The University of the State of New York

The State Education Department
State Review Officer

No. 08-002

Application of a STUDENT 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 New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Vida Alvy, Esq., of counsel

DECISION

Petitioner appeals from the decision of a hearing officer rendered pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[*l*] [1998]), which denied her request that her son's homemade lunches be heated at respondent's school during the school day. The appeal must be dismissed.

At the time of the hearing, the student was attending a sixth grade regular education program at one of respondent's schools (Tr. pp. 70, 77; District Ex. 1 at p. 1).[1] The student is not classified as a student having a disability under the Individuals with Disabilities Education Act (IDEA) and does not have an individualized education program (IEP) (Tr. pp. 70, 561; IHO Decision at p. 17; see Tr. pp. 167, 547). The student was diagnosed with Type I Diabetes on March 26, 2007 (Tr. pp. 70, 74-75, 87, 362, 363, 548, 550, 556; Dist. Ex. 1).

By letter dated May 4, 2007, petitioner requested a hearing alleging that she had submitted section 504 documentation to respondent regarding the need for her son's lunches to be heated during the school day, but that respondent had not provided her son with the accommodation she requested (District Ex. 1). A hearing commenced on May 21, 2007 and concluded on July 13, 2007, after five days of testimony (IHO Decision). By decision dated November 16, 2007,[2] the

[1] I note that the record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious.

[2] I note that the hearing record closed on August 30, 2007, when the hearing officer received closing memoranda of law (IHO Decision at p. 2), yet a final decision was not rendered until November 16, 2007 (id. at p. 22). There is no explanation in the hearing record for the delay in rendering the decision. I caution the hearing officer to issue hearing decisions in a more timely manner.

hearing officer found that the hearing record did not support a finding that the accommodation sought by petitioner was "necessary," or that the student was harmed by a lack of the requested accommodation (id. at p. 22). The hearing officer further found that the student was not rendered unable to perform any "essential functions" by not receiving the requested accommodation (id.). Therefore, he denied petitioner's request pursuant to section 504 (id.).

Petitioner appeals, alleging that the hearing officer's decision should be reversed because, among other things, it was rendered in an untimely manner and was based on faulty findings of fact and biased reasoning. Petitioner asks that a State Review Officer "set aside" the hearing officer's decision and order that the student's lunches be heated by respondent (Pet. ¶ 38).[3] Furthermore, petitioner requests that the delay in service of the petition for review be excused for good cause.

Respondent answers arguing as affirmative defenses that the petition should be dismissed because the petition was untimely served and a State Review Officer lacks subject matter jurisdiction over section 504 claims. Respondent further asserts that the additional documents attached to the petition should not be accepted on appeal.

Petitioner filed an "Affidavit in Reply" to respondent's answer. Pursuant to the State regulations, a reply is limited to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the majority of petitioner's reply does not respond either to procedural defenses interposed by respondent or address additional documentary evidence served with the answer, therefore, I have not considered those portions of the reply which do not comply with 279.6 (Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37).

I note as a preliminary procedural matter that petitioner requested oral argument before a State Review Officer. Such argument is authorized by the rules governing appeals to a State Review Officer only in the event that a State Review Officer determines that oral argument is necessary (8 NYCRR 279.10). I find that oral argument is not necessary in this matter, therefore this request is denied (see Application of a Child with a Disability, Appeal No. 03-067).

As an affirmative defense, respondent asserts that a State Review Officer lacks subject matter jurisdiction to review petitioner's appeal. I agree. The hearing record reflects that the accommodation requested by petitioner for the student was considered pursuant to section 504 and that the hearing officer based his decision upon section 504 (Tr. pp. 167, 547; IHO Decision at pp. 12, 17). The parties do not dispute that the student has a disability as defined under section 504 and has a section 504 plan (see Parent Ex. P-VV); however, they disagree as to whether the student

[3] Subsequent to filing a petition for review, petitioner filed a "Motion to Add Parties" with this office. State regulations direct that no pleadings 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). Therefore, petitioner's motion is improper under 279.6 and I have not considered it.

requires the accommodation petitioner seeks pursuant to section 504 (IHO Decision at p. 4; see Parent Exs. P-GG; P-VV).[4]

New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, I have no jurisdiction to review the hearing officer's decision and the petition must be dismissed.

Lastly, I note that in his decision, the hearing officer advised both parties that the State regulations contain no provision for review by a State Review Officer of section 504 claims, and that any appeal of his decision would need to be filed with a federal district court (IHO Decision at pp. 16, 22). Petitioner's remedy, therefore, is to seek review of the hearing officer's decision by the courts (Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of the Bd. of Educ., Appeal No. 02-104; Application of a Child Suspected of a Disability, Appeal No. 99-069; Application of a Child with a Disability, Appeal No. 99-10; Application of a Child with a Disability, Appeal No. 97-80; Application of a Child with a Disability, Appeal No. 96-37).

As I lack the jurisdiction to review claims brought under section 504, the petition must be dismissed.[5]

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 21, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

4 While petitioner asserts on appeal that her son is also protected by the IDEA, among other statutes, the record reveals that her son has not been classified as a student with a disability under the IDEA, does not currently have an IEP and has not been referred for evaluation under the IDEA by either petitioner or respondent to respondent's Committee on Special Education (CSE) (Tr. pp. 70, 561; IHO Decision at p. 17). Petitioner did not allege in her hearing request or in her petition that her son should be classified as a student with a disability under the IDEA, nor was the issue raised at the hearing. I find that this issue is beyond the scope of my review because it was not raised below (Application of the Bd. of Educ., Appeal No 07-058; Application of the Bd. of Educ., Appeal No. 06-108; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024). Further, petitioner testified that her son does not "need an IEP at this moment" (Tr. p. 561).

5 Having decided this matter on subject matter jurisdiction, I need not address respondent's affirmative defense pertaining to untimeliness of the service of the petition for review, nor do I address respondent's objection to the additional evidence submitted on appeal by petitioner.