



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-023

Application of the [REDACTED]
[REDACTED] for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability

Appearances:

Minerva & D'Agostino, PC, attorneys for petitioner, Roslyn Roth, Esq., of counsel

Law Office of Neal H. Rosenberg, attorneys for respondent, Lakshmi Singh Mergeche, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondent (the parent) for a portion of the cost of the student's tuition at the New Haven Residential Treatment Center (New Haven) for the 2012-13 school year. The appeal must be dismissed.

II. Facts and Procedural History

As discussed more fully below, the merits of the district's appeal will not be addressed because the district has not properly initiated this appeal. Briefly, however, the hearing record reveals that the student has a history of severe social/emotional difficulties, including diagnoses with a major depressive disorder, a posttraumatic stress disorder, an attention deficit hyperactivity disorder, a borderline personality disorder, a bipolar disorder, an autism spectrum disorder, an oppositional defiant disorder, and a generalized anxiety disorder (Parent Exs. C; D; P; Dist. Exs. 5; 17; 33; 34; 62). The student was enrolled in the district in August 2012 and referred to the district's Committee on Special Education (CSE) (Parent Ex. A at pp. 2-3; Dist.

Exs. 2; 34). The student was placed in an out-of-State wilderness program by her family in August 2012 and evaluated privately between August and September 2012 (Parent Exs. A at pp. 2-3; C). Although a CSE meeting was scheduled for October 2012, it was cancelled by the district for the parent's nonattendance and a lack of sufficient evaluative information to develop a program for the student (Parent Ex. A at pp. 3-4; Dist. Exs. 4; 6; 7; 8; 50 at p. 7).¹ The student was privately placed at New Haven, an out-of-State nonpublic residential school, on November 7, 2012 (Parent Ex. A at p. 4; Dist. Ex. 8).² The CSE meeting was rescheduled for December 2012, which resulted in a determination that the student was eligible for special education and related services as a student with an emotional disability, and a recommendation for a residential placement; however, no individualized education program (IEP) was developed at the time (Parent Ex. A at p. 5; Dist. Exs. 12; 20; 21; 22). This district sent applications to a variety of residential placements over the next month, one of which, Foundations Behavioral Health (Foundations)—a State-approved out-of-State nonpublic school—accepted the student by letter dated January 24, 2013 (Parent Ex. A at pp. 1-2, 5-6; Dist. Ex. 30; see Parent Ex. F). The CSE reconvened on February 27, 2013, and recommended placement in a 8:1+1 special class at Foundations and counseling services, all on a 12-month school year basis, with implementation to begin March 11, 2013 (Dist. Ex. 50). The parent initially rejected the recommendation for Foundations by e-mails to the district dated March 19, 2013, and April 18, 2013 (Dist. Exs. 52; 53). The student was discharged from New Haven on April 18, 2013 (Parent Exs. J at p. 1; P at p. 14; Dist. Ex. 62) and began attending Foundations sometime between April 24, 2013, and May 30, 2013, where she continued to attend for the 2013-14 school year pursuant to an IEP developed at a CSE meeting held May 21, 2013 (Parent Ex. A at pp. 6-7; Dist. Exs. 39; 40; 41; 50; 63; 64).

By due process complaint notice dated February 28, 2014, the parent requested an impartial hearing (Parent Ex. A). The parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the period the student attended New Haven, from November 7, 2012, through April 24, 2013 (id. at p. 7). The parent contended that the district's delay in recommending a program for the student from the time of her referral constituted a denial of a FAPE (id. at pp. 7-8). Although the February 2013 IEP indicated that a functional behavioral assessment (FBA) should be conducted and a behavioral intervention plan (BIP) developed, the parents asserted that none were (id. at p. 8). The parent also challenged the annual goals included in the February 2013 IEP as generic, vague, immeasurable, and not appropriate to address the student's needs (id.). For relief, the parent requested reimbursement for the costs of the student's tuition at New Haven and affiliated expenses (id. at p. 9).

Although neither the impartial hearing transcripts nor IHO's decision was included in the hearing record received by the Office of State Review, the district's petition indicates that an impartial hearing was convened on June 30, 2014, and concluded on November 4, 2014, after five non-consecutive hearing dates. In a decision dated January 11, 2015, the IHO apparently

¹ The student's sister was in attendance, and the hearing record indicates that meeting notices were sent to the student's sister as well as her father (Dist. Exs. 6; 7).

² The Commissioner of Education has not approved New Haven as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

determined that the district did not offer the student a FAPE for a portion of the 2012-13 school year, that New Haven was an appropriate placement for the student, and that equitable considerations supported the parents' request for reimbursement for the cost of the student's tuition at New Haven for the period from December 10, 2012, through February 27, 2013.

III. Appeal for State-Level Review

According to the petition, the district appeals from the IHO's January 11, 2015 decision, asserting that the IHO erred in finding that the district did not offer the student a FAPE for the 2012-13 school year, that New Haven was an appropriate placement for the student, and that equitable considerations did not warrant a reduction of the requested relief. The district argues that the IHO erred in finding that it did not develop an IEP in a timely manner after the student's referral. The district asserts that the parent did not present the student for evaluations scheduled by the district prior to the October 2012 CSE meeting, necessitating its cancellation, and that the student's family thereafter refused to produce the student for evaluation and removed the student from the State to plan her in New Haven. Furthermore, the district asserts that subsequent to the December 2012 CSE meeting, the parent did not provide consent for the initial provision of special education services until January 22, 2012. After the student was accepted to Foundations, the district alleges that the parent refused to accept the program until May 30, 2013. Accordingly, the district argues that all delays were attributable to the parent's lack of cooperation with the district's attempts to evaluate the student and develop an appropriate program. The district also asserts that New Haven was not an appropriate placement for the student, because it did not provide academic goals for the student, did not provide the student with specialized instruction, and did not provide her with sufficient social/emotional support. With regard to equitable considerations, the district asserts that the parent failed to provide required notice of his intention to unilaterally place the student at public expense and frustrated the district's attempts to develop an IEP for the student.

IV. Applicable Standards and Discussion

As a procedural matter, I must address the district's failure to timely file the hearing record together with its petition. Federal and state regulations require every school district to maintain a verbatim record of the proceedings before an IHO (see 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]). A board of education that appeals from the decision rendered in an impartial hearing is required to file the complete record before the IHO together with its petition for review, as well as a signed certification "that the record submitted is a true and complete copy of the hearing record before the impartial hearing officer" (8 NYCRR 279.9[a], [c]). "A State Review Officer [SRO] may, at his or her discretion, dismiss an appeal by the board of education when a completed and certified hearing record is not filed with the petition for review" (8 NYCRR 279.9[c]). In the absence of the complete record of the proceeding, an SRO cannot properly proceed with a review of the findings of fact and decisions of the IHO; and federal regulations require an SRO to examine the entire hearing record prior to rendering a decision (see 34 CFR 300.514[b][2][i]).

In this case, the district's assistant superintendent for special education filed an incomplete hearing record with the Office of State Review on February 17, 2015, containing

only the exhibits admitted into evidence at the impartial hearing and an index to the exhibits. The verified petition, dated February 14, 2015, was served upon respondent on February 17, 2015, and was thereafter filed, along with the notice with petition and proof of service, with the Office of State Review on February 18, 2015. Pursuant to New York State regulations, at the time it filed the petition the district was also required to file a complete record of the impartial hearing, including the following: the IHO's decision; a bound copy of the written transcript before the IHO including a word index for the written transcript; an electronic copy of the transcript; a copy of the original exhibits accepted into evidence at the hearing and an index to the exhibits; and a signed certification that the record submitted was the complete hearing record before the IHO (8 NYCRR 279.9 [a], [c]; see 8 NYCRR 200.5[j][5][vi]). By letter dated February 19, 2015, sent both by facsimile and regular mail, an employee of the Office of State Review informed counsel for the district that the hearing record as submitted was incomplete and directed the district to file the missing portions of the hearing record, or request an extension of time in which to do so, by Tuesday, February 24, 2015. As of the date of this decision, no response has been received from the district. Because an SRO is required to examine the entire hearing record prior to rendering a decision, and as I am charged with "conduct[ing] an impartial review of the findings and decision appealed," the district's failure to file the complete hearing record, including the hearing transcripts and the IHO's decision, has thwarted the process of conducting an independent review and issuing a timely and thorough decision in this matter (see 34 CFR 300.514[b][2][i], 300.515[b]; 8 NYCRR 200.5[k][2]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.9[c]; 279.13; see, e.g., Application of the Dep't of Educ., Appeal No. 13-170 [dismissing a district's appeal for failing to timely file the hearing record]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Dep't of Educ., Appeal No. 07-083 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failing to personally serve the petition upon the parents and failing to timely file the complete hearing record]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file the hearing record]). The district is aware, or should be aware, of the procedural requirements associated with practice on review of hearings for students with disabilities (see 8 NYCRR Part 279). Additionally, prior SRO decisions have noted or admonished counsel for noncompliance with the regulations governing practice before the Office of State Review (see Application of a Student with a Disability, Appeal No. 11-103; Application of the Bd. of Educ., Appeal No. 07-055; see also Application of a Child with a Disability, Appeal No. 01-097; Application of a Child Suspected of Having a Disability, Appeal No. 93-07). While in some circumstances, a district may assert good cause for requesting an extension of the decision timeline in order permit the district additional time to file a hearing record, or a portion thereof, in this instance, the district has neither requested nor received an extension of the decision timeline in order to extend the time to file the hearing record, nor has petitioner provided any explanation as to why the hearing record was not timely filed. Under the circumstances herein, no excuse has been proffered for the district's failure to timely file the complete hearing record on appeal together with its petition and the petition is

dismissed without a determination on the merits of the district's appeal challenging the IHO's decision (8 NYCRR 279.9[c]; Application of the Dep't of Educ., Appeal No. 13-170; Application of the Dep't of Educ., Appeal No. 07-083; Application of the Dep't of Educ., Appeal No. 05-060).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 27, 2015**

**JUSTYN P. BATES
STATE REVIEW OFFICER**