The University of the State of New York

The State Education Department
State Review Officer
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No. 09-122

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 Valley Stream Central High School District

Appearances:
The Law Offices of Frederick K. Brewington, attorney for petitioner, Mili Makhijani, Esq., of counsel

Guercio & Guercio, LLP, attorney for respondent, John P. Sheahan, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed her due process complaint notice as moot because the impartial hearing officer found that she did not have the jurisdiction to order respondent (the district) to provide the student with additional related services as the student no longer resided in the district and the district that the student resided in at the time of the impartial hearing (district 2) was a necessary party that had not been made a party to the case. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in a district 2 school and attended classes in a general education environment (Parent Ex. A at p. 7; see IHO Decision at p. 6). The student's eligibility for special education programs and services as a student with an orthopedic impairment is not in dispute in this proceeding (34 C.F.R. § 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

Because the impartial hearing record contains little evidence regarding the student's educational history and the case comes before me to decide a procedural question, a detailed description of the student's educational history will not be presented.

In a due process complaint notice dated May 28, 2009, the parent, through her attorney, requested "compensatory hours of make-up services" for the district's alleged failure to provide related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy,

as well as "educational services" during the period from September 2007 through March 2009 (Parent Ex. A at pp. 1, 7-8). Specifically, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE)[1] by failing to offer the student appropriate related services, such as home-based related services, during the 2007-08 and 2008-09 school years pursuant to the student's individualized education program (IEP) dated June 18, 2007 (id. at pp. 2-3).[2] According to the due process complaint notice, during the 2007-08 school year the parent did not allow the student to be removed from class to receive related services, and the district refused to deliver the related services in the home setting as the parent wished and ceased providing related services to the student in school (id. at p. 2). The parent alleged that as a result, the student received no related services during the 2007-08 school year (id. at pp. 2-3). The parent further alleged that on May 6, 2008, an impartial hearing officer issued a decision in a matter arising out of an October 18, 2007 due process complaint notice (id. at p. 3).[3]

The parent further alleged in her due process complaint notice that in June 2008, the Committee on Special Education (CSE) rendered an IEP that changed the student's placement to a special class at the State-approved private school that was ordered to evaluate the student in the prior impartial hearing officer's May 2008 decision (Parent Ex. A at p. 3).[4] The parent contended that a September 28, 2008 order of the Family Court required the district to provide the student with "homebound schooling with related services … per 2007/2008 IEP until further order of the court" (id. at pp. 3-4).[5] The parent alleges that the district failed to fully comply with the Family Court order; therefore, the student is entitled to compensatory services (id. at pp. 4-7).

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[1] The term "free appropriate public education" means special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

[2] According to the impartial hearing officer's decision, which contains "stipulated facts," the parent filed her initial due process complaint notice regarding the June 2007 IEP on June 18, 2007 (IHO Decision at p. 6). That due process complaint notice was dismissed as insufficient by an impartial hearing officer order dated July 4, 2007 that is not present in the hearing record (id.).

[3] Neither the parent's October 18, 2007 due process complaint notice nor the May 6, 2008 impartial hearing officer's decision are included in the hearing record (Parent Ex. A at p. 3). According to the "stipulated facts" in the impartial hearing officer's decision in this matter, the May 6, 2008 impartial hearing officer's decision ordered that the student was to be evaluated at a State-approved private school (IHO Decision at p. 6).

[4] According to the parent's due process complaint notice, the June 1, 2008 IEP was a result of a CSE meeting that occurred on December 4, 2007 (Parent Ex. A at p. 3). A copy of this IEP is not present in the hearing record.

[5] The order of the Family Court referenced in the parent's due process complaint notice is not present in the hearing record.

The parent testified that in March 2009, she and the student moved to district 2 (Tr. p. 20). According to the parent's due process complaint notice, shortly thereafter, the district wrote to the parent advising her that because the student no longer resided in the district, it would cease the provision of services to the student effective April 1, 2009 (Parent Ex. A at p. 6; see IHO Decision at p. 6). According to the parent's due process complaint notice, on April 7, 2009, district 2 convened a CSE meeting and placed the student in a general education setting in a district 2 middle school (Parent Ex. A at p. 7; see IHO Decision at p. 6).

The district submitted a response to the due process complaint notice dated June 11, 2009, which included four objections and points of law and a motion to dismiss the matter (Dist. Ex. 1). The district argued that the claim raised in the parent's due process complaint notice was not a proper subject of an impartial hearing because the parent failed to allege that the district denied the student a FAPE; that the parent's claim was barred by res judicata; that the impartial hearing officer in the present matter lacked jurisdiction to enforce the terms of an order of the Family Court; and that the student was not entitled to compensatory or additional services from the district because the student no longer resided in the district (Dist. Ex. 1 at pp. 6-7).

The district filed a notice of insufficiency dated June 16, 2009 contending that the parent's May 2008 due process complaint notice was insufficient because it did not allege that the student was denied a FAPE (Dist. Ex. 2 at p. 2). The district also contended that the parent's challenges to the 2007-08 IEP were barred by the doctrine of res judicata and that the impartial hearing officer lacked jurisdiction to enforce a Family Court order (id. at pp. 3-4). The district further alleged that the student was not entitled to compensatory education or additional services and that the issues raised in the due process complaint notice were moot (id. at pp. 5-7). The impartial hearing officer issued an interim order dated June 17, 2009, finding the district's notice of insufficiency to be untimely and, in any event, without merit (IHO Ex. II at p. 5). A second interim order scheduling the impartial hearing to commence at the close of the resolution period was issued on July 8, 2009 (IHO Ex. III at p. 5).

The parent submitted a memorandum in opposition to the district's motion to dismiss the due process complaint notice dated July 29, 2009 (Parent Ex. B). In her memorandum, the parent argued, among other things, that the district failed to provide the student with required related and educational services while the student resided in the district, and therefore, failed to provide the student a FAPE such that compensatory or additional services were warranted from the district regardless of the fact that at the time of the appeal the student no longer resided in the district (id. at pp. 5-8).

In a decision dated September 17, 2009, the impartial hearing officer set out the facts of the case as stipulated to by the parties at the impartial hearing (IHO Decision at pp. 5-8). The impartial hearing officer then determined that the case was moot because she did not have the authority to order the district to provide the student with compensatory or additional services due to the fact that the student no longer resided in the district and was not eligible to attend the district's schools (id. at pp. 8-9). The impartial hearing officer also found the case to be moot because even if she were to make a finding that the student should be afforded with additional services, the matter would need to be referred to the district 2 CSE (the student's current district of residence) in order to determine what services might be appropriate to meet the student's educational needs

and that district was not a party to the case and could not be made a party to the case by the impartial hearing officer (id. at pp. 9-10). Therefore, the impartial hearing officer dismissed the parent's due process complaint notice (id. at p. 10). The impartial hearing officer did not address the other allegations raised in the district's motion to dismiss.

The parent appeals, and asserts that the impartial hearing officered erred in determining that she lacked the authority to order the district to provide compensatory or additional services. The parent requests that a State Review Officer reverse the impartial hearing officer's decision and determine that she has the authority to award compensatory services or, in the alternative, that she has the authority to direct that the district is financially responsible for providing compensatory services, with district 2 implementing the services.

Specifically, the parent alleges, among other things, that because the impartial hearing officer prematurely dismissed the case, the parent was never afforded an opportunity to present evidence that would show that the district wrongly denied the services to the student. The parent also argues that compensatory or additional services are an appropriate remedy in this matter and that the student's current district of residence (district 2) is not a necessary party to the matter.

In its answer, the district asserts that the petition is flawed in that it does not contain the required notice with petition in violation of section 279.3 of the State regulations. The district also alleges, among other things, that: (1) the parent failed to serve a notice of intention to seek review at least ten days prior to serving the notice of petition and verified petition in violation of section 279.2(b) of the State regulations; (2) the petition violates section 279.4(a) of the State regulations by failing to provide a '"clear and concise statement"' of the claim and the act or acts complained of; (3) the parent's request for compensatory education cannot be granted because the student is under the age of 21; (4) the parent is not entitled to prospective relief from the district for a student who no longer resides in the district; (5) a State Review officer may not award monetary and/or punitive damages; (6) the student is not entitled to an award of compensatory services because she no longer resides in the district; (7) the remedy of additional services is often remanded to a CSE to determine what services would be appropriate given the student's educational needs; however, in this case it would not be appropriate to order the district's CSE to make a determination regarding a student who the district has no jurisdiction over or duty to provide the student a FAPE to; (8) an award of compensatory services is not appropriate because the parent claims that the student is receiving special education related services from district 2 and is doing well.

The parent submitted a reply responding, in part, to the district's procedural defenses and attaching three documents for consideration on appeal.

The district submitted a letter dated December 8, 2009, opposing the parent's reply, arguing that the reply failed to comply with the service requirements contained in 279.6 and 279.11 of the State regulations in that it was served late. The district further objects to the reply as including arguments that are outside the allowable scope of a reply as provided for in 279.6 of the State regulations and objects to the parent's attempt to introduce additional evidence. Lastly, the parent submitted a letter dated December 9, 2009 addressing the district's arguments regarding the reply.

Initially, I will address the district's argument that the parent's reply is untimely and that the contents exceed the limits to the scope of a reply found in 8 NYCRR 279.6. A reply by a

petitioner to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer shall be served and filed within three days after service of the answer (8 NYCRR 279.6). For petitions, answers and replies, no filing by facsimile transmission shall be permitted (8 NYCRR 279.4[a], 279.5, 279.6). Pleadings may be served by any person not a party to the appeal over the age of 18 years (8 NYCRR 275.8[a]). All pleadings must be verified (8 NYCRR 275.5, 275.6). Service of all pleadings subsequent to a petition shall be made by mail or by personal service (8 NYCRR 275.8[a]). In its letter dated December 8, 2009, the district argues that the last day for service of the parent's reply fell on November 30, 2009, but that the envelope the reply was mailed in was postmarked December 1, 2009 and was not received by the district until December 7, 2009. The parent's affidavit of service attached to the reply states that the reply was served on November 30, 2009 (Parent Aff. of Service). Under the circumstances of this case, I decline to dismiss the parent's reply as untimely. However, I agree with the district's contention that portions of the parent's reply do not specifically respond to the procedural defenses in the answer and raise arguments that exceed the scope of a reply permitted by State regulation (8 NYCRR 279.6). Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). Accordingly I will consider the parent's reply only to the extent that the contents do not exceed the scope of a reply permitted by State regulations (8 NYCRR 279.6; see Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 06-121).

The district also argues that the parent's petition does not contain the notice required by section 279.3 of the State regulations. State regulations provide that each petition must contain a notice that, among other things, informs a respondent that an answer must be served within 10 days after the service of the petition for review and that a copy of such answer must be filed with the Office of State Review within two days after service of the answer (8 NYCRR 279.3). In this case, the parent initially erred and provided the district with a notice with petition pursuant to section 275.11 of the State regulations, rather than section 279.3. The parent corrected this error and filed a petition with the proper notice with this office and explained the error in correspondence copied to the district's attorney. Moreover, the district served and filed a timely answer in this matter. Therefore, I will exercise my discretion and accept the petition in this matter.

I will now turn to the question of whether the impartial hearing officer erred in dismissing the parent's due process complaint notice and finding that district 2 was a necessary party to the matter that had not been made a party to the impartial hearing.

Within the Second Circuit, compensatory education generally has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see P. v. Newington Bd. of Educ., 546 F.3d 111, 123

[2d Cir. 2008] [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE];see also Application of a Student with a Disability, Appeal No. 09-111; Application of the Bd. of Educ., Appeal No. 09-054; Application of a Student with a Disability, Appeal No. 09-025; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Dep't of Educ., Appeal No. 08-017; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The parent argues that the impartial hearing officer erred in determining that she lacked the authority to order the district to provide compensatory or additional services in this case. I agree. In the present matter, the parent requests additional services to be provided to the student by the district to remedy an alleged denial of a FAPE that occurred while the student still resided in the district. The parent also correctly argues that there is a limitations period of two years in which to bring an impartial hearing (20 U.S.C. § 1415[b][6][B]) that has not yet expired and that the statute does not limit the rights of a student who no longer resides in the district to bring a claim against the district alleging that the student was denied a FAPE during the time period that the student resided in that district.[6]

Here, the impartial hearing officer dismissed the parent's due process complaint notice and did not hear the merits of the parent's claim that the district denied the student a FAPE for the 2007-08 school year. Accordingly, I will remand the case to the impartial hearing officer to conduct an impartial hearing on the claims raised in the parent's May 28, 2009 due process

[6] Both parties cited to Application of a Child with a Disability, Appeal No. 04-054 to support their arguments. Application of a Child with a Disability, Appeal No. 04-054 found that the district alleged to have denied the student a FAPE was a proper party and ordered that district to review its child find procedures implemented at the county correctional facility located within the district and to correct any deficiencies. Application of a Child with a Disability, Appeal 04-054 also ordered the offending district to forward certain information pertaining to services it did or did not offer the student, to the student's district of residence and encouraged the district of residence to consider that information at its next CSE meeting when identifying services to meet the student's then current needs. That facts in Application of a Child with a Disability, Appeal 04-054 are distinguishable from the case at bar and, having considered the parties arguments, I do not find that Application of a Child with a Disability, Appeal No. 04-054 requires a different outcome from the order determined herein.

complaint notice. Under the circumstances of this case, where the student was attending the district during the time period at issue, the district was obligated to provide the student with a FAPE during that time period, and the statute of limitations had not expired at the time that the parent's due process complaint notice was filed, I find that the impartial hearing officer erred in finding she did not have jurisdiction over the parent's claim for compensatory or additional services (see Application of the Bd. of Educ., Appeal No. 09-022). If, upon remand to the impartial hearing officer, the district is found to have failed to offer the student a FAPE while the student was eligible to receive special education services from the district, it will be the district's responsibility to provide the student with compensatory or additional services should such services be required. If the impartial hearing officer finds that compensatory or additional services are warranted, she should also determine the type and amount of services required and the location at which they should be offered.

The parent also argues that the impartial hearing officer erred in finding that district 2 is a necessary party who is not present in the case. Under the circumstances of this case, I agree. A necessary party is a person who ought to be a party, if complete relief is to be accorded between the persons who are parties in the action or proceeding, or who might be inequitably affected by the judgment in the action or proceeding (N.Y.C.P.L.R. § 1001; see Application of a Child with a Disability, Appeal No. 04-054; Application of a Child with a Disability, Appeal No. 95-81). While evidence from district 2 may be useful or required in order for the parent to show that compensatory or additional services are warranted in this matter, there is no reason that district 2 is a necessary party in order for the parent to receive the relief she is seeking. I find that district 2 is not a necessary party and that the matter may proceed without it.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated September 17, 2009 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 to address the parent's claims raised in her May 28, 2009 due process complaint notice and determine what, if any, compensatory or additional services are warranted in this case; and

IT IS FURTHER ORDERED that the impartial hearing officer should determine the type, amount, and location of any compensatory or additional services that are warranted, if any; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, 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 September 17, 2009 decision is not available to conduct the new impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
January 7, 2010

PAUL F. KELLY
STATE REVIEW OFFICER