



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-077

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 Depew Union Free School District

Appearances:

McCallion & Associates, LLP, attorneys for petitioner, Kenneth F. McCallion, Esq., of counsel

Harris Beach, PLLC, attorneys for respondent, Jeffrey J. Weiss, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Gow School (Gow) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As discussed more fully below, the student's educational history need not be discussed in depth because the parent has not properly initiated the appeal. Briefly, the student has received diagnoses of language-based learning disorders affecting his abilities to read and write (Tr. p. 446; Joint Exs. 36 at p. 7; 40 at p. 3). The student has attended Gow since the 2008-09 (seventh grade) school year after attending the district's schools from kindergarten through sixth grade (Tr. pp. 357, 444-45, 516-17).¹

¹ Gow is described in the hearing record as a boarding school for students with language-based learning disabilities from seventh to twelfth grades, most of whom have received diagnoses of dyslexia (Tr. pp. 319-20, 337). It has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

On August 31, 2011, a subcommittee of the CSE met to conduct an annual review and develop the student's IEP for the 2011-12 (tenth grade) school year (Joint Ex. 8 at p. 1).² The CSE subcommittee recommended that the student attend a general education program with direct consultant teacher services in each of his core content area classes; daily resource room in a 5:1 ratio; supplementary aids and services, program modifications, and accommodations; and testing accommodations (*id.* at pp. 1, 6-8). By letter dated September 6, 2011, the parent rejected the proposed IEP and informed the district of her intention to reenroll the student at Gow and seek tuition reimbursement (Joint Ex. 14 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated November 1, 2011 and received by the district on November 21, 2011 (Joint Exs. 1 at p. 9; 3 at p. 1), the parent requested an impartial hearing (Joint Ex. 1). The parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year and requested reimbursement for the student's Gow tuition (*id.* at pp. 1, 5-8).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on January 19, 2012 and concluded the next day (Tr. pp. 1, 310). By decision dated March 6, 2012, the IHO determined that the district had offered the student an appropriate educational program for the 2011-12 school year and denied the parent's request for tuition reimbursement (IHO Decision at pp. 2, 12-13).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred by: (1) finding that the student made progress while he attended the district's schools; (2) comparing the student's grades while in the district to those he earned at Gow; (3) failing to give sufficient weight to the witnesses from Gow; (4) determining that the district's program could have enabled the student to make progress; (5) finding that the August 2011 IEP sufficiently addressed the student's needs; (6) failing to give sufficient weight to the parent's testimony that the district could not implement the student's IEP with respect to the recommended assistive technology; and (7) failing to find that the IEP was deficient because of procedural errors that precluded the parent from meaningfully participating in the development of the student's IEP. The parent also asserts that Gow was an appropriate placement for the student and requests reimbursement for the student's tuition for the 2011-12 school year.³

² While the district prepared the student's IEP on the form prescribed for use by the Commissioner (8 NYCRR 200.4[d][2]; see "Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm>), several of the headings of the various sections of the IEP are illegible on the copy provided to this office (see Joint Ex. 8 at pp. 1-2, 5-10).

³ Upon review of the filings, I note that the parent's memorandum of law in support of the petition fails to comport with State regulations as it does not include a table of contents (8 NYCRR 279.8[a][6]).

The district answers, denying the parent's assertions and raising the affirmative defense that the parent improperly effectuated service of the petition for review by not personally serving the district.

V. Applicable Standards

An appeal from an IHO's decision to an SRO 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]; see 8 NYCRR 275.8[a]). When the respondent is a district, personal service is effected by personal delivery to the district clerk, a district trustee or member of the district's board of education, the district superintendent, or to a person in the superintendent's office who has been designated by the board of education to accept service (8 NYCRR 275.8[a]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition and supporting papers at respondent's residence with a person of suitable age and discretion between the hours of six o'clock in the morning and nine o'clock in the evening (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Bd. of Educ., Appeal No. 07-055; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058; see Application of the Bd. of Educ., Appeal No. 11-129); or (3) permission is obtained from an SRO to use an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).⁴ The failure to comply with the personal service requirements of State regulations may result in the dismissal of a petition by an SRO (see Application of a Student with a Disability, Appeal No. 11-013; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Bd. of Educ., Appeal No. 07-055; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 01-048).

VI. Discussion and Conclusion

Here, the parent's affidavits of service indicate that the petition for review was served on the district by mail and on counsel for the district by private overnight delivery service (Parent Affs. of Service). Service of a petition for review by mail is not permitted by State regulations (8 NYCRR 275.8[a]; 279.2[b]), and the district asserts that it did not agree to waive service by personal delivery for this appeal (Answer ¶ 65; see Apr. 18, 2012 Affirm. ¶¶ 6-7).⁵ Notably, the

⁴ Pursuant to 8 NYCRR 279.1(a), with respect to SRO review of an IHO decision, "references to the term commissioner in [8 NYCRR] Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

⁵ Counsel for the district states that he offered to accept service on behalf of the district in a prior appeal involving the student in which both parties were represented by the same counsel as in this appeal (see Application of a Student with a Disability, Appeal No. 11-055), but that no such offer was made or discussed regarding this appeal (Apr. 18, 2012 Affirm. ¶¶ 6-7; Apr. 18, 2012 Affirm. Ex. C).

parent did not file a reply responding to the district's procedural defense (see 8 NYCRR 279.6), nor did she assert in the petition any reason why she could not timely personally serve the district (see Application of a Student with a Disability, Appeal No. 09-094) or that the district had agreed to waive personal service (see Application of the Dep't of Educ., Appeal No. 09-075). There is no indication in the hearing record that the parent attempted to effectuate personal service of the petition on the district prior to mailing (see Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-087), nor was a request made to an SRO to effectuate service by alternate means (8 NYCRR 275.8[a]; see Application of the Dep't of Educ., Appeal No. 08-006; Application of a Child with a Disability, Appeal No. 07-066).

Under the circumstances of this case, based upon the parent's failure to properly initiate the appeal with personal service of the petition for review on the district or to serve the district pursuant to one of the above-enumerated exceptions to the personal service requirement, I will dismiss the petition without a determination of the merits of the parent's claims (8 NYCRR 279.2[b]; see Application of a Student with a Disability, Appeal No. 11-013; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-075; Application of a Child with a Disability, Appeal No. 05-045; Application of the Dep't of Educ., Appeal No. 01-048; cf. Application of the Dep't of Educ., Appeal No. 05-073; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-084). Additionally, I have conducted an independent review of the entire hearing record and, on due consideration, find that the impartial hearing comported with the requirements of due process (34 CFR 300.514[b][2][i]-[ii]; see Educ. Law § 4404[2]).

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

THE APPEAL IS DISMISSED

Dated: Albany, New York
June 6, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER