



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-017

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]

Appearances:

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

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed the parent's due process complaint notice with prejudice.^{1,2} The appeal must be dismissed.

By due process complaint notice dated December 6, 2009, submitted by e-mail to

¹ The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 09-042; Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-011; Application of a Student with a Disability, Appeal No. 09-007; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046. Another decision regarding this student, Application of a Student with a Disability, Appeal No. 10-016, has also been issued today.

² Petitioner's due process complaint notice has been identified by the district's impartial hearing office as case number 125563.

respondent (the district), the parent requested an impartial hearing (Parent Ex. A at p. 4).³ In the due process complaint notice, the parent alleged that four individuals that the parent identified as being associated with a private school and five individuals that the parent identified as being associated with the district "knowingly significantly impedes parent and child so child cannot receive educational benefits and or services in a timely manner," among other allegations (id. at pp. 4-5). As proposed solutions, the parent requested that the district, a guardian ad litem, and the parent "determine actions" for the district and private school personnel so that the student could receive educational benefits and services, among other requests (id. at pp. 5-6). The due process complaint notice was amended twice (Parent Exs. B; C).

After reviewing the due process complaint notice and the amended due process complaint notices, the impartial hearing officer issued an interim order dated December 18, 2009, which declined to accept the amended complaints and ordered that "the parties shall personally appear at a pre-hearing conference" to discuss the case (emphasis in original) (IHO Interim Order at p. 5). The impartial hearing officer found that the parent's due process complaint notice and amended complaints did not provide "a description of the nature of the problem of the student...including facts relating to such problem" or "a proposed resolution of the problem" (id. at p. 2). The impartial hearing officer further found that "the proposed resolutions, which are dispersed throughout the [p]arent's filings" consist of allegations of general corruption and inefficiency by various district employees, as well as impartial hearing officers, including the impartial hearing officer in the current matter (id.). He noted that all tolled, the parent's due process complaint notice and amended complaints consist of 45 pages; many of which contain assertions that had been alleged in requests for pervious impartial hearings (id. at pp. 2-3).

Thereafter, a prehearing conference took place on January 15, 2010 (IHO Decision at p. 2; Tr. p. 1). Although the impartial hearing officer waited at least 1/2 an hour after the start time of the impartial hearing for the parent to arrive, the parent failed to attend the prehearing conference or send a representative (IHO Decision at pp. 3-4; Tr. pp. 1-2, 7). In a decision dated January 26, 2010, the impartial hearing officer set forth background information regarding the case and described the interim order rendered on December 18, 2009 (IHO Decision at pp. 3-4). The impartial hearing officer noted that an impartial hearing officer may conduct a prehearing conference and compel the attendance of the parties (id.; see 8 NYCRR 200.5[j][3][iv], [vii], [xi], [xii][f]; see also Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). The impartial hearing officer determined that the parent, who is the moving party in the instant matter, failed to request an extension or appear at the scheduled prehearing conference as ordered in the interim order (IHO Decision at p. 4). Therefore, he found that the parent failed to prosecute the case and comply with his reasonable directive by failing to attend the prehearing conference, and he dismissed the due process complaint notice with prejudice (id. at p. 5).

³ There are 3 exhibits in the hearing record identified as "A," "B," and "C." The exhibit list attached to the impartial hearing officer's decision identifies these as Parent exhibits (IHO Decision at p. 6). Therefore, they will be referred to as Parent exhibits in this decision. Parent exhibit A is the parent's due process complaint notice and Parent exhibits B and C are amended due process complaint notices (see id.). Additionally there are two other unmarked exhibits in the hearing record that are not identified in the impartial hearing officer's decision consisting of e-mails sent between the impartial hearing officer and the district's counsel.

This appeal by the parent ensued. The parent asserts, in a petition consisting of two short paragraphs, that the impartial hearing officer did not render a decision, that the appointed impartial hearing officer did not write the decision, did not "true sign" the decision, and did not provide a "true copy" to the parent. The parent also alleges that he does not have a copy of the decision and that there is "no true copy of the written true-signed decision in the complete and accurate [district] books and records" (Pet. ¶ 1). The parent requests that the "Decision" be vacated and annulled (Pet. ¶ 2).

In its answer, the district asserts that the evidence shows that the impartial hearing officer's decision was mailed to the parent on January 26, 2010, that the presumption of mailing and receipt applies, and that the parent has failed to effectively rebut the presumption of mailing and receipt. Accordingly, the district argues, the petition should be dismissed and the impartial hearing officer's order affirmed. The district notes that the parent's original due process complaint notice did not include the parent's mailing address, and asserts that the district obtained the parent's address from an October 21, 2009 affirmation submitted by the parent with one of the amended due process complaint notices, and that the impartial hearing decision in the present matter was sent to that address and was not returned as undeliverable (see Parent Ex. B at pp. 19-20).

As evidence in support of its position, the district attaches four documents to its answer. The first attachment is an affirmation dated February 26, 2010, executed by the deputy chief administrator of the district's impartial hearing office that describes the standard procedures used by the office for transmittal of decisions to parents (Dist. Aff. ¶¶ 3-14). The affirmation also states that those procedures were used in the instant case and that a review of the office's database indicates that the impartial hearing officer's decision, dated January 26, 2010, was mailed to the parent on that same day (id. at ¶ 8). There are also three other documents attached as exhibits to the answer. The first is a copy of an e-mail from the parent to the district with the attached original due process complaint notice dated December 6, 2009, that commenced this matter (Answer Ex. 1). The second is a copy of a cover letter, titled "Transmittal of Decision to Parents," indicating that the enclosed impartial hearing officer's decision was sent to the parent on January 26, 2010 (Answer Ex. 2). The third is a copy of an October 21, 2009 affirmation of the parent attached to one of the parent's amended due process complaint notices that includes a sworn statement of the parent's address (Answer Ex. 4).

The parent did not submit a reply to the district's answer and therefore, has not objected to the district's additional evidence and affidavit attached to its answer (8 NYCRR 279.6).

Turning to the parent's appeal, I note that it is difficult to discern the exact content of the parent's assertions. It appears that the parent is arguing that he never received a copy of the impartial hearing officer's decision in this matter; however, paradoxically, he also claims that no decision was rendered by an impartial hearing officer. As it is clear that both an interim order and a final decision were rendered in this matter (IHO Interim Order; IHO Decision), I will address the parent's assertion that he did not receive a copy of the decision.^{4,5}

⁴ The petition does not reference the impartial hearing officer's interim order and it is not clear whether the parent is claiming he did not receive a copy of that order.

State regulations provide that "the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]). "As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

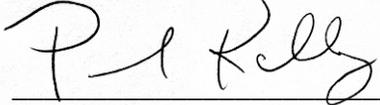
The parent's claim that he did not receive a copy of the impartial hearing officer's decision in this matter is insufficient by itself to rebut the presumption of mailing and receipt. The parent does not allege in his petition or offer evidence that the district's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (see Nassau Ins. Co., 46 N.Y.2d at 829-30). Moreover, the affirmation attached to the district's answer and executed by the deputy chief administrator of the district's impartial hearing office describes the standard procedures used by the office for the transmittal of decisions to parents (Dist. Aff. ¶¶ 3-14). The affirmation states that the affiant has personal knowledge of the procedures and that the office's decision managers are responsible for formatting, processing, and distributing decisions issued by impartial hearing officers (id. at ¶¶ 1, 4). It further states that when an impartial hearing officer's decision is received by the office a transmittal letter is created and a copy of the letter, the decision, and other information is placed in an envelope with a window in it that shows the addressee's address (id. at ¶¶ 6-7, 9). The envelope is then placed in an outgoing mail bin, collected by the district's mail room personnel, stamped and mailed at the end of each day (id. at ¶¶ 10-12). The affirmation states that a review of the office's database shows that this procedure was followed in the present matter and that no mail was returned as undeliverable by the post office (id. at ¶¶ 8, 14). This evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829). The parent does not claim that the address the district obtained from the October 21, 2009 affirmation of the parent is not his correct address. In this case, the parent's claim that he did not receive the decision is insufficient to rebut the presumption (see Nassau Ins. Co., 46 N.Y.2d at 829-30; Application of a Child with a Disability, Appeal No. 06-035).

⁵ The parent does not appeal the impartial hearing officer's determination that he failed to prosecute his claims and failed to comply with the impartial hearing officer's directive to appear in person at the prehearing conference. Therefore, those findings are final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). The parent does not offer any explanation why he did not appear at the prehearing conference as directed. Moreover, while not dispositive in this matter, I note that prior decisions have been issued involving situations in which the parent requested impartial hearings regarding this student and failed to appear for the proceedings (see, e.g., Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-007).

Inasmuch as the parent has not challenged the substance of the impartial hearing officer's decision, this inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 24, 2010



PAUL F. KELLY
STATE REVIEW OFFICER