



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-144

Application of a STUDENT WITH A DISABILITY, by her 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:

Girvin & Ferlazzo, P.C., attorneys for respondent, Tara Moffett, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's independent educational evaluation (IEE).¹ The appeal must be dismissed.

Initially, a procedural matter must be addressed. To initiate the instant appeal, the parents in this case prepared and served a 19-page document referred to as the "Parents' Affidavit, Discussion and Memorandum of Law" together with an affidavit of verification and an affidavit of personal service. The first 10 pages of the document contain numbered paragraphs, albeit non-consecutive and repetitive at times, that recite the alleged factual bases of the appeal; pages 11 through 19 of the document—titled "Discussion and Memorandum of Law, Submitted with Parents' Affidavit"—contain the factual and legal arguments upon which the parents seek to overturn the impartial hearing officer's decision. Although not identified by a particular title, the first ten pages of the parents' document appear to comprise what the parents refer to as the "Affidavit" portion of the document (compare Pet. at pp. 1-10, with Pet. at pp. 11-19).

In its answer, the district seeks to dismiss the petition for review based upon the following affirmative defenses: the petition fails to comply with practice regulations set forth in 8 NYCRR 275, 276, and 279; the memorandum of law fails to comply with practice regulations set forth in 8 NYCRR 275, 276, and 279; and the parents fail to state a claim upon which relief may be granted. Specifically, the district alleges that the petition for review and memorandum of

¹ State regulation defines an "independent educational evaluation" as an "individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z])

law violate one or more of the State regulations governing the required form, content, verification, or endorsement of pleadings (see 8 NYCRR 275.4, 279.4[a], 279.6, 279.8[a][3], [b]). In its accompanying memorandum of law, the district initially argues that the document submitted by the parents to initiate the appeal is not a petition for review (Dist. Mem. of Law at pp. 4-5). The district also asserts that the parents' "Affidavit" should not be accepted as additional documentary evidence for consideration on appeal because both parents were present and available to testify at the impartial hearing, the "Affidavit" attempts to introduce new facts or arguments that could have been presented at the impartial hearing, and furthermore, the "Affidavit" is both unsigned and unsworn (id. at p. 5).²

Alternatively, the district argues that to the extent that the "Affidavit" portion of the parents' document does constitute a petition for review, the petition's failure to comply with State regulations is fatally defective and thus, warrants dismissal (Dist. Mem. of Law at pp. 5-7). In particular, the district contends that the petition fails to "clearly indicate the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions and order to which exceptions are taken," which deprives the district of a "meaningful opportunity to respond" to the petition (id.). In addition, the district asserts that the petition fails to "indicate what relief should be granted by the State Review Officer" (id.). To the extent that the parents' "Discussion and Memorandum of Law" contains a request for relief, the district argues that a memorandum of law cannot be used "to correct the failings of a pleading or offer proof or evidence of any [of] the facts stated therein" (id. at p. 7). The district also argues that the petition fails to contain consecutively numbered paragraphs, proper citations to the hearing record, the parents' signature, or an appropriate endorsement "with the name, post office address and telephone number of the party submitting the same" (id. at pp. 6-7). Due to the "cumulative effect of the multiple deficiencies described," the district requests dismissal of the parents' appeal (id. at p. 7).

Upon independent review of the document submitted by the parents to initiate the appeal, I agree with the district's arguments that to the extent that the "Affidavit" constitutes a petition for review, it must be dismissed as insufficient based upon the failure to comply with State regulations. As noted above, the parents' "Affidavit"/ petition contains factual allegations; however, the petition fails to clearly indicate the reasons for challenging the impartial hearing officer's decision, the petition does not identify the findings or conclusions or order with which the parents take exception, and finally, the petition fails to indicate what relief a State Review Officer should grant (see 8 NYCRR 279.4[a]; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Child with a Disability, Appeal No. 07-112; Application of the Bd. of Educ., Appeal No. 07-097; 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; Pet. at pp. 1-10; see also 8 NYCRR 275.10). The district also correctly asserts that the parents'

² Generally, additional 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).

"Discussion and Memorandum of Law" cannot substitute for a pleading or for a properly drafted petition for review, and thus, any relief requested in the memorandum of law cannot remedy the parents' failure to comply with the pleading requirements in State regulations (see 8 NYCRR 279.4, 279.6; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6).

For the foregoing reasons, I find that the parents' "Affidavit"/ petition for review is deficient and fails to meet the requirements set forth in State regulations, and thus, I will exercise my discretion to dismiss the petition for review (8 NYCRR 279.4, 279.8[a]; 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 Application of the Bd. of Educ., Appeal No. 06-122).

Notwithstanding the above, upon independent review and due consideration of the entire hearing record in this matter, I find that the impartial hearing officer correctly determined that the parents were not entitled to reimbursement for the student's IEE (see IHO Decision at pp. 8-14, 16-17).

In this case, a review of the hearing record reveals that the district conducted a psychoeducational evaluation and a speech-language evaluation of the student in May and June 2006, the parents disagreed with the district's 2006 evaluations and requested an IEE, which the district agreed to pay for and which the Stern Center administered in June 2006 (Joint Ex. 45 at pp. 2, 5, 8, 19; see Tr. pp. 22-28; Joint Ex. 46).³ The Committee on Special Education (CSE) convened in June 2006 and January 2007, and on both occasions, declined to find the student eligible for special education programs and services (Joint Ex. 45 at p. 5). Thereafter, the district conducted a psychoeducational evaluation of the student in May and June 2007, the parents disagreed with the district's 2007 psychoeducational evaluation and requested a second IEE, which the district agreed to pay for and which the Stern Center administered in August 2007 (Joint Ex. 45 at pp. 2, 5-6, 8, 19; see Tr. pp. 22-28; Joint Exs. 11; 37-38). In July 2007, the CSE found the student eligible to receive special education programs and services as a student with a learning disability (Joint Ex. 45 at pp. 5-6).⁴ According to the August 2007 Stern Center IEE

³ The hearing record does not contain copies of the district's May and June 2006 evaluation reports or the parents' June 2006 Stern Center IEE evaluation report (see Tr. pp. 1-137; Joint Exs. 1-31; 33-46; IHO Exs. I-V; Dist. Post-Hr'g Br. at pp. 1-10; Parent Post-Hr'g Br. at pp. 1-25). However, the hearing record indicates that the parents' believed that the test results of the 2006 Stern Center IEE "were a 'red flag' for dyslexia" (see Joint Ex. 45 at p. 19).

⁴ Regulations define "learning disability" as a "disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations," and includes the following conditions: "perceptual disabilities, brain injury, minimal brain dysfunction, *dyslexia* and developmental disabilities" (8 NYCRR 200.1[zz][6] [emphasis added]; see 34 C.F.R. § 300.8[10]).

report, the parents requested the evaluation "to assist in determining the nature of [the student's] learning disability that was recently identified by school staff" (Joint Ex. 38 at p. 1). In addition, the evaluation report indicated that the parents specifically wanted to know whether the student's "learning profile" demonstrated "signs of dyslexia, dysgraphia, and/or dyscalculia" (*id.*). The evaluator who conducted the August 2007 Stern Center IEE concluded that "current findings indicate[d] the presence of dyslexia" (*id.* at p. 10). In November 2007 and January 2008, a subcommittee of the CSE convened to conduct a program review and to review and consider the August 2007 Stern Center IEE report (Joint Ex. 41 at pp. 1-2, 4-5; *see* Joint Exs. 24 at pp. 1-2, 4-5, 10-18; 45 at pp. 6-7). The parents alleged that the January 2008 IEP was not appropriate because, among other things, the IEP did not "state that [the student was] dyslexic" (Joint Ex. 45 at pp. 19-20).

On April 1, 2008, the parents requested an impartial hearing challenging whether the district had offered the student a free appropriate public education (FAPE) for the 2007-08 school year (Joint Ex. 45 at pp. 2-4, 24-32).⁵ During the course of the impartial hearing, the district produced a witness—a licensed psychologist with two advanced educational degrees in educational psychology—who had reviewed the student's educational evaluations, including the student's most recently administered IEE by the Stern Center in August 2007 (*id.* at pp. 17-19). The district's witness testified that contrary to the conclusions set forth in the August 2007 Stern Center IEE report, the test results did not indicate that the student had "dyslexia or a severe reading disability" (*id.* at pp. 17-19, 26-29). In his decision, dated August 21, 2008, the impartial hearing officer determined that the hearing record did not contain "sufficient evidence to conclude that [the student was] dyslexic," noting, in part, that the "district's expert witness testified credibly that [the student's] evaluations were not sufficient to make a diagnosis of dyslexia" (*id.* at pp. 27-28). He also concluded that it "was not necessary for the IEP to state that [the student was] dyslexic, so long as it properly identifie[d] the nature of her disability, its effect on her academic performance, and how her needs [could] be met by special education supports and services" (*id.*). The impartial hearing officer determined that the 2007-08 IEP accurately identified the student's eligibility for special education programs and services as a student with a learning disability, and that the IEP accurately described the "manifestations of that disability in [the student's] reading, writing, and spelling" (*id.*).⁶

⁵ On May 7, 2008, the CSE convened to conduct the student's annual review and to develop the student's IEP for the 2008-09 school year (Joint Ex. 42 at pp. 1-2). The CSE noted in the "Special Alerts" section of the IEP that the "Stern Center report indicate[d] dyslexia" (*id.* at p. 1).

⁶ The parents appealed the impartial hearing officer's August 21, 2008 decision regarding the 2007-08 school year to a State Review Officer. On November 7, 2008, the parents' appeal was dismissed as untimely (*see Application of a Student with a Disability*, Appeal No. 08-116). In that decision, the State Review Officer noted that the parties did not dispute the student's eligibility for special education programs and services as a student with a learning disability, but that "the parents [were] dissatisfied that the CSE did not include a diagnosis of dyslexia" on the student's IEP (*id.* at p. 1, n.1). The parents appealed the State Review Officer's decision to the United States District Court for the Northern District of New York, which dismissed the parents' appeal for lack of subject matter jurisdiction due to the parents' failure to exhaust their administrative remedies (*see Kelly v. Saratoga Springs City Sch. Dist.*, 2009 WL 3163146, at *1-3 [N.D.N.Y. Sept. 25, 2009]).

By e-mail dated August 28, 2008, the parents requested a "neuropsychological evaluation" of the student "at public expense" (Joint Ex. 12 at pp. 1-2; see Tr. pp. 26-27).⁷ In the e-mail, the parents expressed concern that "the district [did] not have enough information to identify" the student's "specific learning disabilities" to develop an appropriate IEP (Joint Ex. 12 at p. 2). By letter dated September 2, 2008, the district declined the parents' request for an IEE, at public expense explaining that the student had not been evaluated by the district since June 2007, and that the parents had already requested and received an IEE at public expense administered by the Stern Center in August 2007 in connection with their expressed disagreement with the district's June 2007 evaluation of the student (Joint Ex. 13; see Tr. pp. 27-28; see generally Joint Exs. 14-18).

In September 2008, the parents obtained an IEE of the student from a private neuropsychologist (Joint Ex. 40 at p. 5; see Tr. p. 45). The evaluator noted that one of the reasons the parents referred the student for an evaluation was because the district "concluded that [the student did] not have a learning disability" (Joint Ex. 40 at p. 5). The evaluator concluded that the student's "profile was indicative of dyslexia, possibly supported the diagnosis of dysgraphia, and suggested that problems with attention were contributing to her difficulties" (id. at pp. 15-16). The evaluator recommended that the CSE consider the student as a student "with an educationally handicapping condition, namely *Learning Disabled*, although she could also be classified *Other Health Impaired*" (id. at p. 16) (emphasis in original).⁸

On November 19, 2008, the CSE convened for a program review and to review and consider the September 2008 IEE report (Joint Ex. 43 at pp. 1-2, 4-5; see Joint Exs. 21-23; 27; see generally Tr. p. 64). In a letter dated November 25, 2008, the parents noted, among other things, that they were "pleased that the District agree[d], as noted by the School Psychologist," that the September 2008 IEE evaluation report "reconfirm[ed] the Stern Center's diagnosis of dyslexia and, at minimum, written expression" (Joint Ex. 21 at p. 1). By letter dated December 1, 2008, the district responded to the parents' letter, and corrected the parents' interpretation of the November 2008 CSE meeting—explaining that the school psychologist "merely summarize[d] for the benefit of other members of the CSE the sum and substance" of the September 2008 IEE evaluation report (Joint Ex. 22 at p. 1). The district further explained that the school psychologist's "summary was not intended as, and does not reflect, any agreement with the conclusions and recommendations" in the September 2008 IEE report (id.). On February 26, 2009, a CSE subcommittee reconvened, and at that time, the parents requested a reevaluation of the student, which the district completed in May 2009 (Joint Ex. 44 at pp. 1-2, 11; see Joint Exs. 26 at p. 1; 27).

By letter dated July 15, 2009, the parents explained their belief that since the district "used, in part" the September 2008 IEE evaluation report to "develop [the student's] current IEP," the district should reimburse the parents for the cost of the IEE (Joint Ex. 1 at p. 3). The parents noted that if the district declined reimbursement, then "without unnecessary delay please

⁷ The parents' e-mail to the district identified an attached document as "IEE neuro.doc" (Joint Ex. 12 at p. 1).

⁸ The CSE convened on September 19, 2008, for a program review (Joint Ex. 19 at pp. 1-2). The CSE modified the student's 2008-09 IEP to include, among other things, daily reading instruction (compare Joint Ex. 19 at pp. 1-3, with Joint Ex. 42 at pp. 1-3). In addition, the CSE modified the "Special Alerts" section of the IEP to note the following: "Stern Center report indicates dyslexia. Hearing Officer's decision dated 8/22/08 concluded that [the student] was not dyslexic" (compare Joint Ex. 19 at p. 2, with Joint Ex. 42 at p. 2).

commence an impartial hearing to resolve the matter" (*id.*). By letter dated July 27, 2009, the district denied the parents' request for reimbursement, enclosed a copy of the district's IEE policies, and noted that if the parents wished to pursue reimbursement then the district would schedule an impartial hearing or mediation (Joint Ex. 28 at pp. 1-5; *see* Joint Exs. 29 at pp. 3-6; 30).

By due process complaint notice dated August 17, 2009, the parents requested reimbursement for the September 2008 IEE asserting a right to such reimbursement because the district used the report to develop the student's IEP (Joint Ex. 1 at p. 2). The parties convened at a resolution session and a prehearing conference prior to proceeding to the impartial hearing on September 22, 2009 (Joint Exs. 2-8; 31; 33-34; 36; *see* Tr. p. 1).

An impartial hearing took place on September 22, 2009 (Tr. p. 1). At the impartial hearing, the parents testified that they requested and received the student's second Stern Center IEE in August 2007 based upon their disagreement with the district's May/ June 2007 evaluation (Tr. pp. 22-25; *see* Joint Exs. 37-38). In addition, the parents testified that their request for the third IEE at public expense—the September 2008 IEE—also arose from the parents' disagreement with the district's May/ June 2007 evaluation (Tr. pp. 13-15). The parents testified that at the time of their request for the September 2008 IEE, the district's May/ June 2007 evaluation had been the last evaluation of the student conducted by the district (Tr. pp. 26-27, 51).

In their closing brief, the parents alleged that they requested the September 2008 IEE due to a district witness's testimonial evidence presented at the prior impartial hearing regarding the student's 2007-08 school year, as well as the prior impartial hearing officer's decision in that matter (Parent Post-Hr'g Br. at pp. 1-3). The parents argued that the district witness's testimony at the prior impartial hearing should be interpreted as an "evaluation" of the student's disabilities, or alternatively, as the district's disagreement with the August 2007 Stern Center IEE evaluation report, and therefore, the September 2008 IEE was necessary "to determine whether or not [the student] had dyslexia" (*id.* at p. 3). Based upon what the parents characterized as the district's disagreement with the August 2007 Stern Center IEE, the parents concluded that the "nature of [the student's] specific learning disabilities were in question" and thus, the parents requested a "further evaluation in the form of a neuropsychological assessment to address the specificity of her disabilities so an appropriate program might be developed" (*id.*). Finally, the parents acknowledged that they sought the September 2008 IEE to confirm the diagnoses set forth in the IEEs administered by the Stern Center (*id.* at p. 4).

By decision dated November 10, 2009, the impartial hearing officer in the instant case concluded that the parents were not entitled to reimbursement for the student's September 2008 IEE (IHO Decision at pp. 8-14, 16-17). The impartial hearing officer noted that pursuant to State and federal regulations, a parent was "entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees" (*id.* at pp. 12-13). Thus, in this case, the impartial hearing officer found that the district properly declined to reimburse the parents for the September 2008 IEE because the parents had already requested and received the August 2007 Stern Center IEE at public expense based upon their disagreement with the district's most recently conducted evaluation of the student in May/ June 2007, and that the parents were not entitled to seek a second IEE based upon an alleged disagreement with the same May/ June 2007 district evaluation (*id.*). In

addition, the impartial hearing officer concluded that the district had no obligation to initiate an impartial hearing to demonstrate that its evaluation of the student was appropriate because no district evaluation existed upon which to trigger this duty (id. at pp. 13-14).

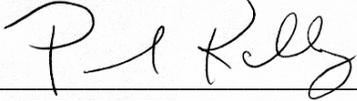
A thorough and independent review of the hearing record supports the impartial hearing officer's decision in this case. It is well settled that federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L., 363 F. Supp. 2d. at 234-35; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 09-121; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

Here, the impartial hearing officer accurately recounted the facts of the case, he set forth the proper legal standard to determine whether the parents were entitled to reimbursement for the September 2008 IEE, and he properly applied the law to the facts of the case in reaching his determination that the parents were not entitled to reimbursement (IHO Decision at pp. 1-22). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully weighed the evidence in support of his conclusions and properly supported his conclusions with citations to the hearing record (id.). In short, based upon my independent review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have considered the parties' remaining contentions and find that in light of my determinations, I need not reach them or they are without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
January 20, 2010



PAUL F. KELLY
STATE REVIEW OFFICER