The University of the State of New York

The State Education Department
State Review Officer
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No. 11-067

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 Board of Education of the Patchogue-Medford Union Free School District

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, John P. Sheahan, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which reversed a manifestation determination review (MDR) team's June 24, 2010 finding that their son's[1] conduct on June 8, 2010 was a manifestation of his disability. The appeal must be dismissed.

Background and Procedural History

Upon review and consideration of the hearing record and as discussed more fully below, this decision will not include a full recitation of the student's educational history or address the merits of the parents' appeal because either the issues in controversy are no longer live and no meaningful relief can be granted, thereby rendering the instant appeal moot, or the parents' claims are without merit and must be dismissed.[2]

Briefly, the student was involved in an incident at respondent's (the district's) high school on June 8, 2010 (Dist. Exs. 49-51; 71; see Parent Ex. 69). On June 24, 2010, the Committee on Special Education (CSE) convened to conduct both a manifestation determination and a program

[1] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] By letter dated June 27, 2011, respondent (the district) submitted documentary evidence to provide a complete hearing record for review on appeal, which the parents did not oppose. In its letter and in an amended certification of the hearing record, the district identified the supplemental documents by consecutively numbering the items "36" through "52." For purposes of clarity, the citation "Dist. Supp. Ex." will be used, along with the district's numerical designations, when citing to the supplemental documents in the decision.

review (Dist. Ex. 1 at pp. 1, 5-7).[3] The committee determined that the student's conduct on June 8, 2010, was a manifestation of his disability (id. at pp. 6-7). At that time, the committee recommended changing the student's placement on the student's IEP to home instruction pending an out-of-district placement for the 2010-11 school year and also recommended that a psychiatric evaluation of the student be conducted (compare Dist. Ex. 1 at pp. 1-2, 6-7, with Dist. Ex. 2 at pp. 1-2, 5-6). The parents disagreed with the recommendations and indicated that they would not provide consent for the psychiatric evaluation (Dist. Ex. 1 at p. 7).

Initially, the parents requested an impartial hearing in this matter by due process complaint notice dated June 15, 2010, which the district moved to dismiss (Dist. Supp. Exs. 48; 50). Subsequently, the parents prepared and filed an amended due process complaint notice dated July 8, 2010, which the district again moved to dismiss (Dist. Ex. 14; Dist. Supp. Ex. 51; see Dist. Supp. Ex. 52). On August 2, 2010, the impartial hearing officer rendered a decision dismissing the items identified as "1-7 listed under 'Proposed Solution' in the parents' 'Amended Due Process Complaint,' dated July 8, 2010" (Dist. Ex. 77 at pp. 1, 3; see Dist. Ex. 14 at p. 3). The parents then prepared and filed a second amended due process complaint notice dated August 24, 2010, which the district also moved to dismiss; by decision dated September 26, 2010, the impartial hearing officer rendered a decision on these issues (IHO Ex. 1; Dist. Supp. Exs. 42-43; see Dist. Supp. Exs. 39-41; 45; IHO Ex. 2). During several of the initial hearing dates—June 29, July 15, August 17, August 23, September 29, and a majority of October 12, 2010—the parties addressed the student's pendency (stay put) placement, the parents' due process complaint notices, and the district's motions to dismiss. Turning to the merits of the case on October 12, 2010, the parties presented opening statements, which further refined both the issues and the relief sought in the parents' second amended due process complaint notice dated August 24, 2010 (Oct. 12, 2010 Tr. pp. 471-595).

Due Process Complaint Notice

In their second amended due process complaint notice, dated August 24, 2010, and relevant to this appeal, the parents alleged that the district's failure to timely conduct a functional behavioral assessment (FBA), timely incorporate a behavioral intervention plan (BIP) into the student's individualized education program (IEP), and timely implement a BIP, resulted in the incident involving the student on June 8, 2010 (see IHO Ex. 1 at pp. 1-3). In addition, the parents described their disagreement with the FBA and BIP reviewed at the June 24, 2010 meeting; the MDR team's finding that the student's conduct on June 8, 2010, was a manifestation of his disability; the recommendation to change the student's placement to home instruction pending an out-of-district placement; and in general, the entire June 24, 2010 IEP, including an allegation that the June 24, 2010 meeting was conducted in "bad faith" (id. at pp. 1-5). As relief, the parents proposed the following: (1) a determination that the district failed to comply with regulatory timelines to implement an FBA/BIP, and to expunge from the student's records any of his behaviors that would have been "prevented/minimized" by an FBA/BIP; (2) an order declaring that the FBA/BIP, as drafted, failed to adequately address issues with security guards and hall staff, and to remand the issue to the CSE to include an FBA/BIP "agreeable" to the parents in the student's IEP; (3) an order declaring that the student's conduct on June 8, 2010, was not a manifestation of the student's

[3] The same group of individuals functioned as both the CSE and the MDR team at the June 24, 2010 meeting. This group will be referred to interchangeably throughout this decision as either the CSE or the MDR team.

disability, and that the June 8, 2010 incident should be expunged from the student's records; (4) an order declaring that the June 24, 2010 CSE/MDR team meeting was conducted in "bad faith;" (5) an order declaring that the student's "final report card" was incomplete and misrepresented his final grades in "Keyboarding Class, Chemistry Class, or his English Class," and annulling the results of the "June and August 2010 [English] Regents;" (6) an order declaring that the June 24, 2010 IEP was developed in "bad faith" as described in the second amended due process complaint notice, the annual goals and objectives added to the student's IEP without discussion at the June 24, 2010 meeting should be expunged, the entire IEP should be voided, and the student should receive instruction pursuant to the June 1, 2010 IEP; (7) an order that the June 24, 2010 CSE meeting should be expunged and voided based upon the district's regulatory violations; and finally, (8) that the parents should be reimbursed for "any and all expenses including, but not limited to lost wages, photo copying expense[,] postage, personal time expended to prepare these Due Process Complaint Notices, represent this case, and any and all expenses" related to the impartial hearing (id. at pp. 5-7).

Impartial Hearing Officer Decision

In this case, the parties convened the impartial hearing over 28 nonconsecutive days from June 29, 2010 to April 19, 2011, and presented testimonial and documentary evidence, as well as post-hearing briefs (see June 29, 2010 Tr. p. 1; April 19, 2010 Tr. p. 4321; Dist. Exs. 1-51; 53-55; 63-64; 68-80; 82-83; 87-89; 91; Parent Exs. 1-14; 16; 19-21; 23-24; 26-27; 30-33; 35-41; 43-56; 58; 60-61; 66-71; 73-75; 81-82; 84-85; 88-95; 97-123; IHO Exs. 1-2; Dist. Post Hr'g Br.; Parent Post Hr'g Br.; see also IHO Decision at p. 2).[4]

In a decision dated May 11, 2011, the impartial hearing officer presented a statement of facts, and then reviewed the student's school background, the positions asserted by the parties, the issues to be addressed, and the applicable legal standards (IHO Decision at pp. 1, 14-18, 34). The impartial hearing officer individually addressed several issues within the decision, including the following: the June 8, 2010 incident; the MDR team's manifestation determination; the appropriateness of the recommended psychiatric evaluation; concerns related to the FBA and BIP; the appropriateness of the recommended home instruction placement pending an out-of-district placement; expunging the student's records; altering the student's grades; his jurisdiction to determine "guilt or innocence" pursuant to statutory authority; the scope of the impartial hearing regarding the 2010-11 school year; and his jurisdiction to make declaratory rulings (id. at pp. 18-33). Ultimately, the impartial hearing officer concluded that the student's conduct on June 8, 2010 was not a manifestation of the student's disability; the recommended psychiatric evaluation was appropriate; the recommendation for home instruction pending an out-of-district placement was appropriate; that he lacked jurisdiction to expunge student records, alter grades, determine "guilt or innocence," make declaratory rulings, or to expand the scope of the hearing to include any issues raised related to the 2010-11 school year; and that the FBA and BIP were independently conducted (id. at p. 33).

[4] At the time of the impartial hearing, the student was attending twelfth grade in the district's high school pursuant to an interim decision, which found that the special education programs and related services in the student's June 1, 2010 IEP constituted his pendency placement (Oct. 12, 2010 Tr. pp. 466, 483, 504-05; see Dist. Exs. 1-2; Dist. Supp. Ex. 38; Parent Exs. 11; 16; IHO Decision at p. 14).

Appeal for State-Level Review

The parents appeal, and seek to affirm the impartial hearing officer's determination that the student's conduct on June 8, 2010, was not a manifestation of his disability. The parents, however, seek to strike language within the impartial hearing officer's decision that appears to contradict this determination. Next, the parents assert that the impartial hearing officer erred in concluding that the district appropriately recommended a psychiatric evaluation of the student. The parents also request a finding that the June 24, 2010 IEP—and in particular, the comments section and the annual goals and objectives—did not accurately reflect the meeting conducted on that date. The parents also contend that the impartial hearing officer erred in concluding that the district appropriately recommended changing the student's placement, and seek a finding that the June 24, 2010 meeting was conducted in bad faith. The parents argue that the impartial hearing officer erred in concluding that the FBA and BIP were conducted as independent evaluations. In addition, the parents request determinations about the impartial hearing officer's conduct during the impartial hearing, and to what extent, if any, his conduct affected the impartial hearing itself, or his decision. The parents also argue that the instant appeal cannot be rendered moot because the district unduly protracted the length of the impartial hearing and a live issue exists as to the parents' request for expenses. Finally, the parents attach additional evidence to the petition for consideration on appeal.

In its answer, the district seeks to uphold the impartial hearing officer's decision in its entirety, and responds to the parents' allegations in the petition. As defenses, the district argues, among other things, that the parents' petition must be dismissed because it fails to contain a clear and concise statement of their claims or the relief sought; the hearing record supports the impartial hearing officer's decision; and, the petition is now moot because the student has graduated, the 2010-11 school year has expired, the June 24, 2010 IEP was never implemented, and the FBA and BIP complained about were never implemented. In addition, the district objects to the additional evidence submitted with the parents' petition for consideration on appeal, and contends that to the extent that the parents seek unspecified amounts of expenses, statutory authority precludes awards of compensatory or punitive monetary damages and that a demand for expenses does not preclude finding their appeal is moot. Finally, the district submits a supplemental affidavit with additional evidence attached to the affidavit for consideration on appeal.

In a reply, the parents respond, in part, to the procedural defenses raised in the district's answer, and object to the consideration of the supplemental affidavit with additional evidence submitted by the district with its answer. The parents also attach additional evidence to their reply for consideration on appeal.[5]

[5] By letter dated July 11, 2011, the district responded to the parents' reply. However, State regulations do not allow for the submission of a sur-reply, and therefore, the district's letter will not be considered (see generally 8 NYCRR 279).

Discussion—Applicable Standards

Procedural Issues

Timeliness of the Parents' Reply

Initially, two procedural matters must be addressed. First, according to the affidavit of service, the parents personally served the reply on the district on July 7, 2011 (Aff. of Service). State regulations require that a "reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer . . . shall be served upon the opposing party within three days after service of the answer is complete" (8 NYCRR 279.6). However, when the answer has been served by mail upon petitioner—as in this case—the "date of mailing and the two days subsequent thereto shall be excluded in the computation of the three day period in which a reply to procedural defenses or a response to additional documentary evidence served with the answer may be served" (8 NYCRR 279.11). State regulations further provide that if the "last day for service of a notice of intention to seek review, a petition for review, an answer or a response to an answer falls on a Saturday or Sunday, service may be made on the following Monday;" and in addition, "if the last day for such service falls on a legal holiday, service may be made on the following business day" (id.). In this case, the district served its answer by mail on June 27, 2011; thus, using the computations set forth above, the last day for the parents to timely serve a reply to the district's answer fell on Tuesday, July 5, 2011 (see id.). Therefore, the parents' service of the reply on July 7, 2011, was untimely, and the reply—as well as the additional evidence attached thereto—will be rejected.

Additional Documentary Evidence

Next, I turn to the remaining additional evidence submitted by both parties with their respective pleadings. 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 a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

With the petition, the parents attach five documents as additional evidence for consideration upon review of the appeal (Pet. Exs. 1-5). A brief inspection of the parents' additional evidence indicates that four of the documents have already been submitted by the district, via letter dated June 27, 2011, in order to complete the hearing record, and as noted previously, the parents did not oppose the district's submission of the supplementary evidence (compare Pet. Exs. 1-2; 4-5; with Dist. Supp. Exs. 38-39; 41; 43). As such, there is no reason to either accept or reject these documents since they are already part of the hearing record. Therefore, since four of the duplicative documents are not necessary in order to render a decision in this matter, they will, therefore, not be considered. In reviewing the remaining document submitted by the parents, I note that it was available at the time of the impartial hearing and could have been

offered into evidence (compare Pet. Ex. 3, with Oct. 12, 2010 Tr. pp. 438-581). The remaining document is also not necessary to render a decision, and therefore, it will not be considered.

With its answer, the district included a supplemental affidavit with three documents attached as additional evidence for consideration upon review of the appeal (Supp. Aff. Exs. 1-3). While these documents, including the supplemental affidavit, could not have been offered at the time of the impartial hearing, I find that they are not necessary to render a decision in this matter, and therefore, the supplemental affidavit and attached additional evidence will not be considered.

Merits of the Appeal

Aggrieved Party

To the extent that the parents seek to affirm the impartial hearing officer's finding that the student's conduct on June 8, 2010 was not a manifestation of his disability, I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the parents are not aggrieved by the impartial hearing officer's finding that the student's conduct on June 8, 2010 was not a manifestation of his disability. Therefore, this issue is not properly before me and will not be addressed. In addition, I find no reason to disturb the language contained within the impartial hearing officer's decision that the parents' find objectionable, as it does not appear to have had any effect on the impartial hearing officer's ultimate manifestation determination in the parents' favor.

Mootness

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 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).

In determining whether the appeal in this case is moot, it is significant that most of the parents' requested relief relates to either the June 24, 2010 IEP—which the district never

implemented—the CSE/MDR team meeting held on June 24, 2010, or the FBA/BIP reviewed at the June 24, 2010 CSE/MDR team meeting, because the expiration of the 2010-11 school year has effectively extinguished these issues such that a decision on the underlying merits would have no actual effect on the parties and no meaningful relief can be granted.

Here, the parents' appeal seeks a review of the June 24, 2010 IEP to determine whether the comments section of the document accurately reflects what occurred at the meeting, and the appeal further argues that the IEP included annual goals and objectives that were not discussed at the June 24, 2010 CSE/MDR team meeting. The parents' appeal also seeks a review of the June 24, 2010 IEP to overturn the impartial hearing officer's determination that the June 24, 2010 IEP's recommended home instruction placement pending an out-of-district placement was appropriate, that the district's recommendation to conduct a psychiatric evaluation of the student was appropriate, and to "make a determination about the conduct of the CSE meeting" held on June 24, 2010. Yet, the district never implemented the June 24, 2010 IEP, the student never received special education programs and related services pursuant to the June 24, 2010 IEP, the district never conducted the psychiatric evaluation of the student, and the hearing record does not contain any evidence that the district pursued—or will pursue—the evaluation by using the due process procedures to override the parents' refusal to provide consent for a psychiatric evaluation of the student. It should also be noted that the impartial hearing officer did not order the district to conduct the psychiatric evaluation of the student, but only determined that the recommendation was appropriate.

Moreover, the parents' arguments against finding the appeal moot are not persuasive. A review of the hearing record reveals that contrary to the parents' assertion, the impartial hearing officer's conduct did not impact either the impartial hearing or his written decision. According to the hearing record, the impartial hearing officer, at times, requested and offered clarification of issues in dispute, and made efforts to maintain the decorum of the proceedings while ensuring that each party had the right to be heard in an orderly manner. Under sometimes challenging conditions, the impartial hearing officer was courteous and did not manifest bias or prejudice in either his words or conduct (see generally June 29, 2010 Tr. pp. 1-39; July 15, 2010 Tr. pp. 1-264; Aug. 17, 2010 Tr. pp. 265-421; Aug. 23, 2010 Tr. pp. 1-47; Sept. 29, 2010 Tr. pp. 1-28; Oct. 12, 2010 Tr. pp. 422-648). Therefore, I find that this argument is without merit and must be dismissed.

The parents also argue that the appeal should be not moot because the district unduly delayed or protracted the length of the impartial hearing. A review of the hearing record reveals that after the district rested its case on November 30, 2010, the parents' case continued until April 5, 2011—after approximately 14 days of hearing—and the district also presented rebuttal witnesses on two additional hearing dates (Nov. 20, 2010 Tr. p. 1081; see Dec. 7, 2010 Tr. p. 1913; Mar. 25, 2011 Tr. pp. 3941-4068; April 5, 2011 Tr. pp. 4250, 4279-80; April 19, 2010 Tr. pp. 4321-4453). Therefore, contrary to the parents' assertions, I am not persuaded that the district, alone, is at fault for the length of the proceedings or, alternatively, that the length of the impartial hearing alone constitutes an exception to the mootness doctrine.[6] Thus, the parents' argument is without merit and must be dismissed.

[6] 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

Finally, I am not persuaded by the parents' argument that the appeal is not moot because a live issue remains concerning expenses, which can only be awarded to a prevailing party at an impartial hearing. The Individuals with Disabilities Education Act (IDEA) does not authorize an administrative hearing 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]; S.N. v. Pittsford Cent. Sch. Dist., 2005 WL 4131503, at *2-4 [W.D.N.Y. Mar. 10, 2005] [holding that an award of attorney's fees was "unavailable to an attorney-parent representing his own child"], aff'd, 448 F.3d 601 [2d Cir. 2006]; 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]). Therefore, the parents' argument is without merit and must be dismissed.

Accordingly, since the 2010-11 school year has expired and 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).

Independently Conducted FBA/BIP

Next, to the extent that the parents' appeal seeks to overturn the impartial hearing officer's determination that the FBA and BIP obtained by the district were, in fact, independently conducted, I find that there is no merit to the parents' contentions. State regulations define an independent educational evaluation as an "individual evaluation of a student with a disability . . . , conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]). The hearing record indicates that the individual selected to conduct the FBA and develop the BIP was not an employee of the district (Nov. 9, 2010

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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).

Tr. pp. 1393-94; Nov. 10, 2010 Tr. pp. 1581-82). In addition, as noted by the impartial hearing officer, the hearing record does not contain "convincing evidence or testimony" that the evaluator was otherwise controlled or directed by the district when conducting the FBA or developing the BIP. Thus, the parents' argument is without merit and must be dismissed.

Conclusion

Based upon a review of the hearing record, the parents' appeal must be dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 14, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER