



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-154

Application of the BOARD OF EDUCATION OF THE PATCHOGUE-MEDFORD UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of transportation services to a student with a disability

Appearances:

Guercio & Guercio, LLP, attorneys for petitioner, Ashley C. Pope, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district is obligated to transport respondent's (the parent's) daughter to a nonpublic school (NPS) pursuant to Section 4402(4)(d) of the Education Law. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the law 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 district representative (Educ. Law § 4402; see 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 (Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]). 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]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration of the period for the resolution process (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 appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; 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 (8 NYCRR 279.12[a]).

III. Facts and Procedural History

The parent placed the student at the NPS beginning in the 2012-13 school year; since then the student has been enrolled at the NPS (Dist. Exs. 5 at p. 2; 6 at p. 2; 7 at p. 1).

On May 15, 2014, a Subcommittee on Special Education met for the student's annual review and to develop an Individualized Education Services Plan (IESP) for the 2014-15 school year (Dist. Ex. 7 at p. 1). The May 2014 CSE subcommittee found the student eligible for special education programs and services as a student with deafness and recommended that the student receive two thirty-minute sessions of individual hearing services per week, to be provided "[a]cross all [e]ducational [s]ettings" (*id.* at pp. 1, 9). The CSE also recommended program modifications and accommodations including a copy of class notes, refocusing and redirection, checking for understanding, and closed captioning for movies (*id.* at p. 9). In addition, the CSE recommended two yearly hearing consultations to be provided to the student's teachers to explain the student's hearing loss and strategies for working with students with deafness (*id.*).

Prior to the 2014-15 school year the NPS was located within the district and the district transported the student to and from the school (see, e.g., Tr. pp. 22, 33, 45-46).¹ As of the 2014-15 school year, the NPS moved outside of the district and the district denied the parent's request for transportation (Tr. pp. 22, 33, 50-51).

A. Due Process Complaint Notice

The parent requested an impartial hearing pursuant to a due process complaint notice dated June 24, 2014, in which the parent sought transportation for the student to and from the NPS (IHO Ex. 1 at p. 2).² The district responded to the due process complaint notice and asserted, among other things, that the parent was not entitled to transportation because the NPS was located more

¹ The hearing record includes transcripts for two pre-hearing conferences and a transcript for the hearing (Tr. pp. 1-233; July 24, 2014 Tr. pp. 1-26; August 4, 2014 Tr. pp. 1-30). Citations to the transcripts for the pre-hearing conferences will indicate the date of the conference; citations without a prefatory date are to the consecutively-paginated, two-volume transcript of the impartial hearing.

² The district filed a notice of insufficiency dated July 9, 2014 (IHO Ex. 4). In an interim decision dated July 14, 2014, the IHO found the parent's due process complaint notice sufficient (IHO Ex. 5). Neither party appeals from the IHO's July 14, 2014 interim decision; therefore, it has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

than 15 miles from the student's home and because the student did not attend the NPS for the purpose of receiving special education services similar to those offered by the district (IHO Ex. 2).

B. Impartial Hearing Officer Decision

Following two pre-hearing conferences, an impartial hearing commenced on August 7, 2014 and concluded on August 8, 2014 (Tr. pp. 1-233; July 24, 2014 Tr. pp. 1-26; August 4, 2014 Tr. pp. 1-30). In a decision dated August 29, 2014, the IHO determined that the parents were entitled to transportation to and from the NPS pursuant to Education Law § 4402(4)(d) (see IHO Decision). As a preliminary matter, the IHO noted that the district did not dispute that the student was identified by the district as a student with a disability and that the NPS is located within 50 miles of the student's home (id. at pp. 11-12). The IHO then determined that the student attended the NPS for the purpose of receiving special education programs and services similar to those recommended by the CSE and granted the parents' request for transportation to and from the NPS (id. at pp. 12-15).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, asserting that the IHO erred in finding that the student attends the NPS for the purpose of receiving special education services, in finding that the programs and services at the NPS are similar to those recommended by the CSE, and in applying an appropriateness standard rather than analyzing the similarity of the programs. The parent answers, asserting that the IHO's decision should be upheld. The parent also contends that the petition should be dismissed as untimely, to which the district replies and additionally asserts that the answer should be rejected for not citing to the hearing record and for not being verified.³

V. Discussion

A. Timeliness of Appeal

The parent asserts that the petition is untimely; however, the parent's assertion appears to be based on a misunderstanding of the applicable law. An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). A petition is timely if it is personally served on the respondent within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). The parent admits that he was personally served on October 3, 2014, the 35th day from the IHO's August 29, 2014 decision, but asserts that service was untimely because he received the petition "in the evening (I believe at approx. 6PM)" (Answer ¶ 7). As a general matter of State law, a "calendar day includes the time from midnight to midnight" (General Construction Law § 19; see Schampier v. Off. of Gen. Servs., 73 A.D.2d 1011, 1012[3d Dep't 1980]), and authorities are generally in agreement that personal service may be made at any time of day (see, e.g., Siegel, N.Y. Prac. § 202 at n.7 [5th ed. 2011]; Alan D. Scheinkman, New York Law of Domestic Relations

³ The answer presented to this office was verified and cannot be rejected on that ground. Additionally, to the extent that the answer does not reference the hearing record, a thorough review of the hearing record has been conducted and I am aware of the contents thereof. Accordingly, I decline to exercise my discretion to reject the answer, particularly in light of the fact that the parent is proceeding pro se on appeal.

§ 9:14 [West 2009]). Furthermore, Part 275 of the Regulations of the Commissioner permits substituted service of a petition "by delivering and leaving the same at the respondent's residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening" (8 NYCRR 275.8), and I have found no authority that supports the parent's proposition that a petition may be personally served only during business hours (see, e.g., State of New York Higher Educ. Servs. Corp. v. Sparozic, 35 A.D.3d 1069, 1071 [3d Dep't 2006]).

B. Transportation

A student identified by a local CSE as a student with a disability is entitled to transportation to and from a nonpublic school located within 50 miles of the student's home if the student attends the nonpublic school "for the purpose of receiving services or programs similar to special education programs recommended" by the CSE (Educ. Law § 4402[4][d]).⁴

Initially, as noted by the IHO, the parties agree that the student is eligible for special education services as a student with a disability and that the NPS is located outside of 15 miles but within 50 miles of the student's home (IHO Decision at pp. 11-12; see Pet. ¶¶ 14, 56-57; IHO Ex. 1 at p. 2). Accordingly, the question remaining is whether the student attended the NPS for the purpose of receiving special education programs and services similar to those recommended by the CSE.

The district asserts that the student does not attend the NPS for the purpose of receiving special education services because the services the student receives at the NPS are provided by the district pursuant to an IESP (see Dist. Ex. 7). The hearing record indicates that the student has received hearing services provided by an itinerant teacher at the NPS (see Tr. pp. 57-58, 106-07; Dist. Exs. 1-6; 9). In addition, the student's teacher at the NPS indicated that the student's hearing service provider pushed into his classroom to provide services (Tr. pp. 226-27). When the NPS was located in the district, the student's hearing services were provided to the student by the district pursuant to an IESP (Tr. pp. 57-58, 106-07; see Dist. Exs. 5; 6). For the 2014-15 school year, the district developed an IESP offering individual hearing services for two thirty-minutes sessions per week and two thirty-minute hearing consultations for the year (Dist. Ex. 7 at pp. 1, 9). However, as the NPS moved to a new district for the 2014-15 school year, the district of location was responsible for providing those service to the student (see Educ. Law §3602[c]). Additionally, the district does not contend that the student is not receiving those services for the 2014-15 school year (see Pet.).

When considering the similarity of the services provided by a NPS with the program recommended by the CSE pursuant to Educ. Law § 4402(4)(d) (Appeal of Students with Disabilities, 51 Ed. Dep't Rep., Decision No. 16,341; Application of a Student With a Disability, 33 Ed. Dep't Rep. 712, Decision No. 13,209), the Supreme Court, Albany County recently found that special education programs and services provided by a district of location pursuant to an IESP must be considered as a part of the analysis of whether the program at the NPS was similar to that offered by the CSE (Lombardo v. King, Index No. 4185-12 [Sup. Ct. Albany County Jan. 23, 2013, Devine, J.]; see Appeal of Students with Disabilities, 52 Educ. Dep't Rep., Decision No. 16,490).

⁴ Generally, a student parentally placed in a nonpublic school is entitled to transportation to and from the nonpublic school only if the school is located within 15 miles of the student's home (see Educ. Law §3635).

Accordingly the hearing services provided to the student by the district will be considered in determining whether the special education programs and services the student received at the NPS are similar to those recommended by the CSE. The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

In addition to the hearing services, the student's teacher at the NPS testified that he provided the student with the program accommodations included in the May 2014 IESP (Tr. pp. 217-19). The program accommodations included closed-captioning of audiovisual material, copies of class notes, repetition, verbal cues, and checks for understanding (Tr. pp. 217-18; Dist. Ex. 7 at p. 9). According to the district's assistant superintendent for pupil personnel special services (assistant superintendent), refocusing, redirection, and checking for understanding are standard strategies that would be expected from a good teacher in every classroom (Tr. p. 91). While the student's teacher explained that there were a number of strategies he employed to help all students with their focus, he also explained that providing copies of class notes was something that was only done for students for whom it was specified as an accommodation on an IEP (Tr. pp. 225-26). The program accommodations were also in agreement with the recommendations contained in the student's last hearing progress report which, for example, indicated the student required class notes due to her inability to lip read or process auditory information (Dist. Ex. 9 at p. 2). In consideration of the above, although some of the listed accommodations (refocusing, redirection, and checking for understanding) may not have been specific to the student, others (closed-captioning on audiovisual material and copies of class notes) were specifically designed to address the student's hearing needs, were recommended by the CSE, and were also provided by the NPS (Tr. pp. 217-18, 225-26; Dist. Exs. 7 at p. 9; 9).

The district contends that the programs and services at the NPS should be compared to the programs and services that were offered to the student in a May 2012 IEP for the 2012-13 school year, the first year that the student was parentally placed at the NPS, rather than the programs and services recommend in the May 2014 IESP for the 2014-15 school year (Tr. pp. 71-72; Dist. Exs. 4; 7). The May 2012 CSE recommended that the student receive three sessions per week of individual hearing services, integrated co-teaching (ICT) services in ELA, math, social studies, and science, and a 15:1 special class once daily for skills development (Dist. Ex. 4 at pp. 1, 7-8).⁵ The district assistant superintendent testified that the reason the May 2014 IESP did not include recommendations for ICT services and a 15:1 special class is that the May 2014 IESP was only intended to provide services at the NPS and that "public schools do not dispense teachers to private schools to provide core academic instruction" (Tr. pp. 105-06, 128-29). While it is understandable that the district did not recommend a special education class in core academic subjects at the NPS, it is still not appropriate to compare the current program at the NPS to what was offered in the district two years ago, as the test at issue for entitlement to transportation to a nonpublic school is that the student "attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special

⁵ The May 2012 CSE recommended the same program modifications as were recommended in the May 2014 IEP except the May 2012 IEP also included preferential seating (compare Dist. Ex. 4 at p. 8, with Dist. Ex. 7 at p. 9).

education" (Educ. Law § 4402[4][d]). This is especially so considering that the student has made progress in the intervening period, warranting a reduction in her hearing services and the removal of the support of a personal auditory trainer (Tr. pp. 111-13; compare Dist. Ex. 4 at pp. 1, 8, with Dist. Ex. 7 at pp. 1, 7).⁶ Accordingly, as the district did not recommend ICT services or a 15:1 special class for the 2014-15 school year, and as it is not clear from the hearing record whether those services would have been required for the student to receive a FAPE,⁷ it would not be proper to compare the program offered at the NPS with programs and services that were recommended for the student two years ago. I am not persuaded that the district has established that the two programs are insufficiently similar (Educ. Law § 4404[1][c]).

Based on the above, I concur with the IHO's determination and find that the hearing services and the management needs and program modifications provided at the NPS were sufficiently similar to the special education programs and services recommended by the CSE for the 2014-15 school year to support the parent's request for transportation (see Tr. pp. 217-18, 225-26; Dist. Ex. 7 at p. 7).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
October 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

⁶ The district objected to the introduction of evidence related to the student's progress at the NPS (Tr. pp. 138-39, 183-84). Normally I would agree with the district as the student's progress does not relate to the similarity of the programs; however, in this instance because the district is seeking a comparison of the current NPS program with what the district would have offered in relation to a two-year old IEP, the student's progress in the intervening period and current functioning would have been crucial elements to the district's claims.

⁷ To the extent that the district asserts the IHO applied an incorrect standard—analyzing the NPS program based on its appropriateness rather than on its similarity to the district's recommended program—that analysis was not necessarily improper as it stems from the district's request to have the IHO speculate as to what program the district would have offered the student for the 2014-15 school year (see IHO Decision at pp. 13-14).