



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-016

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Office of Anton Papakhin, P.C., attorneys for petitioner, Anton Papakhin, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Judge Rotenberg Educational Center (JRC) for the 2012-13 school year. Respondent (the district) cross-appeals those parts of the IHO's decision which determined that JRC was an appropriate placement and the district did not establish that it provided the parent with written notice of the student's change in placement. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record reflects that the student has a history of significant academic, social and communication delays and has received diagnoses including mental retardation, autism, an attention deficit hyperactivity disorder (ADHD), a disruptive behavior disorder, and an expressive receptive language disorder (Dist. Exs. 3 at p. 1; 7 at p. 1; 8 at p. 1). The hearing record further reflects that the student is nonverbal and communicates his wants and needs using staff manipulations, gestures, sign language, and picture exchange communication (Dist. Ex. 3 at p. 1). Additionally, the student exhibits behavioral issues such as throwing himself on the floor, running

away, stealing food, and being aggressive with children (Tr. pp. 155-156; Dist. Ex. 8 at p. 1). In August 2009 the student began attending JRC, a nonpublic residential school located outside of the state (Tr. p. 155; Dist. Exs. 1 at p. 1; 7 at p. 1; 8 at p. 1).¹

On March 20, 2012, a CSE convened to conduct the student's annual review and develop the student's IEP for the 2012-13 school year (Dist. Ex. 13). Finding the student eligible for special education and related services as a student with autism, the March 2012 CSE recommended placement in a State-approved nonpublic residential school and deferred the matter of finding a specific school to the district's central based support team (CBST) (*id.* at pp. 1, 8-9).² By letter dated May 25, 2012, the CBST case manager received notification of the student's acceptance to Springbrook N.Y., Inc. (Springbrook), a State-approved nonpublic residential school to which the CBST had provided the student's information (Tr. pp. 105-06; Dist. Ex. 12).

On June 15, 2012, the CSE reconvened to finalize the student's program recommendation for the 2012-13 school year (Dist. Ex. 3). The June 2012 CSE recommended a 12-month school year program in a State-approved nonpublic residential placement for the student in a 6:1+3 special class setting with related services of speech-language therapy and occupational therapy (*id.* at pp. 1, 7), and the record reflects that Springbrook was chosen by the district as the school at which this IEP would be implemented (Parent Ex. L).³ By letter dated June 19, 2012, the parent by her counsel sent a letter to the CSE which explained her reasons for rejecting the district's recommended "program/placement" (including some which appear to relate to the appropriateness of Springbrook) and indicated her intention to keep the student at JRC for the 2012-13 school year and to seek public funding for the costs of the student's tuition (*id.*).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2012, the parent requested an impartial hearing, asserting that the district did not offer the student a FAPE for the 2012-13 school year (Dist. Ex. 1 at pp. 1-3). A full recitation of the parent's allegations is unnecessary due to the procedural posture of this case; however, the parent generally alleged a number of substantive and procedural inadequacies, including the decision to "transfer" the student from JRC to Springbrook for the 2012-13 school year (*id.* at p. 2). For relief, the parent requested that an IHO "annul" the

¹ JRC has been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d]; 200.7). The parent testified that prior to attending JRC, the student was in a small district special education class of five to ten students and that she provided the student with home instruction for one year (Tr. pp. 155-159).

² The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ The hearing record is unclear as to whether the district provided the parent with a final notice of recommendation (FNR) indicating Springbrook as the school that would implement the June 2012 IEP. During the impartial hearing, the district representative testified that "there may have been a final notice of recommendation [sent to the parent] with that information but [I can't] say for sure that there was" (Tr. p. 74). The district representative further testified that he would fax the FNR to the IHO if possible (*see* Tr. pp. 80-82). Ultimately, a FNR was not submitted as evidence in the hearing record, however the parent testified that she received phone calls and a "signature form" regarding the student's transfer to Springbrook (Tr. p. 162).

student's 2012-13 IEP and issue an order directing payment by the district of "all education and maintenance tuition charges for the student's residential placement at JRC" for the 2012-13 school year (id. at p. 3). The parent also invoked the student's right to a pendency placement at JRC (id.).⁴

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 21, 2012 and concluded on November 21, 2012, after two days of proceedings (Tr. pp. 1-212). In a decision dated December 28, 2012, the IHO determined that the district offered the student a FAPE for the 2012-13 school year and denied the parent's request for relief (IHO Decision at pp. 6-8). In particular, the IHO found that any procedural missteps committed by the district (including its failure to establish that the parent was provided with prior written notice) did not rise to the level of a denial of a FAPE, the June 2012 IEP was substantively appropriate to meet the student's needs, and Springbrook was appropriate for the student (id.). With respect to the unilateral placement, the IHO held that the parent did not need to establish the appropriateness of JRC as the district recommended JRC for the student's 2011-12 school year (id. at p. 7). In addition, the IHO determined that equitable considerations did not weigh in favor of the parent because she failed to cooperate with the CSE and the in-state residential schools being considered by the district (id. at p. 8).

IV. Appeal for State-Level Review

The parent appeals and requests a finding that the district did not offer the student a FAPE on both procedural and substantive grounds and that JRC constituted an appropriate placement for the student during the 2012-13 school year. The parent also argues that the IHO erred in finding that equitable considerations did not weigh in favor of her request for relief.

The district answers by generally denying the parent's claims above and maintaining that it offered the student a FAPE during the 2012-13 school year. In addition, the district cross-appeals the IHO's decision to the extent that she determined that JRC was an appropriate placement for the student and that the district did not provide "actual notice" of a change in placement. The parent responds, denying the allegations contained in the cross-appeal and further alleging the appropriateness of the student's unilateral placement at JRC.

Finally, subsequent to the parties' submission of their pleadings, the district, by letter dated October 29, 2013, informed the Office of State Review that the instant case had been rendered moot as a matter of law because the student's tuition at JRC for the 2012-13 school year had been paid in full pursuant to pendency and further, that the district had recommended that the student attend JRC in the 2013-14 school year. The parent did not respond to this letter. Accordingly, and based on the information provided by the district, the Office of State Review requested documentation evidencing the student's continued placement at JRC for the 2013-14 school year (see 8 NYCRR 279.10[b]). In response, the district submitted as additional evidence the student's IEP for the 2013-14 school year and a final notice of recommendation (FNR) indicating that the district had recommended the student's continued placement at JRC.

⁴ It is undisputed by the parties that the student's pendency (stay put) placement for the 2012-13 school year was JRC.

V. Discussion

A. Additional Evidence

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the additional evidence proffered by the district was not available at the time of the impartial hearing and is necessary in order for a fully informed decision in this matter to be rendered. Furthermore, the parents have not raised any objection to my consideration of either the district's letter or the additional evidence submitted. Accordingly, and since the information contained in these documents is both relevant and necessary in order to render a decision, I will accept the additional evidence.⁵

B. Mootness

Turning to the consequences of the additional evidence, the dispute between the parties in an appeal from an IHO decision 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]). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]). Administrative decisions rendered in cases that concern issues such as desired changes in IEPs, specific placements, and implementation disputes 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]).

Initially, I note that it is undisputed by the parties that the student's pendency (stay put) placement for the 2012-13 school year was JRC and that the district has fully paid for the student's placement throughout the administrative due process proceedings, including through the course of the instant appeal (Dist. Ex. 1 at p. 3; see also Pet. ¶ 8; Answer ¶ 2). Therefore, there is no longer any live controversy relating to the parties' dispute over the placement or program offered the student by the district for the 2012-13 school year. Thus, even if a determination on the merits demonstrated that the district did not offer the student a FAPE for the 2012-13 school year, it would have no effect on the parties because the 2012-13 school year expired on June 30, 2013, and the student remained entitled to his pendency placement at JRC funded by the district through the conclusion of the administrative due process. In other words, the parent has received all of the relief she sought pursuant to pendency, so funding for the student's attendance at JRC for the 2012-13 school year is no longer at issue.

⁵ The IEP for the 2013-14 school year and accompanying FNR submitted by the district will be referred to as Supplemental Exhibits 1 and 2, respectively (Supp. Exs. 1; 2).

Further, this case is easily differentiated from the situation presented to the court in New York City Dept. of Educ. v. V.S. (2011 WL 3273922 [E.D.N.Y. July 29, 2011]), where it was held that an appeal was not moot despite the fact that the funding sought by the parents in that matter was no longer an issue. As noted by the Court in V.S., the parent in that matter had challenged a subsequent IEP developed by the district for the student and the Court held that a decision on the merits in that case would have governed the student's future placement until (a) the IEP at issue in that matter became final via an unappealed SRO or court decision, or (b) the parties agreed on a "placement" for the student for the subsequent year.⁶ By contrast to the situation presented in V.S., it is undisputed that the district in this matter agreed to place the student at JRC for the 2013-14 school year (see Supp. Exs. 1-2), and thus JRC has become the student's last agreed upon—and therefore his pendency—placement pursuant to agreement of the parties (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]; Bd. of Educ. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Thus, a ruling on the merits would have no immediate or potential impact on the district's future obligations to the student.

Finally, 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). However, this 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]). 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). 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]). In this case, neither party asserts that any exception to the mootness doctrine applies, and because the district agreed to place the student at JRC in the 2013-14 school year, there is no reason appearing in the record to believe that the student will again be subject to the same actions complained of here. Accordingly, I am unable to find that this "exception" to the mootness doctrine is applicable here.⁷

⁶ Although not explicitly stated by the Court, the threat of collateral legal consequences (which is essentially what the Court was addressing in V.S.) is one of the recognized exceptions to the mootness doctrine (see Marcus I. v. Dep't of Educ., 434 Fed. App'x 600, 602 [9th Cir. 2011]).

⁷ Although courts have applied other exceptions to the mootness doctrine in the IDEA context (see, e.g., Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 798-99 [9th Cir. 1999]), neither party raises them and the hearing record does not support their application to the facts of this case.

VI. Conclusion

In light of my determinations herein, I find that this matter is moot. Accordingly, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED

THE CROSS-APPEAL IS DISMISSED

Dated: Albany, New York
August 25, 2014

HOWARD BEYER
STATE REVIEW OFFICER