The University of the State of New York

The State Education Department
State Review Officer

No. 08-008

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 Evans-Brant Central School District

Appearances:
Law Office of H. Jeffrey Marcus, attorney for petitioners, Jason H. Sterne, Esq., of counsel

Harris Beach PLLC, attorney for respondent, David W. Oakes, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which dismissed their due process complaint notice on the ground that the impartial hearing officer lacked subject matter jurisdiction over the issues presented in petitioners' due process complaint notice, dated October 31, 2007. The appeal must be dismissed.

Petitioners originally filed a due process complaint notice, dated July 3, 2007, seeking an impartial hearing based upon the following allegations: respondent improperly declassified the student in September 2006; respondent failed to timely reclassify the student upon reentry to respondent's district in December 2006, which denied him a free appropriate public education (FAPE);[1] respondent failed to implement appropriate declassification support services; and respondent failed to perform a functional behavioral assessment (FBA) and provide an appropriate

[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]).

behavioral intervention plan (BIP) (Joint Ex. 2 at Ex. C, IHO Ex. III at pp. 1-2, 5-7). As relief, petitioners requested that respondent reclassify the student, develop an individualized education program (IEP) with services to be provided by petitioners' named provider, provide additional services, and pay for petitioners' attorneys' fees and costs (id.).

In its response to the July 3, 2007 due process complaint notice, respondent denied petitioners' allegations, but agreed to reclassify the student as autistic, conduct an FBA, consider any additional evaluations, and conduct a Committee on Special Education (CSE) meeting to develop an IEP, which would include behavioral consultant services by petitioners' named provider (Joint Ex. 2 at Ex. C, IHO Ex. III at pp. 21-24). On July 19, 2007, the parties convened at a resolution session,[2] and by letter and e-mail dated July 23, 2007, respondent stated its commitment to undertake all of the actions sought by petitioners regarding the student's education and forwarded a draft of a settlement agreement (id. at pp. 8-13). On July 26, 2007, petitioners e-mailed a nearly identical counter-proposal in the form of a consent decree to respondent (id. at pp. 14-18). The parties continued to communicate, but were unable to reach a satisfactory resolution and by e-mail dated August 3, 2007, respondent notified petitioners of its agreement with all of petitioners' requests, except for the payment of petitioners' attorneys' fees and entry of an order by the impartial hearing officer (id. at pp. 19-20).

On August 7, 2007, respondent submitted a motion to dismiss petitioners' July 3, 2007 due process complaint notice on the grounds that the impartial hearing officer lacked jurisdiction to determine the only remaining issue in dispute, namely petitioners' request for payment of attorneys' fees (Joint Ex. 2 at Ex. C, IHO Ex. III at pp. 1-4). On August 8, 2007, the impartial hearing officer conducted a prehearing conference to discuss respondent's motion to dismiss and to set a schedule (Joint Ex. 2 at Ex. C, IHO Ex. V at pp. 1-2).

At the prehearing conference, the impartial hearing officer suggested that the parties convene a CSE meeting (Joint Ex. 2 at Ex. B at p. 2). Respondent's director of special education contacted petitioners on August 10, 2007 to schedule a mutually agreeable date and time for the CSE meeting, petitioners chose August 21, 2007 and respondent sent them written confirmation of the scheduled date and time (Joint Ex. 2 at Ex. C, IHO Ex. VI, Aff. in Supp. of Mot. to Dismiss at ¶ 5). Prior to the scheduled CSE meeting, respondent's director received written information from petitioners' named provider regarding an FBA and the development of a BIP for the student (id. at ¶ 6). By e-mail dated August 17, 2007, petitioners' attorney requested a postponement of the CSE meeting until after the parties received the impartial hearing officer's decision on the motions previously submitted (Joint Ex. 2 at Ex. C, IHO Ex. VI at Ex. 1). In addition, petitioners' attorney noted that petitioners would not attend "any CSE meetings" prior to the issuance of the impartial hearing officer's decision, upon advice of counsel (id.). When respondent's director learned that petitioners would not attend the CSE meeting, she contacted petitioners' named provider on August 20, 2007 to discuss the written materials that the provider had made available

[2] According to the federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 C.F.R. § 300.510[a][2]; see also 8 NYCRR 200.5[j][2]).

for discussion at the CSE meeting (Joint Ex. 2 at Ex. C, IHO Ex. VI, Aff. in Supp. of Mot. to Dismiss at ¶ 10).

The CSE convened as scheduled on August 21, 2007 and developed an IEP for the student for the 2007-08 school year (Joint Ex. 2 at Ex. H at p. 1). In accord with respondent's previously expressed intent to undertake the actions requested by petitioners, the CSE reclassified the student as a student with autism, described his present levels of performance and individual needs, and recommended weekly individual counseling, modifications/ accommodations/supplementary aids and services in the form of preferential seating and behavior management consultant services, and testing accommodations (id. at pp. 1-5). In addition, the CSE included a transition plan, which indicated that the "[l]ong-term outcomes" would be developed with the student's input "when [the] student agrees to participate in [a] meeting and discussion" (id. at p. 5). The CSE also developed goals to address the student's needs regarding socially appropriate behavior and verbally discussing problem situations in counseling (id. at p. 6). Finally, the CSE noted in the IEP that the student's teachers would be informed of his classification and provided with a copy of the IEP, that petitioners' requested consultant would provide the behavior management consultant services, and that an FBA and BIP would be developed after one month in school to allow school staff and the behavior management consultant to gather current information (id.).

Following the August 21, 2007 CSE meeting, the impartial hearing officer, by decision dated September 14, 2007, granted respondent's motion to dismiss petitioners' July 3, 2007 due process complaint notice without prejudice (Joint Ex. 2 at Ex. B). The impartial hearing officer determined that the only remaining relief sought by petitioners concerned the issue of attorneys' fees, over which he had no jurisdiction (id.). Petitioners appealed from the impartial hearing officer's decision (see Application of a Child with a Disability, Appeal No. 07-122). The decision in Application of a Child with a Disability, Appeal No. 07-122, dated December 3, 2007, upheld the impartial hearing officer's decision to dismiss the July 3, 2007 due process compliant notice without prejudice (id.).[3]

On October 1, 2007, respondent received petitioners' letter, dated September 21, 2007, consenting to the placement and services as offered in the August 21, 2007 IEP, but further stating that they reserved the right to challenge the IEP (Joint Ex. 2 at Ex. E ¶ 4; Joint Ex. 2 at Ex. D at p. 4).

By due process compliant notice dated October 31, 2007, petitioners challenged the August 21, 2007 IEP and alleged that respondent failed to offer the student a FAPE for the 2007-08 school year based upon the following grounds: the failure to convene a properly composed CSE; the

[3] In Application of a Child with a Disability, Appeal No. 07-122, petitioners raised contentions regarding the August 21, 2007 CSE meeting and the 2007-08 IEP, but at that time, those issues were beyond the scope of review because they were not raised in the July 3, 2007 due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; 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).

failure to provide speech therapy in accordance with 8 NYCRR 200.13;[4] the failure to provide an appropriate IEP; and the failure to implement an appropriate program for the 2007-08 school year (Joint Ex. 1 at pp. 3-4). In addition, petitioners reasserted the following allegations contained in the July 3, 2007 due process complaint notice: respondent improperly declassified the student in September 2006; respondent failed to reclassify the student upon his return to respondent's district in December 2006; respondent denied the student a FAPE by failing to provide an IEP for the 2006-07 school year; and respondent failed to provide appropriate declassification support services (id. at p. 5).

As relief, petitioners sought an order directing respondent to convene a properly composed CSE, to provide speech services "required by law for an autistic child," to provide additional speech services to remedy respondent's failure to provide speech services from the beginning of the 2007-08 school year, to develop and implement an appropriate IEP addressing the noted deficiencies, to provide additional services to remedy respondent's failure to provide appropriate services from when the student returned to the district in December 2006 through the 2007-08 school year, to apologize for the wrongful declassification and denial of a FAPE, to train all relevant personnel to assure compliance with proper classification/ declassification of students, to develop acceptable policies to address classification/ declassification of students exiting private schools, and to pay petitioners' attorneys' fees and costs (Joint Ex. 1 at pp. 5-6).

Upon receipt of petitioners' due process complaint notice on November 1, 2007, respondent's attorney contacted petitioners' attorney via e-mail dated November 2, 2007 to offer possible dates to schedule a resolution session and a CSE meeting (Joint Ex. 2 at Ex. F at p. 1). By e-mail dated November 6, 2007, petitioners' attorney advised that they "disagree[d] as to whether the CSE ought to meet at this stage" and he would relay the information about a resolution session upon receipt of such (id. at p. 5). By e-mail dated November 6, 2007, respondent's attorney noted that they wanted to hold a CSE meeting "now" and there was "no basis for [petitioners] to refuse to participate" (id.). In the same e-mail, respondent's attorney made a second request for possible dates to schedule a CSE meeting and a resolution session (id.).

Respondent then submitted a response, dated November 9, 2007, to petitioners' due process complaint notice (Joint Ex. 2 at Ex. E). Similar to its response to petitioners' July 3, 2007 due process complaint notice, respondent denied petitioners' allegations but agreed to provide speech-language and/or other services to meet the requirements set forth in 8 NYCRR 200.13; to conduct a CSE meeting to address petitioners' concerns regarding the August 21, 2007 IEP, including the transition plan, goals and objectives, present levels of performance, evaluative criteria, and methodology; to conduct a CSE meeting to address all of petitioners' stated concerns and issues; and to provide speech-language services and other additional services to compensate for the failure to timely provide these services at the beginning of the 2007-08 school year (id. at ¶¶ 3, 7-9, 16). With regard to petitioners' remaining requests for relief, respondent asserted that an impartial hearing officer had no authority to order the following relief: to order the district to train personnel to follow proper procedures for students entering and/or exiting private schools; to order the district to develop acceptable policies for students entering and/or exiting private schools; to order the district to apologize (although respondent admitted in the response that the district did

[4] Generally, 8 NYCRR 200.13 addresses educational programs for students with autism.

apologize for any misunderstandings); or to order the district to pay petitioners' attorneys' fees and costs (id. at ¶ 17).

By letter dated November 29, 2007, respondent submitted a motion to dismiss petitioners' October 31, 2007 due process complaint notice based upon mootness and/or failure to state a claim, and seeking, in the alternative, that the impartial hearing officer order petitioners to attend a CSE meeting (Joint Ex. 2). By letter dated December 13, 2007, respondent submitted a memorandum of law in support of their motion to dismiss (Joint Ex. 3). In response, petitioners submitted a letter memorandum in opposition to respondent's motion to dismiss and to also serve as petitioners' cross-motion for partial summary judgment (Joint Ex. 4).

On December 17, 2007, the parties presented oral arguments to the impartial hearing officer on their respective motions (Tr. pp. 1-96). Respondent's attorney reiterated the district's agreement and commitment to provide speech services pursuant to 8 NYCRR 200.13, to provide additional services to compensate for the untimely implementation of the August 21, 2007 IEP, to provide additional services to compensate for the failure to provide services between December 2006 through September 2007, and to convene a CSE meeting to address all of the issues raised by petitioners regarding the August 21 2007 IEP, including the frequency and duration of speech services, petitioners' requests for additional services, and to discuss the specific details of all of petitioners' requests (Tr. pp. 7-8, 18-20, 44-45, 59-60).

Respondent noted that the student had been reclassified and was receiving services (Tr. p. 56). With regard to the issues raised and the relief requested concerning the student's declassification, respondent argued that those issues no longer existed, and were thus moot, because the student had been reclassified and because respondent had committed to providing additional services to make up for the declassification (Tr. pp. 62-63). Respondent reiterated that the "district has agreed to everything the parents have requested" and in order to implement their requests, petitioners need to collaborate with the district at a CSE meeting to specifically detail the additional services and/or services petitioners requested pursuant to 8 NYCRR 200.13 (Tr. pp. 65-67, 82). Respondent stated that if "the details [cannot] be agreed to" at a CSE meeting, "then that would be something that the parents could make a hearing request for and that a hearing could address" (Tr. p. 66). Respondent noted, however, that the district did not anticipate that the parties would not reach an agreement at a CSE meeting (id.). Respondent also asserted that petitioners acknowledged that there were no longer any issues in dispute regarding the student's education based upon their request for the impartial hearing officer to order "the relief conceded" by the district (Tr. pp. 8-9). Respondent further asserted that, similar to the previous proceedings, petitioners' primary goal was to obtain some type of administrative imprimatur to "help them with respect to attorney's fees" (Tr. pp. 9-11). Respondent also noted that it was inconsistent for petitioners to decline to attend CSE meetings, while at the same time seeking an order from an impartial hearing officer directing petitioners and respondent to attend a CSE meeting (Tr. p. 21).

Petitioners' arguments focused primarily on the issue of attorneys' fees and petitioners' entitlement to attorneys' fees (Tr. pp. 22-28, 34-45, 68-69, 72-82). Petitioners noted that an impartial hearing officer's "actions impact upon the right" to attorneys' fees (Tr. p. 22). Petitioners argued that respondent's "offering to address the parents' concerns" and to "compel resolution through a CSE meeting" deprived them of their right to attorneys' fees (Tr. pp. 24-25). In particular, petitioners noted that "the willingness to have the CSE meet and address the parents'

concerns makes those concerns no longer live for hearing essentially means there would be virtually no hearings," and argued that that outcome was not "what [C]ongress intended when [C]ongress allowed parents the right to enforce their own rights and the rights of their children through the impartial hearing process" (Tr. p. 24). Petitioners also noted that "Congress provides a right to attorney's fees. And it is not unreasonable for the parents' attorney to attempt to resolve the matter in a way that gives rise to that right" (Tr. p. 25). Petitioners asserted that although respondent offered to resolve all the issues raised, they continued to deny liability and/or wrongdoing (Tr. pp. 69-70, 78, 82). In addition, petitioners acknowledged that they could have returned to a CSE meeting after the August 21, 2007 CSE meeting, but they chose not to and instead, chose to "put in another hearing request and exercise our rights under the [Individuals with Disabilities Education Act]" (Tr. pp. 73-74). Petitioners contended that "it would be within their rights to reject [a proposed resolution] because of the failure to resolve the fee issue" (Tr. p. 87). Petitioners also contended that the issues were "not moot because there's a likelihood of recurrence" (Tr. pp. 89-91).

By decision dated January 4, 2008, the impartial hearing officer granted respondent's motion to dismiss petitioners' October 31, 2007 due process complaint notice (IHO Decision at pp. 1, 9-12). The impartial hearing officer agreed with respondent's contention that petitioners' due process complaint notice should be dismissed because respondent agreed to all of the demands regarding the student's special education, and that if "live issues" existed, the proper "forum to address these issues is at the CSE" (id. at p. 9). She indicated that a CSE meeting was the appropriate place to "fine tun[e]" the details of the IEP and moreover, that the purpose of the CSE meeting was to work collaboratively to create an appropriate IEP (id. at pp. 9-10). She further noted that at the CSE meeting, the parties could "resolve the issues and define more finely what is needed" (id. at p. 10). The impartial hearing officer also concluded that petitioners "cannot misuse the hearing process for issues that the Impartial Hearing Officer must not address, namely attorney fees" (id. at p. 11).

On appeal, petitioners assert that the impartial hearing officer erred in failing to grant petitioners any relief despite the implicit recognition that respondent denied the student a FAPE, in failing to hold an impartial hearing, in dismissing the due process complaint notice, and in failing to order the relief sought by petitioners. Petitioners seek an order annulling the August 21, 2007 IEP, and directing respondent to develop an appropriate IEP, to provide services pursuant to 8 NYCRR 200.13, and to provide "makeup declassification" services by a named provider. In addition, petitioners seek to remand the following contested issues for determination at an impartial hearing: whether respondent denied the student a FAPE and improperly declassified the student; whether respondent should be ordered to follow appropriate declassification/ classification procedures in the future; whether respondent should be ordered to provide additional services to compensate for the denial of FAPE between December 2006 through September 2007; and to specify services required pursuant to 8 NYCRR 200.13.

In its answer, respondent denies petitioners' contentions and asserts as defenses that the impartial hearing officer's decision should be upheld based upon the substantive and/or procedural grounds of mootness, lack of justiciability, failure to state a claim, lack of jurisdiction, and res judicata.

For the reasons set forth below, I concur with the impartial hearing officer's decision to dismiss petitioners' October 31, 2007 due process complaint notice.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 52 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 [2d Cir. 2007]; 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 comprehensive written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53). The federal and state statutes and regulations concerning the education of children with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 546 U.S. at 53; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]).

One of the main policies behind the IDEA is to encourage the prompt resolution of disagreements about the education of children so that such children will not be harmed by long delays before being placed in appropriate educational settings (see 121 Cong. Rec. 37416 [1975] [remarks of Senator Williams]), and to prevent the child from falling hopelessly behind in his education (Janzen v. Knox Co. Bd. of Educ., 790 F.2d 484, 488 [6th Cir. 1986]; Dep't of Educ. of the State of Hawaii v. Carl D., 695 F.2d 1154, 1157 [9th Cir. 1983]; see also Evans v. Bd. of Educ., 930 F. Supp. 2d 83, 94 [S.D.N.Y. 1996] ["The Act ...was intended to ensure prompt resolution of disputes regarding appropriate education for disabled children"]). "[T]he IDEA's carefully structured procedure for administrative remedies, [is] a mechanism that encourages parents to seek relief at the time that a deficiency occurs and that allows the educational system to bring its expertise to bear in correcting its own mistakes" (Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2001]). Moreover, in amending the IDEA in 2004, Congress made a finding that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways" (20 U.S.C. § 1400 [c][8]).

The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party; and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]. Depending on the circumstances of a case, a parent's attorney, the state educational agency or local educational agency may be awarded attorneys' fees by a court (20 U.S.C. § 1415[i][3]; 34 C.F.R. § 300.517[a][1]).

The hearing record supports the conclusion that respondent agreed to meet all of petitioners' requests regarding the student's substantive educational concerns. In addition, respondent agreed to correct any procedural errors and to provide additional educational services to compensate for the failure to provide services identified by petitioners, which resulted in gaps in the delivery of services to the student.

In conclusion, the impartial hearing officer correctly determined that since respondent agreed to meet all of the demands regarding the student's special education, no dispute remained

regarding the student's identification, evaluation, eligibility, educational placement, or services. I also concur with the impartial hearing officer that since respondent has agreed to provide appropriate additional educational services to compensate for the failure to provide services to the student as identified by petitioners, given the circumstances of this case, it would be appropriate for petitioners and the CSE to meet to address implementation of such services. Under the circumstances of this case, where the parties' remaining dispute concerned a matter over which the impartial hearing officer did not have subject matter jurisdiction (i.e. attorneys' fees), I find that the impartial hearing officer did not err by dismissing the due process complaint notice. I also find that the impartial hearing officer did not err in declining to hold an impartial hearing to entertain petitioners' request for an order directing respondent to apologize or in declining to hear petitioners' requests for relief in the form of training or transitioning policies as those pertained to matters regarding the 2006-07 school year, which have now become moot due to either the passage of time, respondent's reclassification of the student, or because the student has already transitioned back into respondent's district. Thus, I find no reason to modify her order (Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 31, 2008

PAUL F. KELLY
STATE REVIEW OFFICER