The University of the State of New York

The State Education Department
State Review Officer
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No. 13-094

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, 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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2012-13 school year was not appropriate. The 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.[1] The CSE convened on March 22, 2012 to formulate the student's individualized education program (IEP) for the 2012-13 school year (Parent Ex. D). Finding the student eligible for special education and related services as a student with a speech or language impairment, the March 2012 CSE recommended a general education placement with integrated co-teaching (ICT) services for math, English language arts (ELA) and social studies (id. at pp. 1, 8).[2] The parents disagreed with the recommendations contained in the March 2012 CSE IEP, as well as with the particular public school site to which the district assigned

[1] Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolution of the issues presented in this appeal.

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

the student to attend for the 2012-13 school year (Parent Exs. K; M; see Parent Ex. J).[3] In a due process complaint notice, dated August 20, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school (Parent Ex. A). As relief, the parents requested that the district continue to fund the student's preschool program as reflected in a March 8, 2012 IEP developed by the Committee on Preschool Special Education (CPSE), consisting of 15 hours per week of 1:1 special education itinerant teacher (SEIT) services and related services including two 30-minute sessions of individual occupational therapy (OT) per week, two 30-minute sessions of individual physical therapy (PT) per week, and three 60-minute sessions of individual speech-language therapy per week, with services to be delivered at the student's private preschool (id. at pp. 1, 5).

A hearing was held on September 6, 2012 to address the student's pendency (stay put) placement during the due process proceedings. On September 27, 2012, the IHO issued an interim order, memorializing an agreement between the parties that the district continue to fund the student's preschool services provided under the March 2012 CPSE IEP as pendency (Interim IHO Decision at p. 3; see Tr. pp. 1-8; Parent Ex. B at p. 12).

Following a prehearing conference on October 1, 2012 and hearing regarding a subpoena on October 18, 2012, the impartial hearing convened on October 26, 2012 for the purpose of taking evidence on the merits and concluded on March 19, 2013 (Tr. pp. 9-513). In a decision dated April 24, 2013, the IHO found that the March 2012 CSE IEP did not reflect the evaluative information available to the March 2012 CSE, and thus the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 18-22). As relief, the IHO ordered the district to "fund the student's current pre-school program at his private nursery school as reflected on his March 8, 2012 CPSE IEP" (id. at p. 23).

IV. Appeal for State-Level Review

Because of the procedural posture of this appeal, it is unnecessary to address the district's specific contentions with regard to the IHO's decision. Accordingly, the parties' familiarity with the particular issues for review on appeal is presumed and will not be recited here. The gravamen of the parties' dispute relates to whether a general education placement with ICT services was appropriate for the student.[4]

[3] Although the hearing record indicates that the CSE reconvened on May 24, 2012 to discuss the parent's visit to the assigned public school site, the hearing record reflects that a new IEP was not developed for the student (Tr. pp. 106, 134-35; Dist. Exs. 3; 4). Moreover, the district school psychologist, who also served as a district representative at the March and May 2012 CSE meetings, testified that there were no changes made to the March 2012 IEP at the May 2012 CSE meeting (see Tr. pp. 137-38, 158).

[4] Although the parents were represented by counsel at the impartial hearing, the parents, pro se, sent a letter dated May 31, 2013 to the Office of State Review requesting an extension of their time to answer the district's petition, which was granted; however, the parents did not file an answer to the petition.

V. Applicable Standards and Discussion—Mootness

The merits of the district's arguments need not be addressed in this case because an examination of the threshold question as to whether the parties' claims have now become moot reveals that the parents have already obtained the relief sought for the 2012-13 school year.

In general, 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]). 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]).

In the instant case, the district was required to fund the student's preschool services for the entirety of the 2012-13 school year, as a result of its obligation to provide the student with his pendency services for the duration of these proceedings (Interim IHO Decision). As the relief sought by the parents in their due process complaint, is identical to the relief achieved by virtue of pendency, the dispute between the parties is no longer real or live (see Lillbask, 397 F.3d at 84-85). The case has been rendered moot and no further actual remedial relief can be granted to the parents.

However, an exception may apply and a moot claim may nevertheless need to be decided if, despite the end of a school year for which the student's IEP was written, 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]).

The New York Education Law provides that a student with a disability "shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school" (Educ. Law § 4410[1][i]). The Education Law further provides that students "over five . . . years of age" are entitled to attend public school (Educ. Law § 3202[1]). At the time of the March 2012 CSE meeting, the student was four years old and was thus a "preschool child" pursuant to State statute. At the time the parents initiated due process, they wanted the student to continue to be placed in a preschool program as opposed to a school aged program. However, at the present time, the student is now seven years old and the district has likely already convened CSEs to develop school-aged IEPs for the student for the 2013-14 and 2014-15 school years (or at least should have) and will soon call upon the parties to convene to develop an IEP for the student's 2015-16 school year. As the student is no longer a preschool child by virtue of his age, it is highly unlikely that the parents will request that the student be placed

with other three or four year olds - nearly half his age - in an actual preschool program. In other words, if the parents were to challenge a future IEP that is developed for the student, I find no "reasonable expectation" that the parents would seek a preschool age program for the student and be "subject to the same action again" (F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y. 2012]; see V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-20 [N.D.N.Y. 2013]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *8-*9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; J.N., 2008 WL 4501940, at *3-*4). Accordingly, I am unable to find that this exception to the mootness doctrine is applicable here.

VI. Conclusion

As the all of the relief sought by the parents has been achieved by virtue of pendency, the challenged March 2012 IEP has expired by its own terms, and the student cannot now be subject to the same dispute over the need for a preschool program versus a school age program, I find that the parties' dispute regarding the 2012-13 school year has been rendered moot and I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER