The University of the State of New York

The State Education Department
State Review Officer
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No. 10-059

**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, G. Christopher Harriss, Esq., of counsel

Mayerson & Associates, attorney for respondents, Gary S. Mayerson, Esq. and Brianne N. Dotts, 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') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending McCarton (Tr. pp. 5, 607; Parent Ex. A at p. 5). The student's placement at McCarton constitutes the student's pendency placement pursuant to the impartial hearing officer's September 10, 2009 "Decision and Order on Pendency" (IHO Decision and Order on Pendency at p. 3). McCarton has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). 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]).

In a due process complaint notice dated July 27, 2009, the parents, through their attorney, contended that the student's individualized education program (IEP) dated May 19, 2009, failed to offer the student a free appropriate public education (FAPE)[1] (Parent Exs. A at pp. 2-3; C at p. 1).

The parents' due process complaint notice also included a request that the impartial hearing officer issue a pendency order (Parent Ex. A. at p. 2). An impartial hearing began on September 8, 2009 (Tr. p. 1). During the first date of the hearing a pendency hearing was conducted which resulted in the impartial hearing officer's Decision and Order on Pendency dated September 21, 2009 (IHO Decision and Order on Pendency at p. 3; Tr. pp. 1-7).[2] In his decision, the impartial hearing officer determined that pendency was at McCarton based upon an unappealed impartial hearing officer decision dated May 6, 2009 (id.; see Parent Ex. B. at p. 22). The impartial hearing officer found that pendency commenced on the date of the request for a hearing with the filing of the parents' due process complaint notice dated July 27, 2009 (IHO Decision and Order on Pendency at p. 3; see Parent Ex. A. at p. 1). The impartial hearing continued on October 7, 2009 and concluded on April 7, 2010 after a total of six days of proceedings (Tr. pp. 1, 12, 96, 197, 412, 543).

In a decision dated June 1, 2010, the impartial hearing officer ordered the district to reimburse the parents for the cost of the student's tuition at McCarton for the 2009-10 school year, including the 2009 summer session (IHO Decision at p. 20). The impartial hearing officer found that the district's recommended 6:1+1 program was inappropriate.

On appeal, the district asserts that the impartial hearing officer's decision should be overturned because the district offered the student a FAPE for the 2009-10 school year, and McCarton is inappropriate for the student. The district asserts in the alternative that should a State Review Officer determine that the parents are entitled to tuition reimbursement, the impartial hearing officer erred in awarding the parents reimbursement for the summer of 2009 because the parents were already reimbursed for the summer of 2009 pursuant to a prior impartial hearing officer's order.

In an answer, the parents assert that the impartial hearing officer's finding that the district failed to offer the student a FAPE is supported by the hearing record, that McCarton provided a program that was reasonably calculated to provide the student with meaningful educational benefits and that the equities favored the parents. The parents do not address the district's argument regarding reimbursement for tuition for July and August 2009 except to state that the impartial

[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, 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] For statutory and regulatory provisions pertaining to a student's educational placement during administrative or judicial proceedings, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

hearing officer appropriately included the entire 2009-10 school year in his order because the entire school year was at issue.

Two purposes of the Individuals with Disabilities Education Act (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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]; 8 NYCRR 200.5[j][4][ii]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 least restrictive environment (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 Newington, 546 F.3d at

114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The burden of production and persuasion is upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c]).

With respect to the issues presented in this case, I will first address a threshold question of whether the claims by the district are now moot because the parents are legally entitled to the relief they were seeking at the impartial hearing. 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 M.S. v. New York City Dep't of Educ., 09-CV-5065 [E.D.N.Y. August 25, 2010]; Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; 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).

The impartial hearing officer's Decision and Order on Pendency that placed the student's pendency at McCarton states that the student's pendency in this matter commenced on July 27, 2009 (IHO Decision and Order on Pendency at p. 3). During the course of this matter the student remained entitled to tuition at McCarton subsequent to July 27, 2009 (id.). The district argues that tuition reimbursement to the parents, by the district, for the student's tuition at McCarton for the months of July and August 2009 had already been ordered in a prior reimbursement decision that concluded a prior impartial hearing (see Parent Ex. B) and that reimbursement should not have been ordered for that time period a second time.[3] The hearing record supports the district's position.

The decision in the prior impartial hearing states that the parents paid $105,000 in tuition to McCarton for McCarton's 12-month program and were entitled to receive reimbursement from the district for the full amount (Parent Ex. B at pp. 4, 10, 22). The decision in the prior impartial hearing also shows that the enrollment contract at McCarton began in September 2008 and ran for 12 months (id. at p. 17; see Tr. p. 632; Parent Ex. N at pp. 5-6).[4] The student's mother acknowledged in her testimony that tuition for the months of July and August 2009 was paid for by the parents pursuant to an enrollment contract at McCarton for "the previous year" and that tuition for that contract had been paid in full prior to the commencement of the due process hearing (Tr. pp. 631-32). Thus, taking into consideration the two impartial hearing officers' decisions, the

[3] The prior impartial hearing officer's decision dated May 6, 2009 has not been appealed. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[4] It appears that McCarton is in the process of changing its school year, which formerly commenced in September, to a schedule that conforms to the State's statutory school year (see Parent Ex. N at pp. 2-6).

parents have received or have been ordered to receive all of the remedy that they seek in the present matter.

In this case, there is no longer any live controversy relating to the parties' dispute over the placement or program offered by the district for the 2009-10 school year. I find that even if I were to make a determination that the district offered the student a FAPE for the 2009-10 school year, in this instance, it would have no actual effect on the parties because the 2009-10 school year is over and the student remains entitled to tuition at McCarton for the 2009-10 school year by virtue of pendency (see Application of the Dep't of Educ., Appeal No 10-041; Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). Accordingly, the district's claims for the 2009-10 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Additionally, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; 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).

As a final matter, I find that I do not need to modify the impartial hearing officer's order as the district requests in the alternative because the impartial hearing officer's order states that reimbursement and payment shall be made "upon appropriate proof of payment" (emphasis added) (IHO Decision at p. 20). It would not be appropriate for the parents to be reimbursed two times for the cost of tuition payments made once for a given period of time, therefore the district need not reimburse the parents for the cost of tuition if such reimbursement has already been made by the district to the parents.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**September 8, 2010**

**PAUL F. KELLY**
**STATE REVIEW OFFICER**