The University of the State of New York

The State Education Department
State Review Officer

No. 08-098

Application of a STUDENT WITH A DISABILITY, by her parent, 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:
Metropolitan Parent Center at Sinergia, Inc., attorneys for petitioner, Lizabeth Pardo, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmeuller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the educational programs and transportation services respondent's (the district's) Committee on Special Education (CSE) recommended for her daughter for the 2007-08 school year were appropriate. The appeal is sustained in part.

At the time of the impartial hearing, the student attended kindergarten at a district public school and received related services pursuant to her 2007-08 individualized educational program (IEP) (Tr. pp. 4, 7-8; Dist. Ex. 3 at pp. 1, 15). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]). The student is non-ambulatory and non-verbal (Dist. Ex. 3 at pp. 3-4).

On May 31, 2007, the CSE convened to develop the student's IEP for the 2007-08 school year (Dist. Ex. 3 at p. 1). The CSE recommended placement in a 12:1+4 special class in a specialized, barrier-free school and related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 1, 15).[1] In addition, the CSE recommended special education transportation, noting "school bus/wheelchair" on the student's IEP (id. at p. 1).

[1] A district school psychologist, who worked at the student's public school placement, testified at the impartial hearing that a "barrier-free" school has elevators and allows wheelchair-bound students or students who rely upon wheelchairs to access all parts of the school (Tr. pp. 43-44).

By due process complaint notice dated April 15, 2008, the parent requested an impartial hearing alleging that the district denied "porter services" to her daughter, a non–ambulatory student living in a second floor, walk-up apartment (Parent Ex. A).[2] As relief, the parent requested that the district provide porter services to her daughter (id.). The due process complaint notice did not allege that the student was denied a free appropriate public education (FAPE) because of a lack of porter services, nor did it allege any safety issues related to the student's special transportation (see id.).

On June 6 and 25, 2008, the parties convened for the impartial hearing and presented both testimonial and documentary evidence (Tr. pp. 1-117; Dist. Exs. 1-4; Parent Exs. A-G). The student's special education teacher described the student as non-verbal and non-ambulatory, as well as alert and aware of her surroundings (Tr. p. 22). She also described the student's special class, her classmates, and the staffing (Tr. pp. 22-23). At the beginning of the school day, the student arrived on her school bus and would be lowered from the bus in her stroller using the bus lift (Tr. p. 29).[3] A paraprofessional would then wheel the student into the classroom in her stroller (id.). Once inside the classroom, the student would be transferred from her stroller into a special adaptive chair with a hip belt, a footplate, and its own tray that allowed the student to access tabletop activities (Tr. pp. 24-25, 32-33). The student remained in the adaptive chair during the school day (id.). The adaptive chair provided appropriate support to keep the student's "body in alignment," which allowed the student to focus on activities (Tr. p. 24). The special education teacher also testified that the CSE conducted the student's annual review for the 2008-09 school year (Tr. pp. 21, 30).

The student's Sinergia service coordinator testified that she assisted the student's mother in procuring services or equipment and scheduling appointments for the student (Tr. pp. 81-84). She began providing services to the student and her mother in November 2007, and she assisted the student's mother in requesting porter services at that time (Tr. pp. 82-84; see Parent Exs. B-C).

The district's transportation liaison testified that the school psychologist forwarded the student's application for porter services for review and consideration (Tr. pp. 57-61). After learning that the student resided in private housing, and not public housing, the transportation liaison denied the request for porter services based upon the district's transportation policy (Tr. pp. 61-62; see Parent Exs. B-C; E). He explained in testimony that the provision of porter services arose in the "late '80s" or so in response to a growing number of homeless, disabled students living in public housing or shelters who were unable to "get out of their building" because the public housing or shelters did not consistently provide "working elevators" (Tr. pp. 59-61). Thus, the

[2] According to the district's Updated Specialized Transportation Policy, dated August 2006, submitted into evidence at the impartial hearing, "porter services"—referred to as "specialized transportation assistant services" in the district's policy—"may be provided for non-ambulatory students with disabilities who reside in **non-accessible public buildings** and who must be carried up and down the stairs from their homes to the street" (Parent Ex. E at pp. 1-2 [emphasis in original]; see Tr. pp. 8-9).

[3] The stroller referred to in testimony is specifically designed for students with major special needs (see Parent Ex. F; see also Tr. pp. 12-16). The student's teacher described the stroller as a "large adapted therapeutic . . . stroller" with a "shoulder harness" and a "hip belt," which is wheeled onto the wheelchair lift on the student's specially equipped school bus (Tr. pp. 25-27). After the stroller is on the school bus, the bus matron "buckles the wheels" of the stroller "onto the floor of the bus" similar to how a wheelchair would be secured to the school bus (id.). The student's teacher, who taught for approximately 30 years, characterized the student's stroller as a "standard piece of equipment" (Tr. pp. 20, 28).

district, voluntarily working in conjunction with other city agencies, provided individuals to assist disabled students living in public housing or shelters to "navigate" the stairs and to board the school bus (Tr. pp. 60-61). In this case, he testified that if the student lived in public housing or a shelter and needed to navigate steps in order to get to the school bus, as well as met the medical criteria (wheelchair), she would qualify for the porter services (Tr. pp. 64-65).

The school psychologist testified that he forwarded the student's application for porter services to the transportation liaison because while the CSE was responsible for determining whether to recommend special transportation, the transportation liaison determined whether a disabled student qualified for porter services (Tr. pp. 45-49, 53-54). With respect to his role in the process, the school psychologist provided "the parent with the appropriate paperwork necessary to apply for the services, and forward[ed] it to the appropriate people to review them" (Tr. p. 51). If the transportation liaison approved an application for porter services, the porter services were then added to the student's IEP (Tr. pp. 47, 53-54).

The student's mother also testified at the impartial hearing (Tr. pp. 86-105). At the time of the impartial hearing, she and the student lived in a second floor, walk-up apartment where the student's school bus picked up and dropped off the student for school (Tr. pp. 87-88, 90-91). She testified that she currently used the student's stroller to transport the student up and down the stairs in their apartment building to board the school bus (Tr. pp. 88-89). She obtained the stroller with the assistance of her service coordinator (Tr. pp. 91-92). Although the student also had a wheelchair, the student's mother used the stroller to navigate the stairs because it was easier to use the stroller (Tr. pp. 92, 94, 104). She also used the stroller to navigate the stairs when she took the student for walks or to appointments (Tr. pp. 94, 97-100). For appointments, the student's stroller would be placed in an ambulette for transportation (Tr. pp. 94, 99). The student's mother testified that she was seeking porter services because "[t]hat was a decision from the social worker, because [her daughter's] going to grow up and it's going to be very hard for [the student's mother] to take her down and up the stairs" (id.). Although the student's mother found it difficult to bring her daughter up and down the stairs in the stroller, she testified that she could do it on her own and further, that she could "wait some more" for porter services when her daughter was older and it became more difficult (Tr. pp. 95, 101-02). The student's mother also testified that she applied for public housing, but had not yet been approved (Tr. pp. 96-97). She had been told that an approval could take one to three years, and at the time of the impartial hearing, she had been waiting for approximately 1½ years (Tr. p. 97).

In his decision, dated July 23, 2008, the impartial hearing officer determined that although porter services qualified as a related service that the district would be required to provide under Irvington Independent School District v. Tatro, 468 U.S. 883 (1984), given the facts of the case, the student did not—at this time—require porter services in order to navigate the stairs because the student's mother was "capable of completing that task," and thus, he dismissed the parent's case (IHO Decision at pp. 1-5). In addition, the impartial hearing officer noted that the student's mother could "renew her application for future school years as the need arises, or can apply for porter services when her application for public housing, which is pending, is granted" (id. at p. 4). The impartial hearing officer also noted that although the district explained the policy limiting the provision of porter services based upon a disabled student's housing, he recommended that the district review its policy regarding the provision of porter services only to those disabled students who lived in public housing (id. at pp. 4-5).

On appeal, the parent asserts that the impartial hearing officer erred when he determined that the student did not presently require porter services. The parent asserts that using the student's stroller to transport the student on the bus was unsafe because the stroller was not designed for travel. The parent also contends that the denial of porter services based upon the student's housing violates the Individuals with Disabilities Education Act (IDEA) and that the procedure to add porter services to the student's IEP circumvents the CSE process by allowing a non-CSE member to determine a student's eligibility for the services. In addition, the parent argues that although the impartial hearing officer declined to rule on the validity of the district's porter services' policy, such policy violates the IDEA, and further, that the CSE was responsible for determining whether a student requires specialized transportation services, including porter services, in order to receive a FAPE and the district's procedure bypassing the CSE process to add porter services to a student's IEP constitutes a procedural violation denying the student a FAPE. The parent seeks an order directing that porter services are an appropriate IEP service required to offer the student a FAPE in the least restrictive environment (LRE), that the district's policy regarding porter services and procedures bypassing the CSE violates the IDEA denying the student a FAPE, and she requests an order directing the district to revise its transportation policy to provide porter services based upon a student's unique needs.

In its answer, the district seeks to uphold the impartial hearing officer's decision and alleges as an affirmative defense that the petition failed to comply with the applicable regulations regarding numbered paragraphs and references to the hearing record to support the allegations contained therein and thus, the petition should be dismissed. The district asserts that it sustained its burden to demonstrate that the district offered the student a FAPE, especially in light of the evidence presented that the student's current transportation services do not interfere with her ability to receive educational benefits. In addition, the district argues that because the parent failed to allege a denial of a FAPE based upon the denial of porter services in her due process complaint notice and failed to raise the issue at the impartial hearing, the petition should be dismissed for failure to state a claim upon which relief can be granted. The district also argues that neither the IDEA nor New York State Education Law requires the district to provide porter services, unless the denial of porter services constitutes a denial of a FAPE. The district alleges that the parent's claim regarding the safety of the student's current transportation services should be dismissed because it was raised for the first time on appeal. Similarly, the district contends that the parent's assertion that the district's transportation policy and procedures violated the IDEA or constituted a procedural violation denying the student a FAPE should be dismissed as the parent failed to allege these claims in her due process complaint notice and were either not raised during the impartial hearing or were not raised until the parent's closing argument, thereby denying the district an opportunity to address those issues. Finally, the district asserts that the parent's relief seeking an order directing the district to revise its transportation policy should be dismissed because the due process hearing procedures were designed to only address issues relating to specific students and not broad educational policy. The parent prepared and filed a reply to the district's answer addressing the procedural defenses raised by the district.

Upon review of the appeal, I must initially address a threshold issue. It is well established that 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, the parent's appeal relating to the request for porter services for the 2007-08 school year is moot. As noted above, changes to an IEP or implementation disputes—such as the parent's request to include porter services on the student's 2007-08 IEP and the implementation of those services—risk becoming moot at the end of the school year because no meaningful relief can be granted. At this time, the school year has ended, and a review of the hearing record indicates that the CSE convened for the student's annual review and to develop the student's 2008-09 IEP prior to the first day of testimony in the impartial hearing (Tr. pp. 21, 30). However, the hearing record does not establish whether the CSE considered such services or if such services were requested for the 2008-09 school year. The hearing record indicates that factors affecting the student's current needs could change, including whether the parent could no longer manage to navigate the stairs using the student's stroller or if the parent received approval for public housing, which would significantly alter the student's current needs. Thus, an administrative decision concerning the student's alleged need for porter services during the 2007-08 school year may no longer appropriately address the student's current needs. In addition, the exception to the mootness doctrine does not apply in this case because the hearing record does not contain any evidence that

the parent would be precluded from seeking porter services for the 2008-09 school year, or that the parent's right to challenge a future denial of porter services would evade review.

Although I have found that the parent's appeal in this case is moot, further discussion is warranted.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The IDEA specifically identifies transportation, including any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 C.F.R. § 300.34[c][16]). In addition, New York State law defines special education as "specially designed instruction . . . and transportation to meet the unique needs of a child with a disability" and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1], 4402[4][a]). Transportation includes transport to and from school, between schools, as well as travel in and around schools. It includes specialized equipment (e.g., special or adapted buses, lifts and ramps) if required to provide specialized transportation (34 C.F.R. § 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). When making determinations about a student's transportation needs, CSE's are encouraged to include input from transportation personnel (id.). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the LRE (34 C.F.R. §§ 300.107, 300.305). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]). The term "related services" means transportation and such developmental, corrective, and other supportive services "…as may be required to assist a child with a disability to benefit from education, and includes…medical services for diagnostic or evaluation purposes" and includes school health services (20 U.S.C. §1401[26]; 34 C.F.R. § 34[a]; see 8 NYCRR 200.1[qq]; see Tatro, 468 U.S. 883).

As for the parent's allegations on appeal regarding the use of the student's stroller on the bus and that the district's transportation policy and procedures violated the IDEA or constituted a procedural violation of the IDEA denying the student a FAPE, the district correctly argues that since the parent did not raise these issues in her due process complaint notice or at the impartial hearing in a manner that allowed the district to address these issues, they are outside the scope of my review and not properly before me, and thus, I decline to address them on appeal (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student

Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).[4]

As noted above the parent's concerns have not been properly raised and presented. The hearing record does not establish whether parental concerns about the student's transportation needs were presented to the May 31, 2007 CSE. The hearing record also does not establish whether parental concerns about the student's transportation needs were presented at the CSE conducted for the student's 2008-09 school year. To ensure that the CSE has an opportunity to fully consider the parent's concerns and to ensure that the parent has an opportunity to raise such concerns to the CSE, I will direct that the CSE conduct an assessment of the student's transportation needs, with an opportunity for input from the parent, as they relate to the provision of a FAPE, and to reconvene to consider the assessment. Also, if the CSE determines that there are safety issues during transport that need to be addressed, then the CSE must make recommendations to address those concerns. Lastly, the CSE should consider whether it would be appropriate to provide the parent with the services of a social worker to assist her in determining whether there are any services available through the State's Office of Mental Retardation and Developmental Disabilities (OMRDD) that would provide support services.

I have reviewed the parties' remaining contentions and find that I need not reach them in light of the determinations rendered.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that unless the parties otherwise agree, the CSE will within 30 days from the date of this decision, conduct an assessment of the student's current transportation needs, reconvene and consider that assessment, and if appropriate, develop a new IEP consistent with this decision, as well as consider the appropriateness of adding social worker services to the IEP.

Dated: **Albany, New York**
October 23, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[4] Pursuant to the IDEA, a party requesting an impartial hearing may not raise issues at an impartial hearing that were not raised in its original due process complaint notice unless the original complaint is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). "[T]he purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). In this case, I note that the parent, who was represented by an attorney, did not request to amend her due process complaint notice to include these claims and failed to properly raise these issues during the impartial hearing. Moreover, the district did not consent to include these claims as a part of the impartial hearing.