



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-023

**Application of a STUDENT SUSPECTED OF HAVING A
DISABILITY, by his parents, for review of a determination of a
hearing officer relating to the provision of educational services
by the Brentwood Union Free School District**

Appearances:

Law Offices of Wayne J. Schaefer, LLC, attorneys for petitioners, Wayne J. Schaefer, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Edward H. McCarthy, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed by respondent (the district) for their son's tuition costs at a nonpublic high school (NPS) for the 2009-10 and 2010-11 school years. The appeal must be sustained in part.

According to the record on appeal, the student experienced a "paranoid episode" and received diagnoses of a depressive disorder, anxiety, and behavioral problems secondary to reported peer bullying (Dist. Exs. 1 at pp. 2-5, 7-8; 5 at pp. 10-13, 15-19, 28-36, 38-40, 43).¹ The NPS 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 and related services as a student with an emotional disturbance is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

¹ The record on appeal contains duplicative exhibits (see Dist Exs. 1; 2; 5 at pp. 1-16; 6 at pp. 10-15). For purposes of this decision, the due process complaint notice filed by the parents is cited as "Dist. Ex. 1," the district's response to the due process complaint notice is cited as "Dist. Ex. 2," and the impartial hearing officer's decision is cited as "IHO 2 Decision."

Background

The student's educational history was recently discussed in Application of the Bd. of Educ., Appeal No. 10-129, and will not be repeated here in detail. In that proceeding, the parents filed a due process complaint notice dated January 25, 2010 requesting an impartial hearing (Hearing I) to adjudicate their claims therein and, for relief, the parents sought the costs of tuition reimbursement at the NPS for the 2009-10 and 2010-11 school years.²

Due Process Complaint Notice

On November 15, 2010, the parents filed a second due process complaint notice, alleging, among other things, that: (1) the student was removed from the district high school at the insistence of the district in mid-November 2008 "without due process;" (2) the homebound instruction program provided by the district was "incomplete and insufficient" to meet the student's needs; (3) a psychiatrist found that the student suffered from "anxiety and depressive symptoms and behavioral problems related to chronic stressors as a consequence of bullying and chronic mocking by his peers;" (4) after receiving the results of two psychiatric evaluations of the student in late November 2008, the district had reason to suspect that the student had an emotional disturbance as defined in State and federal regulations, yet the district failed to refer him to the Committee on Special Education (CSE) for an initial evaluation; and (5) that the NPS has been an appropriate placement for the student, insofar as the student has "displayed a positive mood" and "has been able to enter into good relationships with his teachers and guidance counselor and has exhibited social involvement with his peers" (Dist. Ex. 1 at pp. 2-8). The parents sought an order from an impartial hearing officer awarding reimbursement for "all costs and expenditures incurred as a result of having to enroll [the student] in [the NPS]" or alternatively, directing the district to refer the student to the CSE for evaluation of his eligibility to receive special education and related services as a student with a disability (id. at p. 8). The parents sought reimbursement for tuition and related expenses for the student's 2009-10 (eleventh grade) and 2010-11 (twelfth grade) school years at the NPS (id. at pp. 5, 8).

On November 23, 2010, the district responded to the parents' November 2010 due process complaint notice, asserting that: (1) it fulfilled its obligation to offer the student a free appropriate public education (FAPE)³ for the 2008-09 school year; (2) the allegations contained in the

² According to the hearing record, the student was allegedly the victim of a bullying incident on November 5, 2008, which ultimately led to his "removal" from the district high school in mid-November 2008; however, in the November 2010 due process complaint notice, the parents sought reimbursement for the 2009-10 and 2010-11 school years only, as the student had received homebound instruction for the balance of the 2008-09 school year and did not begin attending the NPS until the 2009-10 school year (see Dist. Ex. 1 at pp. 1-5).

³ 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.

November 2010 due process complaint notice were previously adjudicated at a prior impartial hearing and were therefore precluded under the doctrine of res judicata;⁴ (3) the parents failed to exhaust their administrative remedies; (4) the student did not have a specific physical or mental condition which adversely impacted upon his educational performance to the extent that he required special education programs and/or related services; (5) the parents failed to timely notify the district of their intention to remove the student from the district high school and unilaterally place him at the NPS; and (6) equitable considerations otherwise favored the district (Dist. Ex. 2 at pp. 1, 4-5).

Impartial Hearing Officer Decision

On December 28, 2010, the impartial hearing officer in the instant proceeding (Hearing Officer 2) conducted a prehearing conference,⁵ during which the district argued that the parents' November 2010 due process complaint notice should be dismissed based on res judicata grounds, contending that the issues raised therein had already been adjudicated in Hearing I (Dist. Ex. 3 at pp. 1, 5-26; see Application of the Bd. of Educ., Appeal No. 10-129). Hearing Officer 2 granted leave to the parties to submit briefs on the issue, and the district moved to dismiss the November 2010 due process complaint notice on the grounds of res judicata and collateral estoppel on January 10, 2011; the parents opposed the motion on the following day (Dist. Exs. 5; 6). Hearing Officer 2 subsequently issued an undated decision in which he determined that all of the remedies sought in the parents' November 2010 due process complaint notice had been addressed during Hearing I and in the resultant November 23, 2010 decision of a different impartial hearing officer (Hearing Officer 1) (see Dist. Ex. 5 at pp. 22-48; Application of the Bd. of Educ., Appeal No. 10-129).⁶ Consequently, Hearing Officer 2 dismissed the November 2010 due process complaint notice pursuant to the doctrine of res judicata (IHO 2 Decision at p. 2). This appeal ensued.

Appeal for State-Level Review

The parents appeal Hearing Officer 2's decision, contending, among other things, that the district is precluded from moving to dismiss the November 2010 due process complaint notice because the district failed to challenge the sufficiency of the due process complaint notice under State regulations (see 8 NYCRR 200.5[i][3], [6]; see also 34 C.F.R. § 300.508[d][1]-[2]). The parents seek an order reversing Hearing Officer 2's decision in its entirety and reinstating the November 2010 due process complaint notice.⁷

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

⁴ See Application of the Bd. of Educ., Appeal No. 10-129.

⁵ State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]).

⁶ In the petition, the parents ascribe a date of "January 18, 2011" to Hearing Officer 2's decision; however, the decision contained in the hearing record on appeal is undated, and there is no indication in the hearing record as to the date that the decision was issued.

⁷ At the time the parents filed the petition in the instant proceeding, the district's prior request for State-level review of the November 23, 2010 decision of Hearing Officer 1 was pending. Consequently, the parents also argue in the petition that the district was barred from invoking res judicata or collateral estoppel, because at the time the district filed the instant appeal, the prior appeal had not yet been decided (see 34 C.F.R. § 300.514[a]; 8

The district answers, maintaining that: (1) the November 2010 due process complaint notice is barred by the doctrines of res judicata and collateral estoppel; (2) there is no authority permitting the parents to file multiple due process complaint notices on the same set of factual issues; and (3) the November 2010 due process complaint notice is "frivolous, unreasonable, and without foundation" pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III) and 34 C.F.R. § 300.517(a)(1)(ii).

The parents reply, alleging that there is no merit to the district's contentions that the November 2010 due process complaint notice is frivolous, unreasonable, and without foundation.

Discussion and Conclusion

With respect to their son's 2009-10 school year at the NPS, based upon a review of the record on appeal and for the reasons expressed below, I concur with the impartial hearing officer that principles of res judicata preclude the parents' tuition reimbursement claim.

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. 10-072; 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 Child 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

NYCRR 200.5[i][5][v], [k]), and sought a stay of the instant proceeding until the prior appeal was resolved. A final determination was reached by Hearing Officer 1 with regard to the 2009-10 school year on November 23, 2010. The pendency of an appeal does not divest a decision on the merits of the requisite finality for res judicata or collateral estoppel purposes (DiSorbo v. Hoy, 343 F.3d 172, 183 [2d Cir. 2003]; Depasquale v. Allstate Ins. Co., 2002 WL 31520500, at *1 [2d Cir. Oct. 31, 2002]; Rosen v. Paul, Hastings, Janofsky & Walker LLP, 2005 WL 1774126, at *2 [S.D.N.Y. Jul. 28, 2005]; NM IQ LLC v. McVeigh, 2004 WL 2827618, at *7 n.1 [S.D.N.Y. Dec. 9, 2004]; Parkhurst v. Berdell, 110 N.Y. 386, 392 [1888]; In re Capoccia, 272 A.D.2d 838, 847 [3 Dep't 2000]; Beard v. Town of Newburgh, 259 A.D.2d 613, 614 [2d Dep't 1999]). Moreover, a stay is unnecessary in this case since a determination on the district's appeal of Hearing Officer 1's decision in Application of the Bd. of Educ., Appeal No. 10-129 was issued on March 28, 2011. I also note that the general provisions governing discretionary stays in administrative appeals are expressly inapplicable in a review of an impartial hearing officer's decision conducted by a State Review Officer (8 NYCRR 276.1[a], [c], 279.1).

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 with respect to the parents' claim for tuition reimbursement relative to their son's 2009-10 school year at the NPS, the elements of res judicata have been met. As for the first requirement, the prior impartial hearing resulted in a final adjudication on the merits, whereby Hearing Officer 1 determined that the parents were entitled to reimbursement for the student's tuition and expenses at the NPS for the 2009-10 school year (Dist. Ex. 5 at pp. 44-45). With respect to the second requirement, the prior proceeding involved the same parties as in this appeal (compare Dist. Exs. 1; 2, with Dist. Ex. 5 at pp. 17-21). As for the third requirement, the record on appeal demonstrates that the claims articulated in the November 2010 due process complaint notice, namely, that the district failed to properly evaluate and classify the student as a student with an emotional disturbance, that it failed to provide the student with an educational program sufficient to address his needs, that the NPS was an appropriate placement for the student, and that the parents were entitled to reimbursement for tuition and related expenses for the student's 2009-10 school year at the NPS, were raised and adjudicated at the prior impartial hearing (compare Dist. Ex. 1, with Dist. Ex. 5 at pp. 17-48; see Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426 [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]). I further note that the parents' argument that Hearing Officer 2 was required to conduct a hearing because the district failed to challenge the sufficiency of the November 2010 due process complaint lacks merit. A party is not precluded from seeking to use other summary procedures such as dismissal on res judicata grounds with respect to some or all of the opposing party's claims where it becomes clear that a need for further hearing is unnecessary (Application of the Bd. of Educ., Appeal No. 10-129). This is particularly true where, as here, the parents were given a full and fair opportunity to present evidence with respect to material and relevant facts in Hearing I (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; Application of the Bd. of Educ., Appeal No. 10-129). Consequently, the impartial hearing officer correctly relied on a summary disposition procedure insofar as the parents are precluded from re-litigating their tuition reimbursement claim for the 2009-10 school year.

Turning now to the parents' claim for tuition reimbursement for the 2010-11 school year at the NPS, I note that Hearing Officer 1 declined to consider the merits of the 2010-11 claim in Hearing I on the ground that the claim was premature (see Dist. Ex. 5 at p. 17; Application of the Bd. of Educ., Appeal No. 10-129). However, in this proceeding, the parents filed their due process complaint notice in November 2010 after an additional nine months had passed (see Dist. Ex. 1 at p. 1), thereby rendering their tuition reimbursement claim for the 2010-11 school year a live controversy that had become ripe for adjudication. Furthermore, I find the doctrine of res judicata inapplicable to the parents' tuition reimbursement claim for the 2010-11 school year because no

final decision on the merits of their claim was reached after Hearing I (see Dist. Ex. 5 at p. 44; Application of the Bd. of Educ., Appeal No. 10-129).

Based on the foregoing, I find that Hearing Officer 2's dismissal of the parents' claim for tuition reimbursement for the 2010-11 school year was improper, and I will annul that portion of his decision. Accordingly, I will remand this matter to Hearing Officer 2 for a new impartial hearing on the issue of the parents' tuition reimbursement claim for the 2010-11 school year. Given that two due process complaint notices with overlapping factual bases have been filed with respect to this student, and that the parties and Hearing Officer 1 experienced difficulty identifying the issues to be determined in Hearing I, I strongly encourage Hearing Officer 2 to conduct a prehearing conference, prior to receiving evidence, for the purposes of (1) ascertaining whether any other due process complaint notice has been filed by the parents with respect to tuition reimbursement at the NPS arising out of events relating to the 2010-11 school year;⁸ (2) ascertaining whether the parents wish to be given a further opportunity to identify the nature of the problem related to their 2010-11 tuition reimbursement claim by filing an amended due process complaint notice; (3) providing the district with an opportunity to be heard with respect to the scope of the impartial hearing; and (4) permitting the impartial hearing officer to resolve any remaining conflict over the scope of the impartial hearing, narrow the issues to be decided if possible, and clarify the issues that will be resolved through the impartial hearing (see 8 NYCRR 200.5[j][3][iii], [xi]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the decision of Hearing Officer 2 which dismissed the parents' claim for tuition reimbursement for the 2010-11 school year as precluded under the doctrine of res judicata is annulled; and

IT IS FURTHER ORDERED that this matter is remanded to Hearing Officer 2 for an impartial hearing, within 30 days of the date of this decision, on the parents' claim for tuition reimbursement for the student's 2010-11 school year at the NPS, unless the parties otherwise agree or another impartial hearing is being or has been conducted on this issue; and

IT IS FURTHER ORDERED that if Hearing Officer 2 is not available to conduct the new impartial hearing, a new impartial hearing officer be appointed.

Dated: Albany, New York
April 19, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

⁸ There is no indication in the hearing record of the existence of any other pending due process complaint notices or related litigation in any other forum relative to the parents' tuition reimbursement claim for the 2010-11 school year.