The University of the State of New York

The State Education Department
State Review Officer
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No. 09-023

Application of the BOARD OF EDUCATION OF THE GRAND ISLAND CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Goldstein, Ackerhalt & Pletcher, LLP, attorneys for petitioner, Arthur H. Ackerhalt, Esq. and Jay C. Pletcher, Esq., of counsel

Law Offices of H. Jeffrey Marcus, P.C., attorneys for respondent, H. Jeffrey Marcus, Esq., of counsel

DECISION

Petitioner (the district) appeals from an interlocutory ruling of an impartial hearing officer regarding the scope of an impartial hearing to be conducted subsequent to an order of remand issued by a State Review Officer. The December 31, 2008 order of remand resulted from the district's prior appeal pursuant to 8 NYCRR 279.10(d) of the State regulations from an interim decision of an impartial hearing officer regarding the student's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2008-09 school year (Application of the Bd. of Educ., Appeal No. 08-126). The appeal must be dismissed.

Upon remand, on January 9, 2009, the impartial hearing officer conducted a prehearing conference pursuant to 8 NYCRR 200.5(j)(3)(xi) (Tr. p. 1). During the prehearing conference, respondent's (the parent's) counsel stated on the record that:

> … I'm willing to stipulate at this point that the March [27, 2008 Committee on Special Education] CSE meeting was a[nother district's] CSE meeting. That was [another district's] CSE meeting.… I mean, I wasn't there, but there's no reason to think I can put on any proof that the [district] CSE met on March 27, 2008, so. …

> And then I'll put in writing precisely what I'm stipulating to, which is that – that I can't – I can't reasonably put on evidence to counter the conclusion that that was a[nother district's] CSE meeting, that the – I can't prove that the [district] CSE met.

(Tr. pp. 9-10, 16).

On January 29, 2009, the impartial hearing officer issued correspondence to counsel for both parties summarizing the prehearing conference, scheduling the impartial hearing for February 6, 2009, and ruling that this impartial hearing "shall be for the purpose of rendering a pendency determination based upon a trial de novo" (IHO Letter at p. 2).[1] The district appeals from the January 29, 2009 letter, arguing that the impartial hearing officer's ruling set forth therein misapplied the previous determination made in Application of the Bd. of Educ., Appeal No. 08-126, which specifically described the purpose of the remand to "develop a hearing record regarding the alleged existence of a district-generated individualized education program (IEP) developed on March 27, 2008 and, if it is found to exist, whether such IEP constituted the last unchallenged placement for the purpose of determining the student's pendency placement" (emphasis added).[2]

The parent answers, asserting two affirmative defenses: (1) that 8 NYCRR 279.10(d) does not confer upon the district a right to an interlocutory appeal of the impartial hearing officer's January 29, 2009 determination because this determination addressed only the scope of the impending impartial hearing, and did not constitute a pendency determination; and (2) that the district failed to establish that its board of education authorized pursuit of the instant appeal as mandated by 8 NYCRR 279.7.[3]

Jurisdiction of a State Review Officer in appeals from interim decisions of impartial hearing officer decisions is limited to pendency determinations (8 NYCRR 279.10[d]; Application of a Child with a Disability, Appeal No. 07-057; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 04-064). The State regulations pertaining to practice on review of hearings for students with disabilities state:

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[1] Although the district's counsel referred to this correspondence as an "interim decision" in the petition (see Pet. ¶ 2), and the parent's counsel referred to it as a "decision" in the answer (see Answer ¶ 3), I will cite to this correspondence as the "IHO Letter" in this decision.

[2] Application of the Bd. of Educ., Appeal No.08-126 held that the last unchallenged IEP was the student's July 30, 2007 IEP subject to a determination of the validity of the parent's assertion that a district-generated March 27, 2008 IEP existed and that it constituted the last unchallenged IEP.

[3] I note that the district did not comply with State regulations when serving its reply. According to the affidavit of service accompanying the parent's answer, the parent served his answer on March 9, 2009 (see Parent Aff. of Service). The affidavit of service accompanying the district's reply indicates that it was served on March 16, 2009, seven days after the answer (see Dist. Aff. of Service). State regulation 8 NYCRR 279.6 requires that a reply be served within three calendar days after service of the answer. In view of the district's failure to comply with the aforementioned State regulation, and absence of a request for an extension of time in which to serve a reply (8 NYCRR 279.10[e]), I decline to consider the reply in connection with this appeal.

> (d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(8 NYCRR 279.10[d]).

The impartial hearing officer's ruling on the scope of the impartial hearing (IHO Letter at p. 2) is neither a pendency determination that may be appealed (see Educ. Law 4404[4]; 8 NYCRR 279.10[d]; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52), nor a final decision that may be appealed (see Educ. Law 4404[1]; 34 C.F.R. § 300.514; 8 NYCRR 200.5[k]). I find that this appeal must be dismissed as premature (Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 01-006; Application of a Child with a Disability, Appeal No. 00-059; Application of a Child with a Disability, Appeal No. 99-52; Application of a Child with a Disability, Appeal No. 98-29; Application of a Child with a Disability, Appeal No. 98-8). The district may obtain review of the impartial hearing officer's ruling upon the issuance of a pendency order or final determination on the merits.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 25, 2009

PAUL F. KELLY
STATE REVIEW OFFICER