



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-098

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 [REDACTED] School District

Appearances:

Hodgson Russ LLP, attorneys for respondent, Ryan L. Everhart, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer regarding the appointment of a guardian ad litem and her determination that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2008-09 school year was appropriate. The appeal must be sustained in part.

At the time the parents filed their due process complaint notice in November 2008, the student was attending ninth grade at the district's high school and was eligible for special education programs and services as a student with autism (IHO Exs. I; IV at p. 7; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student has been the subject of nine previous appeals from impartial hearing officer determinations; therefore, the parties' familiarity with the student's prior educational history is presumed and will not be repeated here in detail (Application of a Student with a Disability, Appeal No. 09-028; Application of a Student with a Disability, Appeal No. 08-001; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 05-059; Application of a Child with a Disability, Appeal No. 04-105; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-011; Application of a Child with a Disability, Appeal No. 03-050; Application of the Bd. of Educ., Appeal No. 02-070).

On May 6, 2008, the CSE met for the student's annual review and to plan for the student's 2008-09 educational program (Dist. Ex. 27). The meeting attendees included the CSE chairperson, a school counselor, school psychologist, regular education teacher, special

education teacher, speech therapist, occupational therapist, and recording secretary (*id.* at p. 8). The student's mother and her advocate participated by telephone (*id.*). The resultant individualized education program (IEP) recommended a 15:1 special class for language arts, resource room, and related services of three 30-minute individual and two 30-minute speech-language therapy sessions in a group, parent counseling, transitional support services, counseling and occupational therapy consults, as well as other program modifications and accommodations (*id.* at pp. 1-3, 8).

In their due process complaint notice dated November 17, 2008, the parents alleged, among other things, numerous procedural and substantive errors regarding the student's 2008-09 IEP (IHO Ex. I at pp. 5-9). An impartial hearing was scheduled to commence on December 9, 2008, to determine the student's pendency placement, but was canceled because an impartial hearing officer (Hearing Officer 1) recused himself in response to the district's motion (IHO Ex. VI at pp. 40, 44-45, 75-76, 80-81). On December 5, 2008, another impartial hearing officer (Hearing Officer 2) was designated to conduct the impartial hearing (IHO Ex. III).

A prehearing conference was scheduled for December 19, 2008, but was adjourned at the request of the parents (IHO Exs. XVII; XX; XLV-XLVI; LXXX; XC at pp. 1-2). Although the student's mother discontinued participating in a telephonic prehearing conference held on December 30, 2008, her advocate continued to participate on her behalf (Tr. pp. 3, 8, 44). After receiving documentary submissions from both parties, Hearing Officer 2 rendered an interim decision on pendency dated February 8, 2009 (IHO Ex. XVI). The parents appealed from the interim pendency order, and by decision dated April 20, 2009, a State Review Officer rendered a decision determining the student's pendency placement (Application of a Student with a Disability, Appeal No. 09-028).

After the December 30, 2008 prehearing conference was held, hearing dates were scheduled during January 2009, but were adjourned because the parents did not confirm availability for the hearing dates (IHO Exs. XVIII-XXI; XXIII-XXVI). The impartial hearing continued on February 10, 2009, at which time Hearing Officer 2 conducted a hearing to determine whether it was necessary to appoint a guardian ad litem for the student (IHO Exs. XIII-XV). The parents received notice of the February 10, 2009 hearing date, but did not attend (Tr. pp. 47-48, 135-37; IHO Exs. XIII-XV; XXXI; XXXV; XXXVI at pp. 2, 6-7). By interim decision dated February 26, 2009, Hearing Officer 2 found that "the interests of the Parents are opposed to and inconsistent with those of the Student" and that the interests of the student would be best protected by the appointment of a guardian ad litem (IHO Ex. XXXVI at p. 9). Hearing Officer 2 further found that, rather than protecting her son's educational interests, the student's mother interfered with her son's right to a free appropriate public education (FAPE), impeded the scheduling of hearings, refused to participate in hearings, and engaged in "procedural posturing that appeared to be designed to delay the case and create illusions of due process violations" (*id.*

at p. 13).¹ Thus, Hearing Officer 2 determined that the appointment of a guardian ad litem was necessary to protect the student's interests in the proceeding and ordered the district to immediately provide her with a list of surrogate parents (id. at pp. 14-15).

Hearing dates were scheduled during March 2009, but were adjourned at the request of the parents (IHO Exs. XXXVII-XL; LXV-LXIX; LXXI; LXXIII). Since a pro bono attorney could not be found to represent the student as a guardian ad litem, Hearing Officer 2 did not appoint one for the student and proceeded with the impartial hearing on April 17 and 24, 2009 (Tr. pp. 159-60; IHO Decision at p. 9). The parents received notice of the April 2009 hearing dates, but did not attend (Tr. pp. 154-55, 260-61; IHO Exs. XXXIX-XLIII; LVII; LXXV; LXXIX).

By decision dated July 22, 2009, Hearing Officer 2 found that the district proved that it had complied with federal and State procedural requirements in the formulation of the student's 2008-09 IEP (IHO Decision at pp. 15-16). Hearing Officer 2 also found that the district established that the CSE's recommended program and placement were substantively appropriate because the 2008-09 IEP was reasonably calculated to allow the student to make meaningful educational progress (id. at pp. 15, 16-18). Hearing Officer 2 determined that, although the student needed to be comprehensively reevaluated and the district attempted to obtain consent from the parents, the parents refused to consent to the district's requests to reevaluate the student (id. at pp. 18-20). Therefore, Hearing Officer 2 found that the parents' contentions that the district failed to request their consent and reevaluate the student were without merit (id. at p. 20). Hearing Officer 2 also determined that the district did not violate the student's right to a FAPE based on its failure to obtain a vision therapy evaluation or vision therapy services because the parents refused to consent to the district's provision of a vision therapy evaluation and services (id. at pp. 20-21). Hearing Officer 2 further found that the parents did not establish that the student is entitled to compensatory education or services (id. at p. 21). Hearing Officer 2 ordered the district to perform a comprehensive reevaluation of the student without parental consent, subsequently reconvene the CSE to consider the evaluations, and develop a new IEP for the student (id. at pp. 22-23).

The parents appeal, and assert that Hearing Officer 2 erred by determining that an appointment of a guardian ad litem for the student was necessary, but then proceeding with the impartial hearing without appointing one. The parents assert that Hearing Officer 2 erred by conducting the February and April 2009 hearing dates in the parents' absence after the parents had informed Hearing Officer 2 that they could not attend. The parents further allege that they were denied the right to have the hearing at a time and place that was convenient to them. The parents contend that Hearing Officer 2's decision dated July 22, 2009 was not timely rendered

¹ 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]).

and that Hearing Officer 2 impermissibly delayed the impartial hearing. The parents also assert that Hearing Officer 2 erred by granting the district's cross-claim to reevaluate the student without obtaining parental consent. The parents request: (1) a finding that Hearing Officer 2 erred by violating their due process rights when she held the impartial hearing in the parents' absence; (2) a finding that Hearing Officer 2 erred by determining that a guardian ad litem was needed for the student and then proceeding with the impartial hearing without one; (3) a finding that Hearing Officer 2's decision was untimely, arbitrary, and capricious; (4) an order annulling Hearing Officer 2's decision and remanding the case to another impartial hearing officer to determine the issues raised in the parents' due process complaint notice; and (5) a decision regarding whether additional services may be ordered to make up for the time that the student was not in a pendency placement during the 2008-09 school year and previous school years.

In its answer, the district requests that the decision of Hearing Officer 2 be upheld and the parents' petition dismissed. The district asserts that Hearing Officer 2 acted reasonably and appropriately during the impartial hearing. Specifically, the district argues that Hearing Officer 2 undertook reasonable efforts to schedule the hearing dates at reasonable times and to include the parents in the impartial hearing process and that the hearing was conducted in a timely manner. The district also contends that Hearing Officer 2 correctly determined that a guardian ad litem was necessary to represent the student's interests at the impartial hearing. The district further argues that Hearing Officer 2 properly determined that the CSE recommended an appropriate program for the student in his 2008-09 IEP. Finally, the district contends that Hearing Officer 2 correctly ordered the student to be reevaluated without parental consent.

As an initial matter, the parents submitted exhibits with their petition for consideration as additional evidence. The district objects to the submission of the additional exhibits and argues that, because the parents refused to participate in the impartial hearing, they waived their right to introduce evidence in support of their claims. Many of the exhibits submitted by the parents were previously introduced into evidence during the impartial hearing and incorporated into the hearing record. Because these exhibits are already included in the hearing record, I will consider them in this appeal.

The remaining exhibits submitted by the parents with their petition were not admitted into evidence during the impartial hearing. 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). Here, I decline to consider the remainder of the additional documentary evidence submitted by the parents because it either could have been offered at the impartial hearing or is not necessary in order to render a decision in this appeal.

Next, the parents raised concerns regarding the scheduling of the impartial hearing dates. State regulations provide that the impartial hearing "shall be conducted at a time and place which is reasonably convenient to the parent and the student involved" (8 NYCRR 200.5[j][3][x]; see 34 C.F.R. § 300.515[d]) (emphasis added). The parents contend that the last three days of the impartial hearing, held in February and April 2009, were scheduled for times that were not convenient to them. However, the hearing record demonstrates that the parents were afforded reasonable notice of the scheduling of the impartial hearing dates, notwithstanding their decision not to appear during its last three days (Tr. pp. 47-48, 135-37, 154-55, 260-61; IHO Exs. XIII-XV; XXXI; XXXV; XXXVI at pp. 2, 6-7; XXXIX-XLIII; LVII; LXXV; LXXIX). The hearing record also reflects that Hearing Officer 2 adjourned the January 2009 hearing dates because the parents did not confirm availability for the hearing dates, and scheduled the February 2009 impartial hearing date on a Tuesday, which accommodated the schedule of the parents' advocate, who was not available on Mondays and Wednesdays (Tr. pp. 25, 28-29, 47-48, 135-37; IHO Exs. XIII-XV; XVIII-XXI; XXIII-XXVI; XXXI; XXXV; XXXVI at pp. 2, 6-7). In addition, the hearing record reveals that Hearing Officer 2 adjourned the March 2009 hearing dates at the request of the parents and scheduled the two April 2009 impartial hearing dates on days that the parents had specifically requested (IHO Exs. XXXVII-XLIII; LVII; LXV-LXIX; LXXI; LXXIII; LXXV; LXXIX). Accordingly, I find that Hearing Officer 2 complied with federal and State regulations when scheduling the impartial hearing dates (34 C.F.R. § 300.515[d]; 8 NYCRR 200.5[j][3][x]).

Turning to the parents' assertion that the impartial hearing was unnecessarily lengthy, the hearing record reveals that Hearing Officer 2 granted extension requests from both parties throughout the impartial hearing and rendered her decision based on the extended compliance date (Tr. pp. 268-71; IHO Exs. XVII-XXI; XXIII-XXVI; XXXVII-XL; XLV-XLVI; LXV-LXIX; LXXI; LXXIII; LXXX; LXXXVII-LXXXIX; XC; IHO Decision at p. 23). I remind Hearing Officer 2, and both parties in this matter that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

"(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations,

a lack of availability resulting from the parties' and/or representatives' scheduling conflicts . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]).

Next, I agree with the parents' contention that Hearing Officer 2 erred by conducting the impartial hearing without appointing a guardian ad litem for the student after determining that one was necessary. State regulations provide that,

"[i]n the event the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian ad litem, the impartial hearing officer shall appoint a guardian ad litem to protect the interests of such student, unless a surrogate parent shall have previously been assigned"

(8 NYCRR 200.5[j][3][ix]) (emphasis added).

A guardian ad litem is defined in State regulations as "a person familiar with the provisions of this Part who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing" (8 NYCRR 200.1[s]). In this case, the parents did not appeal from Hearing Officer 2's determination that the appointment of a guardian ad litem for the student was necessary, thus, it is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). However, after Hearing Officer 2 determined that the interests of the parents were opposed to and inconsistent with those of the student (IHO Ex. XXXVI at pp. 9, 15), State regulations required Hearing Officer 2 to appoint a guardian ad litem (8 NYCRR 200.5[j][3][ix]). The hearing record reveals that Hearing Officer 2 attempted to find a pro bono attorney who would serve as the student's guardian ad litem, but was unable to find one (Tr. pp. 159-60; IHO Exs. XXXVI at p. 15; XXXVIII; XLVIII-XLVIX; LIII; LVIII). Therefore, she proceeded with the impartial hearing without a guardian ad litem (Tr. pp. 159-60). However, when a pro bono attorney could not be found to serve as guardian ad litem, Hearing Officer 2 was required by State regulations to appoint one from the district's surrogate parents list (8 NYCRR 200.1[s], 200.5[j][3][ix]). Under the circumstances of this case, I will annul Hearing Officer 2's decision and remand for the appointment of a guardian ad litem and a new impartial hearing on the claims raised in the parents' November 17, 2008 due process complaint notice (see Dunphy v. Bolton, 21 A.D.2d 723, 723-24 [3d Dep't 1964] [vacating judgment rendered against unrepresented infant]; c.f. De Groat v. Tompkins Bus Corp., 142 Misc. 528, 529-30 [N.Y. Mun. Ct. 1932] [denying motion to vacate judgment when judgment was rendered in favor of unrepresented infants]; see generally Matter of Figueroa v. Lopez, 48

A.D.3d 906, 907-08 [3d Dep't 2008] [stating that a child's law guardian must be afforded the opportunity to fully participate in a proceeding]).

In addition, I agree with the parents' assertion that Hearing Officer 2 erred by considering and granting the district's cross-claim for reevaluation of the student without obtaining parental consent (IHO Decision at pp. 18-20, 22). Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an evaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008])² and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]). However, if the parent refuses to consent to the evaluation, the school district "may, but is not required to," pursue the reevaluation using consent override procedures, including mediation and the filing of a due process complaint notice (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.5[b][3]) (emphasis added). Although the district requested to reevaluate the student without parental consent, the district has not followed the necessary procedures to obtain such relief (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.5[b][3]). I remind the district that if the parents continue to refuse consent to reevaluation, it may avail itself of the procedures set forth in State and federal regulations as described above.³

Finally, I remind both parties that formulating an IEP is a collaborative effort (Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93) and I encourage the parties to work cooperatively in the future for the educational benefit of the student.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of Hearing Officer 2 dated July 22, 2009 is annulled; and;

IT IS FURTHER ORDERED that, unless the parties otherwise agree, this matter is remanded to Hearing Officer 2 for the appointment of a guardian ad litem for the student and then for a new impartial hearing to determine the claims raised in the parents' November 17, 2008 due process complaint notice; and

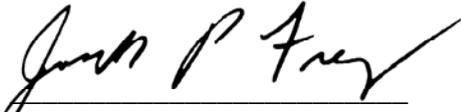
² "Consent" is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[I]).

³ I note further that, in order to avoid duplicative litigation, parties are permitted to move to consolidate at an impartial hearing (see Application of the Bd. of Educ., Appeal No. 09-081; Application of the Bd. of Educ., Appeal No. 08-152).

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the new impartial hearing be held within 45 days from the date of this decision; and

IT IS FURTHER ORDERED that, if Hearing Officer 2 is not available to conduct the new impartial hearing, a new impartial hearing officer shall be appointed.

Dated: Albany, New York
October 7, 2009



JOSEPH P. FREY
STATE REVIEW OFFICER