The University of the State of New York

The State Education Department
State Review Officer
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No. 14-068

Application of a STUDENT WITH A DISABILITY, by his 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:
Law Offices of Regina Skyer & Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs for the Legacy program at Xaverian High School (Xaverian) for the 2013-14 school year. 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 12, 2013, to formulate the student's IEP for the 2013-14 school year (Dist. Ex. 1). Finding the student eligible for special education and related services as a student with a speech or language impairment, the March 2013 CSE recommended placement in a 15:1 special class with related services of speech-language therapy and counseling (id. at p. 6). In a due process complaint notice, dated September

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

9, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, based in part on the student-to-adult staff ratio of the recommended special class placement (Parent Ex. B at p. 1). As relief, the parents requested that district reimburse them for the cost of the student's tuition for the Legacy program at Xaverian for the 2013-14 school year (id. at p. 5). The parents also requested an interim order of pendency directing the district to fund the student's placement at Xaverian based on a prior unappealed IHO decision (id. at p. 2).

An impartial hearing convened on December 16, 2013 and concluded on February 24, 2014 after two nonconsecutive days of proceedings (see Tr. pp. 1-178). On December 17, 2013, the IHO issued an order on pendency, which found that Xaverian constituted the student's pendency (stay-put) placement and ordered the district to pay the student's tuition for the Legacy program from September 9, 2013—the date of the parents' due process complaint notice—through the pendency of these proceedings (see Interim IHO Decision at p. 2). Subsequently, in an April 3, 2014 decision on the merits of the case, the IHO determined that the district offered the student a FAPE for the 2013-14 school year and denied the parent's request for tuition reimbursement (see IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parents' answer thereto is presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether a 15:1 special class with related services of speech-language therapy and counseling was appropriate to address the student's educational needs during the 2013-14 school year.

V. Applicable Standards and Discussion—Mootness

As an initial matter, I note that the IHO's analysis is problematic in this case as, in order to find a denial of FAPE, the IHO relied on information unavailable to the March 2013 CSE, namely the student's participation and performance in mainstream classes during the 2013-14 school year (see IHO Decision at pp. 11-12). However, I am loath to remand for further proceedings in this case, given that the parents have already obtained the relief sought and, therefore, the parties' dispute regarding the 2013-14 school year is no longer a live controversy and has been rendered moot. Thus, under these circumstances, the merits of the parents' arguments need not be addressed.

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 tuition at Xaverian for the entirety of the 2013-14 school year, as a result of its obligation to provide the student with his pendency placement 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 v. Hunt, 455 U.S. 478, 482 [1982]; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]).

Here, the hearing record does not support a reasonable expectation or a demonstrated probability that the parties dispute over the student's educational placement would reoccur. In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The district need not reevaluate a student with a disability whose eligibility terminates on the basis of age or graduation with a local high school or Regents diploma (20 U.S.C. § 1414[c][5][B][i]; 34 C.F.R. § 300.305[e][2]; 8 NYCRR 200.4[c][4]).

During the 2013-14 school year, the student was a high school senior in the Legacy program at Xaverian (Tr. p. 135; Parent Ex. G). His grade point average at the end of the first semester was 90.7 and he received "first honors" during the first and second quarters (Tr. pp. 151-53; Parent Ex. G).[2] In addition, by the time of his senior year, the student had passed five Regents examinations and was eligible to receive a Regents diploma (Tr. pp. 117-18). The Xaverian school psychologist reported that 2013-14 would be the student's last year in the Legacy program and noted that the student was preparing to go to college (Tr. pp. 131, 135; see Tr. pp. 93, 116). As the student was due to receive a Regents diploma, thereby terminating his eligibility for special education and related services as a student with a disability, I find no "reasonable expectation" that the parents would 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

[2] In order to receive first honors a student's average must be between 90-100, with no grade below 85 (Parent Ex. G).

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 2013 IEP has expired by its own terms, and the student cannot now be subject to the same dispute over student-to-adult staff special class ratios, I find that the parties' dispute regarding the 2013-14 school year has been rendered moot and I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
December 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER