UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NORTH KINGSTOWN SCHOOL COMMITTEE

v. Civil Action No. 93-0122

MICHAEL A.

MEMORANDUM and ORDER

ERNEST C. TORRES, District Judge.

This is an action brought by the North Kingstown School Committee (the "School Committee") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. ("IDEA"). The School Committee seeks relief from an order of the Rhode Island Commissioner of Education requiring the School Committee to provide two aides to meet the educational needs of Michael A. ("Michael"). Michael has filed a counterclaim for an award of attorneys' fees. The case is, presently, before the Court for consideration of the parties' cross motions for summary judgment.

BACKGROUND

The material facts are undisputed. Michael is a minor who has an educational disability. Under the IDEA, Michael is entitled to receive educational services tailored to his individual needs which are provided pursuant to an "individualized education program" ("IEP") prepared by a "multi-disciplinary team," ("MDT") consisting of the child's teacher, a representative of the local school

district and the child's parent or guardian.

The IDEA prohibits alteration of an IEP without prior notice to the child's parents and permits those who dispute the manner in which an IEP is being implemented to file a complaint that must be addressed by an impartial hearing officer at a "due process hearing" conducted by the applicable educational agency. The hearing officer's decision may be appealed within the agency and any party aggrieved by the final decision may then bring an action in Federal District Court. 20 U.S.C. § 1415(e)(2). In Rhode Island, intra-agency appeals from decisions of hearing officers are heard by review officers designated by the Commissioner of Education.[1]

Prior to July of 1992, Michael was enrolled in the Warwick public school system where an IEP was developed for him. The portion of the IEP at issue in this case is contained in the "comments" section. It states:

> Michael is working in a self-contained classroom with a full time aide for the room and a full time one on one assistant for Michael. Michael is a youngster who needs a lot of structure and monitoring. . . . Michael needs a one on one assistant to help him get through the day and assist him with his work.

In July of 1992 Michael began living with his aunt in

[1]See, G.L.§ 16-24-2 and Section One, IX, 10.0 of the Regulations of the Board of Regents for Elementary and Secondary Education Governing the Special Education of Children with Disabilities.

North Kingstown and was enrolled in the North Kingstown school system. The following September, Michael was placed in a class with six other students. Initially, the School Committee proposed that an aide be assigned to Michael's classroom but that no aide be provided exclusively for Michael. On the following day, Michael's educational advocate objected to that proposal as a violation of Michael's IEP and requested a "due process hearing". The School Committee responded by assigning a personal aide to Michael and eliminating the general classroom aide. Michael's advocate, again, objected and continued to seek a "due process hearing".

A "due process" hearing was conducted in November of 1992. In her decision, the hearing officer expressed concern about the effect that failure to provide a classroom aide would have on the other students and went on to rule that:

> Until a [Multi-Disciplinary Team] creates an IEP providing otherwise, a certified teacher and <u>two</u> aides shall be present in the child's classroom. It is hereby ordered that the North Kingstown School Department take immediate steps to provide an additional aide in [Michael's] classroom.

The School Committee appealed that decision to the Commissioner of Education. While the appeal was pending, a second aide was assigned to Michael's classroom. The parties disagree as to whether the classroom aide was added because of an interim order issued by the Commissioner at Michael's request or because the size of Michael's class had increased to more than eight students,

which, under state regulations, requires that a classroom aide be provided. However, there is no dispute that, during 1992 and 1993, the size of Michael's class varied from a low of five students to a high of nine students.

In any event, the review officer rejected the School Committee's appeal and ruled that:

> "A one-on-one aide assigned to Michael will remain. A classroom aide will be assigned to the remainder of the students in Michael's class."

There is some question as to whether the review officer's decision was influenced by the perceived effect that lack of a classroom aide would have on other students. Thus, the review officer's order provides that the School Committee cannot eliminate the classroom aide without the consent of the parents of all other students.

The School Committee challenges the review officer's decision on the ground that it is erroneous as a matter of law because it misconstrues the provisions of Michael's IEP. Specifically, the School Committee contends that Michael's IEP does not require a second classroom aide. Michael, on the other hand, contends that the IEP does require a second classroom aide and that he is entitled to attorney's fees for inducing the School Committee to provide one.[2]

---

[2]Michael also argues that even if the Court does not interpret the IEP to require a second classroom aide, the IEP is

Before considering the merits of these contentions, the Court must address the School Committee's assertion that Michael lacks standing to litigate the issue and Michael's assertion that the issue is moot because, under applicable regulations, the increased number of students in Michael's class prevents the School Committee from eliminating the second classroom aide.

I. DISCUSSION

I. Standing

The School Committee argues that the decision requiring a classroom aide was based on the perceived needs of other students and that Michael, therefore, lacks standing to litigate the question. The School Committee's argument is a curious one in light of the fact that the School Committee brought this action against Michael and seeks a declaration that Michael's IEP does not require a classroom aide.

In addition, the School Committee's argument misapprehends Michael's position. Michael does not contend that the review officer's decision should be upheld on the ground that a classroom

---

deficient. However, that issue was not presented to the hearing officer and, therefore, is not a proper subject of this action. See David D. v. Dartmouth School Comm., 775 F.2d 411, 424 (1st Cir.1985) (to be preserved for judicial review, issues must first be presented to the administrative hearing officer), cert. denied, 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986).

aide should be provided for the benefit of other students. Indeed, he expressly disavows any reliance on the effect that absence of a classroom aide would have on other students and concedes that to the extent the review officer may have taken that effect into account, he exceeded his authority. Instead, Michael contends that, under his IEP, a classroom aide is required to provide a disciplined environment to prevent him from being distracted from other students.

II. Mootness

Michael argues that the question of whether his IEP requires a classroom aide is moot because, under applicable regulations, the number of students now in his class require that such an aide be provided.

The short answer to that argument is that "[C]laims under the [IDEA] are not moot if the conduct [plaintiff] originally complained of is 'capable of repetition, yet evading review.'" Honig v. Doe, 484 U.S. 305, 318, 108 S.Ct. 592, 601 (1988). Here, there is a "reasonable likelihood" that the issue will recur under circumstances that would make review difficult, if not impossible. As already noted, state regulations require a classroom aide only when there are more than eight students and the number of students in Michael's class has fluctuated from as few as five to as many as nine. Thus, there is ample reason to believe that the issue is likely to arise in the future.

III. The IEP

A. Standard of Review

Under the IDEA, a party aggrieved by a final agency decision regarding implementation of an IEP may seek relief by bringing an action in the District Court. 20 U.S.C. § 1415(e)(2). See, Board of Education v. Rowley, 458 U.S. 176, 179-84, 102 S.Ct. 3034, 3037-39 (1982). The statute governing such appeals provides:

> (2) ...In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(e)(2).

The standard of review in the District Court has been described as an intermediate standard that "is characterized by independence of judgment, requires a more critical appraisal of the agency determination than clear-error review entails, but which, nevertheless, falls well short of complete *de novo* review." Lenn v. Portland School Committee, 998 F.2d 1083, 1087 (1st Cir. 1993) (citations omitted). Thus, the Court's discretion is both "bounded" and "independent". It is "bounded" by the administrative record and by any additional evidence the Court deems appropriate pursuant to 20 U.S.C. § 1415(e)(2). On the other hand, it is

"independent" in the sense that the Court must determine for itself whether the administrative findings are contrary to the preponderance of the evidence. Hampton School District v. Dobrowolski, 976 F.2d 48, 52 (1st Cir. 1992). See Brougham v. Town of Yarmouth, 823 F.Supp. 9, 14 (D.Me. 1993).

This case is somewhat unique because the issue presented for review is not whether Michael's IEP is adequate but, rather, whether the terms of the IEP require a classroom aide in addition to the aide assigned to Michael, personally. That difference is significant because it bears on the degree of deference owed to the agency decision.

Determining the adequacy of an IEP is a very fact intensive process and requires professional judgments regarding a child's educational needs. Accordingly, in reviewing such determinations "the Court must recognize the expertise of an administrative agency, as well as that of school officials, and consider carefully administrative findings" although "the precise degree of deference due such findings is ultimately left to the discretion of the trial court". Hampton at p. 52 (quoting G.D. v. Westmoreland School District, 930 F.2d 942, 946 (1st Cir. 1991)).

On the other hand, construing the terms of a document that is unambiguous on its face is essentially a matter of law most appropriately decided by the Court. See Danks v. Fields, 696 F.2d 572, 575 (8th Cir. 1982); Granite-Groves v. Washington Metropolitan

Area Transit Authority, 845 F.2d 330 (D.C. Cir. 1988). Thus, although the Court is free to adopt an agency's interpretation of a document, it is not bound to do so. Danks at p. 575. Rather, the Court's role is to make an independent decision. Granite - Groves at pp. 333-334.

B. Michael's IEP

As already noted, the pertinent section of Michael's IEP provides:

> Michael is working in a self-contained classroom with a full time aide for the room and a full time one on one assistant for Michael. Michael is a youngster who needs a lot of structure and monitoring. . . . Michael needs a one on one assistant to help him get through the day and assist him with his work.

It is true that the IEP recites the fact that, at the time it was prepared, Michael was in a classroom that had a classroom aide and that Michael needed a great deal of structure and monitoring. However, there is nothing in the IEP that could be construed to require that a classroom aide be provided. On the contrary, while the IEP specifically refers to Michael's "need" for a "one-on-one" assistant, it pointedly omits any reference to any "need" for a classroom aide.

It may be, as the hearing officer stated, that "there was a laxity in the preparation of IEPs for [Michael]". However, if Michael's contention is that his IEP should have included the requirement of a second classroom aide, the method for correcting

that error is not to read a non-existent provision into the IEP. The proper course of action is to contest the IEP or seek its modification through the statutory mechanism provided. In that way, the issue may be addressed, in the first instance, at the agency level and an administrative record may be developed permitting meaningful review of any determination made regarding Michael's educational needs.

IV. Attorneys' Fees

The IDEA provides that:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party. 20 U.S.C. 1415(e)(4)(B).

In determining when attorneys' fees should be awarded under the IDEA courts have looked to the analogous body of law governing the award of attorneys' fees under 42 U.S.C. § 1988. See, e.g., Angela L., 918 F.2d at 1193. The test is whether the plaintiff

> (i) obtained relief on a significant claim in litigation,
> (ii) effecting a material alteration in the parties' legal relationship,
> (iii) that is not merely technical or de minimis in nature.

802 F.Supp. at 546 (citing Domegan v. Ponte, 972 F.2d 401, 414 (1st Cir. 1992)).

Since the only claim asserted is that Michael's IEP requires a second classroom aide, and, since the Court has found that claim to be without merit, Michael cannot be deemed a "prevailing party".

V. Conclusion

For all of the foregoing reasons, it is hereby ORDERED that:

1. The North Kingstown School Committee's motion for summary judgment is GRANTED and the Clerk is directed to enter judgment declaring that Michael's present IEP does not require the school committee to provide a classroom aide in addition to the aide assigned to Michael personally.
2. Michael's motion for summary judgment awarding him attorney's fees is DENIED.

It is so ORDERED:

_____

Ernest C. Torres

United States District Judge

Date: , 1994