The University of the State of New York

The State Education Department
State Review Officer
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No. 10-021

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Croton-Harmon Union Free School District

Appearances:
Keane & Beane, P.C., attorneys for respondent, Stephanie L. Burns, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decisions of an impartial hearing officer which determined that respondent (the district) was required to conduct an independent educational evaluation (IEE) of the student and ordered the parents to sign a consent form for the purposes of conducting the IEE. The district cross-appeals from that portion of the impartial hearing officer's original decision which found that the district was required to conduct an IEE of the student. The appeal must be dismissed. The cross-appeal must be dismissed.

The hearing record shows that the student has attended the district's schools since kindergarten (Dist. Exs. 13-17). On April 3, 2009, the student's mother submitted a referral form to the district's Committee on Special Education (CSE), requesting an evaluation of the student for "school based emotional issues" that were having a "severe and clear effect on her ability to be in the classroom and learn" (Dist. Ex. 5). The hearing record shows that on April 13, 2009, the student's mother signed a consent form for evaluation of the student for special education and related services (Dist. Ex. 6). In response to the parent's referral, the district conducted the following evaluations of the student: (1) a psychological evaluation completed by the district's high school psychologist on April 16 and 20, 2009 (Dist. Ex. 7); (2) a psychosocial history completed by a district social worker on April 13, 2009 (Dist. Ex. 9); (3) an academic evaluation completed by a district special education teacher over a four day period beginning April 24, 2009 and ending May 4, 2009 (Dist. Ex. 8); (4) an occupational therapy (OT) evaluation completed by a district occupational therapist on April 27, 2009 (Dist. Ex. 10); and (5) a classroom observation of the student completed on May 12, 2009 by the same district social worker who completed the psychosocial history of the student (Dist. Ex. 11).

On or about May 21, 2009, the CSE met to review the aforementioned evaluations and determine the student's eligibility for special education services under the Individuals with Disabilities Education Act (IDEA) (see Tr. pp. 69-73; Parent Ex. Y at p. 1; see also Pet. ¶ 12).[1, 2] The hearing record indicates that the student was not classified as a student with a disability at the time of the impartial hearing, which took place on August 31, 2009 (Tr. pp. 3, 46).

On May 22, 2009, the parents e-mailed the district's then director of staff and pupil personnel services (director), requesting an IEE at district expense (Dist. Ex. 2). On May 26, 2009, the director responded to the parents' request by e-mail and asked the parents to indicate "why they were requesting the [IEE]" so the district could make a determination (id.).[3] After failing to hear from the parents, the director e-mailed them again on June 22, 2009 requesting the parents' reason for their IEE request, specifically "information as to why you believe that the District's evaluations were not acceptable" (Dist. Ex. 3 at p. 2). On June 23, 2009, the parents notified the director by e-mail that they disagreed with the findings of the "school based team" and requested that their daughter be evaluated for "emotional and behavioral issues that were having a significant impact" on her education (id.). On June 26, 2009, the director responded to the parents' June 23, 2009 e-mail, noting that a reply would be forthcoming shortly (id. at p. 1). On July 10, 2009, the parents e-mailed the director requesting a decision no later than July 22, 2009 regarding their IEE request, so that the evaluations could be scheduled and the CSE could reconvene before the start of the school year (id.). On July 14, 2009, the director notified the parents by e-mail that after discussing their request with the district's board of education, "an impartial hearing was approved" to determine if an IEE was warranted and that the district would complete the necessary paperwork to start the process (id.).

On July 15, 2009, the district filed a due process complaint notice, asserting that the psychoeducational evaluation it conducted of the student was sufficient under the IDEA (Dist. Ex. 4 at p. 2). The district quoted the parents' reason for requesting an IEE as stated in their June 23, 2009 e-mail, and requested a determination from an impartial hearing officer that it could "permissibl[y] reject" the parents' request for an IEE (id.).

An impartial hearing was conducted on August 31, 2009. During the impartial hearing, the parents reported that they were requesting an independent psychological evaluation of the student in a clinical setting as well as an independent classroom observation utilizing the same psychologist who would conduct the psychological evaluation (Tr. pp. 295-96, 300, 301-02). The

[1] While the hearing record indicates that the parents were notified of a CSE meeting scheduled for May 21, 2009 (Parent Ex. Y), the hearing record does not contain evidentiary proof of the actual date of the CSE meeting.

[2] The district asserts, and I agree, that the petition does not comport with the Commissioner's Regulations because it does not contain consecutively numbered paragraphs and is not paginated (Answer n.1; see 8 NYCRR 279.8[a][3],[4]). The district submitted as an additional exhibit a copy of the parents' petition with handwritten page numbers and paragraph numbers added by the district's counsel (Answer Ex. A). For purposes of clarity, all citations to the petition in this decision correspond to the petition as renumbered by the district and attached to its answer.

[3] Federal regulations provide that a district "may ask for the parent's reason why he or she objects to the public evaluation. However, the [district] may not require the parent to provide an explanation and may not unreasonably delay either providing the [IEE] at public expense or filing a due process complaint" (34 C.F.R. § 300.502[b][4]; see 8 NYCRR 200.5[g][iii]).

parents also noted that they had private medical and psychiatric evaluations of the student conducted during summer 2009, but had only received the psychiatric evaluation report three days prior to the hearing date (Tr. pp. 297, 301).[4]

In a written decision dated September 28, 2009, the impartial hearing officer determined that there was no dispute concerning the student's academic performance; however, there was a discrepancy in the Behavior Assessment System for Children – Second Edition (BASC-2) results relative to the student "hurting herself" (Sept. 28, 2009 IHO Decision at p. 5). The impartial hearing officer further determined that the school psychologist dismissed the parents' "significant concerns" regarding the student's behavior (id.). The impartial hearing officer ordered the district to conduct a psychiatric evaluation of the student by a "Board Certified Child/Adolescent Psychiatrist," and also provide that psychiatrist with the BASC-2 testing results, as well as the results of the psychological assessment and the psychological history of the student within 30 days of the date of the decision (id. at p. 6).

On December 18, 2009, the district filed a notice of post hearing motion to modify the order of the impartial hearing officer (motion). Attached to the motion was an affidavit in support by the district's assistant superintendent (K.S. Aff.),[5] as well as an affidavit of support by the district's CSE chairperson (D.G. Aff.). The district attached a total of six exhibits to the affidavits (K.S. Ex. A; D.G. Exs. A-E). The district alleged that it initially had difficulty finding a psychiatrist who would observe the student at school as part of the evaluation (K.S. Aff. ¶¶ 5, 6), and that once the district did locate an appropriate psychiatrist, the parents, after being contacted by the district at least three times, would not sign the required consent form (K.S. Aff. ¶ 7; D.G. Aff.; D.G. Exs. A-E). The district requested a modification of the impartial hearing officer's September 28, 2009 decision, to order that if the parents did not sign a consent form for the psychiatric evaluation, the district would be excused from its requirement to evaluate the student (Dist. Mot. at p. 1).

By letter dated January 4, 2010, the parents responded to the district's motion, asserting, among other things, that the district was using the motion to "obfuscate its own non-compliance" with the impartial hearing officer's decision dated September 28, 2009 (Parent Letter dated Jan. 4, 2010 at p. 1).[6] The parents requested, among other things, that if the impartial hearing officer modified her decision, it should specify that the student would undergo an independent psychiatric evaluation by a board certified child/adolescent psychiatrist "at district expense" (id. at p. 3).

In a second written decision, dated January 15, 2010, the impartial hearing officer modified her September 28, 2009 decision to state that: (1) one or both parents would, during the week beginning January 25, appear at the district's assistant superintendent's office to sign a consent form for the psychiatric evaluation of the student; (2) the district would submit the request for an

[4] The district admits that the parents supplied the results of these evaluations to the district after the impartial hearing, and as such they were not made part of the hearing record (Answer ¶ 2).

[5] This individual was previously referred to in this decision as the district's former director of staff and pupil personnel services.

[6] The parents also included as enclosures titled Parent Exhibits 1-3, eight unnumbered pages of e-mails and a two page letter from the district's counsel to the impartial hearing officer.

evaluation to the previously identified psychiatrist, or any other board certified child/adolescent psychiatrist beginning the week of February 1; and (3) that the district would request a date from the psychiatrist for the evaluation (Jan. 15, 2010 IHO Decision at p. 2).

On February 24, 2010, the parents filed an appeal of both the September 28, 2009 and the January 15, 2010 decisions. In their petition, the parents assert, among other things, that their appeal of the September 28, 2009 impartial hearing officer's decision is timely because the impartial hearing officer's January 15, 2010 decision "re-opened" the original impartial hearing (Pet. ¶ 1). With respect to their appeal of the September 28, 2009 decision, the parents assert, among other things, that the impartial hearing officer did not determine if the district's evaluations were appropriate or whether the parents were entitled to an independent psychological evaluation. With respect to the impartial hearing officer's January 15, 2010 decision, the parents assert, among other things, that the impartial hearing officer's decision did not provide them with the required procedural safeguard notices, and that the impartial hearing officer violated their procedural rights by not allowing them the time or opportunity to meet about, call about, have a new meeting about, or otherwise have the opportunity to challenge the district's motion; nor did the impartial hearing officer provide them with the opportunity to cross-examine the affiants in the district's motion or conduct discovery. The parents seek the annulment of both the September 28, 2009 and January 15, 2010 decisions of the impartial hearing officer and request that they "be allowed to proceed with the [IEE] at District expense."

In its answer, the district first asserts, among other things, that an appeal of the September 28, 2009 impartial hearing officer's decision is time barred. In the alternative, the district asserts that under the January 15, 2010 decision, it is still obligated to complete the psychiatric evaluation ordered in the September 28, 2009 decision, and that adding the requirement for the submission of a consent form signed by the parents in the January 15, 2010 decision does not significantly change the impartial hearing officer's September 28, 2009 decision. The district also asserts that, while the district is still obligated to fulfill the impartial hearing officer's order to evaluate the student, it must receive the parents' consent in writing to do so. The district also cross-appeals, asserting that if a State Review Officer determines that the impartial hearing officer's January 15, 2010 decision "re-opened" the September 28, 2009 decision, the hearing record does not support the determination that a psychiatric evaluation of the student was necessitated.

I will first address the parties' contentions regarding the impartial hearing officer's January 15, 2010 decision. I find that the impartial hearing officer lacked the authority to issue a second decision in this matter. Impartial hearing officers are appointed by a board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). An impartial hearing officer's jurisdiction is limited by statute and regulations and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also Application of the Dep't of Educ., Appeal No. 08-041). An impartial hearing officer's decision is final unless timely appealed to a State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, the impartial hearing

officer was appointed, she presided at a hearing on August 31, 2009, and she issued a written decision on September 28, 2009, which ended her jurisdiction over the matter. The impartial hearing officer erred when she entertained the district's subsequent motion, and she erred in rendering a second decision. Accordingly, because she had no authority to issue a second decision, the decision dated January 15, 2010 is null and void (see Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024). Having found that the January 15, 2010 decision is null and void, I need not address the parties' assertions concerning that decision. I now turn to the parties' contentions regarding the timeliness of the appeal of the September 28, 2009 impartial hearing officer's decision.

The district asserts as an affirmative defense that the parents' petition for review is time barred. According to State regulations, a petition for review must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (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). Here, the hearing record shows that the impartial hearing officer rendered a final decision on September 28, 2009, and that the parents did not initiate their appeal until February 24, 2010, a period well beyond the maximum days allowed under the regulations to initiate an appeal. In their petition the parents assert that the time period to appeal the September 28, 2009 decision had expired; however, they claim that the impartial hearing officer's January 15, 2010 decision "re-opened" the September 28, 2009 decision for review, thereby allowing them additional time to appeal. I am not persuaded by the parents' assertion that good cause exists for the untimely appeal of the September 28, 2009 decision. As noted above, the impartial hearing officer lacked the authority to render the January 15, 2010 decision, and as such, that decision is null and void. Therefore, the January 15, 2010 decision did not re-open the prior decision.

Based upon the above, I find that the parents have not initiated an appeal of the September 28, 2009 decision and that they have not alleged sufficient good cause for their untimeliness. Therefore, I find that the petition must be dismissed (8 NYCRR 279.13; see Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006]; Application of a Student with a Disability, Appeal No. 08-065; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; Application of the Dep't of Educ., Appeal No. 08-006; Application of a Child with a Disability, Appeal No. 07-065; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding dismissal of late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006]).

I now turn to the district's cross-appeal. Generally, a cross-appeal is considered timely when it is served upon petitioner with an answer within 10 days after the date of service of a copy of the petition (see 8 NYCRR 279.4[b], 279.5); however, this is predicated upon the petition for review itself being timely served. In this matter, the petition for review was untimely and, therefore, the cross-appeal is also untimely (see, e.g., Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made

defendant's subsequent cross-appeal also untimely]). The district's cross-appeal is, therefore, also dismissed (Application of a Child with a Disability, Appeal No. 05-078). As neither party has timely appealed the September 28, 2009 decision, it is final and binding upon the parties (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 2, 2010

PAUL F. KELLY
STATE REVIEW OFFICER