The University of the State of New York

The State Education Department
State Review Officer

No. 07-011

Application of a CHILD SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Plainview-Old Bethpage Central School District

Appearances:
Guercio & Guercio, attorney for respondent, Barbara P. Aloe, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which dismissed petitioner's due process complaint notice on the ground that petitioner lacked standing to seek an impartial hearing. The appeal must be dismissed.

On October 5, 2006,[1] petitioner, the noncustodial parent of the student who is the subject of this appeal, submitted a due process complaint notice together with several attachments. On October 16, 2006, respondent filed a response and a motion to dismiss the due process complaint notice, alleging, among other things, that the complaint did not meet the statutory content requirements relating to the sufficiency of the complaint under the Individuals with Disabilities Education Act (IDEA) (see 20 U.S.C. § 1415[b][7][A]; 34 C.F.R. § 300.508[b];[2] 8 NYCRR 200.5 [i][1]); that petitioner lacked standing to maintain the proceeding because he was the noncustodial parent whose rights had been curtailed; and that the proceeding was barred by res judicata (Resp't

[1] According to the impartial hearing officer, petitioner submitted the due process complaint notice without signature; however, it was executed and resubmitted on October 11, 2006 (IHO Decision at p. 1).

[2] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations cited became effective October 13, 2006, and accordingly they are applicable to this proceeding.

Mot. to Dismiss).[3] Petitioner did not reply to respondent's motion to dismiss (see IHO Decision at p. 3).[4]

A hearing was not held in this proceeding. By decision dated October 25, 2006, the impartial hearing officer determined that petitioner is the noncustodial parent of the student (IHO Decision at p. 1). For purposes of the motion to dismiss, he accepted as true the documentary evidence submitted with petitioner's due process complaint notice consisting of excerpts from the parents' stipulation of settlement, which was incorporated, but not merged, into a judgment of divorce issued by the New York State Supreme Court in January 2005 (collectively, divorce decree) (id. at p. 1). The impartial hearing officer determined from the divorce decree that petitioner was not considered the parent with decision making authority regarding the student's education, and that he therefore did not have standing to request an impartial hearing (id. at p. 2). The impartial hearing officer further determined that petitioner's complaint failed to state a cause of action and that it was bared by res judicata because petitioner's previously had filed a due process complaint notice which was dismissed by another impartial hearing officer (id. at p. 3).

On appeal petitioner asserts, among other things, that the impartial hearing officer erred by relying upon the Second Circuit's decision in Taylor v. Vermont Dep't of Educ. (313 F.3d 768 [2d Cir. 2002]). Petitioner contends that the divorce decree does not award sole custody to the student's mother, and that it does not give sole educational decision making power to a particular parent. Petitioner also alleges that there are inaccuracies in the content of the student's educational records.[5] Petitioner further asserts that the Commissioner of Education's regulations permit two individuals to act as the parent, and that the divorce decree permits the noncustodial parent to initiate a due process complaint. Petitioner also argues that the impartial hearing officer's decision fails to render a determination of the issues in the present case.

Respondent denies all of petitioner's allegations and contends that many of the allegations in the petition are incoherent. Respondent also argues that the appeal is untimely, petitioner lacks standing, and the due process complaint notice before the impartial hearing officer fails to state a claim inasmuch as it is incoherent and lacks specificity. Among other things, respondent also alleges that petitioner's claim is barred by res judicata.

Turning first to respondent's defense that petitioner's appeal is untimely, a petition for review by a State Review Officer must comply with the timelines specified in the Commissioner's regulations (see 8 NYCRR 279.2; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at pp. *5-6 [N.D.N.Y. Dec. 19, 2006]). The petition must be served upon the respondent within 35 days from the date of the impartial hearing officer's decision sought to be reviewed (8 NYCRR

[3] The October 2006 pleadings and motion papers before the impartial hearing officer are not separately labeled by respondent as exhibits in the record on appeal. Accordingly, I refer to the October 2006 pleadings and motion papers in the same fashion in which they were presented to the impartial hearing officer.

[4] The impartial hearing officer waited until October 23, 2006 before closing the record in the event petitioner submitted a response to the motion (see 8 NYCRR 200.5[j][5][v]).

[5] To the extent petitioner makes reference to the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g) in his petition, I refer him to the procedures set forth under that statute's implementing regulations (34 C.F.R. §§ 99.20-99.22).

279.2[b]). If the impartial hearing officer's decision has been served by mail upon petitioners, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The good cause for the failure to timely seek review must be set forth in the petition (id.).

I find that petitioner's appeal must be dismissed as untimely. Here, the impartial hearing officer's decision is dated October 25, 2006 (IHO Decision at p. 4).[6] The last day to serve the petition was December 4, 2006; however, the affidavit of service indicates that petitioner's notice of intention and petition was not served upon respondent until January 30, 2006. In this case, petitioner offers no explanation for his extended delay in serving his petition, nor did he file a reply responding to the defense that the petition was untimely. Accordingly, I have no basis upon which to excuse petitioner's delay (see 8 NYCRR 279.13; Application of a Child with a Disability, Appeal No. 05-098; [two day delay in serving petition untimely]; Application of a Child with a Disability, Appeal No. 03-109; Application of the Bd. of Educ., Appeal No. 00-050 [ninety day delay in serving petition untimely]; Application of a Child with a Disability, Appeal No. 99-39 [eleven month delay in serving petition untimely]). Therefore, in the absence of good cause stated, I will dismiss the appeal as untimely (Application of a Child with a Disability, Appeal No. 04-067).

The record indicates that the issue of petitioner's standing, as the noncustodial parent, to challenge the CSE's recommendations for the student was previously raised and decided by another impartial hearing officer on May 15, 2006, and this determination was made on the basis of the divorce decree (Resp't Mot. to Dismiss at Ex. D). Petitioner did not appeal the May 2006 decision by the prior impartial hearing officer, and thus it became final and binding upon him (see 20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). If I were to reach the issue of res judicata, more aptly described in this case as collateral estoppel or issue preclusion, I would concur with the impartial hearing officer's conclusion that petitioner is precluded from raising the same issues in a second proceeding after it was determined in a prior proceeding that he was ineligible to raise them (see Boguslavsky v. Kaplan, 159 F.3d 715, 719-20 [2d Cir. 1998]; Grenon, 2006 WL 3751450, at p. *6; Application of the Bd. of Educ., Appeal No. 06-133). Although petitioner's claim would be precluded by collateral estoppel, I will address petitioner's contention that he has standing.

Upon review of petitioner's claim that the impartial hearing officer erred by determining that petitioner lacked standing to file a due process hearing complaint in this case, I also concur with the impartial hearing officer's conclusion. Among other rights, the IDEA confers upon parents the right to examine their children's educational records; to participate in meetings regarding the student's identification, evaluation and placement; to request an impartial hearing; and to obtain independent educational evaluations (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. §§ 300.501, 300.502[a]; 300.511[a]). The IDEA includes biological or adoptive parents among the definition of the term "parent" (see 20 U.S.C. § 1401[23]; 34 C.F.R. § 300.30[a][1]; see also 8 NYCRR 200.1[ii][1]). The federal regulations further clarify that "[i]f a judicial decree or order

[6] Petitioner was advised of his right to appeal in a cover letter but not in the impartial hearing officer's decision. I remind the impartial hearing officer to include a statement in his decision "advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State Review Officer" (8 NYCRR 200.5[j][5][v]).

identifies a specific person … to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the 'parent' for purposes of this section." (34 C.F.R. § 300.30[b][2]; see 8 NYCRR 200.1[ii][4]).

In this case, the divorce decree includes a provision identifying the student's mother as the specific person that makes decisions on behalf of the student with respect to education (Pet. Ex. E at p. 14). While petitioner correctly points out that the divorce decree also provides that the student's mother agrees to discuss educational matters with him (Pet. Ex. E at p. 14), this provision does not confer the right to initiate due process complaints challenging determinations made by respondent's committee on special education (CSE) (see Taylor, 313 F.3d at 782). Under the circumstances presented here, respondent is not obligated to choose among the parents' conflicting ideas with respect to the student's education (see Taylor, 313 F.3d at 779-80). The student's mother indicated in a letter dated October 5, 2006 that she is not in agreement with petitioner's due process complaint notice, and under the terms of the divorce decree petitioner does not have standing to challenge the recommendations of respondent's CSE.

In light of the foregoing, it is not necessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, NY**
March 6, 2107

PAUL F. KELLY
STATE REVIEW OFFICER