



The University of the State of New York

The State Education Department State Review Officer

No. 07-085

Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Nanuet Union Free School District

Appearances:

Kunz, Spagnuolo & Murphy, P.C., attorney for respondent, Vanessa M. Gronbach, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which determined that the educational program respondent's Committee on Special Education (CSE) had recommended for her daughter for the 2005-06 and 2006-07 school years was appropriate. The appeal must be dismissed.

At the time of the commencement of the impartial hearing in January 2006, the student was attending fourth grade in respondent's elementary school where she received direct consultant teacher services, special classes for language arts and math, occupational therapy, physical therapy, speech-language therapy, social skills groups, assistive technology and transportation services (Dist. Ex. 16). The student's classification as a student with multiple disabilities and eligibility for special education services are not in dispute (see 8 NYCRR 200.1[zz][8]).

Respondent's CSE convened in May 2005 for the student's annual review to revise the student's individualized education program (IEP) for the 2005-06 school year (Dist. Ex. 16). The CSE recommended that the student attend its elementary school and receive direct consultant teacher services, special classes for language arts and math, occupational therapy (OT), physical therapy (PT), speech-language therapy, social skills groups, assistive technology and transportation services (id.). By due process complaint notice dated September 29, 2005, petitioner requested an impartial hearing asserting that respondent had refused to locate an alternative out-of-district placement for the student (Parent Ex. K). Petitioner further alleged that the student's language-based program and science and social studies curricula were inappropriate for the student (id.). A resolution session was held in which respondent's CSE agreed to "fast track" the student's triennial reevaluation and to identify potential alternative programs for petitioner to review (Jan.

9, 2006 Tr. pp. 19-20). In turn, petitioner agreed to review the identified programs (Jan. 9, 2006 Tr. p. 20). The impartial hearing commenced on January 9, 2006 and was adjourned to allow the CSE to reconvene and review the student's updated evaluations and reports (Jan. 9, 2006 Tr. pp. 19-25; Dist. Exs. 4; 10-11; 31-36). On January 20, 2006, the CSE reconvened and recommended placement in a neighboring school district's 12:1+1 program with related services for the remainder of the 2005-06 school year (Dist. Ex. 3 at p. 2).

By amended due process complaint notice dated February 8, 2006, petitioner alleged that respondent did not offer the student a free appropriate public education (FAPE)¹ when it failed to create an appropriate IEP, failed to make a reading specialist or reading laboratory available to the student in the 2005-06 school year, and made two detrimental and unsuitable placement recommendations for the student (Dist. Ex. 39 at pp. 1-2). Petitioner requested that if an appropriate program was not available in respondent's school district, the student be placed in an out-of-district placement or private school placement that would provide self-contained, learning disabled (LD) classes for all academic subjects (*id.* at p. 2). Petitioner also requested that respondent provide an independent neuropsychiatric evaluation; reimbursement for a private neuropsychiatric evaluation conducted in 2002; continuation of the student's individualized reading program that included a reading laboratory; use of other evaluations that are not heavily language-based; expungement of an IQ score from the student's records; and an IEP that does not rely on the reduction of homework, but which specifically addresses the student's areas of weakness (*id.*). On February 17, 2006, the due process complaint notice was amended once more, withdrawing petitioner's claim for reimbursement for the 2002 neuropsychiatric evaluation, requested reading and language programs that specifically teach to the student's strengths, and sought an independent evaluation from a specific pediatric neurologist (Dist. Ex. 40).

On March 30, 2006, the impartial hearing officer issued an interim order, which granted respondent's motion to dismiss in part (Dist. Ex. 43 at p. 1; IHO Decision at p. 1).² In response, petitioner amended the due process complaint notice a third time on April 19, 2006 and provided more details in support of the allegations and requests made in the second amended due process complaint notice (Dist. Ex. 43). Petitioner rejected the placement offered by respondent at the neighboring school district and indicated that she was interested in exploring an alternative

¹ 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]).

² The interim order was not included in the hearing record (IHO Decision at p. 1; Jan. 2, 2007 Tr. p. 4). The impartial hearing officer also directed petitioner to obtain an independent neuropsychological evaluation (*id.*).

placement in a self-contained Board of Cooperative Educational Services (BOCES) class (*id.* at p. 5).

On June 9, 2006, respondent's CSE convened for the student's annual review and revised the student's IEP for the 2006-07 school year (Dist. Ex. 1). The CSE recommended placement in a 12:1+1 BOCES class housed at its middle school with related services (*id.* at pp. 2-3, 7). On August 23, 2006, the impartial hearing resumed and the impartial hearing officer issued an interim order formalizing the parties' agreement regarding the student's pendency program and services for the 2006-07 school year (Aug. 23, 2006 Tr. pp. 60-108, 112-14, 119-21; IHO Decision at p. 2).³

The impartial hearing continued on October 10, 2006 and ended on March 29, 2007 after seven additional days of testimony. By order dated June 6, 2006, the impartial hearing officer found, among other things, that the May 2005 and June 2006 IEPs were procedurally valid and reasonably calculated to enable the student to receive educational benefits (IHO Decision at pp. 27-34).

Petitioner appeals and asserts that: 1) the impartial hearing officer and respondent violated the Commissioner's regulations by delaying assignment of the impartial hearing officer and assigning her out of rotational order; 2) the impartial hearing officer and respondent were biased and acted improperly; 3) respondent violated the pendency rule; 4) petitioner worked cooperatively with respondent and was falsely accused of failing to do so; 5) respondent's administration of the Wechsler Intelligence Scale for Children - IV (WISC-IV) did not accurately measure the student's IQ; and 6) respondent's recommendation of a BOCES placement is objectionable because it may lead to the student being placed in a "life skills" program culminating in an IEP diploma rather than in an academic program seeking a high school diploma.

In its answer, respondent objects to the petition as untimely, to the submission of additional evidence attached to the petition, and to the review on appeal of the impartial hearing officer appointment process on the ground that petitioner raised these issues in another administrative forum and is precluded from raising them here. Additionally, respondent asserts that the programs recommended by its CSE were appropriate because the IEPs were reasonably calculated to enable

³ The interim pendency order was not included in the hearing record. Since the student aged out of respondent's elementary school, the student's pendency program for the 2006-07 school year was modified for implementation in respondent's middle school (Aug. 23, 2006 Tr. p. 72). The student's English Language Arts program was changed from a 90-minute period to a 110-minute period, wherein the student would receive small group instruction from a special education teacher (Aug. 23, 2006 Tr. pp. 73, 104-05). The student's math class was changed from a 60-minute self-contained class to a 55-minute integrated class with a special education teacher and teaching assistant support wherein the student would receive small group instruction (Aug. 23, 2006 Tr. pp. 74-75, 93, 105). The student's science and social studies classes were similar to the student's elementary school classes (Aug. 23, 2006 Tr. p. 76). The student's OT, PT, speech/language therapy, assistive technology and transportation services remained the same (Aug. 23, 2006 Tr. pp. 103, 105). Respondent's additional reading support and Academic Intervention Services remained available to the student (Aug. 23, 2006 Tr. pp. 81-82, 94-95, 101, 105-06). Respondent's director of student support services opined that, substantively, the student's middle school pendency program would be "richer in terms of support in a very similar model" (Aug. 23, 2006 Tr. p. 107).

the student to receive educational benefits and offered her a FAPE in the least restrictive environment (LRE). As relief, respondent requests dismissal of the petition.

Initially I must address a procedural matter. Petitioner requests leave to file an untimely appeal. A petition for review by a State Review Officer must comply with the timelines specified in the state regulations (see 8 NYCRR 279.2). The petition must be served upon the respondent within 35 days from the date of the impartial hearing officer's decision sought to be reviewed (8 NYCRR 279.2[b]). If the impartial hearing officer's decision has been served by mail upon petitioners, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The good cause for the failure to timely seek review must be set forth in the petition (id.).

In this case, the impartial hearing officer's decision is dated June 6, 2007 (IHO Decision at p. 37). Presuming that the impartial hearing officer's decision was mailed to petitioner, the last day to serve the petition was July 16, 2007.⁴ Petitioners' Affidavit of Service shows the date of service as July 18, 2007; however, respondent alleges that the actual date of service was July 19, 2007 (Pet'r Aff. of Service). In either case, the petition for review was not timely served according to the Commissioner's regulations.

In her petition for review, petitioner requests that the delay in service of the petition for review be excused because the impartial hearing officer's decision stated that the appeal forms were included with the decision (IHO Decision at p. 40), but petitioner did not actually receive the forms (Pet. ¶ 4). Petitioner also asserts that her computer system failed thereafter, causing a delay in service of the petition for review (id.). Petitioner asserts that a printer prepared the typed version of the petition served on or about July 18, 2007 (id.).

I note that petitioner, in connection with the impartial hearing, sought assistance from an advocate and an attorney (Aug. 23, 2006 Tr. p. 4). It also appears that petitioner was aware that other resources were available to assist in the timely preparation and filing of the instant appeal. The decision of the impartial hearing officer also stated that directions and forms for filing an appeal are available on the Office of State Review website and she provided the web address (IHO Decision at p. 40). Additionally, petitioner's Affidavit of Verification was signed and notarized on July 5, 2007 (Pet'r Aff. of Verification) and she has not set forth any reasons for the delay in serving the petition. Therefore, I am not persuaded that the reasons for the delay set forth in the petition constitute good cause shown to excuse the untimely service of the petition for review, and in the absence of good cause stated, I will dismiss the appeal as untimely (Application of a Child with a Disability, Appeal No. 06-117; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 05-106 [dismissing petitioners' appeal as untimely and finding that petitioners' reasons for untimely service, including that "they proceeded without counsel (although one of the petitioners is an attorney), that the hearing record was 'dense,' and that petitioners' available time to pursue the appeal was constrained by, including among other things, commitments to professional obligations and the birth of a new daughter" did

⁴ Based upon the Commissioner's regulations, petitioner's last day to timely serve the petition fell on July 15, 2007, a Sunday. If the last day for service is a Saturday or Sunday, then service may be made on the following Monday, which in this case was July 16, 2007 (see 8 NYCRR 279.11).

not constitute good cause]; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-048 [dismissing petitioner's appeal as untimely and finding that petitioner's reasons for untimely service, including that "she had been undecided whether to file an appeal" and "her attorney was unavailable due to professional commitments to other clients" did not constitute good cause shown]; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-067).

Despite dismissing the petition as untimely, I have reviewed the merits of petitioner's appeal. I find that the substantive portion of this appeal has now been rendered moot because petitioner has received the relief that she requested on appeal for the 2006-07 school year since, under pendency, the student was not placed in the BOCES class to which petitioner objects.⁵ 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 on appeal is the June 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

⁵ To the extent that petitioner seeks relief for the 2007-08 school year, the appropriateness of the student's program for the 2007-08 school year was not properly raised below (see 8 NYCRR 200.5[j][1][ii]) and is not properly before me (see Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 04-100; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

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 petitioner on appeal, I find that even if I were to make a determination that the program offered to the student in June 2006 was inappropriate, in this instance, it would have no actual effect on the parties. First, the record reveals that the student has not been placed in the BOCES class to which petitioner objects by virtue of pendency (Aug. 23, 2006 Tr. pp. 61-108, 112-14, 119-21). Consequently, petitioner's claims have been rendered moot by the passage of time, as the June 2006 IEP has expired, and a new IEP, based upon the student's needs for the 2007-08 school year, should have been devised to supersede it. Accordingly, petitioner's 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 petitioner's placement claims with respect to the June 2006 IEP. Moreover, I need not discuss the impartial hearing officer's rationale for reaching her determination of the merits of petitioner's claim.

I have considered the parties' remaining arguments and find that I need not reach them in light of my determinations or they are without merit.⁶

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 10, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁶ Although the impartial hearing officer found that petitioner was not entitled to tuition reimbursement pursuant to Sch. Comm. of Burlington v. Dep't of Educ. (471 U.S. 359 [1985]), this portion of the decision is dicta because petitioner did not unilaterally remove the student from public school during the 2005-06 and 2006-07 school years (IHO Decision at pp. 35-36).