



The University of the State of New York

The State Education Department State Review Officer

No. 07-033

Application of a CHILD WITH A DISABILITY, by her parent, for a review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Andrew J. Rauchberg, Esq., of counsel

DECISION

Petitioner appeals from that portion of the decision of an impartial hearing officer which ordered respondent to provide petitioner's requested 250 hours of 1:1 instruction between March 1, 2007 and August 31, 2007. The appeal must be sustained in part.

At the commencement of the impartial hearing, the student was 12 years old and attending sixth grade at the School for Language and Communication Development (Tr. pp. 1, 64-65, 67; Parent Exs. H; I). The Commissioner of Education has approved the School for Language and Communication Development as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's classification and eligibility for special education programs and services as a student with a learning disability (LD) are not in dispute in this appeal (8 NYCRR 200.1[zz][6]).¹

In this case, the impartial hearing occurred on February 14, 2007 (Tr. p. 1). Both parties presented testimonial evidence (Tr. pp. 1-121). Petitioner also presented documentary evidence (Parent Exs. A-O). In her decision, the impartial hearing officer granted all of petitioner's

¹ Since petitioner's appeal is limited to that portion of the impartial hearing officer's decision which directed respondent to provide the requested 250 hours of 1:1 instruction within a six-month time frame, it is unnecessary to recite the student's entire educational history or the procedural history of the case leading up to this appeal.

requested relief and directed respondent to provide the requested 250 hours of 1:1 instruction in a six-month period between March 1, 2007 and August 31, 2007 (IHO Decision at p. 9).

On appeal, petitioner does not dispute the impartial hearing officer's decision to set a time frame within which respondent must provide the 250 hours of 1:1 instruction, but contends that his daughter cannot obtain the full benefit of the instruction in six months and thus, requests an extension of that time frame from six months to one year.

Respondent argues in its answer that petitioner's appeal must be dismissed because petitioner failed to raise the issue on appeal, as well as the supporting arguments included in the petition, during the impartial hearing process. Respondent also argues that petitioner's appeal must be dismissed because the record fails to contain testimony or evidence pertaining to petitioner's current claim for an extension and therefore, it is not properly before the State Review Officer. Finally, respondent claims that the impartial hearing officer properly limited the time frame within which to provide the 1:1 services to petitioner's daughter so the instruction would not interfere with the provision of services during the 2007-08 school year.

A review of the record reveals that petitioner's evidence at the impartial hearing addressed several issues: the qualifications of the private tutor who would provide the 250 hours of 1:1 instruction, the methodology to be used for the instruction, the student's special education needs, how the private tutor would meet the student's special education needs, and the private tutor's rates (Tr. pp. 11-18, 32-34, 50, 52-53; Parent Exs. C; F; G; J-L; O). Notably, however, the record fails to contain any evidence or information about the time frame within which to provide the 250 hours of 1:1 instruction to petitioner's daughter, whether petitioner's daughter required a certain time frame to receive the requested services, whether petitioner was concerned about the time frame within which the services were provided, or whether the nature of the student's learning disability should factor into the time frame within which to provide the 1:1 instruction (see generally Tr. pp. 1-121; Parents Exs. A-O). Petitioner's request for an impartial hearing does not address or raise this issue, and a review of the record indicates that petitioner did not raise the issue during the impartial hearing (Parent Ex. A; see generally Tr. pp. 1-121). It should also be noted that an agreement entered by the parties, which directed respondent to provide 250 hours of 1:1 instruction to petitioner's daughter, did not raise or address the issue of a time frame to provide these services (Parent Exs. B; F; G). Based upon the foregoing, therefore, I find that petitioner's issue on appeal is beyond the scope of my review because it was not raised below (Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024). I therefore do not modify the impartial hearing officer's decision.

However, given the unique circumstances of this case, I will remand the matter for further consideration by the impartial hearing officer. The impartial hearing officer's otherwise reasoned decision did not indicate the basis for deciding that the services should be provided over a six-month period. Also, the record does not suggest that the beginning and ending dates for delivery of the services were clearly discussed and identified. Petitioner's concern about the

time period over which the tutorial services are to be delivered would be more properly addressed by the impartial hearing officer. I will therefore remand the matter for a new hearing solely on the issue of whether the tutorial services should be delivered over a six-month or one-year period. Upon remand, the impartial hearing officer should take evidence as needed and consider whether to modify her prior order.

I have considered respondent's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that this matter is remanded to the same impartial hearing officer who issued the decision that is the subject of this appeal for a new impartial hearing to determine whether her March 1, 2007 order should be amended, and

IT IS FURTHER ORDERED, unless the parties otherwise agree, that the new impartial hearing be held within 30 days from the date of this decision, and

IT IS FURTHER ORDERED, that if the impartial hearing officer who issued the March 1, 2007 decision is not available to conduct the new impartial hearing, a new impartial hearing officer be appointed.

Dated: Albany, New York
June 8, 2007

PAUL F. KELLY
STATE REVIEW OFFICER