



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-013

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] School District

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for respondents, Michael K. Lambert, Esq., of counsel.

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2010-11 school year were appropriate. The appeal must be dismissed.

At the time of the impartial hearing in November 2010, the student was attending a special class located in a Board of Cooperative Educational Services (BOCES). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

Background and Procedural History

The merits of the parent's appeal need not be addressed because, as discussed more fully below, the parent has not properly initiated this appeal. Briefly, the CSE convened on June 15, 2010 to conduct an annual review and to develop the student's individualized education program (IEP), which contained the district's recommendation that the student attend a 6:1+1 special class for the 2010-11 school year (Dist. Ex. 6 at p.1).

In a due process complaint notice dated July 16, 2010, the parent alleged that the June 2010 CSE failed to offer the student extended school year (ESY) services for the 2010-11 school

year and an appropriate educational placement on the student's resulting IEP and, therefore, did not provide her son with a free appropriate public education (FAPE) in the least restrictive environment (LRE) (IHO Ex. I at p. 3). For relief, the parent sought placement in an integrated co-teaching class with a behavioral intervention plan (BIP) (*id.*).

Impartial Hearing Decision

An impartial hearing was convened on September 2, 2010 and concluded on November 18, 2010 after three days of testimony (Tr. pp 1, 249). During the impartial hearing, five witnesses were called and 54 exhibits were entered into evidence (Tr. pp. 1-319; Dist. Exs. 1-47; Parent Exs. A-C; IHO Exs. I-IV). In a decision dated December 23, 2010, the impartial hearing officer determined, among other things, that the parent's claim for ESY services had been rendered moot, that the student had not shown substantial regression, and that the district had offered an appropriate program for the 2010-11 school year (IHO Decision at pp. 9-13).¹

Appeal for State-Level Review

The parent appeals, challenging the impartial hearing officer's determination. The parent asserts that the impartial hearing officer erred by failing to address the parent's argument regarding LRE and in finding that the district's recommended placement for the 2010-11 school year was appropriate. Additionally, the parent asserts that the impartial hearing officer's informal conduct with the district's representative improperly influenced her decision. For relief, the parent requests that the district be directed to place the student in a general education setting with the support of co-teaching classes rather than the BOCES placement recommended by the June 2010 CSE.

In a letter, dated February 3, 2011, responding to the petition, the district asserts that the petition for review should be dismissed because the parent failed to serve the petition for review upon the district and that the time for timely serving the petition for review has elapsed (Dist. Ltr.). The parent did not respond to the district's letter.

Discussion and Conclusion

Service of the Petition

At the outset, two procedural matters must be addressed regarding the initiation of this appeal. The impartial hearing officer's decision in this case is dated December 23, 2010 (IHO Decision at p. 13). According to the parent's affidavit of service, the petition for review was served by mail on January 28, 2011 (Parent Aff. of Service). State regulations provide that the failure to comply with the procedural requirements for initiating an appeal may result in the dismissal of a petition for review by a State Review Officer (8 NYCRR 279.8, 279.13; *see, e.g., Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student with a Disability,*

¹ The impartial hearing officer directed the CSE to consider returning the student to classes offered at the district for the 2011-12 school year (IHO decision at p. 13). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). The district has not cross-appealed the impartial hearing officer's determination and, consequently, the impartial hearing officer's directive has become binding upon the district.

Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition for review upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition for review upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition for review upon the parent where the district served the parent by facsimile]. In this case, the parent's affidavit of service shows that, rather than personally serving the petition upon the district in accordance with State regulations, she attempted to serve the petition by mail (Parent Aff. of Service). Additionally, the parent's affidavit of service does not disclose to whom the parent mailed the petition for review. The district asserts in its letter that it did not receive the petition. In view of the forgoing, I find the parent did not properly serve the petition for review in the manner required by State regulations, which require personal service (8 NYCRR 279.2[b]).

Timeliness of the Petition

Turning next to the district's assertion that the petition for review cannot, now, be timely served, State regulations provide that a petition for review must comply with the timelines specified in section 279.2 of the regulations (8 NYCRR 279.13). State regulations also provide that each petition must contain a notice that, among other things, informs a respondent that an answer must be served within 10 days after the service of the petition for review and that a copy of such answer must be filed with the Office of State Review within two days after service of the answer (8 NYCRR 279.3). The petition for review shall be personally served upon the respondent(s) within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). Here, the impartial hearing officer's decision is dated December 23, 2010 and, excluding the four days subsequent thereto in calculating the 35-day time period to account for mailing, the parent was required to personally serve the petition for review upon the district no later than February 1, 2011. I also note that the parent did not set forth any reasons in the petition for review to explain why she could not personally serve the petition for review within the 35-day timeline as set forth in State regulation (8 NYCRR 279.13; Application of a Student with a Disability, Appeal No. 09-099; Application of a Child with a Disability, Appeal No. 05-032; Application of a Child with a Disability, Appeal No. 04-067), and, furthermore, the parent did not respond to the district's letter alleging that the petition was untimely served. Consequently, I am constrained to dismiss the parent's petition for review as untimely (see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application

of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct. Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Although I do not reach the merits of the parent's appeal, upon review of the entire hearing record, I note that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]).

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 DISMISSED.

**Dated: Albany, New York
March , 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**