The University of the State of New York

The State Education Department
State Review Officer
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No. 10-072

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 Pearl River Union Free School District

Appearances:
Law Office of Andrew K. Cuddy, attorney for petitioner, Andrew K. Cuddy, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP attorneys for respondent, Michael K. Lambert, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that respondent (the district) was not required to reimburse the parent for the cost of a private evaluation of the student.[1] The appeal must be dismissed**.**

Relating to the instant appeal, as part of the district's triennial evaluation of the student in 2007, the district conducted, among other evaluations: a February 17, 2007 occupational therapy (OT) evaluation, a March 8, 2007 psychological evaluation, a March 20, 2007 speech-language triennial review, and a classroom observation of the student completed by the district's school psychologist on January 18, 2007 (Dist. Exs. 2 at p. 27; 15 at pp. 1-2; Parent Exs. A; N; see Parent Exs. B at p. 6; C at p. 6).

By letter dated April 12, 2007, the parent objected to the results of the district's psychological evaluation and requested an independent neuropsychological evaluation (Dist. Ex. 2 at p. 16; see Dist. Ex 3 at p. 5). In the same letter, she also objected to the district's OT evaluation and requested an independent OT evaluation (Dist. Ex. 2 at p. 16).

By letter dated April 16, 2007, the district's director of special services (director) advised the parent that she was not entitled to an independent neuropsychological evaluation because of her disagreement with the results of the psychological evaluation (Dist. Ex. 3 at p. 5). The director

[1] 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][i]; 8 NYCRR 200.1[zz][1]).

further advised that if the parent failed to withdraw her request for independent evaluations by April 24, 2007, then the director would recommend to the Board of Education that it authorize the initiation of an impartial hearing to defend the appropriateness of each of the parent's challenged evaluations (id.).

Thereafter, by letter dated April 17, 2007, the parent disagreed with the district's speech-language evaluation and requested an independent speech-language evaluation (Dist. Ex. 2 at p. 27).

On April 25, 2007, the district commenced an impartial hearing (Hearing 1) to defend the appropriateness of the three challenged evaluations (Dist. Ex. 2 at p. 27). On June 4, 2007, three days prior to the start of testimony before the assigned impartial hearing officer (Hearing Officer 1), the parents withdrew their request for the independent neuropsychological evaluation (Dist. Ex. 2 at pp. 20, 25, 27).[2] The parties proceeded to Hearing 1 for the purpose of adjudicating the appropriateness of the district's 2007 speech-language evaluation and 2007 OT evaluation (id. at pp. 25, 27). On March 5, 2008, Hearing Officer 1 found that the district's speech-language evaluation and OT evaluation were appropriate (id. at p. 50). The parents appealed the March 5, 2008 decision of Hearing Officer 1 and a State Review Officer dismissed their appeal (id. at p. 75; see Application of a Student with a Disability, Appeal No. 08-031).

On April 9, 2008, a subcommittee of the Committee on Special Education (CSE) convened for an annual review of the student and to develop his individualized education program (IEP) for the 2008-09 school year (Dist. Ex. 2 at pp. 59-68). At the CSE subcommittee meeting, the parent requested a neuropsychological evaluation for the student in order "to make sure we're doing the right thing for [the student]" (Tr. p. 645; Dist. Ex. 2 at p. 63; Parent Ex. L at p. 25).[3, 4] The district's director denied the parent's request (Parent Ex. L at pp. 25-26, 35).

In May 2008, the parent obtained a private psychologist to conduct an evaluation of the student (Tr. p. 650).[5] By letter dated June 3, 2008, the parent requested permission from the district for the private psychologist to observe the student at the district's middle school in order "to assist with… [the student's] placement for the next year" (Dist. Ex. 2 at p. 70; see Tr. pp. 655-57). Following additional correspondence between the parties, in a letter dated June 13, 2008 to the parent, the district's director denied the parent's request for the private psychologist to conduct an observation of the student (Dist. Ex. 2 at p. 80). Over the course of six days in May and June 2008, the parent's private psychologist conducted an evaluation of the student (Parent Ex. E). In an

[2] The parent testified that she withdrew her request for an independent neuropsychological evaluation because she did not have "extensive enough knowledge to fight the psychological evaluation" (Tr. p. 644).

[3] According to a transcript of the April 9, 2008 CSE subcommittee meeting, the parent stated at the meeting that in 2007 she had disagreed with the district's 2007 psychological evaluation and that she continued to disagree with the 2007 psychological evaluation (Parent Ex. L at p. 35).

[4] The April 9, 2009 IEP indicated that "[t]he parent requested a neuropsychological evaluation because she claims she sees regression in [the student's] speech functioning and variability on testing" (Dist. Ex. 2 at p. 63).

[5] The parent refers to the private psychologist as a "neuro-psychologist" and the private evaluation as a "neuropsychological evaluation" throughout the hearing record (see, e.g., Tr. pp. 413, 425, 428, 429, 650; Dist. Ex. 2 at pp. 70, 77, 90). For purposes of this decision, the parent's privately obtained psychologist will be referred to as the "private psychologist" and the evaluation that he conducted in May and June 2008 will be referred to as the "private evaluation."

undated report, the private psychologist identified the battery of standardized tests administered, summarized the student's functioning and educational testing results, and made recommendations (id.).

By letter dated July 28, 2008 to the district's director, the student's father reiterated the parent's previous request for a CSE meeting and further advised that the private evaluation was complete and requested that it be considered by the CSE (Dist. Ex. 2 at p. 90). On August 21, 2008, the CSE reconvened to review the parent's private evaluation and to review the student's educational program (Parent Ex. F at p. 1). The private psychologist attended the August 21, 2008 meeting and reviewed his evaluation report with the CSE (id. at pp. 5-6). On September 2, 2008, the CSE reconvened to continue its review of the student's 2008-09 educational program (Parent Ex. G at p. 1). The IEP which resulted from this CSE meeting contained the same recommendations that were made in the prior April 9, 2008 IEP (compare Dist. Ex. 2 at pp. 59-60, with Parent Ex. G at pp. 1-2).

By letter dated January 8, 2009 to the district's director, the parent requested reimbursement in the amount of $3,500.00 for the private evaluation (Dist. Ex. 2 at p. 156; see Parent Ex. D). The director responded by letter on that same day, denying the parent's request for reimbursement (Dist. Ex. 2 at p. 158). Subsequently, the parent filed a "State complaint" with the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) alleging, among other things, that the district failed to reimburse the parent for the private evaluation (Dist. Ex. 1; see 8 NYCRR 200.5[*l*]). In response to the parent's State complaint, the district was directed to either: (1) reimburse the parent for an independent educational evaluation (IEE) at a rate consistent with federal and State regulation, or (2) request an impartial hearing to challenge the parent's request for reimbursement for the private evaluation (Dist. Ex. 3; see 34 C.F.R. § 300.502; 8 NYCRR 200.5[g][1]).

In August 2009, after being provided with a copy of the invoice for the parent's private evaluation that reflected a cost of $3,500.00, the district paid the parent $1,800.00 for the evaluation (Tr. pp. 677-678; see Parent Ex. D). The $1,800.00 payment was equal to the district's then-existing reimbursement ceiling for neuropsychological evaluations (Dist. Ex. 2 at pp. 160-64). On October 27, 2009, the district revised its reimbursement ceiling for neuropsychological evaluations to $3,000.00 (Dist. Ex. 6 at p. 4). On October 28, 2009, the district forwarded an additional $1,200.00 payment to the parent to bring the total amount tendered to the parent to $3,000.00 (Tr. p. 679; see Dist. Exs. 6 at pp. 3-4; 7 at p. 1). The district was subsequently directed by VESID in December 2009 and January 2010 to either forward proof that the parent agreed with the $3,000.00 reimbursement amount or commence an impartial hearing (Dist. Exs. 7; 9).

By due process complaint notice dated January 27, 2010, the district noted that its Board of Education had authorized the district to initiate an impartial hearing in connection with the parent's request for additional reimbursement for the private evaluation (Dist. Ex. 14 at p. 1).[6] The district alleged that the parent's private evaluation was not an IEE, that the evaluations of the student conducted by the district were appropriate, and that the district's $3,000.00 cap for neuropsychological evaluations was appropriate (id.). The district advised that it would seek a ruling from the impartial hearing officer that the parent's private evaluation was not an IEE within the meaning of federal and State law (id.). Alternatively, if the parent's private evaluation were

[6] I note that the district filed the due process complaint notice in this matter pursuant to the procedures set forth in 34 C.F.R. § 300.502[b][2][i] and 8 NYCRR 200.5[g][1][iv].

deemed to be an IEE, then the district would seek a ruling that its own evaluations be deemed appropriate and further that its $3,000.00 reimbursement cap for neuropsychological evaluations be deemed appropriate (id.). On March 26, 2010, the district advised the parent that the Board of Education had again authorized the district to initiate an impartial hearing (Tr. p. 9; Parent Ex. J).[7] This March 26, 2010 due process complaint notice was nearly identical to the prior January 27, 2010 complaint, the only significant difference being that rather than just requesting a ruling on the appropriateness of its $3000.00 reimbursement cap for neuropsychological evaluations, the district sought a determination that all of its "dollar-cap limitations" be deemed "reasonable and appropriate" (compare Dist. Ex. 14, with Parent Ex. J).

An impartial hearing (Hearing 2) commenced on April 23, 2010 and concluded on May 27, 2010, after four days of testimony (Tr. pp. 1, 272, 463, 719, 799). By decision dated July 4, 2010, the impartial hearing officer (Hearing Officer 2) found that the district was not obligated to reimburse the parent for the private evaluation (IHO Decision at p. 16). He concluded that the parent's request for a neuropsychological evaluation was the precise issue that was raised prior to Hearing 1 and therefore the parent was barred from attempting to relitigate this issue that she had previously withdrew (id. at pp. 11, 13). Hearing Officer 2 also concluded that implied within the State regulation governing IEEs (8 NYCRR 200.5[g]) was that parents can only seek the same type of evaluation as that with which the parent disagrees (id. at p. 12). Hearing Officer 2 found that the parent never requested a neuropsychological evaluation at public expense until January 2009 (id. at pp. 12-13). Hearing Officer 2 determined that in June 2008, the parent requested that the private psychologist be able "to assist with [student's] placement for the next year;" however, the parent did not indicate any disagreement with the district's evaluation (IHO Decision at p. 12; see Dist. Ex. 2 at p. 70). Hearing Officer 2 also found that the parent never requested any payment for the private evaluation at either the August 2008 or September 2008 CSE meetings (IHO Decision at p. 13).

Regarding the private evaluation, Hearing Officer 2 determined that it was a psychological and educational evaluation, not a neuropsychological evaluation (IHO Decision at p. 14). To support this conclusion, he noted that the evaluator's curriculum vitae did not suggest that he was qualified to perform a neuropsychological evaluation and further noted that the evaluation report was titled "psychological and educational evaluation" (id.). Hearing Officer 2 also rejected the parent's assertion that the CSE, after reviewing the private evaluation, concluded that its prior April 9, 2008 program was not the proper program for the student (id. at p. 15). According to Hearing Officer 2, the parent's private evaluation offered little more about the student than what was already known (id.). Hearing Officer 2 also found that the district's failure to include a repayment claim in its due process complaint notice prevented him from making any determination on that issue (id.). He also found it unnecessary to address the district's request to rule on the appropriateness of its schedule of maximum reimbursement payments for a neuropsychological evaluation (id.).

[7] According to the district, after the impartial hearing was commenced on January 27, 2010, the district sought to consolidate this case with another case (Answer ¶ 33). The parent refused to consent to consolidation (Tr. p. 102). The district then withdrew the January 27, 2010 hearing request, filed the second hearing request on March 26, 2010, and appointed a different impartial hearing officer (Hearing Officer 2) to preside over the impartial hearing that consolidated the issues from the two cases (Tr. pp. 100-02). After Hearing Officer 2 was appointed to hear the consolidated cases, the issues concerning the other case were resolved and the parties proceeded to Hearing 2 to litigate only the remaining issue concerning reimbursement for the private evaluation (Tr. p. 102).

The parent appeals and asserts that Hearing Officer 2 erred in determining that the parent was barred from seeking reimbursement for the private evaluation on res judicata grounds. The parent asserts that res judicata does not apply because the appropriateness of the private evaluation was never litigated at Hearing 1. The parent also asserts that Hearing Officer 2 erred in determining that the parent was not entitled to reimbursement for an IEE because she failed to express disagreement with a comparable district evaluation prior to obtaining her own evaluation. The parent further asserts that Hearing Officer 2 erred in concluding that the private evaluation provided little, if any new information about the student. Finally, the parent contends that Hearing Officer 2 failed to address the appropriateness of the district's $3,000.00 reimbursement cap.

In its answer, the district asserts that Hearing Officer 2 correctly determined that the parent was precluded from seeking reimbursement for the private evaluation on res judicata grounds. The district asserts that res judicata precludes parties from litigating not only issues that were raised at the prior proceeding, but also those issues that could have been raised at the prior proceeding. The district also asserts that the parent incorrectly interprets Hearing Officer 2's decision to state that in order to be eligible for an IEE, the timing of a parent's disagreement must occur prior to obtaining a private evaluation. According to the district, Hearing Officer 2's denial of reimbursement to the parent was based not on a finding of an inappropriate timing of the parent's disagreement, but rather on the fact that the parent never disagreed with an existing comparable district evaluation and simply wanted to obtain another evaluation to assist with the development of the student's 2008-09 IEP. The district also asserts that it was proper for Hearing Officer 2 not to address the appropriateness of the $3,000.00 cap because the cap was not applicable as the parent was barred by res judicata and because the disputed evaluation was not an IEE.

Upon a review of the hearing record and for the reasons expressed below, I concur with the impartial hearing officer that principles of res judicata preclude the parent from seeking reimbursement for the private evaluation when she previously had the opportunity to present her case regarding her request for an independent neuropsychological evaluation (see IHO Decision at pp. 11, 13).

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 Chi ld 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; see Ross v. Board of Educ. of Tp. High Sch. Dist. 211, 486 F.3d 279, 283 [7th Cir. 2007] [describing a transaction as a "common core of operative fact"]; see also Waldman v. Village of Kiryas Joel, 207 F.3d 105, 110-11 [2d Cir. 2000] [holding that plaintiff cannot avoid the preclusive effect of res judicata by

splitting a claim into various suits with overlapping facts]; Cameron v. Church, 253 F. Supp. 2d 611, 620 [S.D.N.Y. 2003]). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or someone in privity with the parties; 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).

In the instant case, I find that the elements of res judicata have been met. As for the first requirement, Hearing 1 resulted in an adjudication on the merits wherein Hearing Officer 1 determined that the district's OT evaluation and speech-language evaluation were appropriate and denied the parent's request for reimbursement for privately-obtained evaluations (Dist. Ex. 2 at pp. 50, 75). A State Review Officer dismissed the parent's appeal of Hearing Officer 1's decision (Application of a Student with a Disability, Appeal No. 08-031). As for the second requirement, both Hearing 1 and Hearing 2 involved the same parties (see Dist. Ex. 2 at p. 25; IHO Decision at p. 2). As for the third requirement, the hearing record demonstrates that although Hearing Officer 1 did not determine whether the parent was entitled to reimbursement for an independent neuropsychological evaluation, the issue was raised by the parent in her letter to the district dated April 12, 2007 and would have been adjudicated at Hearing 1 were it not withdrawn by the parent (see Dist. Ex. 2 at pp. 16, 20, 63, 156; Parent Ex. L at p. 25; see Application of a Child with a Disability, Appeal No. 04-061; see also Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450 at *6 [N.D.N.Y. Dec. 19, 2006] [quoting Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003] [internal quotations omitted] ["The doctrine of res judicata precludes parties from litigating issues that were or could have been decided in a prior proceeding"]; Heimbach v. Chu, 744 F.2d 11, 14 [2d Cir. 1984] [noting that a claim that could have been asserted under a given set of facts in a concluded action is barred from being asserted under the same set of facts in a subsequent action]; Saylor v. Lindsley, 391 F. 2d 965, 968 [2d Cir. 1968] [stating that res judicata operates to bind the parties both as to issues actually litigated and determined in the first suit, and to those grounds or issues which might have been, but were not, actually raised and decided in that action]).

In summary, I find that the impartial hearing officer properly dismissed the parent's claim upon principles of res judicata, and in light of the determinations herein, it is not necessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 23, 2010

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FRANK MUÑOZ
STATE REVIEW OFFICER