The University of the State of New York

The State Education Department
State Review Officer
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No. 10-062

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Offices of Neal Howard Rosenberg, attorney for petitioner, Neal H. Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

According to the parent, the student is six years old and has a learning disability (Pet. ¶ 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).[1] Also according to the parent, she has a diagnosis of a pervasive developmental disorder (PDD) and "struggles with cognitive, communicative and social/emotional deficits" (Pet. ¶ 2). The district Committee on Special Education (CSE) met on March 19, 2009 for the student's "turning five" individualized education program (IEP) meeting and determined the student was eligible for special education services as a student with autism (Pet. ¶ 4; Answer ¶¶ 4, 21; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR

[1] History pertaining to the student and the procedural process in this matter has been taken from the pleadings as the record on appeal consists only of a brief order of dismissal by the impartial hearing officer. I note that there are several exhibits attached to the petition and one exhibit attached to the answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, additional evidence is not necessary in order to render a decision on the issues in this matter and, consequently, I decline to consider it in this appeal.

200.1[zz][1]).[2] The CSE recommended a general education program with special education teacher support services (SETSS) (Pet. ¶ 4; Answer ¶ 4). At that time the student was receiving district-funded special education itinerant teacher (SEIT) services from Yeled V'Yalda and related services of speech therapy and occupational therapy pursuant to an IEP created by the district Committee on Preschool Special Education (CPSE) on February 3, 2009 (Pet. ¶¶ 4, 7; Answer ¶¶ 4, 7).

The parent filed an impartial hearing request on or about September 8, 2009 and an amended impartial hearing request on or about October 1, 2009 (Pet. ¶ 5; Answer ¶ 20). An impartial hearing officer was appointed on September 9, 2009 (Pet. ¶ 6; Answer ¶ 23). According to the district, a resolution case manager was assigned to this case on September 19, 2009 (Answer ¶ 23). According to the parent, the impartial hearing office sent an e-mail to the parent on October 9, 2009 stating that the impartial hearing officer would contact her to schedule an impartial hearing (Pet. ¶ 6). The parties signed a pendency agreement on or about October 12, 2009 stating that the student's February 3, 2009 IEP created by the CPSE was the last agreed-upon IEP and that the program contained therein would be the "pendency placement" for the student during the course of litigation pertaining to this matter (Pet. ¶ 7; Answer ¶¶ 7, 25). Five extensions, each based on witness unavailability, were subsequently granted by the impartial hearing officer (Pet. ¶ 8; Answer ¶¶ 26-29, 31). The first three extensions were requested by the parent and the last two extensions were requested by both parties (Pet. ¶ 8; Answer ¶¶ 26-29, 31).[3] On May 3, 2010, the impartial hearing officer contacted the parties by e-mail and stated that he had unilaterally decided to dismiss the case because it had gone a week beyond the established compliance date but that he would consider granting one final adjournment (Pet. ¶ 10; Answer ¶ 30). The last of the five extensions was requested after the parties received the May 3, 2010 e-mail from the impartial hearing officer (Pet. ¶ 10; Answer ¶ 31). According to the parent, the impartial hearing officer did not schedule any hearing dates since an adjournment granted in March 2010 (Pet. ¶ 10). According to the district, the impartial hearing officer did schedule adjourn dates after March 2010 (Answer ¶¶ 29, 31).

No hearing was convened in this matter. The impartial hearing officer issued a written order of dismissal dated June 9, 2010. The body of the order consisted only of the statement that "[p]ursuant to email from the Parent's Attorney dated May 3, 2010, requesting a final adjournment in this matter, which was granted and extended to 30 May, and as a result of no effort by the parties to schedule this matter to come to a hearing on or prior to May 30th this matter is hereby Dismissed, with prejudice" (IHO Order of Dismissal at p. 2).

This appeal ensued. The parent alleges, among other things, that the impartial hearing officer erred in dismissing the parent's case *sua sponte* and with prejudice because the parent was not responsible for scheduling the impartial hearing. The parent alleges that the impartial hearing officer, not either party to this matter, was obligated to "marshal the matter and convene a hearing in a timely fashion" and that to grant a "series of discretionary extensions . . . only to dismiss the case . . . is not only illogical but manifestly unjust." The parent alleges that the impartial hearing

[2] The IEP is also referred to by the parent and the district as an IESP, which the parent defines as an individualized educational services program (Pet. ¶ 5; Answer ¶ 21).

[3] The pleadings are not in agreement on the various adjournment request dates and scheduled impartial hearing dates (compare Pet. ¶¶ 9-10 with Answer ¶¶ 26-29). I note that this factual disagreement has no impact on the decision rendered herein.

officer failed to provide the parent with any scheduling information or tender a written response to the parent's extension request made after receipt of the May 3, 2010 e-mail from the impartial hearing officer.

The parent further alleges that the impartial hearing officer erred in failing to compile a record on which to base his decision. Specifically, the parent alleges that the impartial hearing officer failed to provide a written response to each extension request, set a new date for rendering his decision, notify the parties in writing of such date, and include the same in the hearing record. The parent alleges that she was never notified of the May 30, 2010 deadline identified in the order of dismissal.

The parent also alleges that the impartial hearing officer abused his discretion by dismissing the case with prejudice, which effectively held in favor of the district and terminated the student's pendency placement. The parent requests that the impartial hearing officer's order of dismissal be overturned and that the matter be remanded to a new hearing officer.

The district alleges that the impartial hearing officer acted properly in dismissing this case with prejudice. The district alleges that during the nine months after the parent filed her due process complaint the parent requested five adjournments related to witness availability and that she never indicated her readiness to proceed. The district alleges that it was the parent's responsibility as the moving party to "make an effort to see to it that a hearing was conducted." The district alleges that "[a]s a result of the [parent's] delays, pendency payments covered the entirety of the [2009-10] school year for [the student]" and that "[t]his case illustrates how a parent can abuse the pendency system by obtaining pendency and then delaying a hearing on the merits."

The district "concedes . . . that it does not appear that the [impartial hearing officer] contacted the parties to inform them that he had scheduled a final adjourn date for May 30, 2010 in this case." The district alleges that any error in not contacting the parties was "*de minimus* as it appears the parent[] never would have proceeded to a hearing to challenge the new IESP in the first place." The district alleges that although the impartial hearing officer should have contacted the parties to inform them of the May 30, 2010 adjournment date, "the real issue" is the parent's "attempt to obscure the fact that they never intended to prosecute this case."[4]

The district also alleges that the record was sufficiently developed in this case because there was no record that the impartial hearing officer should have developed. The district further alleges that the parent has not been unfairly prejudiced by the impartial hearing officer's dismissal of the case. The district alleges that the parent abused her position in this case by requesting five adjournments over the course of nine months without attempting to actually prosecute the case and while requiring the district to continue to make pendency payments. The district alleges that the impartial hearing officer's order of dismissal in this case was not arbitrary or capricious, that any prejudice to the student in this case due to dismissal would be minimal as the parent received all the relief that was requested in the parent's due process complaint notice, and that the pendency placement would be for continued CPSE services which are "inappropriate for a school-aged child."

[4] I note that it does not appear that the district raised this argument to the impartial hearing officer.

The Regulations of the Commissioner of Education set forth the procedure by which an impartial hearing shall be conducted (8 NYCRR 200.5[j]). The regulations state that "'[u]pon receipt of the parent's due process complaint notice, or the filing of the school district's due process complaint notice, the board of education shall arrange for an impartial due process hearing to be conducted" (8 NYCRR 200.5[j][3]). The regulations prescribe a timeline for commencement of a hearing, a timeline for rendering a decision, and requirements for the granting of extensions (8 NYCRR 200.5[j][3][iii], [5]). Regarding extensions, impartial hearing officers are required to "respond in writing to each request for an extension" which response is to become part of the hearing record (8 NYCRR 200.5[j][5][iv]). Additionally, for each extension that is granted, impartial hearing officers are required to "set a new date for rendering his or her decision, and notify the parties in writing of such date" (id.).

The district in this matter seemingly complied with State regulations in that it arranged for a due process hearing to be conducted by appointing an impartial hearing officer to the case. The hearing record reflects that the impartial hearing officer granted an extension to May 30, 2010 pursuant to an adjournment request in this matter. The parent alleges and the district concedes that, contrary to State regulations, it appears that the impartial hearing officer did not communicate the final adjourn date to the parties. I find that the impartial hearing officer erred in dismissing this case with prejudice under the circumstances herein where the parties were not notified of the final adjournment date. Accordingly, I will remand the matter back to the impartial hearing officer to schedule a hearing on the merits. In my discretion, I decline to remand the matter to a new impartial hearing officer.

In light of the determinations made herein, it is unnecessary for me to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that this matter is remanded to the same impartial hearing officer who issued the order of dismissal that is the subject of this appeal for an impartial hearing on the merits, and

II IS FURTHER ORDERED, unless the parties otherwise agree, that the impartial hearing be held within 30 days from the date of this decision, and

IT IS FURTHER ORDERED, that if the impartial hearing officer who issued the June 9, 2010 order of dismissal is not available to conduct the impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
September 7, 2010

PAUL F. KELLY
STATE REVIEW OFFICER