



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-029

Application of a STUDENT WITH A DISABILITY, by his 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:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Vida Alvy, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which granted respondent's (the district's) request to dismiss the parent's due process complaint notice dated August 10, 2008.¹ The appeal must be dismissed.

The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). According to the parent, the student is currently attending a private school (Pet. ¶ 1).

¹ The August 10, 2008 due process complaint notice is identified by the district as case number 117010 (Answer Ex. 1 at pp. 1-2). The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-011; Application of a Student with a Disability, Appeal No. 09-007; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046.

The parent's August 10, 2008 due process complaint notice included general allegations that the district and its employees had acted in violation of the law regarding "the initiation, placement, and or evaluation" of the student (Answer Ex. 1 at p. 3). The parent also alleged that the district had prevented the student from receiving a free appropriate public education (FAPE), "significantly impeded" the parent's opportunity to participate in decision making, and "caused a deprivation of educational benefits" (*id.*). In addition, the parent alleged that the district did not conduct a resolution session(s) according to State and federal law, that the parent has been denied requests for prehearing conferences, and that the parent has been denied access to the student's records for all cases (*id.* at pp. 7, 21-22). The parent also alleged in the August 10, 2008 due process complaint notice that the parent and the student had been denied the opportunity for any and all proceedings to commence in a reasonably convenient location, generally alleging that the closest location to his home district was "reasonably convenient" and that "[a]ny other location" was inconvenient (*id.* at p. 3).

The impartial hearing convened on January 8, 2009 (Tr. p. 1).² The parent did not appear at the impartial hearing (Tr. pp. 3-4; IHO Decision at p. 2). An individual appeared at the impartial hearing, but denied being the student's parent or legal guardian (Tr. pp. 4-5). In a decision dated January 29, 2009, the impartial hearing officer dismissed the due process complaint notice, finding that the parent had received notice of the impartial hearing and had failed to appear, and that the individual present at the impartial hearing had failed to present documentation that indicated he was authorized to represent the parent (IHO Decision at p. 2).

The parent appeals, contending that the district, for a variety of reasons, impeded the parent and the student from receiving educational benefits and related services because of the district's alleged failure to follow due process procedures. The parent seeks a determination that the impartial hearing officer's decision should be annulled on the basis of "misconduct" or "incompetence" (Pet. ¶ 43). The parent alleges that the impartial hearing officer failed to organize the hearing record, read the due process complaint notice, and conduct an open hearing (*id.* ¶ 23). The parent also argues that the impartial hearing officer colluded with the district's representative to "rush" the impartial hearing, failed to contact the parent and facilitate the parent's participation and "meaningful accompaniment" in the impartial hearing, and was biased (*id.* ¶¶ 25-26). The parent also asserts, among other things, that the district failed to offer a timely resolution session and that the impartial hearing officer's decision was untimely (*id.* ¶¶ 33, 35). For relief in the instant matter, the parent requests, among other things, the "opportunity for a [p]arent requested [individualized education program (IEP)] [m]eeting" (*id.* ¶ 41).³

In its answer, the district alleges that the petition should be dismissed because the impartial hearing officer correctly determined that the parent failed to appear at the impartial hearing and the parent is barred from relitigating the same claims that were raised in two prior proceedings. The district concedes that a resolution session was not timely conducted; however, contends that

² After recusal by two impartial hearing officers, the impartial hearing was conducted by a third impartial hearing officer who was appointed in the instant case (Answer Exs. 10; 11).

³ The parent makes additional allegations regarding other impartial hearings and proceedings that are not related to the decision by the impartial hearing officer in the instant matter.

its error is not a basis for overturning the impartial hearing officer's decision.⁴ Among other things, the district urges affirmance of the impartial hearing officer's decision.

Before turning to the parent's contentions as raised in the petition for review, a procedural matter must be addressed. The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]; Application of a Student with a Disability, Appeal No. 09-025; Application of a Student with a Disability, Appeal No. 08-093; Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 07-093; Application of a Child with a Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099). The rule applies not only to claims actually litigated, but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (In re Hunter, 4 N.Y.3d 260, 269 [2005]). "[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450, at *6).

Here, the doctrine of res judicata applies because, as noted in the decision in Application of a Student with a Disability, Appeal No. 09-012, the parent had already sought and been awarded relief with regard to the merits of the claims raised in prior proceedings,⁵ the prior proceedings involved the same parties, and the allegations in the parent's August 10, 2008 due process complaint notice in this case are the same allegations asserted in a prior due process complaint notice (compare Answer Ex. 1, with Answer Ex. 12; see Application of a Student with a Disability, Appeal No. 09-012; see also Application of a Student with a Disability, Appeal No. 09-006).⁶ Under these circumstances, in which the parent has previously had an opportunity to be heard with respect to these allegations, I find the parent is barred from relitigating all of the claims raised in

⁴ A parent may seek the intervention of the impartial hearing officer to begin the due process hearing timeline if a school district fails to hold a resolution meeting within 15 days of receipt of a parent's due process complaint notice or fails to participate in the resolution meeting (8 NYCRR 200.5[j][2][vi][b]).

⁵ The district was ordered to reconvene the Committee on Special Education (CSE) and develop an IEP for the student (Application of a Student with a Disability, Appeal No. 09-006).

⁶ I also note that the claims raised by the parent in Application of a Student with a Disability, Appeal No. 09-012 were essentially the same as the parent's claims that were previously addressed in Application of a Student with a Disability, Appeal No. 09-006.

the August 10, 2008 due process complaint notice by the doctrine of res judicata (see Answer Ex. 1).

I also note that the allegations set forth in the parent's petition for review, many of which were not raised in the parent's August 10, 2008 due process complaint notice, are also duplicative of the allegations in the parent's petitions for review in Application of a Student with a Disability, Appeal No. 09-012 and Application of a Student with a Disability, Appeal No. 09-006, and the only new allegations in the petition for review are those that address the January 8, 2009 impartial hearing (see Pet. ¶¶ 23-27, 43, 47). A State Review Officer's decision is final and binding upon the parties unless appealed in a civil action (20 U.S.C. § 1415[i][1][a]; 34 C.F.R. §§ 300.514[d]; 300.516; 8 NYCRR 200.5[k][3]). Furthermore, State regulations expressly prohibit reopening or rearguing a prior decision of a State Review Officer (8 NYCRR 276.8[d]). The decision in Application of a Student with a Disability, Appeal No. 09-012 is final and binding upon the parties unless one of the parties seeks judicial review and the parent is now precluded from rearguing those matters in a new petition for review. Accordingly, I will only consider the allegations that may be reasonably construed as raising matters related the impartial hearing conducted on January 8, 2009 (see Pet. ¶¶ 23-27, 43, 47).

Turning next to the parent's allegations regarding the impartial hearing conducted on January 8, 2009, the hearing record is clear that the individual appearing at the impartial hearing was not the student's parent or legal guardian (Tr. pp. 4-5). Furthermore, the parent did not appear, despite receiving notice of the date and time and location of the impartial hearing (Answer Ex. 11).⁷ I have conducted an independent review of the hearing record and I find, under the unique circumstances presented in this case in which the claims are barred by res judicata and there is a demonstrable history of the parent's failure to appear at impartial hearings, that there is no reason to disturb the impartial hearing officer's decision to dismiss the case due to the parent's failure to appear (IHO Decision at p. 2).⁸

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 26, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁷ The parent's contentions regarding the location of meetings and proceedings, such as the resolution session and impartial hearings, were previously addressed and resolved in the district's favor (see Application of a Student with a Disability, Appeal No. 08-090).

⁸ Although the parent's claims have previously been dismissed for failure to appear at another impartial hearing, I note that efforts were made to contact the parent by telephone during the proceeding (see Application of a Student with a Disability, Appeal No. 09-007). The hearing record does not indicate whether such efforts to telephone the parent were made at the January 8, 2009 impartial hearing; however, the absence of such efforts in this particular case are not prejudicial, given the ample opportunities for the parent to be heard on these claims in prior cases as discussed above.