The University of the State of New York

The State Education Department
State Review Officer

No. 08-089

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 Board of Education of the Patchogue-Medford Union Free School District

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, Barbara P. Aloe, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which dismissed as moot their request to be reimbursed for their son's tuition costs at the Kildonan School (Kildonan) and the Sappo School (Sappo) for the 2007-08 school year. The appeal must be sustained in part.

The hearing record is sparse regarding the student's educational history. At the time of the impartial hearing in July 2008, the student was enrolled at Sappo (Tr. p. 31). In this appeal, the parties do not specifically dispute the student's eligibility for special education and related services as a student with a learning disability (IHO Ex. 13 at p. 18;[1] see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).[2]

[1] The impartial hearing officer failed to identify exhibits entered into the hearing record with dates, identifying numbers or letters, or page numbers in accordance with State regulations (8 NYCRR 200.5[5][j][v]). In order to provide a clear and efficient means of reference to the hearing record on appeal, the exhibits before the impartial hearing officer have been numbered in chronological order and will be referenced as follows: Due Process Complaint Notice, IHO Ex. 1; Notice of Appointment and Interim Order, IHO Ex. 2; District's Response to Due Process Complaint Notice & Notice of Insufficiency, IHO Ex. 3; Determination on Notice of Insufficiency, IHO Ex. 4; seven consecutive Notices of Impartial Hearing and Second through Ninth Interim Orders, IHO Exs. 5-12, respectively; Letter and Motion to Dismiss Due Process Complaint, IHO Ex. 13; and Notice of Impartial Hearing and Tenth Interim Order, IHO Ex. 14.

[2] I note that the parties agree that the student should be classified, but that the parents are dissatisfied with the manner in which the student's diagnoses have been described by the district (Pet. at p. 11). However, that aspect of the parties' disagreement in no way alters the student's eligibility to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).

On August 2, 2007, the district convened a Committee on Special Education (CSE) meeting to discuss an individualized education program (IEP) for the student for the 2007-08 school year (IHO Ex. 13 at p. 22). Meeting attendees included the parents, the parents' attorney, an additional parent member, the district's attorney, the CSE chairperson, a district psychologist, regular and special education teachers and the academic dean from Kildonan, which was the school that the student attended during the 2006-07 school year (id.). At the CSE meeting, the parents objected to the presence and participation of the specific individual who was acting as the CSE chairperson (id.). The parents' objection was noted in the CSE meeting minutes and the CSE proceeded to meet for approximately four hours (id.). The resultant August 2007 IEP indicated that the student would be placed in a 15:1 special class in the district's high school, receive 1:1 reading instruction with a teacher familiar with Orton-Gillingham methodology of instruction, and participate in 12-month extended school year (ESY) services consisting of reading instruction and academic tutoring in the home (id. at pp. 18-19; 22-23).

In a due process complaint notice dated October 31, 2007, the parents requested an impartial hearing, alleging that the CSE chairperson should not have participated in the August 2007 CSE meeting and that the meeting was conducted in bad faith (IHO Ex. 1). Among other things, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE), the 10-month school year and ESY reading instruction programs were inappropriate, the IEP failed to excuse the student from language other than English requirements, the IEP failed to recognize the student's diagnosis of dyslexia, the IEP did not appropriately describe the student's organizational skills, and the district failed to reimburse the parents' for the student's tuition at Kildonan (id.).[3] In November 2007, the district challenged the sufficiency of the parents' due process complaint notice and, in an interim order dated November 15, 2007, the impartial hearing officer determined that, among other things, the parents' description of the nature of the problem and proposed resolution were sufficient (IHO Ex. 4).

During the course of the 2007-08 school year, the impartial hearing officer found "compelling reasons" to grant seven extension requests for the parties to attempt to effectuate a settlement agreement (IHO Exs. 5-11). While the parties attempted to settle the case, the student was transferred from Kildonan and was unilaterally enrolled in Sappo (Tr. p. 32). In July 2008, the impartial hearing officer issued two additional extensions for purposes of scheduling the impartial hearing. (IHO Exs. 12; 14).

On July 9, 2008, the district moved to dismiss the parents' due process complaint notice as moot (IHO Ex. 13). The district asserted that it had reimbursed the parent for both the student's tuition costs at Kildonan and Sappo for the 2007-08 school year and the cost of summer 2007 tutoring services (id. at p. 3). The district argued, among other things, that even if the impartial hearing officer held a hearing to determine whether the district failed to offer the student a FAPE and that Kildonan was appropriate for the student, such determinations could not effect the parties because the district had already provided the parents with the remedy they were seeking and the student was no longer attending Kildonan (id. at pp. 3-4).[4]

[3] According to the district, there was an agreement between the parties that the district would pay for the parents' unilateral placements of the student as pendency (IHO Ex. 14 at p. 4).

[4] In its pre-hearing motion to dismiss, the district also argued that the parents would not be able to sustain their burden of proof with respect to the merits of their claim (IHO Ex. 13 at pp. 4-5).

An impartial hearing was convened on July 24, 2008 to resolve the district's motion to dismiss (Tr. p. 5). No testimony was adduced at the impartial hearing, but the impartial hearing officer considered the documentary evidence submitted by the parties and the interim decisions that were previously issued (IHO Exs. 1-14). In a one-page decision dated July 26, 2006, the impartial hearing officer dismissed the parents' due process complaint notice as moot "[p]ursuant to the finding of facts made on the record" (IHO Decision).[5]

The parents appeal,[6] contending that the CSE chairperson should have "recused" herself from the CSE meeting, the CSE meeting was conducted in "bad faith," the district did not consider the recommendations from the academic dean from Kildonan, and the IEP did not provide for a certified Orton-Gillingham instructor.[7] The parents argue that the impartial hearing officer improperly extended the start of the impartial hearing ten times without gaining an understanding of the parties' settlement negotiations, and that the district withdrew its settlement offer in bad faith in order to move to dismiss the case as moot and refused to pay the student's tuition costs until June 27, 2008. The parents assert that the district failed to timely conduct the student's annual review for the 2008-09 school year. According to the parents, the impartial hearing officer improperly refused the parents' request for an adjournment of the impartial hearing on July 24, 2008, although their attorney "was seen in the [e]mergency [r]oom" just prior to the impartial hearing, during which he was in pain and "under the influence of painkillers" (Pet. at pp. 5-6). The parents contend that the district did not comply with a prior settlement agreement because it failed to timely make "partial payments" thereby "forcing the parents to enter into a parental contract with . . . Kildonan" (id. at p. 7). Among other things, the parents also allege that the district's attorneys engaged in unethical conduct with regard to efforts to settle the case and note their dissatisfaction with the manner in which the impartial hearing officer conducted the hearing.

For relief, the parents seek an order directing that the impartial hearing officer's decision be overturned. The parents also seek: (1) that the student's placement be changed to a "6-8:1 class" with Orton-Gillingham methodology and a certified instructor; (2) that the CSE chairperson be barred from participating in educational decision making regarding the student; (3) a declaratory order indicating that Sappo is the student's pendency placement for the 2008-09 school year; (4) a declaratory order indicating that certain individuals acted in bad faith; (5) an order directing reimbursement for educational related expenses, athletic fee(s) and legal expenses; (6) an investigation of the district and certain personnel as well as referral of the case to the Office of Professional Discipline; (7) an investigation of the district's attorneys and the impartial hearing officer, disciplinary action against them, and referral of the district's attorneys and the impartial

[5] I note that, although the hearing record is 74 pages of hearing transcript and 14 exhibits, the impartial hearing officer's decision consist of a conclusory statement that the case was dismissed on the ground of mootness, without specifying any of the facts upon which her conclusions were based and a single statement, without any citation whatsoever, that it was based on the hearing record (IHO Decision). The impartial hearing officer's decision fails to comply with State regulations, which require that the reasons and factual basis be set forth in the decision with references to the hearing record that support the findings of fact (8 NYCRR 200.5[5][j][v]).

[6] Although the parents were represented by counsel at the impartial hearing, they are proceeding pro se on appeal.

[7] The parents also allege certain facts in their petition regarding a State administrative complaint proceeding that they filed with the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) with respect to the district's alleged failure to timely develop the student's IEP or appropriately implement the student's program (see 8 NYCRR 200.5[*l*]).

hearing officer to a bar association; and (9) compensation for the parents' time and expenses in the preparation of this proceeding.

In the answer, the district argues that the petition for review was insufficient and that the parents failed to properly serve it upon the district. The district denies the parents' allegations, arguing that the CSE was properly composed, input from the academic dean from Kildonan was considered by the CSE, and that the August 2007 IEP is not part of the hearing record. The district contends that information regarding settlement of the case should not be considered on appeal,[8] that the impartial hearing officer correctly did not involve herself in settlement negotiations and that matters involving the parents' State administrative complaints to VESID are outside the hearing record and should not be considered. According to the district, matters related to the student's 2008-09 IEP are beyond the scope of this proceeding. Among other things, the district asserts that it did not act in bad faith, it paid in full the student's tuition costs for the 2007-08 school year at Kildonan and Sappo in accordance with the settlement of a prior impartial hearing, the only remaining claim raised at the impartial hearing related to a $450 athletic fee(s), and the impartial hearing officer correctly determined that the case was moot. The district asserts that the parents' claims for "additional amounts pursuant to a settlement agreement" are breach of contract claims that are not properly before a State Review Officer. The district also contends that the parents' requests relating to compensation, conducting investigations, and disciplining the impartial hearing officer, the district's attorneys and district personnel are beyond the jurisdiction of administrative officers.

In their reply, the parents argue that a State Review Officer should accept as additional evidence the copy of the student's 2007-08 IEP proffered by the parents. The parents also assert that the district's answer is untimely and does not conform to State regulations and should be stricken.

At the outset, I will address the parties' procedural contentions regarding the pleadings on appeal. First, the district contends that the parents' petition for review should be dismissed because the parents personally served the district's assistant superintendent for business, who the district alleges was not authorized to accept service. The parents also point to pleading irregularities, arguing that the district's answer was untimely and did not conform to State regulations. In general, State Review Officers may exercise their discretion to accept a petition for review in spite of service irregularities, particularly in cases in which an unrepresented parent has complied with nearly all of the service requirements for a petition and the sole irregularity is the mistaken service upon a high ranking district representative or official who is nevertheless unauthorized to accept service of process (Application of a Child with a Disability, Appeal No. 95-66; Application of a Child Suspected of Having a Disability, Appeal No. 93-7). In this case, the parents timely and personally effectuated service of the petition for review upon an assistant superintendent of the district. I note that the district did not present evidence that the assistant superintendent who accepted the parents' papers indicated that that she was not authorized to accept service on behalf of the district so that the oversight could be readily corrected (see id.). Furthermore, the district was granted two extensions to serve its answer, one of which was due to its own failure to conform to the pleading requirements and it has not established that it was in any way prevented from answering the petition due to the service irregularity. Similarly, it would be inequitable to excuse

[8] The district, however, also alleges its own version of facts regarding settlement negotiations and threats of litigation (Answer ¶ 2.g).

the parents' failure to comply with the service requirements and then sustain their position that the district unduly delayed in answering the petition. Moreover, the district was granted an extension to conform their answer to the pleading requirements, and it was timely served upon the parents within the extension period. Accordingly, I will not dismiss the parents' petition for review or strike the district's answer due to the alleged procedural defects.

Turning next to the district's procedural defense that the petition for review should be dismissed for insufficiency insofar as it does not "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer" (8 NYCRR 279.4[a]), I find the district's arguments unpersuasive. The petition clearly alleges the parents' points of disagreement with the impartial hearing officer's decision to dismiss the case as moot and clearly indicates the relief they seek. Additionally, I note that the district has cogently formulated responses to the allegations in petition for review. In light of the factors above, I find that the district's argument that the petition is insufficient lacks merit.[9]

I also note that a reply is limited by State regulations to the procedural defenses interposed by a respondent or to any additional documentary evidence served with an answer (8 NYCRR 279.6). In this case, the parents' reply reiterates arguments in response to the substantive allegations in the answer. Furthermore, the parents' reply does not respond to the district's procedural defenses that the petition should be dismissed for improper service or insufficiency. Moreover, no additional evidence was submitted by the district with the answer. Accordingly, the reply is beyond the scope permitted by State regulations and I will not consider it (8 NYCRR 279.6).[10]

I will next address the district's objections to the additional evidence submitted by the parents with their petition for review. I note that the petition is accompanied by 11 additional attachments submitted by the parents (Pet. Exs. 1-11). 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 impartial hearing and the evidence is necessary in order to render a decision (see, e.g., 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; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, five of the attachments, or unmarked copies that were substantially the same, are considered as part of the hearing record and it is unnecessary for the parents to resubmit them (Pet. Exs. 1; 2; 4; 5; 6). Of the remaining attachments, three were available at the time of the impartial hearing (Pet. Exs. 3; 8; 9) and three were not (Pet. Exs. 7; 10; 11); however, none of them are necessary in order to render a decision in this case. Accordingly, I will not consider them.

[9] I note that the parents, in complying with the sufficiency requirements, were presented with the additional hurdle of appealing the impartial hearing officers' decision which failed to contain any findings of fact or supporting analysis (see note 5, supra).

[10] I also note that the district has attempted to interpose a "sur-reply" in the form of an affirmation by its attorney. Such a pleading is not authorized by State regulations and I will not consider it.

Turning next to the parties' arguments regarding the impartial hearing officer's dismissal of the parents' claims, 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]; 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]; 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, the parents elected to unilaterally enroll the student at Kildonan and Sappo rather than the placement offered by the district (Tr. pp. 30-31; IHO Ex. 1). The August 2007 IEP recommended by the CSE has expired by its own terms (IHO Ex. 13 at pp. 18-19), and the 2007-08 school year has ended. I concur with the impartial hearing officer's conclusion that the case is moot insofar as no relief may be granted with respect to the August 2007 CSE meeting or the resultant IEP that would have any actual effect upon the parties. Accordingly, the parents' requests for relief related to the conduct of the CSE and the program recommended by the district are no longer a "live" dispute and I find they are moot.

With regard to the parents' request for tuition reimbursement, the parents conceded, albeit reluctantly, that the district had paid the costs of the student's tuition for the six months he attended Kildonan and the four months he attended Sappo under the parties' pendency agreement (Tr. pp. 28, 30-31, 33-34, 40-41). Accordingly, I find that the parents have obtained most of the relief they sought in their due process complaint notice, and the issue of the costs of tuition are also moot.

However, I note that at the impartial hearing the parties disputed whether the district should have paid for the student's athletic fee(s) at Kildonan, and the impartial hearing officer ruled, without explanation, that the fee(s) did not fall within the scope of the due process complaint notice (Tr. pp. 54-57, 67, 69). The due process complaint notice clearly indicated that the parents were seeking reimbursement for tuition "and other related expenses from the Kildonan school where [the student] currently attends" (IHO Ex. 1 at p. 4). I disagree with the impartial hearing officers' conclusion that the athletic fee(s) were not encompassed by the due process complaint notice, simply because the term "related expenses" was used instead of "fees" (Tr. p. 57), and I find that the parents should have been afforded an opportunity to present evidence on this issue. As the district pointed out at the impartial hearing, no information had been submitted regarding athletics (id.). The impartial hearing officer, without hearing testimony or considering documentary evidence, concluded that the parents did not have adequate proof that they should be awarded the athletic fee(s); however, she noted that she did not know what did and did not constitute Kildonan's tuition costs (Tr. pp. 69, 71).[11] The impartial hearing officer indicated that she would not hold a hearing to determine if the district owed the parents additional fees (Tr. pp. 71-72). In view of the forgoing, I find that the hearing record with regard to the issue of the athletic fee(s) at Kildonan was inadequately developed to provide meaningful review, and therefore, the issue must be remanded for an impartial hearing.

With regard to the parents' claim for monetary compensation and their contentions that the district's personnel and attorney's should be disciplined, impartial hearings conducted under the IDEA are not the proper forum for such education disputes because such hearings are limited to issues concerning the identification, evaluation and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 08-071; Application of a Child with a Disability, Appeal No. 03-070; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a school district's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]) I also note that it is well settled, however, that monetary damages, including compensatory damages, are not available to remedy violations of the IDEA (Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; see Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). Consequently, these claims are not properly before me and must be dismissed.

I have considered the parties' remaining contentions and find that they are without merit.

[11] The hearing record indicates that another unidentified letter was discussed at the impartial hearing regarding the athletic fee(s), but this document was not entered into evidence (Tr. pp. 64-65).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated July 26, 2008 that dismissed the parents' claim for reimbursement for the student's athletic fee(s) at Kildonan for the 2007-08 school year is annulled; and

IT IS FURTHER ORDERED that this matter is remanded to the same impartial hearing officer who issued the decision that is the subject of this appeal for a new impartial hearing limited to the issue of whether the parents are entitled to reimbursement for the cost of the student's athletic fee(s) at Kildonan for the 2007-08 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, that the new impartial hearing be held within 30 days from the date of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the July 26, 2008 decision is not available to conduct the new impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
October 22, 2008

PAUL F. KELLY
STATE REVIEW OFFICER