagreement" with the CSE's recommendation to place the student in a "6:1+1 special class" in a specialized school, that they had not received a "final notice," and that the CSE failed to offer the student a 12-month program (Parent Ex. A at pp. 1-2).[3]

Due Process Complaint Notice

By due process complaint notice the parents—through their attorneys—alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year based upon both procedural and substantive violations (Dist. Ex. 1 at pp. 1-4).[4] Specifically, the parents asserted that the special education teacher who attended the February 2010 CSE meeting did not satisfy the regulatory requirements because she was not "currently teaching," and further, that the CSE failed to include an additional parent member (id. at p. 2). In addition, the parents alleged that the CSE improperly relied upon teacher estimates to determine the student's current skill levels; the annual goals and short-term objectives were "generic, vague and d[id] not provide a baseline from which to work;" the CSE failed to specify the method of measurement for the student's annual goals and short-term objectives; the proposed special class did not offer the student an appropriate functional peer group for instructional purposes or for social/emotional purposes; and the parents could not consider a specific class for the student due

[2] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] At the impartial hearing, the district presented testimonial evidence to support its assertions that the district mailed the June 7, 2010 notice of assigned school to the parents, the parents did not contact the district to advise that they had not received the June 7, 2010 notice of assigned school, and that the district never received the parents' June 15, 2010 notice of unilateral placement (Tr. pp. 43-56). The student's mother testified that for the past three school years, she had received final notices, and admitted that she "should have found it odd" that she had not received a final notice for the 2010-11 school year (Tr. pp. 293-94). She also testified that she, personally, was not responsible for mailing the June 15, 2010 notice of unilateral placement to the district (Tr. pp. 288-96).

[4] The due process complaint notice referred to the June 15, 2010 notice of unilateral placement (Parent Ex. A at p. 1).

to the district's failure to send a final notice prior to the beginning of the school year (id. at pp. 2-4). The parents also noted that the Rebecca School was appropriate to meet the student's needs and that no equitable considerations would bar an award of reimbursement for the costs of the student's tuition at the Rebecca School for the 2010-11 school year (id. at p. 4).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on March 2, 2011, which concluded on May 26, 2011, after four nonconsecutive days of testimony (Tr. pp. 1, 241). At the time of the impartial hearing, the student was attending the Rebecca School, which both parties agreed constituted the student's pendency placement based upon a previously unappealed impartial hearing officer's decision, dated January 12, 2010 (Tr. pp. 62-67; Parent Ex. BB at pp. 1, 4-5; Interim IHO Decision at p. 2).[5] In an interim order, the impartial hearing officer memorialized the parties' pendency agreement, and ordered the district to continue to reimburse the parents for the costs of the student's pendency placement at the Rebecca School during the instant due process proceedings (Interim IHO Decision at p. 2).

In a decision dated June 6, 2011, the impartial hearing officer rendered a decision on the merits of the case, and concluded that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was appropriate to meet the student's special education needs, and that equitable considerations did not preclude an award of tuition reimbursement (IHO Decision at pp. 2-10). The impartial hearing officer determined that, contrary to the parents' assertion, the CSE was validly composed, but that the district failed to sustain its burden to establish that the parents had received the final notice of the student's assigned school or that the recommended "placement" was appropriate,[6] specifically noting, however, that the parents "agreed with the recommended program on the IEP, [but had] concerns with the school placement" (id. at pp. 8-9). The impartial hearing officer also noted that "many of [the parents'] concerns were unfounded" (id. at p. 9). Next, the impartial hearing officer addressed the student's unilateral placement at the Rebecca School and equitable considerations, and ultimately, she directed the district to reimburse the parents for the costs of the student's tuition at the Rebecca School upon receipt of proper proof of payment (id. at pp. 9-10).

[5] The district's attorney stated on the record that the district had "no objection to continuing pendency" as long as the amount of the student's tuition was "substantially similar" to the amount of tuition paid under the unappealed impartial hearing officer's decision (Tr. pp. 62-67; see Interim IHO Decision at p. 2).

[6] The impartial hearing officer appears to refer to the school "placement" as the location identified in the final notice of recommendation (FNR) as the placement; however, as the Second Circuit has explained, under the Individuals with Disabilities Education Act (IDEA) an "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]).

Appeal for State-Level Review

The district appeals, and alleges that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2010-11 school year. The district contends that the evidence established that the district adhered to its standard office procedures to ensure the proper addressing and mailing of the final notice, that it was not returned as undelivered and, therefore, the district was entitled to the legal presumption of mailing and receipt. In addition, the district argues that the impartial hearing officer erred because the student did not attend the public school, the parents' claims regarding the particular class were speculative, and the district was not obligated to hold the particular spot open for the student and offer evidence to establish that the particular classroom would have met the student's needs. The district also asserts that equitable considerations preclude an award of tuition reimbursement because the parents failed to establish that they provided the district with the required 10-day notice of unilateral placement and because the parents did not object to any portions of the student's 2010-11 IEP. Finally, the district contends that the Rebecca School's for-profit status precludes tuition reimbursement as an available remedy.

In their answer, the parents assert general admissions and denials, as well as additional arguments, in support of their request to dismiss the district's petition in its entirety. The parents also attach additional evidence to the answer for consideration upon review. The district responds in a reply, and argues that the additional evidence was available at the time of the impartial hearing and is not necessary in order to render a decision, and thus, the additional evidence should not be considered on appeal.

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

Initially, I must note that in this case the parents have already received all of the relief they were seeking at the impartial hearing by virtue of pendency and the 2010-11 school year at issue has expired, which raises the question of whether the instant appeal has been rendered moot by the passage of time. Although the district acknowledged the student's pendency (stay put) placement for the 2010-11 school year as the Rebecca School and that the parents' claim for tuition reimbursement already been paid by the district (Pet. ¶ 4; Dist. Aug. 3, 2011 Letter), the district asserts in a footnote that the instant appeal is not moot, because it still has a legally cognizable interest in an adjudication on the merits regarding whether the district offered the student a FAPE for the 2010-11 school year because a "decision in the [district's] favor" would change the student's pendency placement to the public school and relieve the district of "any future obligation to fund Rebecca's tuition as the pendency placement during future IDEA proceedings" (Pet. at p. 3, n.3; citing Pawling Cent. Sch. Dist. v. N.Y.S. Educ. Dep't, 3 A.D.3d 821, 823-24 [3rd Dept. 2004]). However, upon careful consideration of the evidence 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 may be granted to the parents because they have

received all of the relief sought pursuant to pendency, and thus, the district's appeal has been rendered moot. In addition, careful consideration of the District Court's recent decision rendered in New York City Dept. of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011), as discussed further below, does not compel a different result.

As other State Review Officer 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 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, 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 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 or program offered by the district for the 2010-11 school year. Here, even if a

determination on the merits demonstrated that the district did 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 entitled to her pendency placement at the Rebecca School funded by the district through the conclusion of the administrative due process. Accordingly, the district's claims for the 2010-11 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).

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 parents' 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). 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.[7]

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);[8] 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. 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

[7] Although State Review Officers endeavor to adhere as closely as possible to the legal guidance provided by the courts, in rare instances, where conflicting authorities regarding statutory interpretation are present, such authority may not be binding upon a 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]).

[8] 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 3651051, *1 [W.D.N.Y. Aug. 18, 2011] [acknowledging that the student remained in a 2003-04 pendency placement despite numerous subsequent adjudications regarding the student's educational placement]).

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. 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. 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]).[9] 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 student to remain in an educational institution pending litigation, but does not guarantee a student 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]).[10]

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.[11]

[9] 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.

[10] 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. Dep't. (3 A.D.3d 821 [3d Dep't 2004]) regarding future pendency placements.

[11] 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.

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 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.[12] 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 respect to the mootness exception, neither party argues that the exception to the mootness doctrine applies in this case. Moreover, the hearing record fails to contain evidence or an offer of additional evidence to support this contention. I also note that the crux of the parents' case focused primarily upon the district's failure to provide a final notice of the student's assigned school prior to the beginning of the school year, as well as concerns about the assigned school, which the impartial hearing officer determined were largely "unfounded." Therefore, while it may be theoretically possible that the district could fail to issue a final notice or assign the student to the same school for the 2011-12 school year, such 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 a demonstrated probability of recurrence sufficient to satisfy the requirements necessary for the exception to apply. 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).

[12] For example, 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).

Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 7 , 2011

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JUSTYN P. BATES
STATE REVIEW OFFICER