The University of the State of New York

The State Education Department

State Review Officer

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No. 10-031

Application of a STUDENT WITH 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, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which dismissed the parent's due process complaint notice as insufficient.[1,2] The appeal must be dismissed.

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[1] The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 10-030; Application of a Student with a Disability, Appeal No. 10-024; Application of a Student with a Disability, Appeal No. 10-017; Application of a Student with a Disability, Appeal No. 10-016; Application of a Student with a Disability, Appeal No. 09-042; Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-011; Application of a Student with a Disability, Appeal No. 09-007; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046.

[2] The parent's due process complaint notice in this matter has been identified by the district's impartial hearing office as case number 126521.

By amended due process complaint notice dated February 19, 2010, submitted by e-mail to the district, the parent requested an impartial hearing (Dist Ex. 2 at pp. 1-8).[3] According to the impartial hearing officer, the district submitted a notice of insufficiency to the impartial hearing officer alleging that the parent's due process complaint notice failed to set forth the student's address, failed to state the problem and related facts, and failed to state a proposed solution (IHO Decision at p. 3; see 20 U.S.C. § 1415[b][7][A]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).[4] In a decision dated March 8, 2010, the impartial hearing officer determined that the due process complaint notice lacked the required information and dismissed the matter (IHO Decision at p. 3).

This appeal by the parent ensued. The parent asserts that no decision was rendered by the impartial hearing officer, the impartial hearing officer did not send a "true copy" of the decision directly to the parent, the impartial hearing officer did not write or "true sign" the decision, and the parent has never received a copy of the decision. The parent further alleges that there is no "true copy" of the decision in the "complete and accurate [district] books and records." The parent also asserts that, based on an affirmation of a district impartial hearing office employee, "[d]ecision [m]anagers" wrote and signed the decision.[5] The parent contends that the aforementioned affirmation is incomplete, is not on district letterhead, and is not notarized. The parent further alleges that the impartial hearing officer was not appointed through the rotational selection process and asks that a State Review Officer "independently verify" the appointment. The parent next disputes the accuracy of the hearing record in a prior case concerning the student identified by the district's impartial hearing office as case number 126040. The parent also "objects" to how the "merge and consolidation" of cases occurred in a prior case concerning the student identified by the district's impartial hearing office as case number 126040 and asks that the impartial hearing officers in that case and the present matter be removed in favor of new appointments. The parent alleges, without specificity, that attorneys working for the district are acting as notaries public while "financially or beneficially interested in a party," and are engaging in "misconduct, with intent to obtain a benefit or to injure or deprive [p]arent and [c]hild of a benefit." The parent requests that the "'[d]ecision'" be vacated and annulled, that the impartial hearing officer's certification be revoked, and that charges be filed with "appropriate authorities for Code of Conduct violations." The petition also contains the phrase "[c]hild is prejudiced, is not receiving timely & appropriate special education services."

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[3] The hearing record consists of an e-mail cover letter and due process complaint notice dated February 18, 2010, and an amended e-mail cover letter and due process complaint notice dated February 19, 2010 (Dist. Exs. 1-2). It is unclear from the hearing record which party entered these exhibits into evidence and they are not marked by the impartial hearing officer. For ease of review, this Office has marked the exhibits "Dist. Ex. 1" and "Dist Ex. 2," respectively.

[4] The district's notice of insufficiency is not present in the hearing record (see Answer ¶ 16).

[5] Presumably, the parent is referring to an affirmation contained in the hearing record of one of the many prior cases concerning the student. An affirmation does not appear in this hearing record, nor is one attached to the petition. However a similar affirmation from the same district impartial hearing office employee is attached to the district's answer (see Dist. Aff.).

In its answer, the district's arguments include the contention that the impartial hearing officer was correct in dismissing the parent's due process complaint notice because the notice was insufficient as a matter of law. The district also argues that the parent's repetition of vague and unsubstantiated claims constitutes a misuse and manipulation of the administrative process and an improper use of time, money and resources that would more appropriately be spent on providing services to students with disabilities, citing the decision in Application of a Child with a Disability, Appeal No. 04-061, in support. Attached to the district's answer is an affirmation dated April 22, 2010, executed by the deputy chief administrator of the district's impartial hearing office that describes the standard procedures used by the office for the transmittal of decisions to parents (Dist. Aff. ¶¶ 3-15). The affirmation also states that those procedures were followed in the instant case and that a review of the impartial hearing office's database indicates that the impartial hearing officer's decision, dated March 8, 2010, was mailed to the parent on the same day (id. at ¶¶ 8, 18).

The parent did not submit a reply to the district's answer and therefore, has not objected to the district's affirmation attached to its answer (8 NYCRR 279.6).

Turning to the parent's arguments on appeal, he initially appears to be contending that he never received a copy of the impartial hearing officer's decision in this matter; however, paradoxically, he also claims that no decision was rendered by an impartial hearing officer. As it is clear that an impartial hearing officer's decision was rendered in this matter (IHO Decision), I will address the parent's assertion that he did not receive a copy of the decision.

State regulations provide that "the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]). "As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

The parent's claim that he did not receive a copy of the impartial hearing officer's decision in this matter is insufficient by itself to rebut the presumption of mailing and receipt. The parent does not allege in his petition or offer evidence that the district's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (see Nassau Ins. Co., 46 N.Y.2d at 829-30). Moreover, the affirmation attached to the district's answer and executed by the deputy chief administrator of the district's impartial hearing office describes the standard procedures used by the office for the transmittal of decisions to parents

(Dist. Aff. ¶¶ 3-14). The affirmation states that the affiant has personal knowledge of the procedures and that the office's decision managers are responsible for formatting, processing, and distributing decisions issued by impartial hearing officers (id. at ¶¶ 1, 2, 4). It further states that when an impartial hearing officer's decision is received by the office, a transmittal letter is created and a copy of the letter, the decision, and other information is placed in an envelope with a window in it that shows the addressee's address (id. at ¶¶ 6-7, 9). The envelope is then placed in an outgoing mail bin, collected by the district's mail room personnel, stamped, and mailed at the end of each day (id. at ¶¶ 10-12). The affirmation states that a review of the office's database shows that this procedure was followed in the present matter and that no mail was returned as undeliverable by the post office (id. at ¶¶ 8, 18-19). This evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829). The parent does not claim that the address used by the district is not the parent's correct address. In this case, the parent's claim that he did not receive the decision is insufficient to rebut the presumption (see Nassau Ins. Co., 46 N.Y.2d at 829-30; Application of a Student with a Disability, Appeal No. 10-024; Application of a Student with a Disability, Appeal No. 10-017; Application of a Student with a Disability, Appeal No. 10-016; Application of a Child with a Disability, Appeal No. 06-035). Additionally, the affirmation also states that the impartial hearing officer's decision was transmitted to the parent by e-mail at the parent's request and the parent has not alleged that the district used an e-mail address that was not correct (Dist. Aff. ¶¶ 14-18).

I also find the parent's arguments regarding who wrote and signed the impartial hearing officer's decision to be unconvincing. The parent argues that the impartial hearing officer's decision was written and signed by a "decision manager" in the district's impartial hearing office, and not by the impartial hearing officer assigned to the matter. The parent's argument that the decision was not written by the impartial hearing officer is unconvincing given the statement in the affirmation of the deputy chief administrator of the district's impartial hearing office that decisions are issued and then transmitted to the office by impartial hearing officers and are received electronically (Dist. Aff. ¶ 4, n.1). The affirmation states that decision managers in the office are responsible for "formatting, processing and distributing decisions issued by [i]mpartial [h]earing [o]fficers" (id. at ¶ 4). The affirmation also states that the office's standard procedures were followed in this case (id. at ¶¶ 3, 8, 16-18).

The parent's argument that the impartial hearing officer's decision is invalid because it was allegedly signed by a decision manager and not by the assigned impartial hearing officer is also unconvincing. An impartial hearing officer shall "render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]; see 34 C.F.R. § 300.512[a][5]). Nothing in the State regulations requires an impartial hearing officer's original signature or a copy of such a signature upon a written impartial hearing officer's decision and there is no apparent justification for reading such a requirement into the regulations (cf., Poughkeepsie Sav. Bank, FSB v R.S. Paralegal & Recovery Services, Inc., 160 A.D.2d 857, 858 [2d Dep't. 1990] [finding certain notices with conformed signatures issued pursuant to CPLR § 5222 enforceable because the statute did not require original signatures]; see Application of a Student with a Disability, Appeal No. 10-024). Moreover, even if the failure to

provide the parent with a signed decision constituted a procedural violation, the parent has not alleged any harm resulting from the purported error.[6] Therefore, the parent's claim is denied.

The parent's claim that the affirmation executed by the deputy chief administrator of the district's impartial hearing office (Dist. Aff.) is improper because it is not notarized and is not on the district's letterhead is also unconvincing. As a threshold matter, the only affirmation in this hearing record is the one submitted by the district as an attachment to its answer, and the parent has not objected, via a reply, to this additional evidence submitted by the district.[7] In any event, to the extent that the parent's argument weighs against the affirmation attached to the district's answer, the alleged inadequacies of the affirmation do not render the affirmation invalid. There does not appear to be any requirement that an affirmation be made on any particular letterhead and given that the deputy chief administrator of the district's impartial hearing office is an attorney and is not a party in the present matter (Dist. Aff. at p. 1), she is able to submit an affirmation upon her own signature without a notarization that has the same affect as a notarized affidavit (see CPLR Rule 2106 and practice commentaries by Vincent C. Alexander; see also CPLR Rule 2101).

Regarding the parent's claim that the impartial hearing officer was not appointed by the district's rotational selection policy, it is dismissed because it is insufficiently pleaded and was not raised below. The appointment of an impartial hearing officer must be made in accordance with the rotational selection process mandated by State regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], [e][1], 200.5[j][3][i]) and in accordance with the timelines and procedures delineated in 8 NYCRR 200.5(j). The State regulations require that a list be maintained of eligible impartial hearing officers' names in alphabetical order, and that selection shall be made beginning with the first name appearing after the last impartial hearing officer who served (8 NYCRR 200.2[e][1][ii]; see Application of a Child with a Disability, Appeal No. 05-056). In the event that an impartial hearing officer declines or is unreachable after reasonable efforts documented by the district, the district must offer the appointment to the next name on the list, in the same manner, until such appointment is accepted (id.). "The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent" (8 NYCRR 200.5[j][3][i]; see Application of a Student with a Disability, Appeal No. 09-004). A review of the hearing record reveals that this issue was not raised at the impartial hearing; therefore, any facts relating to the parent's contention have not been sufficiently developed in the hearing record and I decline to consider the matter on appeal (see Application of a Student with a Disability, Appeal No. 09-012; Application of a Child with a Disability, Appeal No. 96-70). However I do

[6] Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

[7] Pursuant to State regulations, a reply may address any procedural defenses interposed by a respondent or any additional documentary evidence served with the answer (8 NYCRR 279.6).

remind the district to ensure compliance with the rotational selection process (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], [e][1], 200.5[j][3][i]).

The parent's allegation that unspecified attorneys working for the district have engaged in misconduct and act as notaries public while "financially or beneficially interested in a party" is also dismissed as insufficiently pleaded and, as presented, outside my jurisdiction to review matters relating to the identification, evaluation, educational placement of a student with a disability, or the provision of a free appropriate public education (FAPE) (34 C.F.R. §§ 300.507[a], 300.514[b]; 8 NYCRR 200.5[i][1], [k][1]). Moreover, the parent's general complaints about the district's practices and procedures with regard to Individuals with Disabilities Education Act (IDEA) should be addressed to the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) for resolution pursuant to the State complaint provisions of 34 CFR §§ 300.151-153 and 8 NYCRR 200.5(*l*) (see Application of a Child Suspected of Having a Disability, Appeal No. 97-80: Application of a Child Suspected of Having a Disability, Appeal No. 95-23).

The parent's claims disputing the accuracy of the hearing record transcript and objection to how the "merge and consolidation" of cases occurred in the prior case concerning the student identified by the district's impartial hearing office as case number 126040 is dismissed because that case is not the subject of the present appeal and has been reviewed separately (see Application of a Student with a Disability, Appeal No. 10-030). There is no indication in the hearing record that this case was merged or consolidated with any other matter.

Lastly, the parent requests that the impartial hearing officer's decision be vacated and that the impartial hearing officer's certification be revoked, among other requests. The Commissioner of the State Education Department may suspend or revoke the certification of an impartial hearing officer upon, among other things, a finding that a State Review Officer has determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence (see 8 NYCRR 200.21[b][4][iii]). However, a review of the hearing record reveals no basis for finding misconduct or incompetence on the part of the impartial hearing officer.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decisions herein. As the parent does not contend that his due process complaint notice was improperly dismissed by the impartial hearing officer for insufficiency, this inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 11, 2010

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PAUL F. KELLY
STATE REVIEW OFFICER