



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-075

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which awarded respondent's (the parent's) request for payment of the student's tuition costs at the Family Foundation School (Family Foundation) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Family Foundation (Tr. p. 118). Family Foundation is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (Parent Ex. B; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

In the parent's October 21, 2008 due process complaint notice, the parent alleged that the CSE failed to recommend a placement for the student for the 2008-09 school year (Parent Ex. B).¹ As a remedy, the parent sought funding for her son's tuition at Family Foundation for the 2008-09 school year, as well as reasonable costs of transportation and related services (*id.*). The impartial

¹ I note that the due process complaint notice is dated September 19, 2008, and that October 21, 2008 is handwritten next to the September date with the words "second attempt" (Parent Ex. B). The attorney for the parent indicated at the impartial hearing that he filed the due process complaint notice in September 2008, that it was lost by the district's impartial hearing office, and that he refiled it on October 21, 2008 (Tr. p. 4).

hearing convened on December 18, 2008 and concluded on January 28, 2009, after three days (Tr. pp. 1, 12, 103).

By decision dated June 1, 2009, the impartial hearing officer, after noting the district's concession that it had not offered the student a free appropriate public education (FAPE) for the 2008-09 school year, concluded that Family Foundation was an appropriate placement for the student and that the equities favored the parent (IHO Decision at pp. 7-9). The impartial hearing officer awarded the parent tuition payment (id. at p. 9). This appeal by the district ensued.

At the outset, a procedural matter must be addressed. As a general rule, an appeal to a State Review Officer is initiated by personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-082; Application of the Dep't of Educ., Appeal No. 08-056).² Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from a State Review Officer for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).³ The failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition for review by a State Review Officer (8 NYCRR 279.8[a], 279.13).

In this case, personal service upon the parent did not occur, nor did service occur pursuant to any of the above enumerated exceptions to the personal service requirement. Here, the impartial hearing officer issued his amended decision on June 11, 2009. On July 6, 2009, the district personally served the petition for review on an employee of the law firm that had represented the parent in the impartial hearing below, as indicated in the district's July 8, 2009 affidavit of service (Pet'r Aff. of Service). The district did not personally serve the parent and the record on appeal does not reflect that the attorney who represented the parent in the impartial hearing below

² Part 279 of the State regulations governs the practice on review of impartial hearings for students with disabilities. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279. Pursuant to 8 NYCRR 279.2(c), a petition must be personally served upon a parent when a district initiates an appeal.

³ Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

continues to represent the parent, or that the district attempted alternative service as provided for by State regulation (see 8 NYCRR 275.8[a]). The district indicates in its July 8, 2009 affidavit of service that the parent's attorney was "apprised" of the filing and "did not object to receiving service on behalf of their client." The district does not represent, however, that the parent or an attorney representing the parent agreed to waive personal service. Moreover, the district does not offer any explanation for its failure to personally serve the petition for review on the parent. The parent has not answered the petition.

The district is aware of the procedural requirements associated with initiating an appeal for review of a decision of an impartial hearing officer, having had prior petitions dismissed for failure to comply with the required procedures (see Application of the Dep't of Educ., Appeal No. 08-139 [dismissing petition for untimely service]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing petition for failure to personally serve respondents and for untimely service]; Application of the Dep't of Educ., Appeal No. 06-078 [dismissing petition for failure to personally serve respondents and for untimely service]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing petition for failure to personally serve respondents]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing petition for failure to timely file the hearing record pursuant to Part 279]; Application of the Bd. of Educ., Appeal No. 01-048 [dismissing petition for failure to personally serve respondents]).⁴

Accordingly, I find that the hearing record shows that the district failed to personally serve the parent, obtain an agreed upon waiver of personal service, effectuate alternate service upon a suitable person at the parent's residence, or obtain permission from a State Review Officer for service by means other than personal service. Under the circumstances presented in this case, I find that the failure to personally serve the petition upon the parent warrants dismissal, without a determination of the merits of the district's claim (Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 05-082).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
July 29, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

⁴ See also Application of the Dep't of Educ., Appeal No. 09-062 which recently dismissed a petition for failure to personally serve a respondent.