



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-082

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, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondent, 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 their daughter's tuition costs at the McCarton School (McCarton) for the 2009-10 school year. The parents assert that this matter is moot; however, in the alternative, the parents cross-appeal from several adverse aspects of the impartial hearing officer's decision regarding the district's recommended program and the impartial hearing officer's decision which denied the parents' request to be reimbursed for supplemental home-based applied behavior analysis (ABA) services. The appeal must be dismissed. The cross-appeal must be dismissed.

This is the second instance in which the parties have appeared in this matter, after the case was remanded by a State Review Officer for the completion of an impartial hearing on the merits (Application of a Student with a Disability, Appeal No. 09-142).¹ At the time of the impartial hearing, the student was attending McCarton and receiving home-based ABA services (Tr. pp. 10, 523). 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

¹ The impartial hearing officer who was first assigned to this case subsequently recused himself after the decision in Application of a Student with a Disability, Appeal No. 09-142 was issued, and a new impartial hearing officer was assigned, who rendered the decision at issue in this appeal (Application of a Student with a Disability, Appeal No. 09-142; IHO Decision at p. 4; Order of Recusal).

student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In an amended due process complaint notice dated July 14, 2009,² the parents requested that the district reimburse them for the tuition costs at McCarton and provide 15 hours per week of supplemental home-based ABA services to the student (Parent Ex. A at p. 6). The parents alleged that the district failed to substantively and procedurally provide the student with a free appropriate public education (FAPE), that the placement and services secured for the student by the parents were appropriate, and that there were no equitable considerations barring reimbursement to the parents (id. at pp. 1-2). In accordance with an unappealed May 13, 2009 decision of another impartial hearing officer, the parents also asserted that, for the pendency of the proceeding, the district should provide the student with tuition at McCarton and 15 hours per week of 1:1 ABA services, as part of a 12-month school year program (id. at p. 2; see Parent Ex. C).

An impartial hearing convened on October 15, 2009 and concluded on June 15, 2010 after seven days of testimony. In a decision dated July 21, 2010, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2009-10 school year, that McCarton was an appropriate placement for the student, and that equitable considerations supported an award of tuition reimbursement to the parents, but that the parents were not entitled to reimbursement for the supplemental home-based ABA services received by the student.

With regard to the district's recommended program, the impartial hearing officer found that there was a procedural defect insofar as the student was eligible for a 12-month school year but that the student's individualized education program (IEP) and final notice of recommendation (FNR) were sent to the parents after July 1, 2009 (IHO Decision at p. 15).³ Notwithstanding this delay, the impartial hearing officer found that the procedural defect did not constitute a denial of a FAPE as the student had been scheduled to attend McCarton until the end of August 2009 (id.). Among other things, the impartial hearing officer determined that the recommended 6:1+1 class, supplemented with a 1:1 paraprofessional, was "appropriate generally to meet the student[']s needs" (id. at pp. 15-16). Although the impartial hearing officer determined that the recommended educational placement was appropriate, she determined that the district failed to offer the student a FAPE because the student's IEP did not adequately address the student's sign-language and communication needs in light of her anticipated transition into a district-recommended placement (id. at pp. 17-18).

Regarding the parents' unilateral placement of the student, the impartial hearing officer found that the parents established that McCarton was appropriate for the student insofar as it "provided differentiated instruction designed to meet the needs of the student and reasonably calculated to produce educational benefit" (IHO Decision at p. 18). As for the home-based ABA services that the parents privately obtained for the student, the impartial hearing officer found that the parents did not present sufficient objective evidence to support an award of reimbursement (id. at pp. 18-19). Additionally, the impartial hearing officer found that there was no "equitable impediment" to reimbursement of tuition for McCarton for the 2009-10 school year as the parents

² The original due process complaint notice in this matter is dated June 29, 2009 and is contained in the hearing record (Parent Ex. B).

³ As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]).

were cooperative and participated in good faith throughout the IEP process (*id.* at p. 18). For relief, the impartial hearing officer directed the district to reimburse the parents for the cost of the student's tuition at McCarton for the 2009-10 school year.

This appeal ensued. The district argues that it offered the student a FAPE and that an IEP is not required to include a plan for the student to transition into a public school setting. Nonetheless, the district alleges, among other things, that the student's transition from McCarton to the district was considered by the May 12, 2009 IEP team and that a paraprofessional was assigned to the student in order to assist with her transition.

The district asserts that the parents failed to demonstrate that McCarton was an appropriate placement for the student because the student was being educated in an overly restrictive special education environment without sufficient opportunities to interact with her peers and that McCarton had taught the student a modified sign language system that was unique to the student, making it the "ultimate restrictive placement."

The district contends that equitable considerations preclude relief for the parents because the parents never seriously intended to enroll the student in public school. Alternatively, the district alleges that the 12-month tuition for McCarton was pro-rated for the period between September 1, 2009 and June 30, 2010 and that any reimbursement should be limited to the amount of payment supported by the evidence contained in the hearing record. The district requests that the impartial hearing officer's decision be annulled.

The district further asserts that the parents' reimbursement claims related to the 2009-10 school year should be decided on the merits because those claims are still live insofar as the parents are entitled to attorney's fees if they obtain prevailing party status. The district contends that rendering the case moot because the parents ultimately obtained full relief through pendency is "inherently inequitable." The district also asserts that it would be unfair to render this case moot because of a substantial delay caused by the parties' appeal and cross-appeal that was addressed in Application of a Student with a Disability, Appeal No. 09-142.

In their answer, the parents assert that the petition should be dismissed as moot because all of the tuition funding that the parents sought was fully covered under pendency. In the alternative, the parents assert that the petition should be dismissed on the merits, alleging that the district failed to create an appropriate IEP plan for the student and that the impartial hearing officer properly held that the student's placement at McCarton was reasonably calculated to provide meaningful educational benefits.

The parents also cross-appeal a portion of the impartial hearing officer's decision and assert two alternative arguments.⁴ First, the parents allege that there were additional bases for finding that the district denied the student a FAPE but that these grounds were ignored by the impartial hearing officer. Second, the parents cross-appeal the impartial hearing officer's denial of their

⁴ I note that the parents argue that their own alternative cross-appeals, similar to the district's petition, are "subject to being dismissed as moot because all of the tuition funding relief that respondents sought was fully covered under pendency" (Pet. ¶ 53).

claim for continued reimbursement of the supplemental home-based ABA services.⁵ The district submitted an answer to the parents' cross-appeal, denying the allegations contained therein.

Upon review of the pleadings and the evidence contained in the hearing record, I am not persuaded by the district's arguments that this matter is not moot or that the parent's claims should be adjudicated on the underlying merits of whether the district offered the student a FAPE for the 2009-10 school year. 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]; 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 the Dep't of Educ., Appeal No. 10-066; Application of a Student with a Disability, Appeal No. 10-064; 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). 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 concerning such issues arising out of school years that have 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]; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *9 [E.D.N.Y. Aug. 25, 2010]; 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, an exception provides that 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]). First, 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). Second, 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

⁵ The parents indicate that they only wish to pursue their arguments in their cross-appeal in the event that the district's appeal is not dismissed as moot.

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; M.S., 2010 WL 3377667, at *9 [noting that a each year new determination is made based on a student's continuing development]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *4 [W.D.N.Y. Sept. 30, 2008]; 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).

First, the district contends that issues in this case are still "live" because the parents are entitled to attorney's fees if they obtain prevailing party status. However, I note that the Individuals with Disabilities Education Act (IDEA) does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009] [holding that the possibility that parents may recoup attorneys fees does not salvage an appeal from being moot]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; Ivanlee J. v. Wilson Area Sch. Dist. 1997 WL 164272, at *1 [E.D.Pa. 1997] [noting that administrative hearing officers may not award attorneys fees under the fee shifting provisions of the IDEA]; Andalusia City Bd. of Educ. v. Andress, 916 F.Supp. 1179, 1183 [M.D.Ala. 1996]); see generally, Dell v. Bd. of Educ., Twp. High Sch. Dist., 32 F.3d 1053, 1055-56 [3d Cir.1994]; Moore v. District of Columbia, 907 F.2d 165, 166 [D.C. Cir. 1990]; Application of the Bd. of Educ., Appeal No. 09-081). Therefore, the district's argument is without merit and must be dismissed.

Next, the district asserts that it is "inherently unequitable" to render this case moot because the parents ultimately obtained full relief through pendency. Regardless of the reason, the parents obtained full tuition funding relief for the 2009-10 school year and, as stated above, it is well-settled that a dispute between parties may be moot if it is not "real and live" at all stages. 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 determine that the district did not offer 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 expired on June 30, 2010, and the student remained enrolled at McCarton during the 12-month 2009-10 school year by virtue of pendency. Accordingly, I need not address the parents' claims for the 2009-10 school year in this appeal because no meaningful relief can be granted. 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).

Furthermore, I find that the exception to the mootness doctrine does not apply under the circumstances of this case. With regard to the district's argument that it would be unfair to render this case moot because of the "substantial delay" attributable to the prior appeal in this case (see

Application of a Student with a Disability, Appeal No. 09-142), courts have noted that IEP disputes such as the one in the instant case often satisfy the first factor of the exception, namely that the challenged action was too short in duration to be fully litigated (see Lillbask, 397 F.3d at 85). However, this first factor by itself is not sufficient to find that the exception applies (id.).

Next, although the district asserts that this matter is capable of repetition because it could be obligated to pay the student's tuition at McCarton "in perpetuity" in the absence of a decision on the merits,⁶ I find that such speculation is insufficient to establish the second factor of the mootness exception. I decline to render a finding on this issue based upon the allegations in the district's petition, which fails to contain any factual basis in the hearing record or legal authority in support of this argument. Therefore, the district's argument must be dismissed. While it may be theoretically possible that the parties will disagree again in the future regarding the student's special education services, there is no evidence in the hearing record to support a conclusion that after the student's next annual review, the issues raised in the parents' amended due process complaint notice, including, among other things, the process followed by the CSE and recommendations made in the student's IEP, would recur in following years (see Parent Ex. A). Moreover, there is no evidence in the hearing record to support a conclusion that the procedural history of any possible future impartial hearing regarding this student would repeat the procedural history present in this matter. In view of the foregoing, I find that the exception to the mootness doctrine does not apply in this case.

I have examined the parties' remaining contentions and it is not necessary to address them in light of my decision herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
December 3, 2010**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁶ Even if a decision on the merits was rendered in favor of the district, such a decision does not, by itself, alter the district's obligations under pendency if additional proceedings are initiated because a state-level decision on the merits must be rendered in favor of a student's parents in order to be treated as an agreement for purposes of pendency (see 34 C.F.R. § 300.518[d]; 8 NYCRR 200.5[m][2]).