The University of the State of New York

The State Education Department
State Review Officer

No. 08-134

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, Karyn R. Thompson, 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') daughter and ordered it to reimburse the parents for the costs of their daughter's home-based program that consisted of Applied Behavioral Analysis (ABA) services, speech-language therapy, and physical therapy (PT) for the 2007-08 school year. The appeal must be dismissed.

Procedurally, the instant appeal began by due process complaint notice dated August 31, 2007, in which the parents sought reimbursement for the costs of their daughter's home-based program for the 2007-08 school year alleging that the district failed to offer the student a free appropriate public education (FAPE) based upon both procedural and substantive violations (Parent Ex. A at pp. 1-4). In their due process complaint notice, the parents invoked pendency rights pursuant to the Individuals with Disabilities Education Act (IDEA) and as pendency services, requested that their daughter receive those services contained in an unappealed impartial hearing officer's decision, dated March 15, 2007 (id. at p. 2).[1] Specifically, the unappealed

[1] The unappealed impartial hearing officer's decision contained a typographical error that mistakenly dated the decision as March 15, 2006, as opposed to the correct date of March 15, 2007 (see Parent Br. at pp. 1-3; see and compare Parent Ex. A at p. 2, with Parent Ex. N at p. 11). The unappealed March 15, 2007 impartial hearing officer's decision issued a determination on the merits as to whether the home-based services obtained by the parents for the 2006-07 school year were appropriate to meet the student's needs; in that decision, the impartial hearing officer noted that the district conceded that it failed to offer the student a FAPE for the 2006-07 school year and further conceded that equitable considerations did not prelude an award of tuition reimbursement (Parent Ex. N at pp. 3-4, 6-10).

impartial hearing officer's decision directed the district to reimburse the parents for home-based services that consisted of five hours per week of speech-language therapy, two 45-minute sessions per week of PT, and 50 hours per week of ABA services for the 2006-07 school year (Parent Ex. N at p. 10; see Parent Ex. A at p. 2). In the instant matter, litigation ensued to establish the student's pendency placement services, which resulted in the impartial hearing officer's interim decision, dated November 7, 2007, directing the district to provide the student with the services described in the unappealed March 15, 2007 impartial hearing officer's decision (IHO Interim Order at pp. 2-3; see Tr. pp. 1-26). The district appealed from the impartial hearing officer's November 7, 2007 interim decision, and by decision dated February 11, 2008, this State Review Officer upheld the impartial hearing officer's November 7, 2007 interim decision directing the district to provide the student with the services described in the unappealed March 15, 2007 impartial hearing officer's decision as pendency services during the instant matter (Application of the Dep't of Educ., Appeal No. 07-134).[2, 3]

As for relief sought regarding the alleged denial of a FAPE for the 2007-08 school year, the parents requested reimbursement for the costs of their daughter's home-based program and supplemental services, consisting of the following: five hours per week of speech-language therapy; 1.5 hours per week of PT; 50 hours per week of ABA services; three hours per month of parent training and service coordination; and two hours per week of occupational therapy (OT) (Parent Ex. A at p. 4).

The parties proceeded with the impartial hearing, which concluded on June 4, 2008 after 18 days of hearing (Tr. pp. 1, 2328). Both parties presented testimonial and documentary evidence (Tr. pp. 1-2381; Dist. Exs. 1-37; Parent Exs. A-D; F-Q; S-Z; AA-CC; EE; IHO Exs. 1-2). In a thorough and lengthy decision dated October 15, 2008, the impartial hearing officer concluded that the district did not sustain its burden to establish that it offered the student a FAPE for the 2007-08 school year, the parents did sustain their burden to establish the appropriateness of the home-based services obtained for their daughter, that equitable considerations did not preclude an award of tuition reimbursement, and thus, he directed the district to reimburse the parents for five hours per week of speech-language therapy, 1.5 hours per week of PT, three hours per week of parent training, and up to 50 hours per week of ABA services excluding ABA services performed on weekends and holidays (IHO Decision at pp. 6-42).

On appeal, the district contends that the impartial hearing officer erred in finding the following: that the district failed to offer the student a FAPE for the 2007-08 school year, that the home-based services obtained by the parents were appropriate to meet the student's needs, that equitable considerations favored the parents, and in awarding reimbursement for the costs of the student's home-based services. The district also contends that the impartial hearing officer improperly placed the burden of proof on the district. The district asserts that the instant appeal is not moot since the district suffered an injury that remains in controversy and needs to be addressed, arguing that the district is entitled to recoup pendency payments made during this proceeding because the district offered the student a FAPE for the 2007-08 school year. Specifically, the

[2] In Application of the Dep't of Educ., Appeal No. 07-134, this State Review Officer concluded that an unappealed impartial hearing officer's decision could establish a student's pendency placement.

[3] The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

district contends that this appeal should be decided on the merits regarding whether the district offered the student a FAPE for the 2007-08 school year because upon a finding that the district offered the student a FAPE, the parents should be required to reimburse the district for payments made pursuant to pendency. The district also asserts that the burden of proof should have been placed on the parents, that the parents failed to meet their burden to establish the appropriateness of the home-based services, and that equitable considerations favored the district.

In their answer, the parents assert that the district's appeal should be dismissed as moot because regardless of whether the district did or did not offer the student a FAPE for the 2007-08 school year, the district is not entitled to recoup payments made pursuant to pendency as a matter of law. In the alternative, the parents contend that the impartial hearing officer's decision should be upheld in its entirety.

The parents attached eight exhibits to their answer and seek to have those documents considered on appeal. 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). The district objects to the consideration of all eight exhibits attached to the parents' answer, arguing that two exhibits are part of the hearing record in this matter, four exhibits could have been offered at the time of the impartial hearing, and finally, the two remaining exhibits—while not available at the time of the impartial hearing—are irrelevant to the instant appeal. While I generally agree with the district's characterization of the exhibits, the two documents that were not available at the time of the impartial hearing include the following: the parents' due process complaint notice, dated July 8, 2008, challenging the programs and services offered to the student for the 2008-09 school year; and a transcript, dated October 21, 2008, which contains testimony from an impartial hearing related to the parents' challenges for the 2008-09 school year (Answer Exs. F-G). I will accept the parents' due process complaint notice, dated July 8, 2008, as additional evidence for the limited purpose of establishing that an individualized educational program (IEP) has been developed for the 2008-09 school year, but I decline to accept the transcript, dated October 21, 2008, as it is not necessary to render a decision in this appeal.

Turning to the issues raised, I agree with the parents' contention that regardless of whether the district offered the student a FAPE for the 2007-08 school year, the district is not entitled to recoup payments made pursuant to pendency, and thus, the district's appeal is dismissed as moot. It is well settled 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). Exceptions to the mootness doctrine apply only in limited situations and are severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). 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).

It is also well established that the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]).

In an appeal previously litigated by the district, Application of the Dep't of Educ., Appeal No. 08-061, the district argued to recoup payments made pursuant to pendency in light of a determination that the district offered a FAPE to the student (see Application of the Dep't of Educ., Appeal No. 08-061). In that appeal, this State Review Officer did not find the district's arguments persuasive and denied the district's request to be reimbursed for the pendency payments (id.). In the instant appeal, the district makes the same arguments offered in the previous appeal and fails to offer any new or compelling facts or legal authority to distinguish the present case to warrant a change from the prior holding (see Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Thus, given that no meaningful relief can be granted, a review of the underlying merits regarding whether the district did or did not offer the student a FAPE for the 2007-08 school year would have no actual effect on the parties, and the district's appeal is moot. A State Review Officer is not required to make a determination that will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-061; 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). Moreover, I note that the 2007-08 school year has long since expired and a new IEP has been developed for the student's 2008-09 school year (see Answer Ex. F at pp. 1-4).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 16, 2009

PAUL F. KELLY
STATE REVIEW OFFICER