



The University of the State of New York

The State Education Department State Review Officer

No. 07-055

Application of the BOARD OF EDUCATION OF THE SMITHTOWN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Law Offices of Peter G. Albert, attorney for petitioner, Peter G. Albert, Esq., of counsel

Roslyn Z. Roth, Esq., attorney for respondents

DECISION

Petitioner, the Board of Education of the Smithtown Central School District, appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' son and ordered it to reimburse respondents for their son's tuition costs at the New York Institute of Technology (NYIT) for the 2006-07 school year in its Vocational Independence Program. The appeal must be dismissed.

When the hearing commenced on November 20, 2006, the student was 19 years old and attending NYIT pursuant to the parties' stipulation (Tr. pp. 12-13; Parent Exs. 2 p. at 1; 8). The student has received special education services since age three (Tr. p. 64), and his eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (8 NYCRR 200.1[zz][8]). Petitioner's Committee on Special Education (CSE) met on May 25, 2006, and the student's recommended individualized education program (IEP) was mailed to respondents on or about August 16, 2006 (Parent Exs. 2; 5). The May 2006 CSE recommended that the student be placed in a self-contained special class at petitioner's public high school with a 15:1 student to teacher ratio with a frequency of three times per week for three hours (Dist. Ex. 2 at p. 1). The May 2006 CSE also recommended adaptive physical education with a 5:1 staffing ratio two times per week for 30 minutes (Parent Ex. 2 at p. 1). Vocational counseling was recommended for the student at an unspecified frequency and

duration,¹ and the May 2006 IEP included a recommendation for vocational training for "3 hours School/Community." The IEP included various program modifications, including use of a calculator, opportunities for breaks and socialization opportunities, use of self monitoring strategies, and access to computers (id. at pp. 2-3). The May 2006 CSE also recommended that the student receive a variety of testing accommodations and that he participate in "general education" assessments (id. at p. 3). By letter dated August 22, 2006, respondents expressed their dissatisfaction with the proposed IEP and requested that the CSE reconvene (Parent Ex. 8). The CSE reconvened on September 26, 2006, and revised the May 2006 IEP, eliminating the vocational training described above and clarifying that vocational counseling would be provided in a 15:1 staffing ratio five times per week for three hour sessions in a "School/Community" setting (Parent Ex. 10). The September 2006 CSE also amended the student's annual goals (compare Parent Ex. 10 at pp. 7-10, with Parent Ex. 2 at pp. 6-8). The September 2006 IEP was mailed to respondents with a letter dated October 11, 2006 (Parent Ex. 10 at p. 1). Respondents were dissatisfied with the September 2006 IEP (Tr. pp. 128-44).

On or about October 16, 2006, respondents requested an impartial hearing.² At the impartial hearing, respondents contended, among other things, that the CSE was not composed of all required members and that petitioner failed to recommend appropriate special education and related services to their son, and they requested tuition reimbursement for the costs of the tuition at NYIT. The impartial hearing commenced on November 20, 2006 and concluded on February 5, 2007 after seven days of testimony.

By decision dated April 6, 2007, the impartial hearing officer found, among other things, that petitioner failed to offer the student a free appropriate public education (FAPE) as a result of procedural deficiencies at the CSE meetings and substantive inadequacies in the student's IEPs (IHO Decision at pp. 6-14, 15-20). The impartial hearing officer also determined that the student's unilateral placement at NYIT was appropriate and that respondents' claim was supported by equitable considerations (id. at pp. 20-25). Consequently, the impartial hearing officer ordered petitioner to reimburse respondents for the cost of tuition, including the cost of the student's residential placement at NYIT for the 2006-07 school year (id. at p. 25). This appeal ensued.

At the outset, several procedural matters must be addressed. The Regulations of the Commissioner of Education require that when a board of education initiates an appeal from an impartial hearing officer's decision the petition must be served upon the parent (8 NYCRR 279.2[c]). Personal service of a petition for review on a respondent is required whether the petitioning party is a parent or a board of education (8 NYCRR 275.8, 279.1[a]; see Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 06-117; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 01-048). Here, petitioner's affidavit of service indicates that the petition for review was served on May 15, 2007 by regular mail on the attorney who represented respondents in the hearing below (see 8 NYCRR 275.8, 279.2[c]). Petitioner did not personally serve respondents and there is no indication in the record that either respondents or the attorney who represented

¹ A vocational counselor testified that the recommendation for vocational counseling was for "every other week" (Tr. p. 340).

² Respondents' request for an impartial hearing was not made part of the record.

them in the hearing below consented to such service (Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058). Moreover, the record does not reflect that the attorney who represented respondents in the hearing below continues to represent respondents, or that petitioner attempted alternative service as provided for by regulation (8 NYCRR 275.8[a]). Upon submitting the petition, petitioner did not offer any explanation for its failure to personally serve the petition for review. I further note that, by letter dated May 24, 2006, petitioner was notified of numerous errors contained in the record before the impartial hearing officer, and was offered the opportunity to file corrected exhibits, submit an explanation for the discrepancies and recertify the record. Petitioner has failed to respond. I find that the record does not conform to the requirements set forth by the Commissioner of Education (8 NYCRR 279.9). The failure to file a complete record within the prescribed time period may result in the dismissal of a board of education's petition for review (8 NYCRR 279.9[b]; Application of the Dep't of Educ., Appeal No. 05-060).

Respondents served their answer upon petitioner, and according to the accompanying affidavit of service by mail, the answer was served by express mail on June 4, 2007. The time period for service of the answer expired on May 25, 2007 (8 NYCRR 279.5), and respondents do not offer any explanation for their failure to timely serve the answer. I further note that the answer does not conform with the form requirements set forth in the Commissioner's Regulations (8 NYCRR 279.8). Consequently, I will not consider the answer. With respect to petitioner's reply affirmation to the procedural defenses raised in the answer, I decline to find that petitioner's unsuccessful attempts to contact respondents' attorney via telephone and e-mail to obtain consent for a waiver of personal service were sufficient to relieve petitioner of its obligation to personally serve respondents in accordance with the Commissioner's Regulations.

The failure to comply with the practice requirements of Part 279 of the Commissioner's regulations may result in the dismissal of a petition for review by a State Review Officer (see, e.g., Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 01-048; see also Application of the Dep't of Educ., Appeal No. 05-073; 8 NYCRR 279.8[a], 279.13). I note that petitioner is aware, or should be aware, of the procedural requirements associated with practice on review of hearings for students with disabilities, having previously been cautioned with regard to compliance with the Commissioner's Regulations with respect to service and other procedural aspects of review (see Application of the Bd. of Educ., Appeal No. 04-072; Application of a Child with a Disability, Appeal No. 00-003).

Under the circumstances, I will dismiss the appeal for failure to personally serve the petition for review upon respondents and timely file a completed record, without a determination of the merits of petitioner's claims.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 7, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**