The University of the State of New York

The State Education Department
State Review Officer

No. 07-077

Application of a CHILD 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 Lauren A. Baum, attorney for petitioners, Lauren A. Baum, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioners appeal from that portion of a decision of an impartial hearing officer which denied petitioners' request for special education itinerant teacher (SEIT) services for the remainder of their son's 2006-07 school year. The appeal must be sustained in part.

When the impartial hearing began in August 2006, the child was attending summer camp at a nursery school and receiving 35 hours of SEIT services at school and at home (Parent Exs. B at p. 3; F at p. 1; H). The child also received three hours per week of individual speech/language therapy, two hours per week of occupational therapy, two hours per week of speech/language therapy and one hour per week of physical therapy (Parent Ex. B at p. 3). The child's classification as a student with autism and eligibility for special education services are not in dispute (see 8 NYCRR 200.1[zz][1]).

During the 2004-05 school year, the child attended an inclusion preschool program at the nursery school (Tr. p. 287; Parent Ex. H). The director of the nursery school indicated that, over time, the child became more comfortable in group settings, actively sought out classmates and appeared happier, and opined that the child's progress was due in part to the stimulation and modeling available in an inclusion setting (Parent Ex. H). During the 2004-05 and 2005-06 school years, the child received 35 hours per week of applied behavior analysis (ABA) therapy provided by a SEIT (Tr. pp. 289-91; Parent Exs. H; K). The majority of the child's SEIT hours were delivered in the school setting, where he was provided coverage for the entire day totaling approximately 30 hours (Tr. pp. 299-301).

During the 2005-06 school year, the child attended an inclusion pre-kindergarten program at one of respondent's schools (Tr. pp. 287, 289; Parent Exs. H; K; Dist. Ex. 1). The child's 2005-06 pre-kindergarten class consisted of 18 children, six of whom had special needs, and was staffed by an early childhood teacher, a special education teacher and two assistant teachers (Parent Ex. K). The child's teachers reported that, in September, the child had significant difficulty adjusting to school routines and was unable to remain with the group (id. at p. 1). They described him as distracted and unfocused and reported that he made loud noises and threw himself on the floor, requiring removal from the room by the SEIT (id.). His SEIT would guide him back to classroom activities with physical and verbal prompts (id.). Respondent's pre-kindergarten teachers reported that, over time, the child was able to interact with peers (id.). They described the child's progress in 2005-06 as "remarkable" and recommended that the child continue to receive the same "level of services and intervention" for the 2006-07 school year (id. at p. 2).

The child was evaluated by a school psychologist on July 21 and 24, 2006 (Parent Ex. M). The psychologist reported that the child presented as pleasant, but easily distracted and that he often needed to have directions repeated and simplified throughout the assessment (id. at p. 2). During the testing, the child became inattentive and exhibited signs of frustration, and required redirection (id.). The psychologist noted difficulty maintaining a reciprocal conversation with the child because he often followed his own train of thought rather than participate in an exchange with her (id. at p. 3). He did not respond to an invitation to interact with the examiner during play (id.).

Administration of the Autism Diagnostic Observation Schedule, Module 3 (ADOS) was affected by the child's limited insight into typical social relationships and the understanding of emotions (Parent Ex. M at pp. 2-4). Though the child exhibited some prolonged visual examination of art and pictures, he did not exhibit atypical hand and finger movements or self-injurious behaviors (id.). Based on a modified administration of the ADOS, the evaluating psychologist concluded that the child was functioning in the autistic range for communication and social skills (id.).

The evaluator reported that a January 2005 administration of the Stanford Binet Intelligence Scale: Fifth Edition (SB-5) yielded a verbal IQ score of 97 (42nd percentile), a nonverbal IQ score of 91 (27th percentile) and a full scale IQ score of 94 (34th percentile), indicating cognitive functioning within the average range (Parent Ex. M at p. 4). Administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) yielded a reading standard score of 142 (99.7th percentile), a math composite standard score of 88 (21st percentile) and an oral language composite standard score of 76 (5th percentile) (id. at p. 5). Noting that the child's social skills were below expectancy for a child his age, the psychologist recommended that that the child receive reminders to take turns, share and follow directions and rules and indicated that the child would benefit from social training to address appropriate behaviors in social settings (id. at. p. 8). She recommended that the child be placed in a small 8:1+1 kindergarten class and continue to receive related services (id.).

The child was evaluated at the McCarton Center for Developmental Pediatrics on August 9, 18 and September 6, 2006 (Parent Ex. I). The evaluator noted that the child's ability to attend to tasks varied, and his behavior was more on task on the second day of testing than the first (id. at pp. 3, 4). Often, the child ignored the evaluator's instructions and attended to his own interests

(id. at p. 3). When frustrated with testing items, the child complained, ignored the examiner and laid facedown on the floor (id. at p. 3).

The Receptive (ROWPVT) and Expressive (EOWPVT) One Word Picture Vocabulary Tests were administered to the child (Parent Ex. I at p. 5). Receptively, the child had difficulty comprehending more complex language during assessment and during conversation (id.). Expressively, concerns were noted as organizational demands increased and his ability to communicate decreased, especially without visual support (id.). The child's performance on the Wide Range Assessment of Memory and Language yielded scores in the average to below average range, suggesting that he had difficulty in processing language (id. at p. 6).

The evaluator indicated that the child's lack of functional skills interfered with his ability to perform in a classroom of typically developing peers without appropriate one-to-one support (Parent Ex. I at p. 8). His social language lacked the spontaneity required for successful and productive interaction and his visual inattention kept him from attending to social cues (id.). The evaluator opined that peer modeling was most appropriate and important for the child (id.).

A speech and language evaluation was conducted on July 24, 2006 (Parent Ex. L). The child presented with deficits in the areas of pragmatic, receptive, and expressive language (id. at pp. 2, 6). The evaluator noted that he had difficulties maintaining eye contact, demonstrating conversational skills, and in making and expressing appropriate judgments given specific social situations (id. at p. 6). Some echolalia was noted as well (id. at pp. 2, 6). Receptively, the child had difficulty following multi-step directions, including concepts, temporal and location (id. at p. 6).

On June 29, 2006, an impartial hearing (Hearing 1) was conducted to determine the child's summer pendency services for the 2006-07 academic year (Parent Ex. B).[1] On July 7, 2006, an impartial hearing officer ordered respondent to provide the child with 35 hours of SEIT services and other related services during July and August 2006 (Parent Ex. B).

Respondent's Committee on Special Education (CSE) met on July 7, 2006, but adjourned to conduct evaluations of the child (Tr. pp. 302-04). On July 7, 2006, petitioners filed a due process complaint notice, alleging that respondent did not have a valid individualized education program (IEP) or offer a placement for the child for the 2006-07 school year (Parent Ex. A). Petitioners requested the continuation of SEIT and other related services that were provided to the child as part of his preschool program (id.). Respondent's CSE met on August 17, 2006 and developed an IEP recommending placement in an 8:1+1 class for the 2006-07 school year (Parent Exs. D; F; M at p. 8). Thereafter, respondent changed the recommended program site to a collaborative team teaching class (Parent Exs. D; E; G). The August 2006 IEP did not include one-to-one ABA services (Parent Ex. F).

Petitioners amended their due process complaint notice on September 21, 2006, alleging that there had been a predetermination of placement; the recommended programs could not achieve the social, emotional, and language goals on the August 2006 IEP without 1:1 support provided by a person trained in working with autistic students; goals drafted by the district's evaluator were

[1] The record does not reveal the nature of the underlying dispute in Hearing 1.

included in the August 2006 IEP even though they conflicted with other goals in the IEP; academic goals were not discussed or drafted with the parents' assistance at the August 2006 CSE meeting; the IEP failed to include recommendations for the child's F.M. unit, for his Lindamood-Bell home reading program or his home math program; and petitioners could not tell whether the offered placement was a kindergarten or a first grade program (Parent Ex. C).

Respondent's CSE reconvened on November 9, 2006 and revised the child's IEP for the 2006-07 school year to include a full time 1:1 behavior management paraprofessional (Dist. Ex. 4 at p. 20). Additionally, the CSE recommended counseling, speech and language therapy, occupational therapy, and physical therapy (Tr. p. 230; Dist. Ex. 4 at p. 20). Petitioners agreed with the CSE's recommended program except for the lack of SEIT services (Tr. pp. 157, 291-295, 673).

The impartial hearing (Hearing 2) commenced on August 23, 2006, and after seven days of testimony, concluded on April 19, 2007. By decision dated May 16, 2007, the impartial hearing officer found that the record as a whole demonstrated that petitioners were given the opportunity to meaningfully participate in the development of the child's IEP and the absence of the parent member was a procedural violation that did not impede the rights of petitioners or the child (IHO Decision at pp. 25-26). The impartial hearing officer also found that respondent's recommended program was appropriate, except to the extent that it did not provide certain transitional support services for a student with autism or provide extended school year (ESY) services to prevent substantial regression with respect to social interactions (IHO Decision at pp. 26-28). The impartial hearing officer further found that the child's behavior management plan should be formalized into a behavior intervention plan (BIP) (IHO Decision at pp. 26, 28). Additionally, the impartial hearing officer found that a SEIT is no longer needed to aid in the child's transitions; the IEP appropriately addresses the child's social skills through individual and group speech/language therapy and counseling; a trained paraprofessional would be qualified to assist the child in initiating and responding to social interactions with his peers; and the child does not require home SEIT services in order to make appropriate educational progress (IHO Decision at pp. 26-27). Accordingly, the impartial hearing officer ordered respondent's CSE to reconvene within 10 business days to determine an appropriate amount of transitional support services to be provided by a teacher with training in autism and amend the child's IEP to provide for such transitional support (IHO Decision at p. 28). Additionally, the impartial hearing officer ordered that the next CSE review shall include one or more of the child's SEIT providers; the CSE team shall, in conjunction with the child's SEIT providers, develop a BIP; the CSE shall provide for monthly meetings of the child's teachers, service providers and paraprofessionals to review his BIP; and the CSE shall recommend ESY services necessary to maintain the child's social interaction skills during the summer months (IHO Decision at pp. 28-29).

Petitioners appeal from that portion of the impartial hearing officer's decision that determined that: 1) they had sufficient opportunity for meaningful participation in the November 9, 2006 CSE meeting; 2) the IEP was procedurally valid and not an interference with the child's

right to a free appropriate public education (FAPE);[2] 3) SEIT services, both at home and school, were no longer warranted for the remainder of the 2006-07 school year; and 4) the CSE's recommendation of a paraprofessional for 2006-07 was appropriate. As relief, petitioners seek a finding as to the appropriateness of SEIT services to be provided to the child during the 2006-07 school year; a reversal of the impartial hearing officer's decision denying their request to continue receiving SEIT services for 35 hours per week during the remainder of the 2006-07 school year; and a pendency order that the last agreed upon services be continued from May 16, 2007 until a final decision on the merits is issued.

Respondent asserts in its answer that its recommended program and placement were appropriate and sufficient to provide an educational benefit to the student and petitioners failed to demonstrate that SEIT services were necessary. Respondent seeks dismissal of the petition.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[3] is to ensure that students with disabilities have available to them FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[4] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). It may or may not turn out to be the same placement that is determined to be the appropriate educational placement for the child after the conclusion of a hearing on the merits of the

---

[2] The term "free appropriate public education" means special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

[3] On December 3, 2004, Congress amended the IDEA; effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

[4] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

recommended program for that year. The U.S. Department of Education has opined that a child's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 [3d Cir. 1996] [last functioning IEP]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 [9th Cir. 1987]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, at 1189 n.3 [S.D.N.Y. 1996]; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]).

As an initial matter, I concur with petitioners' assertion that, under the IDEA's pendency provisions, respondent was required to provide the child with 35 hours per week of SEIT services during the pendency of this dispute (Parent Ex. B; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). The pendency provisions of the IDEA and New York State Education Law require that a child remain in his or her then current placement, unless the child's parents and the school district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the child (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; see 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]). Because petitioners filed this appeal, the impartial hearing officer's decision was not the conclusion of the administrative proceedings regarding the instant due process complaint notice (see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]), and petitioners were entitled to continuation of the child's 35 hours per week of SEIT services during the pendency of this appeal. Pendency continues until a final determination of the claims set forth in the due process complaint notice. A determination is not final if it is appealed to the next level of administrative or judicial review (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]; Zvi D., 694 F.2d at 906).

In light of the foregoing pendency determination, I find that the substantive portion of this appeal has now been rendered moot because petitioners have received all of the relief they requested for the 2006-07 school year. 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]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes are 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. 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 that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (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, a claim may not be moot despite the end of a school year for which the child'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 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; 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]). 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]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (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 (id.). In the instant case, the challenged IEP is the November 2006 IEP, which has since expired, and the 2006-07 school year has ended. Moreover, an appeal from an impartial hearing officer's decision regarding a student's IEP may become moot because the IEP has been replaced (Robbins v. Maine School Admin. Dist. No. 56, 807 F. Supp. 11 [D. Me., 1992]; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 93-27).

In light of the absence of any live controversy relating to the relief requested by petitioners, I find that even if I were to make a determination that the program offered to the child in November 2006 was inappropriate, in this instance, it would have no actual effect on the parties. First, petitioners admit that the child has received the SEIT services throughout the 2006-07 school year, or at least until the May 16, 2007 decision by the impartial hearing officer, by virtue of a pendency order.[5] Consequently, petitioners' claims have been rendered moot by the passage of time, as the November 2006 IEP has expired, and a new IEP, based upon the child's needs for the 2007-08 school year, should have been devised to supersede it.[6] Accordingly, petitioners' claims will not be further addressed here. A State Review Officer is not required to make a determination which will have no actual impact upon the parties (Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Under the circumstances presented here, I decline to review the merits of petitioners' SEIT claims with respect to the November 2006 IEP. Moreover, I need not discuss the impartial hearing officer's rationale for reaching her determination of the merits of petitioners' claim.

[5] It is unclear from the record on appeal whether the 35 hours per week of SEIT services continued per pendency subsequent to the impartial hearing officer's decision. It is also unclear whether petitioners request reimbursement for such services or additional services to compensate for any denial of such services after May 16, 2007. I will, therefore, order both forms of relief in the alternative to ensure that the child is afforded an opportunity to receive the services due by virtue of pendency.

[6] Neither party appealed from the impartial hearing officer's order to reconvene the CSE within 10 business days to amend the child's IEP in accordance with the impartial hearing officer's decision. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's order to reconvene the CSE to amend the child's IEP is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent shall reimburse petitioners for the cost of any SEIT services to which the child was entitled under pendency, but did not receive during the pendency of this appeal, upon the submission of proof of payment for such services; alternatively, unless the parties otherwise agree, respondent shall convene its CSE within 30 days from the date of this decision to plan for the provision of any SEIT services to which the child was entitled under pendency, but did not receive during the pendency of this appeal.

Dated: **Albany, New York**
August 28, 2007

PAUL F. KELLY
STATE REVIEW OFFICER