The University of the State of New York

The State Education Department
State Review Officer

No. 07-087

Application of the BOARD OF EDUCATION OF THE SPRINGVILLE-GRIFFITH INSTITUTE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:
Hodgson Russ LLP, attorney for petitioner, Jeffrey J. Weiss, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which determined that its Committee on Special Education (CSE) improperly decided that respondent's son was no longer eligible for special education. The appeal must be dismissed.

I will first address the procedural issues raised in this appeal. Respondent asserts as affirmative defenses in her answer that the petition for review was both untimely and improperly served. In its reply, petitioner asserts that it served respondent its appeal papers in a timely and sufficient manner.[1]

The Regulations of the Commissioner of Education require that, when a board of education initiates an appeal from an impartial hearing officer's decision, the petition be served upon the parent (8 NYCRR 279.2[c]). Personal service of a petition on a respondent is required whether the petitioning party is a parent or a board of education (8 NYCRR 275.8[a], 279.1[a]; Application of the Dep't of Educ., Appeal No. 07-037; see Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 93-2). If respondent cannot be found

[1] Petitioner filed an unverified reply on August 7, 2007. Petitioner subsequently submitted proper verification. Accordingly, I will consider petitioner's reply in this appeal (see Application of the Bd. of Educ., Appeal No. 05-067; Application of a Child with a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 02-009; Application of the Bd. of Educ., Appeal No. 01-014). I remind petitioner that "[a]ll pleadings shall be verified . . . [a]n answer shall be verified by the oath of the respondent submitting such answer . . . [a] reply shall be verified in the manner set forth for the verification of an answer" (8 NYCRR 279.7).

upon diligent search, petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at 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, or as otherwise directed (8 NYCRR 275.8[a]).

Respondent claims that petitioner was advised that respondent was on vacation from July 20 to August 3, 2007, but made no attempt to serve respondent earlier than July 20, 2007 or to coordinate other service arrangements. Petitioner's affidavits of service show that petitioner unsuccessfully attempted to effectuate personal service of the petition upon respondent at her residence eight times, throughout the day and evening, from July 18 to July 23, 2007. On July 20 and July 23, 2007, copies of the notice of petition, petition, and memorandum of law were placed in the doorway of respondent's residence (Harwood Pet'r Aff. of Service; Rodriguez Aff. of Service). Copies of the notice of petition, petition, and memorandum of law were also mailed to respondent on July 20, 2007 and July 24, 2007. Respondent admits that she received the petition for review and supporting papers at least by July 27, 2007 (see attached Affidavit to Answer).

While petitioner did not effectuate personal service, I decline to dismiss the appeal for improper service. Dismissal is particularly inappropriate when it appears, as it does here, that respondent and/or person(s) of suitable age and discretion were at home at the time personal service was attempted but refused to answer the door or accept service (see Pet'r Reply at pp. 2, 4; Harwood Aff. of Service; see Application of the Bd. of Educ., Appeal No. 04-085). Although petitioner did not comply with the service requirements of 8 NYCRR 275.8[a], I find that respondent effectively responded to petitioner's allegations in a timely manner upon receipt of the petition and I will excuse petitioner's improper service (Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-073; Application of the Bd. of Educ., Appeal No. 05-002; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-084; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 01-055; Application of a Child with a Disability, Appeal No. 93-2).

In addition, the provisions of the Commissioner's Regulations also state that a petition for review by a State Review Officer must comply with the timelines specified in the Regulations of the Commissioner of Education (see 8 NYCRR 279.2; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5-*6 [N.D.N.Y. Dec. 19, 2006]). Respondent asserts in her answer that petitioner failed to commence this appeal within the time period set forth in Part 279 of the regulations (8 NYCRR 279.2[b]). Part 279 requires that a petition for review of an impartial hearing officer's decision shall be served upon the school district within 35 days from the date of the decision sought to be reviewed (id.). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25 or 35-day period (id.). A State Review Officer may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for such failure shall be set forth in the petition (id.).

The impartial hearing officer's decision is dated June 15, 2007 (IHO Decision at p. 19). Petitioner's affidavits of service show that petitioner attempted to personally serve the petition on respondent multiple times from July 18 to July 23, 2007. Respondent received the petition by at least July 27, 2007. Given that personal service was diligently attempted prior to the time in which

to bring an appeal had elapsed, and given that personal service was not effectuated in part due to the actions of respondent in frustrating service, I decline to dismiss this appeal as untimely (Application of the Bd. of Educ., Appeal No. 04-085; see Application of a Child with a Disability, Appeal No. 07-053; Application of a Child with a Disability, Appeal No. 03-096).

Turning to the child's educational history, the record shows that the child entered petitioner's school district in 2002 as a kindergarten student, and was classified as a student having an other health impairment in 2003 (Tr. p. 796; Dist. Ex. 25 at p. 1). The child's medical history includes conductive hearing loss in the left ear, acute mastoiditis, and sinusitis (id.). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition on May 19, 2005 yielded a verbal comprehension score (percentile rank) (qualitative description) of 102 (55) (average), a perceptual reasoning score of 104 (61) (average), a working memory score of 110 (75) (high average), a processing speed score of 121 (92) (superior), and a full scale IQ score of 111 (77) (high average) (Dist. Ex. 4 at p. 2). Results from the May 25, 2005 Woodcock-Johnson Test of Achievement-Third Edition revealed high average broad math, broad reading, and broad written language scores (id. at p. 4).

An April 22, 2005 private occupational therapy evaluation report stated that the child's performance on formal assessments yielded a particular cluster of scores that was consistent with dysgraphia caused by deficits in the tactile and visual spatial skills and mixed sensory processing difficulties (Dist. Ex. 3 at p. 4). The evaluator stated that the child's performance was complicated by his left handedness and difficulty with motor planning an appropriate sitting posture to complete his seated work efficiently (id.). For the 2005-06 school year, the child was placed in a regular education program with accommodations and assistive technology (Dist. Ex. 8 at pp. 1-2). The November 18, 2005 individualized education program (IEP) recommended that the child receive individualized occupational therapy for 30-minute sessions twice a week in a special location and once a week in his regular education classroom (id. at p. 1).

On May 30, 2006, petitioner's CSE held an annual review/reevaluation meeting for respondent's son for the 2006-07 school year (Dist. Exs. 30; 34). Respondent did not attend the May 30, 2006 CSE meeting (Dist. Ex. 35 at p. 1). Petitioner's May 30, 2006 CSE determined that the child was no longer eligible for classification as a student with a disability and, therefore, was not eligible to receive special education services (id.) The CSE recommended the following declassification support services: adaptive seat cushion for his chair in the classroom; preferential seating in all classes; and an occupational therapy consult with regular education teacher for a 30-minute session once per month (Dist. Exs. 34; 39 at p. 6; 89 at p. 2).

In a due process complaint notice dated September 5, 2006, respondent alleged, among other things, that petitioner failed to: provide respondent with appropriate notice of the May 30, 2006 CSE meeting and prior written notice; schedule the meeting at a mutually agreeable time, place, and location; allow parental participation in the development of her son's IEP; and convene a properly composed CSE (Dist. Ex. 50). In a second due process complaint notice dated October 20, 2006, respondent alleged that, among other things, during the course of the impartial hearing petitioner failed to implement her son's pendency program according to his November 18, 2005 IEP (Dist. Ex. 64 at pp. 1, 3). The two due process complaint notices were consolidated upon consent of the parties (Dist. Exs. 69; 73; 74; 76; 77; 78).

The impartial hearing commenced on January 4, 2007 and ended on March 15, 2007, after five days of testimony. By decision dated June 15, 2007, the impartial hearing officer ordered that petitioner's "declassification" of the student be annulled and he directed petitioner to reconvened a full CSE within thirty days of the receipt of his order to discuss and resolve the issue of the child's classification (IHO Decision p. 19). The impartial hearing officer reached his decision, in part, based upon his conclusion that: 1) petitioner failed to schedule a CSE meeting at a mutually convenient time which would allow respondent to attend; and 2) the resulting CSE meeting was improperly composed due to the lack of parent attendance. Having so found, the impartial hearing officer did not address respondent's substantive allegations regarding the sufficiency of the May 30, 2006 annual review and the resulting recommendations (id. at p. 17).

Petitioner asserts on appeal that the impartial hearing officer erred to the extent that he annulled petitioner's declassification of the student.[2]

The central purpose of the Individuals with Disabilities Education Act (IDEA) is to ensure that students with disabilities have available to them a free appropriate public education (FAPE)[3] (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

I agree with the impartial hearing officer's determination that petitioner failed to schedule the CSE meeting at a mutually agreeable time to enable respondent to attend. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Parents of a child with a disability are mandated team members of a CSE (8 NYCRR 200.3[a]; see also 34 C.F.R. § 300.321[a][1]). Federal and state regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's CSE meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322[a]; 8 NYCRR 200.5[d]; see Mr. M v. Ridgefield Bd. of Educ., 2007 WL 987483 [D. Conn. Mar. 30, 2007]).

---

[2] On appeal, respondent requests that I recuse myself from the review of this appeal on grounds that she has received unfavorable decisions in the past and that she currently has an appeal of Application of a Child with a Disability, Appeal No. 07-007, pending in the United States District Court, Western District. I have considered respondent's request and decline to recuse myself. There is no basis in law or fact that warrants recusal (see 8 NYCRR 279.1).

[3] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

If neither parent can attend a CSE meeting, the school district must use other methods to ensure parent participation, including individual or conference telephone calls (34 C.F.R. §§ 300.322[c], 300.328; see 8 NYCRR 200.5[d][1][iii]). A CSE meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3]). The school district must keep a record of its attempts to arrange a mutually agreed upon time and place, such as telephone call records, correspondence, and detailed records of visits made to the parents' home or place of employment and the results of those visits (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3] - [4]).

The record shows that petitioner attempted to schedule the annual review/reevaluation meeting for respondent's son on four dates (Tr. pp. 147, 155-56; Dist. Exs. 11; 12; 16; 17; 19; 20; 26; 30; 31), but rescheduled two of those dates due to teacher unavailability (Tr. pp. 158, 405; Dist. Exs. 19; 20) and a conflict caused by a scheduling matter unrelated to respondent's son (Tr. p. 402). Respondent requested that one date be changed because she had been unaware of the rescheduled date and had made other time commitments (Tr. pp. 161, 475; Dist. Ex. 28). In a letter dated April 18, 2006, respondent indicated that she was available to meet with petitioner on three specified dates (Tr. pp. 161, 480; Dist. Ex. 28). Petitioner rescheduled the annual review/reevaluation meeting for May 30, 2006, one of the dates on which respondent was available (Tr. p. 162; Dist. Exs. 28; 37). Petitioner's parental contact log indicates that on May 26, 2006, petitioner unsuccessfully attempted to contact respondent to remind her of the May 30, 2006 meeting (Dist. Ex. 32). On the morning of May 30, 2006, respondent advised petitioner's director of special education that she would be unable to attend her son's CSE meeting because of a medical appointment scheduled for the same time (Tr. pp. 163, 916; Dist. Ex. 38; Parent Ex. DD). Respondent proposed rescheduling the CSE meeting to June 13, 2006 or June 15, 2006 (Dist. Ex. 38). Petitioner's director of special education testified that the May 30, 2006 annual review/reevaluation meeting went forward without respondent because the meeting had been cancelled previously, and in view of respondent's prior limited availability, she was concerned that there would not be enough time to meet to "have something set" for the child for September 2006 (Tr. pp. 164, 483, 904; Dist. Ex. 36 at p. 1).

Here, each party canceled two scheduled CSE meeting dates, as discussed above. The record does not show that petitioner responded to respondent's offer to meet on one of two June 2006 dates (Dist. Ex. 38; see Mr. M, 2007 WL 987483, at *6). The record does, however, demonstrate that there were three weeks left until the end of the school year, within which time an annual review/reevaluation meeting could have been scheduled (Tr. pp. 164, 904; Dist. Ex. 38).[4] Based on the above, I concur with the impartial hearing officer and I find that petitioner's CSE failed to comply with its obligation to ensure that respondent was present at her son's annual review/reevaluation meeting or was afforded the opportunity to participate in the meeting (see Mr. M, 2007 WL 987483, at *6 -*7; 34 C.F.R. § 300.322; 8 NYCRR 200.5[d]).

Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies a) impeded the student's right to a FAPE, b) significantly impeded the parents' opportunity to participate in the decision-

[4] I note that in her answer respondent asserts that during the weekdays she is available for CSE meetings on Tuesdays, Thursdays, and Fridays (Answer ¶ 41).

making process regarding the provision of a FAPE to the child, or c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]; 34 C.F.R. § 300.513[a][2]). Here, petitioner conducted the May 30, 2007 CSE meeting in the absence of respondent and in the absence of input from respondent regarding the eligibility of her son for special education. At that meeting it determined that respondent's child was not eligible for special education. In the circumstances of this case, petitioner significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and therefore failed in its obligation to offer respondent's son a FAPE.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 17, 2007[*]

PAUL F. KELLY
STATE REVIEW OFFICER

[*] Technical changes incorporated on October 9, 2007.