The University of the State of New York

The State Education Department
State Review Officer
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No. 10-090

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Mayerson & Associates, attorneys for petitioners, Brianne N. Dotts, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2009-10 school year was appropriate. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the McCarton School (McCarton) (Tr. pp. 18, 695; Parent Ex. C at p. 1). McCarton is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. p. 21).

On June 4, 2009, the CSE convened to develop an individualized education program (IEP) for the student's upcoming 2009-10 school year (Parent Ex. C). The parents disagreed with the CSE's recommendations and consequently filed a due process complaint notice dated July 21, 2009, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year due to numerous procedural and substantive errors (Parent Ex. A at pp. 2-4). As a remedy, the parents requested that the district pay the student's tuition and related costs at McCarton for the 2009-10 school year (id. at p. 5). The parents also requested an impartial hearing regarding the student's pendency placement (id. at pp. 1-2). The parents asserted that pursuant to a prior, unappealed February 2009 impartial hearing officer's (Hearing Officer 1's)

decision, their son was entitled to receive tuition and costs for McCarton from the district as part of his 12-month program (id. at p. 2). In the February 2009 decision, Hearing Officer 1 determined that the evidence in the hearing record supported the parents' claims for tuition reimbursement at McCarton for the "12-month 2008-2009 school year beginning September 1, 2008" (Parent Ex. B at p. 15).

An impartial hearing convened on August 25, 2009 to determine the student's pendency program and placement (Tr. pp. 1-9; IHO Interim Decision at p. 1). In an interim decision dated September 2, 2009, the impartial hearing officer (Hearing Officer 2) directed that the student continue to receive the educational services as provided pursuant to Hearing Officer 1's decision, as the student's pendency placement, effective September 1, 2009 (IHO Interim Decision at p. 3).

The impartial hearing reconvened on September 15, 2009, and concluded on April 19, 2010, after seven days of proceedings (Tr. pp. 11, 33, 137, 227, 348, 521, 685). By decision dated August 11, 2010, Hearing Officer 2 found that the district offered a FAPE to the student for the 2009-10 school year (IHO Decision at p. 46). Specifically, Hearing Officer 2 determined, among other things, that the June 2009 CSE: (1) was properly constituted; (2) reviewed current and relevant materials when creating the student's June 2009 IEP; (3) discussed the student's daily living skills, goals, related services, and proposed 6:1+1 placement; and (4) discussed a "transition plan" for the student (id. at p. 43). Hearing Officer 2 also noted the student's need for a highly structured milieu and that the district recommended that the student receive the services of a 1:1 paraprofessional (id. at pp. 43-44). Finally, Hearing Officer 2 also noted that the district's proposed placement offered applied behavioral analysis (ABA) services for the student, which the parents maintained the student needed (id. at p. 44). Consequently, Hearing Officer 2 denied the parents' claim for tuition reimbursement for the 2009-10 school year and found that it was unnecessary to address the appropriateness of the student's placement at McCarton or whether equitable considerations support an award of tuition reimbursement (id. at p. 46).

The parents appeal Hearing Officer 2's final determination.[1] The parents assert that Hearing Officer 2 erred in determining that the district offered the student a FAPE for the 2009-10 school year. The parents assert, among other things, that the district failed an IEP to them an IEP prior to the start of the 2009-10 school year (see 20 U.S.C. § 1414 [d][1][D][2][A]; 8 NYRCC 200.4[e][1][ii]); the district failed to conduct a functional behavioral assessment (FBA) and to develop an appropriate behavioral intervention plan (BIP) to address the student's behavioral concerns; and that the district failed to demonstrate that the student could receive educational benefit in a group setting. The parents also assert that McCarton was an appropriate unilateral placement for the student, and that equitable considerations favor an award of tuition

[1] The parents attached three exhibits to their petition for review (Pet. Exs. A-C). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073). The first exhibit is Hearing Officer 2's August 2010 decision, the second is Hearing Officer 1's February 2009 decision that is already contained in the record, and the third is a special education service delivery report (id.). I find that the documents attached to the petition are not necessary for me to render a decision in this appeal or are duplicative of exhibits contained in the hearing record. Accordingly, these documents will not be considered.

reimbursement. As relief, the parents seek reversal of Hearing Officer 2's determination that the district offered the student a FAPE and an order directing that the district pay for tuition and related costs associated with the student's 2009-10 school year at McCarton.

In its answer, the district asserts, among other things, that Hearing Officer 2 properly found that the district offered the student a FAPE for the 2009-10 school year; that McCarton was not an appropriate placement for the student; and that equitable considerations do not favor an award of tuition reimbursement.

Upon careful review of the evidence contained in the hearing record, I find that regardless of whether the district offered the student a FAPE for the 2009-10 school year, no meaningful relief can be granted to the parents because they have already received all of the relief they were seeking at the impartial hearing pursuant to Hearing Officer 2's September 2009 interim decision, and thus, the parents' appeal regarding the merits of this case is moot. 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]; 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 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).

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 for 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. 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).

With regard to the mootness exception, federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). The impartial hearing commenced on August 25, 2009; however, due to extensions sought by and granted to both parties, the impartial hearing did not conclude until April 19, 2010 (Tr. pp. 9, 31, 134, 224-25, 345, 519, 682-83). The hearing record also demonstrates that Hearing Officer 2 did not render his decision until August 11, 2010, nearly a year after the due process complaint notice was filed in this case (Tr. pp. 914-15). Due to the delay in the proceedings, the impartial hearing officer did not issue a written decision until after completion of the student's 2009-10 school year (IHO Decision at p. 46).[2] Furthermore, 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 the issues raised in the parents' due process complaint notice, including, among

[2] I note that the hearing record lacks documentation regarding the delay in conducting the impartial hearing or rendering a decision that complied with State regulations (see 8 NYCRR 200.5[j][5][i]-[iv]). Most discussions concerning the scheduling of hearing dates were conducted off the record (Tr. pp. 8, 31, 134, 224, 345, 519, 682-83). Furthermore, although the impartial hearing concluded in April 2010, the impartial hearing officer did not render a decision for nearly three months after the scheduled submission of post-hearing briefs (Tr. p. 915; IHO Decision at p. 46). I remind the impartial hearing officer to comply with State regulations with regard to identifying the reasons for granting extensions in the hearing record and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

other things, the process followed by the CSE and recommendations made in the student's IEP, would reoccur in following years (see Parent Ex. A). In view of the foregoing, I find that the exception to mootness does not apply in this case.

In light of my determination herein, I find that it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 12, 2010

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JUSTYN P. BATES
STATE REVIEW OFFICER