



The University of the State of New York

The State Education Department State Review Officer

No. 08-004

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Jimmie Engram, Esq., attorney for petitioner

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which dismissed her request to change the student's transportation services provider. The appeal must be dismissed.

The hearing record is sparse with regard to the student's educational history. The student is eligible for special education and related services as a student with a speech or language impairment, and his eligibility is not in dispute in this appeal (Answer Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][1]). Respondent's Committee on Special Education (CSE) recommended that the student be placed in a non-public day school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities for the 2007-08 school year (Answer Ex. 1 at p. 1; see 8 NYCRR 200.1[d], 200.7). Among other things, the student's individualized education program (IEP) dated April 18, 2007 lists "busing" as a related service (Answer Ex. 1 at p. 1).

The essence of the dispute between the parties is that petitioner is dissatisfied with the transportation services provider procured by respondent, and respondent does not believe that there are sufficient grounds for changing the provider (Tr. pp. 4, 7). Specifically, on August 10, 2007, according to a State Department of Motor Vehicles accident report, the bus transporting the student and a second vehicle were involved in an incident at the student's bus stop near his home (Parent Ex. A at p. 1). The hearing record indicates that the bus had stopped and engaged its flashing red signals and stop sign (id.). Although the order of events is unclear, it appears

that, sometime shortly before or after the student exited the bus, a second vehicle disregarded the school bus stop signals (Tr. p. 6; Parent Ex. A at p. 1). According to the report, the student "touched [the] rear of [the second vehicle] with his hands" and received no visible injury (Parent Ex. A at p. 1).

Respondent notes that petitioner filed a due process complaint notice on November 2, 2007, alleging that the bus company dropped the student off on the side of the street opposite the student's home and requested that respondent place the student on a different bus to the student's school (Answer ¶ 20).¹ An impartial hearing was convened on November 30, 2007, and the assistant director of operations at respondent's Office of Pupil Transportation testified regarding respondent's provision of transportation to the student (Tr. p. 5). By decision dated December 19, 2007, the impartial hearing officer found that respondent provided a "bus matron" to monitor the student on his bus and that the evidence in the hearing record did not support petitioner's claim (IHO Decision at p. 2). Consequently, the impartial hearing officer denied petitioner's claim (*id.*).

Petitioner appeals, contending that the evidence supports her claim and that the impartial hearing officer incorrectly "focused on issues of jurisdiction or liability" in dismissing her claim. In its answer, respondent asserts that the petition for review is insufficient and fails to comply with State regulations. However, respondent acknowledges its responsibility to provide the student with transportation in accordance with his IEP and asserts, among other things, that the student received suitable transportation and that the petition should be dismissed for failing to state a claim upon which relief may be granted. Respondent also asserts that it may permissibly provide the student with transportation using a private contractor in accordance with State law, and that it is within respondent's discretion to manage transportation services. According to respondent, there is no evidence that the student's education has been affected in any way by his transportation services. Respondent also contends that, at the time of the incident on August 10, 2007, the private contractor was not providing services to the student on respondent's behalf and the incident occurred due to the actions of another driver rather than the bus driver employed by the private contractor.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; *see Schaffer v. Weast*, 546 U.S. 49, 51 [2005]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 [1982]; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; *see* 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).²

¹ Neither the due process complaint notice nor the response is included in the hearing record.

² 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.
(20 U.S.C. § 1401[9]).

While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). An administrative officer may order a school district to comply with the procedural requirements of the IDEA or State regulations (34 C.F.R. § 300.513[a][3]; 8 NYCRR 200.5[j][4][ii]). However, if a procedural violation is alleged, the IDEA provides that an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

Under New York State law, the burden of production and persuasion in any impartial hearing is placed on the school district, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion with regard to the appropriateness of a unilateral placement (Educ. Law § 4404[1][c]).³

Turning first to respondent's contention that the petition for review should be dismissed for lack of sufficiency, a petition for review must comply with State regulations, which provide in pertinent part, that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]; see Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).

In this case, the petition for review fails to meet this requirement. For example, the petition for review identifies that petitioner made efforts at the impartial hearing to demonstrate that the private contractor is a "shady" company "with characteristics that is [sic] not healthy to transport her autistic son" (Pet. ¶¶ 8, 12). Petitioner also states that the private contractor did not file an incident report, pay emergency room bills or telephone petitioner and tell her that the student was "hit" by a car (Pet. ¶ 13). With regard to the impartial hearing officer's decision, petitioner states that the impartial hearing officer focused only on the issue of jurisdiction or liability and "missed the parent's point" (Pet. ¶ 16). Petitioner indicates that she cannot trust the private contractor, but concedes that the private contractor was not employed by respondent at the time of the August 2007 incident (Pet. ¶ 17). Petitioner concludes that she is concerned that the private contractor will attempt to hide an accident that may occur in the future, and in general fashion requests reversal of the impartial hearing officer's decision (Pet. ¶ 18). Although petitioner has made general allegations regarding the trustworthiness of the private contractor, I

³ Under the IDEA, the burden of persuasion in an administrative hearing is placed upon the party seeking relief (see Schaffer, 546 U.S. at 59-62). On August 15, 2007, New York State amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007.

find that the petition for review does not allege, with sufficient specificity, how the impartial hearing officer erred in rendering her decision, nor does it allege the relief sought by petitioner other than reversal (see 8 NYCRR 279.4[a]). I also note that the petition for review does not contain specific factual allegations from which it can be reasonably inferred that respondent failed to comply with the IDEA, Article 89 of the Education Law or the attendant federal or State regulations. Accordingly, I will dismiss the petition for review.

Notwithstanding my decision to dismiss the petition for review as insufficient, I have reviewed the entire hearing record and find no reason to disturb the decision of the impartial hearing officer. The assistant director testified that the incident in August 2007 occurred when the student was attending a camp "outside of the purview" of respondent, and that it was the camp which had provided the services of the private contractor (Tr. pp. 5-6). I am not persuaded by the evidence in the hearing record that respondent's obligation to implement the student's IEP was related in any way to the camp's provision of transportation services (Tr. p. 6). I concur with the impartial hearing officer's finding that there is no allegation that the student was in danger while receiving transportation services from respondent (IHO Decision at p. 2). The hearing record adequately establishes that respondent provides transportation services to the student in accordance with his IEP (Tr. pp. 5-10, 14-16; Answer Ex. 1 at p. 1; see 34 C.F.R. § 300.34[c][16]; Educ. Law § 4402[4][a]-[c]; 8 NYCRR 200.1[ww]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
February 29, 2007

PAUL F. KELLY
STATE REVIEW OFFICER