The University of the State of New York

The State Education Department
State Review Officer
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No. 11-150

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:
Friedman & Moses, LLP, attorneys for petitioner, Elisa Hyman, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandar, Esq., of counsel

DECISION

Petitioner (the parent) appeals from those portions of a decision of an impartial hearing officer which denied his request for additional services for the 2009-10 and 2010-11 school years. The appeal must be dismissed.

Background and Procedural History

As discussed more fully below, the merits of the parent's appeal need not be addressed because the parent has not properly initiated this appeal. Briefly, however, the Committee on Special Education (CSE) developed individualized education programs (IEPs) for the student for the 2009-10 school year on September 10, 2009 (Dist. Ex. 9), and for the 2010-11 school year on September 15, 2010 (Dist. Ex. 47).

In a due process complaint notice dated September 8, 2010, the parent requested an impartial hearing alleging that, for numerous reasons detailed in the complaint, the district had denied the student a free appropriate education (FAPE) for the 2009-10 and 2010-11 school years (Parent Ex. A at pp. 2, 4-7).[1] As relief, the parent requested, among other things, compensatory education services consisting of "1:1 multisensory instruction" by a provider selected by the parent; that the district provided the parent with certain translated documents; "direct payment and/or satisfaction of the parent[']s debt" for independent evaluations; and a "legally sufficient" IEP and placement.

An impartial hearing was held over 16 days between September 27, 2010 and July 28, 2011. In a decision dated September 22, 2011, the impartial hearing officer awarded the parent

[1] The complaint asserted that the parents' native language is Arabic (Parent Ex. A at p. 3).

reimbursement for privately obtained neuropsychological and assistive technology evaluations; found that the district denied the student a FAPE for the 2009-10 school year; ordered the district to fund 15 hours of 1:1 tutoring per week for one school year; directed the district to provide the student with the assistive technology services recommended by a private assistive technology evaluation; ordered the district to translate the student's IEPs into Arabic and provide an Arabic translator at all CSE meetings; and ordered the district to provide the student with transportation to and from school and her related service providers (IHO Decision).[2, 3]

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[2] I note that the hearing record does not indicate that the timelines within which an impartial hearing is to be held were followed in this case. Numerous extensions were granted throughout the course of the ten-month hearing, yet the hearing record does not reflect that the impartial hearing officer documented his reasons for granting the extensions, fully considered the cumulative impact of the factors relevant to granting extensions, or responded in writing to the extension requests (8 NYCRR 200.5[j][5][i], [ii], [iv]). Rather, the hearing record indicates that the impartial hearing officer granted extensions based solely on agreement of the parties, without a compelling reason or a showing of substantial hardship in violation of State and federal regulations (8 NYCRR 200.5[j][5][iii]). On at least one occasion, an extension was apparently granted because of district counsel's previously scheduled vacation (Tr. pp. 1112-13). Additionally, on several occasions the impartial hearing officer apparently granted multiple undocumented 30-day extensions at once, in violation of State regulation (Tr. pp. 12, 944, 946, 948; see 8 NYCRR 200.5[j][5][i]). I also note that State regulations contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision," and that additional hearing days are required to be scheduled on consecutive days to the extent practicable (8 NYCRR 200.5[j][3][xiii]). In this case, there were many instances where the impartial hearing officer allowed far more time than was reasonably necessary for the examination of witnesses, including extensive redirect and re-cross examination. I remind the impartial hearing officer that he has the power to limit examination of witnesses whose testimony he determines to be irrelevant, immaterial or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]). The hearing record also reflects that at on several hearing dates, the impartial hearing officer solicited a request for extension of the compliance date for issuing a decision from both parties (Tr. pp. 672, 1290). Such a solicitation on the part of the impartial hearing officer violates federal and State regulations governing impartial hearings, which require that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][[5]; see Letter to Kerr, 22 IDELR 364 [OSEP 1994] [an impartial hearing officer "cannot extend the timeline on his or her own initiative, or pressure a party to request an extension"]). Additionally, while the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that he must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5]). The impartial hearing officer is reminded that it is his obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (see Application of the Dep't of Educ., Appeal No. 11-095; Application of the Dep't of Educ., Appeal No. 11-037; Application of a Student with a Disability, Appeal No. 08-064; Application of the Dep't of Educ., Appeal No. 08-061). Finally, on the final hearing date, the impartial hearing officer indicated that the parties' posthearing memoranda would be due on August 25, 2011 (Tr. pp. 1710-11). However, the impartial hearing officer's decision indicates that the record was not closed until September 20, 2011 (IHO Decision). I remind the impartial hearing officer to comply with State regulations, which require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date the record is closed, which is "when all post-hearing submissions are received by the IHO [and o]nce a record is closed, there may be no further extensions to the hearing timelines" ("Changes in the Impartial Hearing Reporting System," Office of Special Education [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf; see 8 NYCRR 200.5[j][5]).

[3] The impartial hearing officer found that the issue of whether the district provided "comparable services" for the 2010-11 school year was "moot" (IHO Decision at p. 12).

The parent appeals, arguing that the impartial hearing officer erred in not awarding all of the compensatory additional services that he sought.[4] In an answer, the district responds to the parent's allegations with general admissions and denials, interposes procedural defenses, and requests that the appeal be dismissed.[5]

Discussion and Conclusion

An appeal from an impartial hearing officer's decision to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-119; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; 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. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a 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 for review (8 NYCRR 279.2[b], [c]).[6] 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; 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

[4] Counsel for the parent has submitted the parties' posthearing memoranda with the petition. I remind the impartial hearing officer that, while oral statements and written briefs by attorneys or parties are not treated as evidence, State regulations nevertheless require the impartial hearing officer to identify (i.e. mark) and enter "all other items" he considers into the hearing record (8 NYCRR 200.5[j][5][v]; see 8 NYCRR 200.5[j][3][xii]).

[5] Counsel for the parent requested an extension of time in which to reply to the procedural defenses interposed in the district's answer; however, she did not file a reply with the Office of State Review; the third time in as many months that counsel has requested an extension of time for a pleading which she ultimately did not serve on the opposing party. Counsel is requested to keep this office updated with respect to her intentions regarding pleadings. Additionally, the request for an extension was received by this office via e-mail, inconsistent with State regulation requiring that an application for an extension must "be in writing [and] postmarked not later than the date on which the time to answer or reply will expire" (8 NYCRR 279.10[e]). Counsel did not follow up regarding her initial, informal request with a formally filed application in writing postmarked prior to the date on which her time to reply expired, and I caution counsel that in the future she will be given little to no leeway regarding her requests for extensions if she continues to demonstrate failures to adhere to the practice regulations.

[6] As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065).

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 general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by a State Review Officer (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the 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]).

In the present case, the impartial hearing officer's decision was dated September 22, 2011, and included the required statement advising the parties of their rights to seek review of the decision by a State Review Office, and further provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text and underlined (IHO Decision at p. 15; see 8 NYCRR 200.5[j][5][v], [k]). Although the petition for review does not indicate how the impartial hearing officer delivered his decision, for purposes of this decision I assume that it was sent by mail. As such, the date of mailing and the four days subsequent thereto are excluded in calculating the 35-day period within which the petition for review would have been timely served, and the petition was required to be served on the district no later than November 1, 2011 (8 NYCRR 279.2[b]). According to the parent's affidavit of service, the petition for review was personally served on the district on November 15, 2011.

I also note that the parent did not acknowledge that the petition was served late or set forth good cause for the failure to timely seek review in his petition (see 8 NYCRR 279.13). Instead, the petition states that "[a]fter the IHO issued his decision, the [district] translated it to Arabic and mailed it to the parent's correct address on October 7, 2011" (Pet. ¶ 29). However, nowhere in the petition is there any indication that counsel for the parent is aware that the petition is untimely, nor does the petition allege that the impartial hearing officer's decision was not mailed to the parent in English prior to the mailing of the translated decision by the district (see 8 NYCRR 200.5[j][5] [impartial hearing officers are required to "mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents . . . no later than 14 days from the date the impartial hearing officer closes the record"]). I note that the parent is represented by the same English-speaking counsel on appeal as at the impartial hearing, and the parent raises no allegation that he was unable to understand the import of the impartial hearing officer's decision or that his counsel was unavailable to explain it to him. I also note that State regulations do not rely upon the date of receipt of an impartial hearing officer's decision for purposes of ascertaining the deadline

for serving a petition for review (8 NYCRR 279.2[b], [c]; see Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Finally, nowhere in the Individuals with Disabilities Education Act (IDEA) or its implementing regulations is there any provision which provides that an impartial hearing officer's decision must be translated into a parent's native language, nor did the impartial hearing officer direct the district to do so in this case (IHO Decision at pp. 14-15).[7]

Thus, based upon the parent's failure to timely initiate the appeal and in the absence of good cause for the untimely service of the petition for review, I will exercise my discretion and dismiss the petition for review as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. 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] [Sup. Ct., Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Although I do not reach the merits of the parent's appeal, upon review of the entire hearing record, and on due consideration thereof, I note that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]).

[7] In certain cases, such as when parents whose native language is not English are proceeding pro se and are facing substantial hardships in presenting their case on behalf of their child as a result thereof, or as a result of difficulties in finding assistance navigating the due process hearing system, nothing in the IDEA would prohibit the impartial hearing officer from directing a district to provide such parents with a translation of the decision (see Application of a Student with a Disability, Appeal No. 11-090). Even the issuance of a translated decision at the directive of an impartial hearing officer may not constitute good cause for delay in serving a petition for review.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 23, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER