



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-018

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 Board of Education of the North Shore Central School District

Appearances:

Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, 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 a decision of an impartial hearing officer (IHO) dismissing petitioner's amended due process complaint. 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

This appeal arises from a decision of an IHO that was issued after remand (see Application of a Student with a Disability, Appeal No. 14-038). Therefore, the parties' familiarity with the factual and procedural history of the case, the IHO's decision, and the issues presented for review on appeal is presumed and they will not be repeated in detail (see id.).¹

According to the hearing record, the student has received diagnoses of an attention deficit hyperactivity disorder, combined type (ADHD), a cognitive disorder not otherwise specified (NOS), a mixed receptive-expressive language disorder, a reading disorder, a disorder of written expression, a mathematics disorder, an anxiety disorder NOS, and an oppositional defiant disorder (Dist. Ex. 17 at pp. 3, 18-19; Parent Ex. A). The hearing record also documents the student's ongoing academic, cognitive, attending, and social/emotional/behavioral challenges, as well as a

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

number of school-based initiatives intended to ameliorate these concerns (see Dist. Exs. 10 at p. 3; 11 at pp. 1-3, 8-10; 16; 17 at pp. 2-4; 18-28).

In an IEP developed for the student's sixth grade (2012-13) school year, the CSE recommended that the student be enrolled in a twelve-month program including placement in a 12:1+1 special class, one 30-minute individual counseling session per week, and one 30-minute small group (3:1) counseling session per week (Dist. Ex. 6 at p. 1). "BOCES Class" was indicated as the recommended placement in the IEP, which also indicated that "[t]he parent has expressed complete disagreement with placement outside the district" (*id.* at pp. 1, 10-11).² In addition, the CSE recommended an interim plan to provide home instruction and counseling services if the student was not enrolled in a placement by the start of the school year (*id.* at p. 1). The parent testified that she consistently made it clear to the district that she wanted the student placed in the district middle school but was told that placement in the middle school was "not an option" (Tr. pp. 902-05, 923-24). The CSE reconvened in June 2012 to further develop the student's IEP, including a notation on the June 2012 IEP that the parent would not cooperate with the CSE's recommendation for placement of the student out of district (Dist. Ex. 7). By letter dated September 6, 2012, the parent notified the district of her intent to homeschool the student for the 2012-13 school year (Dist. Ex. 34). The student's IEP was further amended twice after the start of the 2012-13 school year, but the CSE continued to recommend a special class program for the student, indicating that a program providing integrated co-teaching (ICT) services would be "insufficient" to meet the student's needs (Dist. Ex. 8 at p. 1; Dist. Ex. 9 at p. 2). The record shows that at the time of the impartial hearing, the student continued to be home-schooled (Tr. p. 977; Dist. Ex. 4 at p. 2).

A. Due Process Complaint Notice and Prior Procedural History

The parent filed an amended due process complaint notice January 10, 2013, requesting, among other things, that the student's educational placement be changed from an "out of district program" to the district middle school (Dist. Ex. 4 at p. 2). On April 12, 2013, the parties proceeded to an impartial hearing, which concluded on October 1, 2013, following four days of proceedings (see Tr. pp. 1-1033). The parent was assisted by an advocate who examined witnesses and also appeared as a witness (Tr. pp. 4, 151, 1001). In a decision dated February 3, 2014, an IHO found that the district offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) during the time period at issue and denied the parent's claim (IHO Ex. I at pp. 18-22). The parent, appearing pro se, appealed the IHO's decision to the SRO, asserting claims concerning the IHO's management of the impartial hearing, including that the IHO erred in failing to compel the attendance of the former principal of the district's elementary school as a witness for the parent's direct case. The parent further alleged that the IHO demonstrated bias and predetermined his decision. The district, in its answer, requested that the IHO's decision be upheld. I vacated the portion of the IHO's order that concluded the district offered the student a FAPE and ordered the matter remanded to the IHO to determine whether it was necessary to issue a subpoena to permit the parent the opportunity to offer additional testimonial evidence from the former principal of the student's elementary school (Application of

² Although not defined in the hearing record, the term "BOCES" is an acronym for "Board of Cooperative Educational Services" (see Educ. Law § 1950).

a Student with a Disability, Appeal No. 14-038). I directed the parent to be prepared to provide an offer of proof to the IHO regarding the principal's testimony so that the IHO could determine the relevance of the proposed witness and whether there continued to be a need to issue a subpoena (id.).

B. Impartial Hearing Officer Decision on Remand

The IHO, in an April 17, 2014, e-mail to the parties, acknowledged receipt of my decision and his intention to issue a scheduling order (IHO Ex. III at p. 1). Between May 23, 2014, and August 11, 2014, the IHO contacted the parties via e-mail on four occasions in order to schedule a conference (id. at pp. 1, 3, 7, 11). Response times and availability was varied among the parties and the IHO received no response to his final scheduling availability e-mail request, sent to the parties on August 11, 2014 (id. at p. 11). On November 3, 2014, the district moved to dismiss the case with prejudice based upon abandonment by the parent (IHO Ex. IV). The parent, in an e-mail dated November 24, 2014, opposed the motion, citing various reasons for the delay in scheduling a conference and also notifying the IHO that the student had returned to the district (IHO Ex. V).

In a decision, dated January 6, 2015, the IHO found that there was no longer a live controversy in this case since the school year in dispute had expired and the student had returned to the district for the 2014-15 school year (IHO Decision at p. 6). The IHO also ruled that even if there was a live controversy with regard to the student's placement for the 2012-13 school year, he would not find the testimony of the former principal of the district elementary school attended by the student "relevant or material to the dispute" (id.). The IHO found that the parent failed to provide an offer of proof to show the relevance of the former principal's testimony (id. at p. 7). The IHO additionally found that, to the extent the parent sought the former principal's testimony to hold district staff accountable for denying the student a FAPE, it was not within his jurisdiction to grant such relief and the principal's testimony on that issue would be duplicative of evidence already in the hearing record (id.).

IV. Appeal for State-Level Review

The parent appeals, appearing pro se, and asserts that the IHO was not "impartial or accurate" in dismissing her claim. The parent sets forth a timeline of her responses to the IHO's e-mails attempting to schedule a meeting of the parties and cites multiple reasons for the difficulty in scheduling. The parent requests remand to a different IHO to determine whether the testimony of the former principal "would have had an effect upon the IHO's initial ruling."

In an answer, the district asserts that the IHO was correct in holding that there is no longer any live controversy with respect to the student's placement for the 2012-13 school year. The district notes that the relief requested was the student's admission to the district middle school and that the student is now in attendance at the district middle school, rendering the parent's complaint moot. The district further asserts that the parent cited to no evidence showing that the IHO was biased and that a change in IHO at this point would be "extremely prejudicial" to the district. The district further states that disciplining district staff is outside of the jurisdiction of the IHO and, as such, the IHO was without jurisdiction to hold district staff "accountable." The district requests that the decision of the IHO be upheld in its entirety, the parent's request for relief be denied and for the parent's appeal to be dismissed.

V. Applicable Standards and Discussion

A. Conduct of Impartial Hearing and IHO Bias

The parent asserts that the IHO was not impartial in his conduct of the impartial hearing. It is well settled that an IHO must be fair, impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097) and render their decision based upon the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealing with litigants and other with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. §1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

In my initial decision in this matter, I found the parent's allegations of IHO bias to be without merit (Application of a Student with a Disability, Appeal No. 14-038). With regard to the proceedings conducted upon remand to the IHO, the parent presents no additional basis, and I have found nothing in the hearing record, to support the parent's contention that the IHO displayed a lack of impartiality. Accordingly, as there is no evidence related to the proceedings on remand that would sustain any inference of a lack of impartiality on the part of the IHO, I find the parent's accusation is without merit.

The parent, in her petition, asserts that the IHO "inaccurately" concluded in his dismissal order of that the testimony of additional witnesses would not affect his ruling. It was the parent who wanted to call the principal as a witness in the first instance and, in granting the parent an opportunity to be further heard upon remand, it was incumbent upon the parent to explain to the IHO why the principal's testimony was relevant. The parent has not offer any reasoning, argument based upon the existing proof in the record, or explanation of the IHO's inaccuracy to accompany her statement. When no particulars are given as to why a party is challenging a determination, meaningful review is thereby precluded (Application of the Bd. of Educ., Appeal No. 11-088). Additionally, State regulations explicitly allow an IHO to limit or preclude examination of a witness whose testimony is deemed by the IHO to be "irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Further, an IHO may limit the number of additional witnesses in order to avoid unduly repetitious testimony (8 NYCRR 200.5[j][3][xii][d]). The IHO found any testimony of the principal would be duplicative of the testimony already given by both the parent and her advocate as testimonial evidence of the culpability of the former principal in denying the student a FAPE for the 2012-13 school year (IHO Decision at p. 7). Upon the failure of the parent to timely offer a reasonable explanation of what the principal's testimony was likely to establish,

the IHO permissibly exercised his broad discretion regarding the conduct of the impartial hearing in ruling that the former principal's testimony would not have had an effect on the outcome of the case.

B. Mootness

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]). 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., V.M. v. North Colonic Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]). Administrative decisions rendered in cases that concern such issues 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]). However, 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).

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]). 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). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 85 [2d Cir. 2005]). In this instance, the parent's petition challenging the IEP for the 2012-13 school year was filed halfway through the student's 2014-15 school year, a year in which the student was enrolled at the district's middle school. 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]). 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). There is nothing in the record to suggest that the student is having difficulties adjusting to the district middle school, therefore any proposed removal of the student from the district is not reasonably to be expected (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d at 85). The case at issue fails to fall within an exception to the mootness doctrine.

In this case, there is no longer a live controversy relating to the parties' dispute regarding the district's IEP for the student for the 2012-13 school year. The school year has since expired and, with it, the IEP at issue. Assuming for the sake of argument that the IHO had determined that the district had denied the student a FAPE for the 2012-13 school year, in this instance such a failure would have no real effect on the parties since the school year expired and the parent did not

seek any relief other than the student's placement in the district middle school for the 2012-13 school year. There is no further relief to grant in this instance, as the student is now attending the district middle school, as requested by the parent. Accordingly, the parent's claim related to the 2012-13 school year has been rendered moot.

VI. Conclusion

Based on the above, the parent's claims are dismissed. Now that the parent has been afforded a more than adequate opportunity to be heard, I conclude that the hearing record presents no reason to depart from the IHO's determination. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 13, 2015**

**JUSTYN P. BATES
STATE REVIEW OFFICER**