The University of the State of New York

The State Education Department
State Review Officer
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No. 10-058

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 petitioner, Jessica C. Darpino, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorneys for respondent, Lauren A. Baum, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for the student's tuition costs at the Aaron School for the 2008-09 school year. The appeal must be dismissed.

At the time that the impartial hearing convened in March 2009, the student was attending an ungraded class at the Aaron School, where she was also receiving three 30-minute sessions of speech-language therapy per week (see Tr. p. 78; Parent Ex. Q at p. 1). The hearing record describes the Aaron School as a "for-profit" school for children who are characterized as "cognitively intact," but exhibit speech-language and auditory processing deficits and may also exhibit learning disabilities in addition to sensory difficulties (Tr. pp. 67, 581, 616). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student reportedly has weaknesses in expressive and receptive language and has been described as distracted internally and externally (Tr. p. 357). In addition, she also exhibits weak writing skills and reportedly has difficulty with following directions and organizing her thoughts with regard to writing and answering questions in the classroom (id.). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

This proceeding was commenced by a due process complaint notice dated January 28, 2009, in which the parent sought, among other things, reimbursement for the student's tuition at the Aaron School for the 2008-09 school year (Parent Ex. A). An impartial hearing convened on March 18, 2009; however, before the parties concluded their evidentiary hearing, the impartial hearing officer issued a decision dated June 5, 2009 granting the district's motion to dismiss the parent's tuition reimbursement claim upon a finding that tuition reimbursement was a remedy "limited to non-profit institutions under the applicable statutes" (see Parent Ex. P at p. 4). The impartial hearing officer did not make a determination with respect to the issues raised in the parent's due process complaint notice. The impartial hearing officer closed the case and the parent appealed the June 2009 decision to a State Review Officer (see id.). In Application of a Student with a Disability, Appeal No. 09-080, issued on September 17, 2009, a State Review Officer determined that the parent was not categorically barred by the Individuals with Disabilities Education Act (IDEA) (see 20 U.S.C. §§ 1400-1482) from seeking relief in the form of tuition reimbursement at a for-profit school (id. at p. 5). The State Review Officer annulled the portion of the impartial hearing officer's June 2009 decision that determined that the parent was precluded from seeking tuition reimbursement at the Aaron School, remanded the case for completion of the evidentiary phase of the impartial hearing, and ordered the impartial hearing officer to render a decision on the issues raised in the parent's January 2009 due process complaint notice (id. at p. 7).

On October 16, 2009, the parties reconvened and continued the impartial hearing before the same impartial hearing officer who issued the June 2009 decision (Tr. p. 186). The impartial hearing concluded on December 3, 2009, after four days of testimony (Tr. pp. 186-671). Upon the conclusion of the impartial hearing, the impartial hearing officer rendered a written decision dated May 25, 2010 regarding the issues raised in the parent's January 2009 due process complaint notice (IHO Decision). He concluded that the district failed to establish that it offered the student a free appropriate public education (FAPE) during the 2008-09 school year, that the Aaron School was appropriate to meet the student's educational needs, and that equitable considerations favored an award of tuition reimbursement to the parent (id. at pp. 17-19). The impartial hearing officer ordered the district to reimburse the parent for her daughter's tuition at the Aaron School for the 2008-09 school year (id. at p. 20).

The district appeals and requests that the impartial hearing officer's May 25, 2010 decision be annulled. According to the district, the IDEA precludes an award of relief to the parent because the Aaron School is a for-profit institution. The district also requests that a State Review Officer find that good cause exists for the district's late filing and service of the petition. In its petition for review, the district does not challenge the impartial hearing officer's determinations that the district failed to offer the student a FAPE during the 2008-09 school year; that the Aaron School was appropriate to meet the student's educational needs; or that the equities favor an award of relief to the parent.[1]

The parent submitted an answer requesting that the impartial hearing officer's decision be upheld and that the petition be dismissed. The parent asserts that the petition was not filed in a

[1] These determinations of the impartial hearing officer are final and binding on the parties because they have not been appealed (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Student with a Disability, Appeal No. 09-129).

timely manner and good cause did not exist for the delay in service. The parent also contends that the district is barred by the doctrine of collateral estoppel from raising its for-profit argument because the issue was previously litigated, decided by a State Review Officer in September 2009, and the September 2009 decision was not appealed to federal or State court. The parent further argues that a State Review Officer lacks the authority to reopen a prior decision. Alternatively, the parent argues that the IDEA does not preclude her from seeking an award of tuition reimbursement at a for-profit institution like the Aaron School.

The district submitted a reply to the answer. The district maintains that good cause exists for the late service of the petition and that the parent was not prejudiced by any service irregularity. The district also argues that collateral estoppel does not preclude the district from bringing this appeal.

Turning first to the district's request to file an untimely appeal, a petition for review by a State Review Officer must comply with the timelines specified in State 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 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 (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide a State Review Officer with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). 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 reasons for the failure to timely seek review must be set forth in the petition (id.).

In the instant case, the impartial hearing officer's decision is dated May 25, 2010 and there is no dispute that the deadline for timely serving the verified petition was no later than Tuesday, June 29, 2010 (IHO Decision at p. 20; Pet. ¶ 40; Answer ¶ 15; Reply ¶ 2; see 8 NYCRR 279.2[c]). The district's affidavit of service states that the petition was personally served on the parent on July 1, 2010 at 7:36 p.m. (Dist. Aff. of Service). Thus, the appeal was not properly initiated according to State regulations (8 NYCRR 279.2[c]).

In the petition, the district requests that the delay in service of the petition be excused because of an error made by the process service company on the last day to effectuate timely service on the parent. According to the district, after a series of correspondence between the parent and the district's counsel, the parent informed the district that she was available to accept service of the petition at her residence on June 29, 2010. As stated by the district, the process server was unable to effectuate personal service of the petition on the parent on June 29, 2010 because the work order provided to him by the process service company did not contain the parent's correct name or address. On June 30, 2010, the district's counsel contacted the parent, who said that she would be available at her home on

July 1, 2010 to receive the petition. The district personally served the petition upon the parent on July 1, 2010 (Dist. Aff. of Service).

I am not persuaded that the reasons for the delay set forth in the petition constitute good cause to excuse the untimely service of the petition (see Application of the Dep't of Educ., Appeal No. 08-139 [finding that a process server's mistake about the parent's address did not constitute good cause]). Thus, based upon the district's failure to properly initiate the appeal and the absence of good cause for the untimeliness, I will exercise my discretion and dismiss the petition as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; see also Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon, 2006 WL 3751450, at *5 [upholding dismissal of a late petition where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition that was served one day late]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]; see generally Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Moreover, even if the district's appeal had been timely, principles of res judicata and collateral estoppel, more aptly described in this matter as law of the case, bars the district from asserting an issue that has been previously decided within this matter. The doctrine of law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata"']; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by a State Review Officer would not be reopened during the proceeding once it was decided]). Once an issue is decided within a proceeding, a party is generally precluded from reopening a matter which has been decided and must adhere to the decision for the duration of the proceeding (Evans, 94 N.Y.2d at 502-04).[2] Like res judicata and collateral estoppel, "preclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" (id.).

Here, the district's sole argument in this appeal is the same defense to the parent's claim that it raised at the commencement of this case – that the IDEA precludes the parent from seeking

[2] This principle does not preclude a party from seeking judicial review (34 C.F.R. § 300.516; 8 NYCRR 200.5[k][3]).

tuition reimbursement from a for-profit institution such as the Aaron School. As discussed in Application of a Student with a Disability, Appeal No. 09-080, both parties previously presented written legal memoranda to the impartial hearing officer to support their respective positions on the for-profit issue (see IHO Exs. III-VI), and also presented further written argument to the State Review Officer with regard to the impartial hearing officer's June 5, 2009 decision (see Pet. Exs. 1-2). There is no indication in the hearing record, and the district does not argue in this appeal, that the district was prevented from offering any evidence or precluded from submitting argument regarding its for-profit defense. I also note that at all times during this proceeding, the district was represented by counsel. Accordingly, the principle of law of the case precludes the district from now seeking review of an issue that was previously decided in which the district had a full and fair opportunity to litigate (see Pardini v. Allegheny Intermediate Unit, 524 F.3d 419, 423 [3d Cir. 2008]). Lastly, to the extent that the petition for review in this case may be interpreted as a request to reopen the decision in Application of a Student with a Disability, Appeal No. 09-080, I note that an application to reopen or reargue a prior decision of a State Review Officer is expressly prohibited by State regulations (8 NYCRR 276.8[d]; see Application of the Bd. of Educ., Appeal No. 07-074).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 10, 2010

PAUL F. KELLY
STATE REVIEW OFFICER