The University of the State of New York

The State Education Department
State Review Officer

No. 08-044

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Emily R. Goldman, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of home-based applied behavioral analysis (ABA) services, speech-language therapy, and "parent/training/supervision" for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending second grade in a general education class for the 2007-08 school year; however, the parties disputed whether the student should receive special education teacher support services (SETSS) in school as recommended by the district's Committee on Special Education (CSE), as well as the extent to which the student should receive home-based ABA services and related services (Tr. pp. 212, 481, 483-44; Parent Exs. A at pp. 2-4; C at pp. 1, 12, 14). The student's prior educational history is discussed in Application of the Dep't of Educ., Appeal No. 08-009 and Application of a Child with a Disability, Appeal No. 06-063, and will not be repeated here in detail. The student's eligibility for special education services as a student with autism is not in dispute in this appeal (Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][i]; 8 NYCRR 200.1[zz][1]).

As relevant to the instant appeal, the CSE met on July 30, 2007 and recommended that the student be placed in an 8:1+1 general education class with SETSS support for three periods per week, speech-language therapy once per week for 60 minutes on a 1:1 basis and once per week for

60 minutes on a 3:1 basis, and occupational therapy (OT) once per week for 30 minutes on a 3:1 basis (Parent Ex. C at pp. 1, 12). In a due process complaint notice dated August 22, 2007, the parents alleged, among other things, that the district failed to properly evaluate the student and that the July 2007 IEP did not appropriately set forth the student's present levels of performance, did not include appropriate goals and objectives, did not indicate the number of progress reports to be issued or who would issue them, failed to include 12-month extended school year (ESY) services or parent training and counseling, failed to offer sufficient speech-language services, and failed to provide for ABA services (Parent Ex. A at pp. 2-3). The parents also alleged that no functional behavioral assessment (FBA) was conducted and no behavioral intervention plan was developed for the student (id. at p. 3). The parents also contended that the notice of the CSE meeting was deficient, the CSE meeting was not properly composed, the parents were not afforded a meaningful opportunity to participate in the development of the goals and objectives and placement of the student and the district impermissibly predetermined the student's program (id. at pp. 2-3). As relief, the parents requested that the student receive 14 hours of home-based ABA services per week, one hour per week of OT, and three hours per week of speech-language therapy (id. at p. 4). In addition the parents sought two hours per week of parent training/counseling and supervision (id. at p. 4).[1]

The impartial hearing convened on October 26, 2007 and concluded on March 26, 2008 after six days of testimony. The impartial hearing officer issued an interim decision dated January 9, 2008 finding that the student's pendency placement was established through an unappealed decision rendered on August 8, 2007 in a separate impartial hearing regarding the 2006-07 school year (IHO Interim Decision dated January 9, 2008 at p. 9). The student's pendency services were determined to be 20 hours per week of direct ABA services, up to ten hours per week of supervisory and parent training services, and 1:1 speech-language therapy two times per week for 60 minutes (id.; Application of the Dep't of Educ., Appeal No. 08-009). The district appealed the impartial hearing officer's interim decision through an interlocutory appeal, which was dismissed on March 19, 2008 (Application of the Dep't of Educ., Appeal No. 08-009). By decision dated April 22, 2008, the impartial hearing officer determined that the district committed procedural and substantive violations that deprived the student of a free appropriate public education (FAPE), that the services obtained by the parents were appropriate and that the equities favored the parents (IHO Decision at pp. 35-38). The impartial hearing officer awarded the parents, upon proof of payment, a maximum of 12 hours of 1:1 home-based ABA services per week, three hours of 1:1 speech-language therapy per week and two hours per week of "Parent/training/supervision" (id. at p. 38).

The district appeals, asserting, among other things, that portions of the impartial hearing officer's findings are not supported by citation to the hearing record, the July 2007 CSE was duly constituted, and the program proposed by the July 2007 CSE was appropriate. The district also asserts that the impartial hearing officer improperly relied on the outcome of the impartial hearing for the 2006-07 school year, and notes that an April 2008 decision of the U.S. District Court for the Southern District of New York indicates that for the 2005-06 school year, the level of home

[1] During the closing argument at the impartial hearing, the parents, through their attorney, noted that the student's need for OT had been discontinued and reduced their request for relief to 10-12 hours per week of home-based ABA services, two hours per week of parent training/counseling and supervision and three hours per week of speech-language therapy (Tr. pp. 649-50).

services requested by the parents was excessive.[2] The district asserts that the parents did not present any evidence regarding the appropriateness of the home-based ABA services, and that the student's home program is focused on activities such as play dates that are neither academic nor educational. The district argues that home-based services are not necessary for the student, and that the parents did not cooperate with the district because they did not provide the district with information requested from the student's home-based service providers. As relief, the district requests that the impartial hearing officer's award of ABA services, speech-language therapy, and parent training and counseling be annulled.

In its answer, the parents request that the impartial hearing officer's decision be upheld and the parents note that the student made sufficient progress with the services that he received during the 2007-08 school year. The parents assert that the district was required to inform the parents in advance that the July 2007 CSE meeting would be a subcommittee meeting. The parents also argue that the student needed "generalization" from teaching across different settings and individuals. The parents contend that the district was required to conduct an FBA and provide parent training and counseling.[3] The parents annexed to their answer a letter to the district dated June 18, 2007 indicating that the student had made sufficient progress during the 2007-08 school year and "waiving [their] right to a 2008-2009 school year IEP."[4]

In a reply, the district requests, among other things, that the parents' answer and memorandum of law be stricken for failure to comply with State regulations and objects to the parents' submission of additional evidence as unnecessary in order for a State Review Officer to render a decision.

At the outset, I will address two procedural issues. First, to the extent that the reply objects to the submission of additional evidence, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). In this case, I note that the parents' June 2008 letter was not available at the time of the impartial hearing and, in light of my decision below, I find that it is relevant to the disposition of this case. Therefore, in the exercise of my discretion, I will consider it.

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[2] The District Court's decision was issued after the impartial hearing officer rendered his decision (see A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

[3] I note that the parents' answer does not comply with State regulations insofar as almost none of the factual allegations are supported with citations to the hearing record before the impartial hearing officer. Although there is little point in addressing the matter further in light of the disposition of this case, I again encourage the parents' attorney to observe these State regulations and comply with them in the future (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 08-003).

[4] It appears from the context of the letter and the district's reply that the year noted in the letter contains a typographical error and should have been dated June 18, 2008 (Answer at Ex. C).

Turning to the next procedural issue that has arisen since this appeal was initiated, I note that the parents have already received all of the relief they were seeking at the impartial hearing under pendency, which raises the question of whether this case has been rendered moot by the passage of time. 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]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). 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., 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 (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; 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 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; 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]). 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; Application of a Child with a Disability, Appeal No. 07-139). 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; Application of a Child with a Disability, Appeal No. 07-139). 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]; Application of a Child with a Disability, Appeal No. 07-139). 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; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the parties' dispute over the services offered by the district for the 2007-08 school year. I find that even if I were to make a determination that the program offered to the student in July 2007 was appropriate, in this instance, it would have no actual effect on the parties. The 2007-08 school year expired on June 30, 2008, and the district alleged that the student has received the home-based ABA services, speech-language therapy, OT and parent training and counseling throughout the 2007-08 school year by virtue of pendency (Pet. ¶ 9; Parent Ex. A at pp. 2-5). I note that this is the very relief that the

parents sought in their due process complaint notice. Consequently, the parties' dispute has been rendered moot by the passage of time since a new IEP, based upon the student's needs for the 2008-09 school year, would need to be devised.[5] Furthermore, I note that the parents have indicated that they will not attend a CSE meeting for the 2008-09 school year and are waiving their right to a 2008-2009 IEP because the student "has made sufficient progress" (Answer at Ex. C). Accordingly, the parents' claims for the 2007-08 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of a Child with a Disability, Appeal No. 07-077; 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 the district's appeal and it is not necessary to discuss the impartial hearing officer's rationale for reaching her determination on the merits of the parents' claims for the 2007-08 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 15, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[5] I also note that the parents did not appeal the impartial hearing officer's decision denying ESY services for summer 2008 (IHO Decision at p. 37).