



The University of the State of New York

The State Education Department State Review Officer

No. 08-053

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 New York City Department of Education

Appearances:

Partnership for Children's Rights, attorneys for petitioner, Warren Sinsheimer, Esq. and James H. Fogel, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program that respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2007-08 school year was appropriate, and denied the parent's request for the student's tuition costs at St. Ursula's Learning Center (St. Ursula's). The appeal must be dismissed.

At the time of the impartial hearing, the student was attending St. Ursula's, which is not approved by the State to provide special education services to students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. p. 5). The student's overall cognitive functioning has been found to be in the low average range with a significant deficit noted in working memory (Dist. Ex. 5 at pp. 1, 6). He exhibits significant academic delays in reading, mathematics, and written expression, as well as deficits in articulation, expressive language, and his social emotional skills; specifically anger management and appropriate expression of feelings (Dist. Exs. 1 at pp. 3-4; 2 at p. 1; 3 at p. 1; 4). The student's eligibility for special education programs and services and his classification as a student with a speech or language impairment are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

By due process complaint notice dated December 4, 2007, the parent requested an impartial hearing seeking the costs of her son's tuition at St. Ursula's for the 2007-08 school year (Pet. ¶ 6).¹

An impartial hearing was convened on December 14, 2007 and concluded on April 14, 2008, after three days of testimony. By decision dated April 29, 2008, the impartial hearing officer determined: (1) that the district had offered the student a free appropriate public education (FAPE) (IHO Decision at pp. 9-10); (2) that even if the district failed to offer the student a FAPE, St. Ursula's was an inappropriate placement for the student (*id.*); and (3) that the parent is not entitled to reimbursement for the student's private school placement for the 2007-08 school year (*id.* at p. 10).

The parent appeals from the impartial hearing officer's decision and seeks reversal of the impartial hearing officer's decision.

The district answered, requesting dismissal of the petition in its entirety based upon procedural deficiencies, or, in the alternative, denying the petition in its entirety on the merits.

The parent replied, contending that her petition complied with the requirements of Part 279 of the State regulations and requesting a determination on the merits.

At the outset, I will address several procedural matters arising on appeal. The district contends that the petition should be dismissed outright because it is procedurally defective for three reasons: (1) the petition fails to state the parent's basis for the appeal in contravention of 8 NYCRR 279.4(a); (2) the petition fails to include any references to the hearing record, in violation of 8 NYCRR 279.8(b); and (3) the parent's memorandum of law fails to comply with 8 NYCRR 279.8(a)(6) in that it does not contain a table of contents. On these grounds, the district requests that I exercise my discretion under 8 NYCRR 279.8(a) and dismiss the petition for the parent's failure to comply with these requirements.

First, I will address the district's assertion that the petition for review fails to clearly indicate the reasons for challenging the impartial hearing officer's decision and fails to indicate what relief should be granted by a State Review Officer as required by 8 NYCRR 279.4(a). Section 279.4(a) provides, in pertinent part that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner." As explained herein, the petition in this case fails to comply with 8 NYCRR 279.4(a) (see Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096).

In this appeal, the parent is represented by counsel. The statements in the petition are unduly vague and ambiguous as to preclude the district from effectively formulating a responsive

¹ The parent's due process complaint notice is not included in the hearing record. Both parties are reminded that a due process complaint notice should be included as a part of the hearing record.

answer. Other than asserting in general terms that the parent seeks a review of the impartial hearing officer's decision, the petition does not provide sufficient particulars as to the reasons why she challenges the impartial hearing officer's decision. For example, the parent alleges in general terms that "the [h]earing [o]fficer's decision was incorrect in that the [district] failed to prove that it had offered petitioner a FAPE and that St. Ursula's was an [in]appropriate placement for him" (Pet. ¶ 11).

Moreover, the reference in the petition to "the reasons set forth in the attached [m]emorandum of [l]aw dated May 22, 2008" (Pet. ¶ 11), does not cure the parent's failure to comply with 8 NYCRR 279.4(a) (see Application of a Child with a Disability, Appeal No. 06-096). I note that the parent raised several procedural and substantive issues in her memorandum of law that were not raised in her petition for review. The petition for review is required to "clearly indicate the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[a]). A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Although the parent submitted a memorandum of law together with her petition for review, the memorandum is not a substitute for a properly drafted petition for review and will not be considered to the extent that it raises issues that were not raised in the petition.

In addition to not comporting with 8 NYCRR 279.4, I find that the four-page petition fails to reference the hearing record as required by 8 NYCRR 279.8(b). State regulation directs that "[t]he petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-003 [dismissing a petition that *inter alia* did not reference the hearing record]). In the instant appeal, aside from a single citation to the documentary record, there are no other citations to the hearing record contained in the petition to support the parent's allegations.²

State regulations provide that documents that fail to comply with the above-mentioned requirements may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080).

Due to the non-compliance with 8 NYCRR 279.8[b] and 279.4[a], the petition for review is deficient and fails to meet the requirements set forth in the State regulations. I will therefore exercise my discretion under 8 NYCRR 279.8(a), and dismiss the petition (8 NYCRR 279.4;

² The parent's memorandum of law is also deficient insofar as it does not contain a table of contents. Although the parent ultimately attached a table of contents to her reply, State regulations provide that a memorandum of law shall include a table of contents (8 NYCRR 279.9[8][a][6]).

Application of a Student with a Disability, Appeal No. 08-022; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 11, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**