



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-170

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Kandhar, Esq., of counsel

Educational Advocacy Services, attorneys for respondents, Jennifer A. Tazzi, 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 the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondents (the parents) for the cost of the student's tuition at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. The 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 individualized education program (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 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

As discussed more fully below, the merits of the district's appeal will not be addressed because the district has not properly initiated this appeal. Briefly, however, on April 18, 2012, the CSE met for an annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 11). The CSE found the student eligible for special education programs and related services as a student with a speech or language impairment and recommended placement in a 15:1 special education classroom for math, English language arts, social studies, and sciences and related services including speech-language therapy and occupational therapy (id. at pp. 1, 6-7).¹

¹ The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The parents entered into a contract with Mary McDowell on April 30, 2012 to continue the student's enrollment at Mary McDowell for the 2012-13 school year (Parent Ex. F).²

A. Due Process Complaint Notice

By amended due process complaint notice dated March 1, 2013, the parents requested an impartial hearing (Parent Ex. A).³ The parents asserted that the April 2012 IEP was both procedurally defective and substantively inappropriate (*id.* at p. 2). In particular, the parents claimed that the 15:1 special classroom placement recommended by the district would have been too large for the student and would not have provided an appropriate amount of 1:1 instruction (*id.* at pp. 1-2). The parents also asserted that the April 2012 IEP was improper because the student's present levels of performance were based on teacher input rather than standardized testing and because the annual goals were vague and not measurable (*id.* at p. 2).⁴ As relief, the parents requested reimbursement or direct payment for the cost of the student's tuition at Mary McDowell for the 2012-13 school year (*id.* at p. 2). The parents also requested that the district provide the related services listed on the student's last agreed upon IEP and transportation to and from Mary McDowell (*id.* at p. 3). Finally, the parents invoked the student's right to stay put (pendency) at Mary McDowell (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on May 6, 2013 and concluded on June 28, 2013 after two non-consecutive hearing dates (Tr. pp. 22-230).⁵ In a decision dated August 14, 2013, the IHO determined that the district did not offer the student a FAPE for the 2012-13 school year, that Mary McDowell was an appropriate placement for the student, and that equitable considerations supported the parents' request for reimbursement for the cost of the student's tuition at Mary McDowell for the 2012-13 school year (IHO Decision at pp. 5-13).

IV. Appeal for State-Level Review

The district appeals from the IHO's August 14, 2013 decision, asserting that the IHO erred in finding that the district did not offer the student a FAPE for the 2012-13 school year, that Mary McDowell was an appropriate placement for the student, and that equitable considerations did not warrant a reduction of the requested relief.

² The Commissioner of Education has not approved Mary McDowell as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

³ According to counsel for the district, the parents' original due process complaint notice was withdrawn and the parents retained counsel to file the amended due process complaint notice (Tr. p. 216-17). A copy of the parents' original due process complaint notice was not included in the hearing record.

⁴ The parents also purported to reserve the right to challenge the appropriateness of the placement as well as the IEP, and to amend the due process complaint notice upon receipt of the student's file (Parent Ex. A at pp. 2-3).

⁵ The parties held a hearing regarding the student's stay put (pendency) placement on March 14, 2013, after which the IHO issued an interim order on March 15, 2013, ordering the district to fund the student's placement at Mary McDowell pursuant to pendency (IHO Interim Decision at p. 2).

The parents answer, denying the allegations contained in the petition and asserting that the IHO was correct in determining that the district did not offer the student a FAPE for the 2012-13 school year, that Mary McDowell was an appropriate placement for the student, and that equitable considerations weighed in favor of the parents.

V. Applicable Standards and Discussion

As a procedural matter, I must address the district's failure to timely file the hearing record together with its petition. Federal and state regulations require each school district to maintain a verbatim record of the proceedings before an IHO (see 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]). A board of education that appeals from the decision rendered in an impartial hearing is required to file the complete record before the IHO together with its petition for review (8 NYCRR 279.9[a], [c]). "A State Review Officer may, at his or her discretion, dismiss an appeal by the board of education when a completed and certified hearing record is not filed with the petition for review" (8 NYCRR 279.9[c]). In the absence of the complete record of the proceeding, an SRO cannot properly proceed with a review of the findings of fact and decisions of the IHO; and federal regulations require an SRO to examine the entire hearing record prior to rendering a decision (see 34 CFR 300.514[b][2][i]).

In this case, the petition, dated September 6, 2013, was served upon respondents on September 9, 2013, and was thereafter filed, along with the notice of petition and proof of service, with the Office of State Review on September 10, 2013. Pursuant to New York State regulations, at the time it filed the petition the district was also required to file a complete record of the impartial hearing, including the following: the IHO's decision; a bound copy of the written transcript before the IHO including a word index for the written transcript; an electronic copy of the transcript; a copy of the original exhibits accepted into evidence at the hearing and an index to the exhibits; and a signed certification that the record submitted was the complete hearing record before the IHO (8 NYCRR 279.9 [a], [c]). The hearing record was not filed at the time the petition was filed and was ultimately received on September 19, 2013. Because an SRO is required to examine the entire hearing record prior to rendering a decision and because an SRO decision must be issued within 30 days from the filing of the petition in this case, the district's nine day delay in filing the hearing record has impeded my ability to issue a timely and thorough decision in this matter (see 34 CFR 300.514[b][2][i], 300.515[b]; 8 NYCRR 200.5[k][2]).

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]; 279.9[c]; 279.13; see, e.g., Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a 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 a parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of the Dep't of Educ., Appeal No. 07-083 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; 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. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal].

Petitioner is aware, or should be aware, of the procedural requirements associated with practice on review of hearings for students with disabilities (see 8 NYCRR Part 279).

Additionally, petitioner has recently been cautioned regarding its obligation to maintain and file a complete and accurate copy of the hearing record (see, e.g., Application of the Dep't of Educ., Appeal No. 12-183; Application of a Student with a Disability, Appeal No. 12-119; Application of a Student with a Disability, Appeal No. 12-098; Application of a Student Suspected of Having a Disability, Appeal No. 11-084), and previous appeals filed by the district have been dismissed for its failure to timely file a completed hearing record at the time it filed its petition (Application of the Dep't of Educ., Appeal No. 07-083; Application of the Dep't of Educ., Appeal No. 05-060; see also Application of the Dep't of Educ., Appeal No. 06-088 [cautioning the district to comply with the Part 279 regulations relating to filing the hearing record together with the petition]; Application of the Dep't of Educ., Appeal No. 05-033 [noting that "it is well within the discretion of a State Review Officer to dismiss an appeal by the board of education when a complete hearing record is not filed within the timeframes proscribed under the regulations"]). While in some circumstances, a district may assert good cause for requesting an extension of time to file a hearing record, or a portion thereof, in this instance, petitioner has neither requested nor received an extension of time to file the hearing record, nor has petitioner provided any explanation as to why the hearing record was not timely filed. An extension request with regard to a hearing record should be made upon notice to the opposing party and timely submitted by the appearing attorney(s) who has undertaken representation of the district in the appeal. I am not in a position to solicit such extensions, as I am precluded from granting extensions of time on my own initiative—extensions must be requested by a party (34 CFR 300.515). Under the circumstances herein, I will not excuse the district's failure to timely file the hearing record on appeal together with its petition and exercise my discretion to dismiss the petition without rendering a determination on the merits of the district's appeal challenging the IHO's decision (8 NYCRR 279.9[c]; Application of the Dep't of Educ., Appeal No. 07-083; Application of the Dep't of Educ., Appeal No. 05-060).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 30, 2013**

**JUSTYN P. BATES
STATE REVIEW OFFICER**