



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-016

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:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy SiligmueLLer, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed the parent's due process complaint notice without prejudice.^{1,2} The appeal must be dismissed.

¹ The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 09-042; Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-011; Application of a Student with a Disability, Appeal No. 09-007; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046. Another decision regarding this student, Application of a Student with a Disability, Appeal No. 10-017, has also been issued today.

² Petitioner's due process complaint notice has been identified by the district's impartial hearing office as case number 124664.

By due process complaint notice dated October 27, 2009, submitted by e-mail to respondent (the district), the parent requested an impartial hearing (Dist. Ex. 1).³ In the due process complaint notice, the parent alleged that an attorney working for the district "knowingly significantly impedes parent and child so child cannot receive educational benefits and or services," and for relief requested that the district and the parent would "determine actions" for the district's attorney so that the student could receive educational benefits and/or services (id. at p. 2).

The district challenged the sufficiency of the parent's due process complaint notice arguing that the complaint did not comply with the requirements of the Individuals with Disabilities Education Act (IDEA) and federal and State regulations in that it failed to identify the school that the student attended; failed to state the nature of the problem, including related facts; and failed to state a proposed solution (IHO Decision at p. 1; Answer Ex. 2). In a decision dated November 2, 2009, the impartial hearing officer found that the due process complaint notice did not describe a special education problem or propose a solution and failed to include the name of the school the student attended in violation of 20 U.S.C. § 1415(b)(7)(A)(ii)(I) (IHO Decision at p. 1). The impartial hearing officer further found that "the parent's allegation concerning a [district] attorney does not describe a special education complaint, nor does it set forth any related facts" (id.). The impartial hearing officer determined that the due process complaint notice was insufficient and dismissed the parent's complaint without prejudice (id.). She further stated that the parent may commence another impartial hearing with a due process complaint notice "that sets forth the required information outlined above" (id.).

This appeal by the parent ensued. The parent asserts, in a petition consisting of two short paragraphs, that the impartial hearing officer did not render a decision, that the appointed impartial hearing officer did not write the decision, did not "true sign" the decision, and did not provide a "true copy" to the parent. The parent also alleges that he does not have a copy of the decision and that there is "no true copy of the written true-signed decision in the complete and accurate [district] books and records" (Pet. ¶ 1). The parent requests that the "Decision" be vacated and annulled (Pet. ¶ 2).

In its answer, the district asserts that the evidence shows that the impartial hearing officer's decision was mailed to the parent on November 2, 2009, that the presumption of mailing and receipt applies, and that the parent has failed to effectively rebut the presumption of mailing and receipt. Accordingly, the district argues that the petition should be dismissed and the impartial hearing officer's order should be affirmed. The district notes that the parent's due process complaint notice did not include the parent's mailing address and asserts that the district obtained the parent's address from an October 21, 2009 affirmation submitted by the parent in an amended due process complaint notice in another case and that the impartial hearing officer's decision in the present matter was sent to that address and was not returned as undeliverable.

³ The hearing record contains a single exhibit consisting of a copy of an e-mail from the parent to the district with an attached one-page due process complaint notice (Dist. Ex. 1). It is unclear from the hearing record which party entered this exhibit into evidence and it was not marked by the impartial hearing officer. For ease of review, this Office has marked the exhibit "Dist. Ex. 1."

As evidence in support of its position, the district attaches five documents, including an affirmation, to its answer. The first attachment is an e-mail from the parent to the district and the parent's October 27, 2009 due process complaint notice (Answer Ex. 1). The second is a copy of a notice from the district entitled "Notice of Challenge to the Sufficiency of the Request" dated October 30, 2009 (Answer Ex. 2). The third is a copy of a cover letter, titled "Transmittal of Decision to Parents," indicating that the enclosed impartial hearing officer's decision was sent to the parent on November 2, 2009 (Answer Ex. 3). The fourth is a copy of an October 21, 2009 affirmation of the parent in an unrelated matter that includes a sworn statement of the parent's address (Answer Ex. 4). Also attached to the district's answer is an affirmation dated February 26, 2010 executed by the deputy chief administrator of the district's impartial hearing office that describes the standard procedures used by the office for transmittal of decisions to parents (Dist. Aff. ¶¶ 3-14). The affirmation also states that those procedures were used in the instant case and that a review of the office's database indicates that the impartial hearing officer's decision, dated November 2, 2009, was mailed to the parent on the same day (*id.* at ¶ 8).

The parent did not submit a reply to the district's answer and therefore, has not objected to the district's additional evidence and affidavit attached to its answer (8 NYCRR 279.6).

Turning to the parent's appeal, I note that it is difficult to discern the exact content of the parent's assertions. It appears that the parent is arguing that he never received a copy of the impartial hearing officer's decision in this matter; however, paradoxically, he also claims that no decision was rendered by an impartial hearing officer. As it is clear that an impartial hearing officer's decision was rendered in this matter (IHO Decision), I will address the parent's assertion that he did not receive a copy of the decision.⁴

State regulations provide that "the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (*Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829 [1978]). "As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (*In re Lumbermens Mutual Casualty Co. v. Collins*, 135 A.D.2d 373, 374 [1st Dep't 1987]; but see *Rhulen Agency, Inc. v. Gramercy Brokerage, Inc.*, 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (*Nassau Ins. Co.*, 46 N.Y.2d at 829-30).

⁴ The parent does not appeal the impartial hearing officer's determination that his October 27, 2009 due process complaint notice was insufficient. Therefore, that finding is final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The parent's claim that he did not receive a copy of the impartial hearing officer's decision in this matter is insufficient by itself to rebut the presumption of mailing and receipt. The parent does not allege in his petition or offer evidence that the district's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (see Nassau Ins. Co., 46 N.Y.2d at 829-30). Moreover, the affirmation attached to the district's answer and executed by the deputy chief administrator of the district's impartial hearing office describes the standard procedures used by the office for the transmittal of decisions to parents (Dist. Aff. ¶¶ 3-14). The affirmation states that the affiant has personal knowledge of the procedures and that the office's decision managers are responsible for formatting, processing, and distributing decisions issued by impartial hearing officers (id. at ¶¶ 1, 4). It further states that when an impartial hearing officer's decision is received by the office, a transmittal letter is created and a copy of the letter, the decision, and other information is placed in an envelope with a window in it that shows the addressee's address (id. at ¶¶ 6-7, 9). The envelope is then placed in an outgoing mail bin, collected by the district's mail room personnel, stamped, and mailed at the end of each day (id. at ¶¶ 10-12). The affirmation states that a review of the office's database shows that this procedure was followed in the present matter and that no mail was returned as undeliverable by the post office (id. at ¶¶ 8, 14). This evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829). The parent does not claim that the address the district obtained from the October 21, 2009 affirmation of the parent is not his correct address. In this case, the parent's claim that he did not receive the decision is insufficient to rebut the presumption (see Nassau Ins. Co., 46 N.Y.2d at 829-30; Application of a Child with a Disability, Appeal No. 06-035).

Inasmuch as the parent has not challenged the substance of the impartial hearing officer's decision, this inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 24, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**