The University of the State of New York

The State Education Department
State Review Officer
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No. 11-108

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, Lisa R. Khandhar, Esq., of counsel

Partnership for Children's Rights, attorneys for respondents, Todd Silverblatt, 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') son and ordered it to reimburse their son's tuition costs at the Aaron School in addition to the cost of privately obtained speech-language therapy and occupational therapy (OT) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in fifth grade at the Aaron School and he was also receiving after-school individual speech-language therapy and individual OT (Tr. pp. 303, 328-30). The Commissioner of Education has not approved the Aaron 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 and related services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; see Tr. pp. 19-20).

Background and Due Process Complaint Notice

Upon review and consideration of the hearing record, 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 April 20, 2010 to develop an individualized education program (IEP) for the student's upcoming 2010-11 school year (Parent Ex. C). The April 2010 CSE recommended that the student attend a 12:1+1 special class in a community school with a 12-month program for related services consisting of speech-language therapy, OT, and counseling (id. at pp. 1-2, 20). By due process complaint notice dated August 9, 2010, the parents commenced an impartial hearing (Tr. p. 5; Parent Ex. A at p. 1).[1] By letter dated August 19, 2010, the parents advised the district that they rejected the April 2010 IEP and that they planned to enroll the student in the Aaron School for the 2010-11 school year (Parent Ex. G at p. 1). The parents further advised that they intended to seek tuition reimbursement for the Aaron School from the district (id. at p. 2).

With the district's consent, the parents filed an amended due process complaint notice dated November 8, 2010, in which they alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A). As relief, the parents requested reimbursement for the student's tuition at the Aaron School in addition to reimbursement for the student's after-school OT and speech-language therapy (id. at pp. 7-8). The parents also requested the following orders pursuant to the student's pendency entitlements: (1) directing the district to fund the student's tuition at the Aaron School; and (2) directing the district to reimburse the parents for privately obtained speech-language therapy and OT (id.).

Impartial Hearing Officer's Decision

An impartial hearing convened on December 23, 2010 to determine the student's pendency placement (Tr. pp. 1-9). During the impartial hearing, there was no dispute that the Aaron School in conjunction with the student's after-school related services, comprised of four sessions per week of individual speech-language therapy and four sessions per week of individual OT, constituted the student's pendency placement (Tr. pp. 6-8). By interim decision dated January 21, 2011, the impartial hearing officer determined that the student's placement at the Aaron School combined with his after-school related services formed the student's pendency placement (Interim IHO Decision at p. 2).

On May 3, 2011, the impartial hearing reconvened and concluded after four days of proceedings (Tr. pp. 10-399). In a decision dated August 4, 2011, the impartial hearing officer awarded tuition reimbursement to the parents for the Aaron School in addition to reimbursement for the student's after-school speech-language therapy and OT (IHO Decision at pp. 12-13). She concluded that the district failed to offer the student a FAPE because the IEP developed for him was not reasonably calculated to meet his special education needs and the 12:1+1 recommended placement would not have addressed the student's need for support with regard to his attention and sensory deficits (id. at p. 11). The impartial hearing officer also concluded that the Aaron School was reasonably calculated to provide the student with meaningful educational benefits and therefore, was appropriate (id. at p. 12).[2] Lastly, having found that the parents cooperated with

[1] The hearing record does not contain the original August 2010 due process complaint notice.

[2] Notwithstanding the parents' request for reimbursement for the student's related services, the impartial hearing officer did not make any findings with regard to the appropriateness of the student's privately obtained speech-language therapy and OT (see IHO Decision).

the district and visited the district's assigned school, the impartial hearing officer concluded that equitable considerations supported the parents' request for relief (id.).

Appeal for State-Level Review

The district appeals and requests a reversal of the impartial hearing officer's decision. The district argues, in pertinent part, that it offered the student a FAPE during the 2010-11 school year because the April 2010 CSE was properly composed and addressed the student's need for support throughout the IEP. Additionally, the district asserts that the recommended 12:1+1 class was appropriate for the student because although the student could function in a general education setting, he needed a small, self-contained class due to his anxiety and attention deficits. The district further contends that the 12:1+1 classroom at the assigned school would have been an appropriate placement for the student because it was tailored to his academic, social, and emotional needs. Next, the district maintains that the Aaron School was not an appropriate placement for the student because it did not provide the student with his related services as prescribed by his IEP and did not provide the student with related services during the summer. The district also contends that the frequency of the student's unsupervised breaks decreased the student's time spent on academics. Moreover, the district alleges that the Aaron School did not constitute the student's least restrictive environment (LRE) because it did not offer him the opportunity to interact with typically developing peers. Lastly, the district argues that equitable considerations preclude the parents' request for relief because they never seriously intended to enroll the student in public school and they failed to afford the district timely notice of their intention to enroll the student in the Aaron School.

In an answer, the parents request that the impartial hearing officer's decision be upheld. They allege that the district did not establish that the recommended 12:1+1 program would have addressed the student's special education needs. Furthermore, with regard to the assigned school, the parents argue that the district failed to show that the student's sensory processing deficits would have been addressed. They also maintain that the student's sensory needs would have been aggravated by placement in the assigned school as the student lacked the capacity to function in unstructured and unsupported social settings. Next, the parents contend that the Aaron School provided the student with educational services and instruction that was specially designed to meet his related services needs. In addition, they assert that the student's educational team at the Aaron School collaboratively determined the appropriate balance between his related services pull-out sessions and classroom instruction to maximize the student's academic success. The parents also argue that the student demonstrated progress at the Aaron School with respect to his OT, speech-language, and social/emotional needs. Moreover, the parents argue that the appropriateness of the unilateral placement should be assessed based on the totality of the circumstances, and in this case, they maintain that the student's program was complimented by the addition of after-school OT and speech-language therapy. Lastly, they maintain that the Aaron School constituted the student's LRE. With regard to equitable considerations, the parents allege that the impartial hearing officer correctly found in their favor because they fully cooperated with the district. As for the district's claim that they failed to afford it adequate notice of their intention to enroll the student at the Aaron School for the 2010-11 school year, the parents contend that the district did not raise this issue at the impartial hearing, and accordingly, it should not be considered. Regardless of whether the issue of notice was properly preserved for appeal, the parents maintain that they complied with the Individuals with Disabilities Education Act's (IDEA's) notice requirements.

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 under pendency 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 (see also Tr. pp. 332-33). 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 Dep't 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 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. 11-088; 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 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 entitled to his pendency placement at the Aaron School funded by the district through the conclusion of the administrative due process. Accordingly, the district's claims, which relate to 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 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 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). 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]

[3] 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, 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]).

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 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]).[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 child to remain in an educational institution pending litigation, but does not guarantee a child the right to remain in any

[4] 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]).

[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.

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 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.[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

With respect to the mootness exception, the hearing record fails to contain evidence or an offer of additional evidence to demonstrate that the instant matter is capable of repetition, yet evading review. While it may be theoretically possible that the parents could challenge a subsequent school year's IEP and seek tuition reimbursement for the student during a subsequent school year at the Aaron School, such speculation that the parties will be involved in a dispute

[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. Dept. (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.

[8] 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).

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. Additionally, 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).

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**
October 14, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER