The University of the State of New York

The State Education Department
State Review Officer
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No. 10-024

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 without prejudice the parent's claims in his due process complaint notice with respect to the alleged failure of respondent (the district) to conduct an annual review for the student or to provide the student with special education services in a timely manner, and dismissed with prejudice all other claims in the due process complaint notice.[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. 10-017; Application of a Student with a Disability, Appeal No. 10-016; 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.

[2] Petitioner's due process complaint notice in this matter has been identified by the district's impartial hearing office as case number 125638.

By due process complaint notice dated December 13, 2009, submitted by e-mail to the district, the parent requested an impartial hearing (IHO Ex. I).[3] In the due process complaint notice, the parent contended that the district and a named impartial hearing officer "colluded to steal [d]istrict funds" and "significantly impede [p]arent and [c]hild by making inaccurate and or misleading entries in the … books and records of the [district] with the intent to impede, obstruct, and influence proper administration of [the student's] educational benefits and or services in a timely manner" (id. at p. 4). The due process complaint notice also alleged that certain private school personnel, as well as attorneys working for the district and other district personnel, "impede [p]arent and [c]hild" from receiving "educational benefits and or services in a timely manner" (id. at pp. 3-4). The due process complaint notice discussed, among other things, refiling or amending the complaint in this case, and alleged that a named district employee "provides" transcripts containing "suspicious redactions and edits" (id. at p. 5). The due process complaint notice also includes the statement "no IEP meeting; no annual review" (id. at p. 4).[4]

In a section of the due process complaint notice titled "Solution," the parent discusses, among other things, vacating a prior impartial hearing officer's decision, removing district employees "from office," providing the parent with "timesheets," the appointment of a guardian ad litem, determining "actions" for district and private school personnel, and reviewing an unrelated impartial hearing case for an alleged "fraudulent" appointment of a guardian ad litem by an impartial hearing officer (IHO Ex. I at pp. 5-6). The parent also attached copies of two orders of dismissal for insufficiency of two prior due process complaint notices to his complaint in this case (id. at pp. 7-12). The orders of dismissal arose from cases that involved the same student who is at issue in the present matter (id.).

An impartial hearing was held on January 28, 2010, wherein counsel for the district appeared in person and the parent participated by telephone (Tr. pp. 3-6). The impartial hearing officer's order of dismissal of the parent's December 13, 2009 due process complaint notice is dated February 8, 2010 (IHO Decision at p. 9). The impartial hearing officer noted that the parent's December 13, 2009 complaint "referenced 35 prior hearing requests" that he had filed (id. at p. 4). She further determined that although the parent's due process complaint notice referenced a guardian ad litem, there was no request for such an appointment before her (id.). She also noted in a footnote that the current proceeding "was not merged or consolidated with any of the parent's other impartial hearings" (id.). She then went on to describe the January 28, 2010 hearing date wherein the parent participated by telephone and stated that he would only be available for one hour (id. at p. 5). The impartial hearing officer noted that at the hearing date, she offered to continue the impartial hearing at a time and location more convenient for the parent and also offered to adjourn the hearing so the parent could obtain counsel, but the parent "ignored" the offers (id. at pp. 5, 8-9).

The impartial hearing officer described the district's position and stated that the district made an oral motion at the hearing date to dismiss the due process complaint notice, arguing that the complaint set forth allegations of criminal conduct that the impartial hearing officer did not

[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 12-page due process complaint notice (IHO Ex. I). It appears from the hearing record that the impartial hearing officer entered this exhibit into evidence and marked it as Exhibit I (IHO Decision at p. 10).

[4] Presumably, the parent's use of the acronym "IEP" is a reference to an individualized education program.

have jurisdiction to hear, and that the parent's complaint did not include allegations relating to a denial of a free appropriate public education (FAPE) on the part of the district (IHO Decision at p. 5).[5] The impartial hearing officer noted that the parent refused to cooperate with her efforts to administer an oath that would allow the parent to provide sworn testimony and refused to tell the impartial hearing officer where the student attended school, information that was not included in his due process complaint notice (id. at p. 6). Although the impartial hearing officer stated that the due process complaint notice contained two potentially justiciable claims under the Individuals with Disabilities Education Act (IDEA): (1) that the student was not receiving timely services; and (2) that there had been no individualized education program (IEP) meeting or annual review; she noted that her repeated attempts to steer the parent toward making an argument on these issues and presenting evidence were not successful (id. at pp. 6-7). Lastly, the impartial hearing officer noted that approximately one hour after the impartial hearing commenced, the parent ceased his participation in the hearing by hanging up the telephone (id. at p. 7). Based on the above, the impartial hearing officer found that the parent had chosen not to pursue his two potential IDEA claims and dismissed those claims without prejudice (id. at pp. 8-9). The remaining claims in the parent's due process complaint notice were dismissed with prejudice (id. at p. 9).

This appeal by the parent ensued. The parent asserts that no decision was rendered by the impartial hearing officer, the impartial hearing officer did not send a "true copy" of the decision to the parent, the impartial hearing officer did not write the decision, and the parent has never received a copy of the decision. The parent further alleges that there is no "true copy" of the decision in the "complete and accurate [district] books and records." The parent also asserts that, based on an affirmation of a district impartial hearing office employee, "[d]ecision [m]anagers" wrote and signed the decision.[6] The parent offers reproductions purported to be the signatures of the impartial hearing officer in a prior case concerning the student identified by the district's impartial hearing office as case number 124664 (affirmed by a State Review Officer in Application of a Student with a Disability, Appeal No 10-016) and the present matter, case number 125638, which appear to have been executed by different hands. The parent next disputes the accuracy of the hearing record transcript and claims, without specificity, that the "source tapes" given to the transcription service were "falsified . . . not authentic and have been tampered inter alia deletion, obscuration, transformation, synthesis" (Pet. ¶ 3). The parent further contends that the present case was not "fully litigated" and asks that a State Review Officer review this case and another case (identified by the district's impartial hearing office as case number 126040) currently under review

[5] 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]; see 34 C.F.R. § 300.17).

[6] Presumably, the parent is referring to an affirmation contained in the hearing record of one of the many prior cases concerning the student, as an affirmation does not appear in the hearing record, nor is one attached to the petition. However a similar affirmation from the same district impartial hearing office employee is attached to the district's answer (see Dist. Aff.).

by this office.[7] The parent requests that the "'[d]ecision'" be vacated and annulled, that the impartial hearing officer's certification be revoked, and that charges be filed with "appropriate authorities for Code of Conduct violations."

In its answer, the district asserts that the evidence shows that the impartial hearing officer's decision was mailed to the parent on February 8, 2010, that the presumption of mailing and receipt applies, and that the parent has failed to effectively rebut the presumption of mailing and receipt. 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 concerning the student, and that the impartial hearing officer's decision in the present matter was sent to that address and was not returned as undeliverable. As evidence in support of this argument, the district attaches three documents, including an affirmation, to its answer. The first 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 February 8, 2010 (Answer Ex. 1). The second 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. 2). Also attached to the district's answer is an affirmation dated March 19, 2010, executed by the deputy chief administrator of the district's impartial hearing office that describes the standard procedures used by the office for the 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 February 8, 2010, was mailed to the parent on the same day (id. at ¶ 8).

Next, the district argues that the parent's claim regarding alleged inaccuracies in the hearing transcript fails because the parent does not present any evidence of inaccuracies and does not specifically describe any alleged inaccuracies. Furthermore, the district argues that an inaccurate hearing transcript would constitute a procedural flaw that would need to cause a depravation of FAPE or significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, neither of which is alleged in the petition.

The district also argues that the parent's claims and requested relief regarding the impartial hearing officer should be dismissed because the parent has not stated any reasons for the request or given any facts to support a claim of misconduct on the part of the impartial hearing officer. Moreover, the district contends that these arguments are not properly raised before a State Review Officer and would instead be properly brought through the State complaint procedures or the procedures for suspension or revocation of an impartial hearing officer's certification described in 8 NYCRR 200.21(b). Lastly, the district argues that any claims regarding a prior due process complaint notice in case number 126040 should be dismissed because, among other reasons, at the time of the answer only an interim order that was not a pendency determination had been rendered in the case, which cannot be appealed. Moreover, the district contends that the petition does not clearly indicate the reasons for challenging that impartial hearing officer's decision, identify the findings to which exception is taken, or indicate what relief should be granted by a State Review Officer as required by 8 NYCRR 279.4(a).

[7] The paragraph of the petition making this argument also contains a reproduction of portions of transcript pages purportedly from a case identified by the district's impartial hearing office as case number 126040, but the purpose behind including the transcript pages is difficult to discern (see Pet. ¶ 4).

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 arguments on appeal, he initially appears to be contending 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.

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).

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 Student with a Disability, Appeal No. 10-017; Application of a Student with a Disability, Appeal No. 10-016; Application of a Child with a Disability, Appeal No. 06-035).

The parent also argues that the impartial hearing officer's decision was written and signed by a "decision manager" in the district's impartial hearing office, and not by the impartial hearing officer assigned to the matter. The parent's argument that the decision was not written by the impartial hearing officer is unconvincing given the statement in the affirmation of the deputy chief administrator of the district's impartial hearing office that decisions are issued and then transmitted to the office by impartial hearing officers and are received electronically (Dist. Aff. ¶ 4, n.1). The affirmation states that decision managers in the office are responsible for "formatting, processing and distributing decisions issued by [i]mpartial [h]earing [o]fficers" (id. at ¶ 4). The affirmation also states that the office's standard procedures were followed in this case (id. at ¶¶ 3, 8, 14).

The parent's argument that the impartial hearing officer's decision is invalid because it was allegedly signed by a decision manager and not by the assigned impartial hearing officer is also unconvincing. An 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]; see 34 C.F.R. § 300.512[a][5]). Nothing in the State regulations requires an impartial hearing officer's original signature or a copy of such a signature upon a written impartial hearing officer's decision and there is no apparent justification for reading such a requirement into the regulations (cf., Poughkeepsie Sav. Bank, FSB v R.S. Paralegal & Recovery Services, Inc., 160 A.D.2d 857, 858 [2d Dep't. 1990] [finding certain notices with conformed signatures issued pursuant to CPLR § 5222 enforceable because the statute did not require original signatures]). Moreover, even if the failure to provide the parent with a signed decision constituted a procedural violation, the parent has not alleged any harm resulting from the purported error.[8] Therefore, the parent's claim is denied.

Regarding the parent's claim disputing the accuracy of the hearing record transcript, it is dismissed because it is insufficiently pleaded. State regulations require the petition for review to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]; see Application of a Student with a Disability, Appeal No. 09-110; Application of the Bd. of Educ., Appeal No. 07-097). The petition alleges that the hearing record transcript is inaccurate and was tampered with, but does not provide any specific errors, or challenged material, nor does it identify any evidence regarding inaccuracies or tampering. Moreover, even if the hearing record was inaccurate or tampered with such that there was a procedural violation, the parent has not alleged any harm resulting from the purported errors (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

In the petition the parent also states that the case was not "fully litigated" and asks a State Review Officer to review both the present matter's transcript and the transcript of another case identified by the district's impartial hearing office as case number 126040 (Pet. ¶ 4). To the extent

[8] 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-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

that the parent requests a review of the case identified by the district's impartial hearing office as case number 126040, that case is not properly before me for review at this time. To the extent that the parent requests a review of the case identified by the district's impartial hearing office as case number 125638, that case is the present matter and has been reviewed herein.

Lastly, the parent requests that the impartial hearing officer's decision be vacated and that the impartial hearing officer's certification be revoked, among other requests. The district contends that the parent's argument on this point does not identify any alleged misconduct on the part of the impartial hearing officer and is also not properly before a State Review Officer because the "State complaint" procedure (8 NYCRR 200.5[*l*]) and/or the procedures for suspension or revocation of an impartial hearing officer (8 NYCRR 200.21[b]) would be the proper mechanism to address such a claim. The district fails to note that the Commissioner of the State Education Department may suspend or revoke the certification of an impartial hearing officer upon a finding that a State Review Officer has determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence (see 8 NYCRR 200.21[b][4][iii]). However, a review of the hearing record reveals no basis for finding misconduct or incompetence on the part of the impartial hearing officer. Given that the parent participated in the impartial hearing by telephone, proceeded pro se, and stated that he only had one hour to participate; the impartial hearing officer's multiple offers to the parent for an adjournment to obtain counsel, reschedule the impartial hearing, and to hold the impartial hearing at a location more convenient to the parent, were proper (Tr. pp. 12, 21, 40-45, 52-53). Additionally, given the parent's refusal to be sworn in and his failure to provide evidence or proceed in any meaningful way on the portions of his due process complaint notice that could have constituted IDEA claims, the impartial hearing officer properly employed her authority to assist an unrepresented party with information relating to the hearing process and ask questions to clarify the record (Tr. pp. 3, 6-7, 11-15, 18-22, 34-39, 54-57; see 8 NYCRR 200.5[j][3][vii]). In light of the above there is no basis for disturbing the impartial hearing officer's decision dismissing the parent's due process complaint notice.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2010

PAUL F. KELLY
STATE REVIEW OFFICER