The University of the State of New York

The State Education Department
State Review Officer
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No. 11-102

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
The Law Offices of Neal H. Rosenberg, attorneys for petitioners, Neal H. Rosenberg, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Churchill School (Churchill) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Churchill, an ungraded school for students with average to above average intelligence who have received classifications of a learning disability or a speech or language impairment (Tr. pp. 151-52, 266). Churchill 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 (Tr. pp. 151-52; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Background and Due Process Complaint Notice

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 parents' appeal because the issues in controversy are no longer live and no meaningful relief can be granted, thereby rendering the instant appeal moot.

Briefly, on October 20, 2009, the Committee on Special Education (CSE) convened to develop an individualized education program (IEP) for the student that recommended for the 2009-10 school year that she attend a 12:1+1 special class at Churchill with related services of speech-language therapy, occupational therapy (OT), and counseling (Parent Ex. B1 at pp. 1, 14). On May 4, 2010, the CSE convened to develop an IEP for the student's upcoming 2010-11 school year (Parent Ex. H). The May 2010 CSE recommended a collaborative team teaching (CTT) class with a 12:1 ratio and related services of speech-language therapy, OT, and counseling (id. at pp. 1, 14).[1] At the parents' request, the CSE reconvened on August 24, 2010, and recommended that the student attend a CTT class with a 12:1+1 ratio and related services of speech-language therapy, OT, and counseling (Dist. Ex. 2 at pp. 1, 11).

The parents disagreed with the CSE's recommendations and consequently filed a due process complaint notice asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year due to procedural and substantive errors that were detailed in the complaint (Dist. Ex. 1). As a remedy, the parents requested that the district provide funding for, or placement at, Churchill and provide transportation and related services (id.). The parents also stated that they "exercised [their] right to request that the [district] continue to fund the child's placement under the pendency provisions of the law" (id.).

Impartial Hearing Officer's Decision

An impartial hearing convened on December 2, 2010 and concluded on July 6, 2011, after a total of six days of proceedings (Tr. pp. 1, 6, 11, 145, 244, 281). During the impartial hearing, there was no dispute by the parties that the special education program and services provided in the October 2009 IEP constituted the student's pendency placement (Interim IHO Decision at p. 2; Tr. pp. 1-4). The impartial hearing officer subsequently issued a pendency determination dated December 15, 2010 that ordered the district to "continue to fund [the student] at the Churchill School" (Interim IHO Decision at p. 2).

By decision dated July 21, 2011, the impartial hearing officer found that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at pp. 18-21). Among other things, the impartial hearing officer found that the August 2010 CSE meeting was duly constituted, that the student's IEP was procedurally and substantively appropriate, that the district's program was reasonably calculated to enable the student to receive educational benefits in the least restrictive environment (LRE), and that the district's assigned school was appropriate (id.). The impartial hearing officer also found "strictly for the purpose of making a complete record," that the parents

[1] It is apparent from the hearing record that the parties and the impartial hearing officer use the term "collaborative team teaching" to mean an integrated co-teaching class (see Tr. pp. 17, 46-47, 229-34, 251-53). State regulation defines "integrated co-teaching" as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). Furthermore, school personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (now the Office of Special Education) issued a guidance document in April 2008 entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). For purposes of this decision, I will refer to this type of class as a CTT class.

met their burden of establishing that Churchill was appropriate for the student (id. at pp. 21-23). The impartial hearing officer further determined that equitable considerations favored the district because although the parents cooperated with the CSE, the hearing record showed that the parents were not "open to the idea of a public school" and, accordingly, had the parents prevailed on the question of whether the district offered the student a FAPE, she would have reduced an award of tuition reimbursement (id. at pp. 23-24).

Appeal for State-Level Review

This appeal by the parents ensued. The parents allege that the impartial hearing officer's decision should be overturned because: (1) the impartial hearing officer failed to adequately consider the district's procedural errors and how those errors constituted a failure to offer a FAPE; (2) the CSE's program proposed in the student's IEP would not have provided the student with a FAPE; and (3) the district's proposed placement in the assigned district school was not appropriate for the student. According to the parents, the impartial hearing officer properly determined that their unilateral placement of the student at Churchill was appropriate and erred in finding that equitable considerations favored the district. The Parents further argue that although the 2010-11 school year has concluded, the appeal is not moot because their controversy is capable of repetition and a decision in their favor would alter the student's pendency placement in future proceedings.

In its answer, the district denies many of the substantive allegations of the parents and asserts that the impartial hearing officer properly determined that the district offered the student a FAPE and that equitable considerations favored the district. Citing New York City Dep't of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011), the district asserts that the case is not moot because a decision on the merits of the case will affect its pendency obligations during future litigation.

Applicable Standards and Discussion

Mootness

Initially, I must note that in this case the parents have now received under pendency all of the relief they sought at the impartial hearing and that 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.[2] As stated above, the parties assert that the instant appeal is not moot (Pet. ¶¶ 49-50; Answer ¶ 35). 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 parents' appeal has

[2] An affidavit dated January 2011 from Churchill's chief financial officer avers that the district has paid the student's tuition at Churchill for September through December 2010 (Parent Ex. A). Pursuant to the impartial hearing officer's December 15, 2010 interim decision, the district was ordered to continue to pay for the student's tuition at Churchill (Interim IHO Decision at p. 2). Current prevailing caselaw prohibits a district from recouping payments made pursuant to pendency (see New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *11 [S.D.N.Y. Mar. 17, 2010]).

been rendered moot. In addition, careful consideration of the District Court's recent decision rendered in V.S., 2011 WL 3273922, as discussed further below, does not compel a different result.

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, 84-85 [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 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 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 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 entitled to her pendency placement at Churchill funded by the district through the conclusion of the administrative due process. Accordingly, the parents' 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 the Dep't of Educ., Appeal No. 11-085; 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 in that case 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 discussed below, I respectfully decline to adopt the reasoning as set forth in V.S.[3]

First, the sole reason that the District Court in V.S. 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);[4] 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 Murphy v. Arlington Cent. Sch. 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'

[3] 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]).

[4] 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]).

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]).[5] 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]).[6]

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.[7]

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

[5] 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 that the State Review Officer issued the decision on mootness grounds and did not further comment.

[6] 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.

[7] 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.

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.[8] For the forgoing reasons, I decline to find that the parents' claim for tuition reimbursement for the 2010-11 school year continues to be a live controversy.

Exception to Mootness

The parents argue that the exception to the mootness doctrine applies in this case because the matter is capable of repetition, yet would evade review. To support their argument, the parents assert that the CSE has recommended a 12:1+1 placement for the student's 2011-12 school year, and that the parents believe that Churchill is the appropriate placement for the student for the 2011-12 school year (Pet. ¶ 50). While the parents may elect to challenge the IEP developed for the 2011-12 school year and seek tuition reimbursement for the student at Churchill for the 2011-12 school year in a subsequent due process proceeding, the issues presented in such a claim would be different as the placement recommended for the 2011-12 school year is a change from the CTT placement recommended for the student for the 2010-11 school year (Pet. ¶ 50; see Dist Ex. 2 at p. 1). Moreover, each year the elements of a tuition reimbursement claim must be analyzed separately (see Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, *9-*10 [D.Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of the Bd. of Educ., Appeal No. 09-071; Application of the Bd. of Educ., Appeal No. 09-055). 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).

[8] 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 determination herein, I find that it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October14, 2011

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STEPHANIE DEYOE
STATE REVIEW OFFICER