The University of the State of New York

The State Education Department
State Review Officer
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No. 12-100

Application of the BOARD OF EDUCATION OF THE ORCHARD PARK 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:
Hodgson Russ LLP, attorneys for petitioner, Ryan L. Everhart, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, H. Jeffrey Marcus, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which denied its motion to dismiss and which found that the district denied the student a FAPE for the 2011-12 school year. The parents cross-appeal from those parts of the IHO's decision which found that the reading services provided to the student during the 2011-12 school year were appropriate and that deficiencies in the student's individualized education program (IEP) did not deny the student a FAPE. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State

complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's educational history need not be discussed in depth because, as discussed more fully below, the district has not properly initiated the appeal. The CSE convened on July 15 and 29, 2010 to develop the student's IEP for the 2010-11 school year (Dist. Ex. D at pp. 1, 8). The CSE recommended that the student be placed in a 12:1+1 special class in a district elementary school and receive extended school year (ESY) services (id. at pp. 4, 5). The CSE also recommended that the student receive the assistance of a full time teacher aide as well as counseling and speech-language therapy as related services (id. at pp. 4-8). During the student's

extended school year program from July 6, 2010 through August 16, 2010, among other things, the CSE recommended that the student receive "Phonemic Awareness Training" two times per week for 30 minutes per session (id. at p. 6). As part of the student's program commencing on September 7, 2010, among other things, the CSE recommended a "reading specialist to provide training (2 sessions)" and a reading teacher "consult with outside [r]eading [t]utor every 2 weeks," then indicated the service would be provided five times per week for 30 minutes per session (id.). During the 2010-11 school year, the student continued to receive private reading instruction, which was normally two days per week for 50 minutes per session (Tr. at pp. 267-68, 355-56).

The record reflects that on June 13, 2011, the principal of the student's elementary school telephoned the student's mother (Tr. pp. 358-59). She advised the parent that the student's reading services, which she characterized as academic intervention services (AIS), would not be discussed at the upcoming CSE meeting (Tr. p. 359; Dist. Ex. 10). A meeting with district staff to discuss the student's reading services was scheduled for June 14, 2011 (Tr. p. 360). At the meeting, which the parent attended, the reading specialist who had been providing the student with daily reading services during the 2010-11 school year recommended that the student's reading services be reduced to between two and three times per week (Tr. p. 361).

Also on June 14, 2011, the CSE convened for an annual review to develop the student's program for the 2011-12 school year (Dist. Ex. E at pp. 1, 3, 14-16). The June 2011 CSE recommended that the student be provided with ESY services and that he be placed in a 12:1+1 special class program (id. at pp. 1, 14, 15). The June 2011 CSE also recommended that the student receive speech-language therapy during summer 2011 and that he receive both speech-language therapy and counseling from September 2011 through June 2012 (id. at pp. 14, 16). The June 2011 CSE recommended that the student be integrated with general education students for math and science and that he be provided with the assistance of an aide during that instruction (id. at pp. 3, 14, 17). The June 2011 CSE did not recommend that the student continue to receive the daily reading instruction by a reading specialist or the previously recommended phonemic awareness training (see id. at pp. 3, 14-16). Finally, it indicated that AIS reading services would be determined by the building principal and reading specialist (id. at p. 17).

The district determined to discontinue the amount of reading services provided to the student by its reading specialist from five times a week during the 2010-11 school year to three times a week, for 45 minutes, starting in September 2011 (see Tr. pp. 94-95, 98-100, 126-29; see also Tr. pp. 179-80). The student continued to receive private reading instruction two days per week for 50 minutes per session during the 2011-12 school year (see Tr. pp. 267, 286, 300, 305, 327; see also Tr. pp. 267-68).

A. Due Process Complaint Notice

In a due process complaint notice dated August 26, 2011, the parents requested an impartial hearing, asserting that in summer 2011, the district reduced the student's reading services from five individual sessions per week to three group sessions per week (Dist. Ex. C at p. 2). With respect to the June 2011 IEP, among other things, the parents contended that despite the student's significant reading needs, the district had "refuse[d] to put reading services on the IEP" and that the district was characterizing its reading services as a "general education support service" that need not be included in the student's IEP (id.). Among other relief, the parents sought daily

individual reading instruction and additional reading services to compensate for the asserted failure of the district to offer the student appropriate summer 2011 reading instruction (id. at p. 3).

B. Impartial Hearing Officer Decision

As a result of a November 7, 2011 prehearing conference, the IHO received written submissions from the parties relating to the student's pendency placement with respect to his reading services as well as a motion to dismiss from the district, to which the parents objected (see Parent Nov. 30, 2011 Aff. with attached Exs. A-J; Dist. Notice of Mot. to Dismiss with attached Nov. 30, 2011 Affirmation; Dist. Mem. of Law; Parent Mem. of Law; Parent Response to Dist. Mot. to Dismiss). The district's motion to dismiss requested that the IHO dismiss the parents' complaint, based on the district's allegation that the parents were disputing a reduction in AIS provided to the student. The district asserted that AIS services were not governed by the IDEA and that therefore there was no legal basis for the parents to request an impartial hearing.

The IHO issued an interim decision dated December 20, 2011. With respect to the district's motion to dismiss, the IHO declined to find, as the district had argued, that instruction in reading was "exclusively a general education service" which precluded consideration at an impartial hearing regarding whether a student with a disability was provided a FAPE (Interim IHO Decision at p. 7). With respect to the student's pendency placement, the IHO's interim decision ordered, among other things, that, unless the parties otherwise agreed, the student's pendency placement include special education reading instruction by a reading specialist five times per week for 30 minutes per session, as well as phonemic awareness training two times per week for 30 minutes per session (id. at p. 8).

Both parties appealed the IHO's December 2011 interim decision. In Application of the Bd. of Educ., Appeal No. 12-018, for reasons explained therein, an SRO modified the IHO's interim decision and ordered that, unless the parties otherwise agreed, the student's pendency placement should include reading instruction by a reading specialist, five times per week for 45 minutes per session (see Application of the Bd. of Educ., Appeal No. 12-018). Additionally, the SRO determined that a portion of the district's appeal of the IHO's interim order was essentially an appeal of that part of the IHO's interim order which denied the district's motion to dismiss, and therefore was not within the scope of a permissible interlocutory appeal to an SRO (id.; see 8 NYCRR 279.10[d]).

The impartial hearing began on January 26, 2012 and concluded on February 27, 2012, after three days of proceedings (see Tr. pp. 1, 197, 381, 517-18). The IHO issued a final decision dated April 3, 2012. The IHO rejected the district's argument that instruction in reading could not be a special education service provided pursuant to an IEP if a district offered a student AIS services (see IHO Decision at p. 14). The IHO concluded that the IDEA required that a district's recommendations be based on the individual needs of a student with a disability and that the IDEA would not allow a district to decline to provide otherwise needed special education services simply because it offered the student AIS (id. at pp. 14-15).

Regarding the student's special education reading services, the IHO concluded that for the 2010-11 school year the district had complied with the IDEA and had provided the student with appropriate special education reading services (IHO Decision at pp. 15-16). However, the IHO

concluded that the district had not followed proper IDEA procedures when it eliminated the student's special education services in the June 2011 IEP and that the parents were denied the opportunity to meaningfully participate in the June 2011 CSE meeting (id. at pp. 14-16, 17 n.2). Among other things, the IHO further found that at the time of the June 2011 CSE meeting, the evidence in the hearing record supported a finding that the student needed five periods a week of special education reading services to sustain progress in reading for the 2011-12 school year and that the failure of the June 2011 IEP to include such a recommendation denied the student a FAPE (id. at pp. 17-19, 21). However, the IHO concluded that "no substantive remedy [was] appropriate" because the combination of reading services that were provided to the student as a result of his 12:1+1 special class along with the additional reading services that the student received three times per week were appropriate for the student and resulted in meaningful progress (id. at p. 21). The IHO also declined to award compensatory education "for the failure" of the district to provide reading services to the student during his summer 2011 extended school year program (id. at p. 20).

IV. Appeal for State-Level Review

The district appeals the entirety of the IHO's decision except for that part regarding summer 2011 extended school year services. The district asserts that the IHO wrongly denied its motion to dismiss and also requests a finding that the district provided the student a FAPE at all times. Among other things, the district alleges that the parents are unable to challenge the provision of AIS services by commencing an impartial hearing under the IDEA. The district also contends that the student was making reasonable and meaningful progress in reading subsequent to the reduction of the student's AIS services to three sessions per week. Additionally, the district asserts that the IHO wrongfully determined that the district prevented the parents from meaningfully participating in the June 2011 CSE meeting.

In an answer and cross-appeal, the parents assert, among other things, that the district's petition was improperly served, and request that it be dismissed. In the cross-appeal, the parents assert that the IHO erred as follows: (1) in not expressly finding that the district's refusal to consider the provision of specialized reading services on the June 2011 IEP significantly impeded the parents' opportunity to participate in the decision making process; (2) in finding that the deficiencies in the June 2011 IEP relating to reading did not result in a denial of FAPE; and (3) in declining to separate out the impact of the student's reading services provided in school from the impact of the student's private reading services in assessing whether the student received a FAPE with respect to the 2011-12 school year. The parents also assert that the IHO erred when he found that the reading services provided to the student in the 12:1+1 classroom combined with the additional reading services provided three times per week in school were appropriate and resulted in the student making meaningful progress.

In a reply, among other things, the district admits that the petition was not properly served, but asserts that such improper service does not warrant the dismissal of its appeal. In an answer responding to the parents' cross-appeal, the district asserts general admissions and denials, and seeks to dismiss the parents' cross-appeal.

V. Applicable Standards

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a 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 by the Commissioner (8 NYCRR 275.8[a]; Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student with a Disability, Appeal No. 12-042; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).[1]

Additionally, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). An SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of the Bd. of Educ., Appeal No. 12-059 [dismissing district's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013

[1] Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

[dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

VI. Discussion and Conclusion

Here, the district's affidavit of service indicates that the petition was served on the parents by service on their counsel (see Dist. Aff. of Service). As previously indicated, the district also concedes this in its reply (see Reply ¶ 4). However, service of a petition by service upon the party's counsel is not permitted by State regulations (see 8 NYCRR 275.8[a]; 279.2[b]) and the parents assert that they did not agree to waive service by personal delivery for this appeal (Answer ¶ 81). While I note that the district filed a reply responding to the parents' procedural defense (see 8 NYCRR 279.6), I also note that the reply fails to assert any reason why the district could not timely personally serve the parents.[2] Nor does the district assert in its petition any reason why it could not timely personally serve the parents (see Application of a Student with a Disability, Appeal No. 09-094) or that the parents had agreed to waive personal service (see Application of the Dep't of Educ., Appeal No. 09-075). Further, there is no indication in the hearing record that the district attempted to effectuate personal service of the petition on the parents prior to service on their counsel (see Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-087). Nor was a request made to an SRO to effectuate service by alternate means (8 NYCRR 275.8[a]; see Application of the Dep't of Educ., Appeal No. 08-006; Application of a Child with a Disability, Appeal No. 07-066).

Based upon the aforementioned nonconformity with State regulations, including the district's failure to properly initiate the appeal with personal service of the petition on the parents or to serve the parents pursuant to one of the above-enumerated exceptions to the personal service requirement, I will exercise my discretion and dismiss the petition without a determination of the merits of the district's claims (8 NYCRR 279.2[b]; see Application of a Student with a Disability, Appeal No. 12-077; Application of a Student with a Disability, Appeal No. 11-013; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-075; Application of a Child with a Disability, Appeal No. 05-045; Application of the Dep't of Educ.,

[2] The reply merely states that the parents' counsel was served because the district was aware that the attorney continued to represent the parents (see Reply ¶¶ 5-7).

Appeal No. 01-048; cf. Application of the Dep't of Educ., Appeal No. 05-073; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-084; see also R.S. v. Bedford Cent. Sch. Dist., 2012 WL 4955185, at *5 [S.D.N.Y. Oct. 2, 2012]; T.W. v. Spencerport Cent. Sch. Dist., 2012 WL 4074576, at *3-*4 [W.D.N.Y. Sept. 18, 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of a late petition where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition that was served one day late]).

I now turn to the parents' cross-appeal. Generally, a cross-appeal is considered timely when it is served upon petitioner with an answer within 10 days after the date of service of a copy of the petition (see 8 NYCRR 279.4[b], 279.5); however, this is predicated upon the petition itself being timely served. In this matter, the petition was not timely served on the parents and, therefore, the cross-appeal is also untimely (see Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 05-048; cf Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]). Accordingly, as neither party has timely appealed the April 3, 2012 IHO decision, it is final and binding upon the parties (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Additionally, I have conducted an independent review of the entire hearing record and, on due consideration, find that the impartial hearing comported with the requirements of due process (34 CFR 300.514[b][2][i]-[ii]; see Educ. Law § 4404[2]).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 25, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER