Mount Vernon City School Distict v R.N.
2019 NY Slip Op 30135(U)
January 3, 2019
Supreme Court, Westchester County
Docket Number: 66291/2018
Judge: Lawrence H. Ecker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[*1]

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

MOUNT VERNON CITY SCHOOL DISTRICT,

Petitioner,

-against-

R.N., by his Parent and Natural Guardian and THE OFFICE OF STATE REVIEW OF THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

----------X

INDEX NO. 66291/2018
DECISION/ORDER/JUDGMENT
Mot. Seq. 1
Submission Date: 11/21/18

ECKER, J.

The following papers numbered 1 through 24 were read on the petition of MOUNT VERNON CITY SCHOOL DISTRICT ("petitioner"), made pursuant to Article 4 of the Civil Practice Law and Rules and Education Law §4403(a) and (b), for an order vacating the June 4, 2018, decision of THE OFFICE OF STATE REVIEW OF THE NEW YORK STATE DEPARTMENT OF EDUCATION ("Office of State Review"), which dismissed petitioner's appeal of an impartial hearing officer's decision on procedural grounds, and upon so doing, remanding petitioner's appeal to the Office of State Review for a decision on the merits, as against R.N., by his Parent and Natural Guardian and the Office of State Review ("respondents" or "respondent"):

PAPERS	**NUMBERED**
Notice of Petition, Petition, Affirmation, Exhibits 1-10	1-13
Verified Answer and Objections in Point of Law, Exhibits A-J	14-24

Upon the foregoing papers, the court determines as follows:

Petitioner alleges that it is aggrieved by the decision on the merits of Jerome D. Schad, the Impartial Hearing Officer ("IHO"), dated March 23, 2018 ("IHO decision"). In the IHO decision, the officer made findings of fact and determined that petitioner failed to deliver educational services to student R.N. as required by the Free Appropriate Public Education Act ("FAPE"). The IHO ordered certain remedial efforts be made by petitioner

[*2]

to ameliorate the deficiencies in student R.N.'s educational plan during the time that he was enrolled in petitioner's public school system.

It is undisputed that, on May 5, 2018, petitioner served a Notice of Request for Review of the IHO decision, although the document is dated May 2, 2018. Pursuant to 8 NYCRR 279.4(a), the Notice of Request for Review must be served upon the opposing party within forty days after the date of the decision of the IHO. Here, the IHO decision was dated March 23, 2018, and, accordingly, the notice needed to be filed by May 2, 2018. In the petition, petitioner's counsel admits that the Notice of Request for Review was not served and filed until May 5, 2018, three days after the date that it was due.

By decision dated June 4, 2018, Justyn P. Bates, State Review Officer ("SRO"), determined that he was without jurisdiction to consider petitioner's substantive objections to the IHO decision, due to the late filing of the Notice of Request for Review ("the SRO decision"). In the SRO decision, the SRO ruled, *intra alia*, that there was no good cause "or any cause" shown for the three-day delay in service. As such, the SRO, citing several federal court decisions, dismissed the request for review without consideration of the merits.

On June 8, 2018, petitioner's counsel sent a letter to the SRO requesting a re-determination of the SRO decision outlining the reasons for the delayed filing of the Notice of Request for Review. The SRO, by letter dated June 14, 2018, rejected the request for reconsideration. The proceeding before this court only involves the issue of the SRO's summary rejection of petitioner's application for review of the IHO decision

In terms of an excuse for failing to timely serve the notice, petitioner's counsel avers that he was advised by an unidentified employee of the Department of Education that the forty-day period to serve the notice was measured from the date that the parties are "actually served" with the decision. The attorney avers that he therefore calculated the time period for service of the request as running from the date of the email receipt of the IHO decision on March 26, 2018, or from March 28, 2018, the date that a copy was received by regular mail. Affirmant does not identify the individual who allegedly provided him with the misinformation, nor did he send a communication to the Department of Education confirming his understanding of that conversation. Hence, there is no "paper trail" upon which petitioner may rely.

The rules provide that the SRO may, for good cause shown, in his sole discretion, excuse a failure to timely serve or file a request for review within the time specified. See 8 NYCRR 229.13. In the SRO decision, after citing sections of federal statute and federal and state rules, the SRO held, in essence, that based on the cited law and the necessity of the finality of requirements for the review of decisions, good cause was not demonstrated and he "cannot grant your request due to federal and State regulations."

Now, this court must determine whether the SRO acted arbitrarily or capriciously in denying the application for review, predicated upon petitioner's misguided belief that the

[*3]

filing was done in a timely fashion. It is noted that petitioner is authorized by statute (CPLR §403[b]), to file a reply, but elected not to do so. The essence of petitioner's argument is that the misinformation he allegedly received from the unidentified employee of the Department of Education was given in furtherance of the department's duty to provide assistance relative to its procedures, as published on its website, and, as such, he was entitled to rely upon that information to calculate the "law date."

In the current case, it is undisputed that the appeal of the IHO decision was untimely, and that tardiness was the basis for the SRO's denial of petitioner's request for review. Where an appeal to the SRO has been dismissed as untimely, the SRO's decision must be upheld unless it is arbitrary and capricious. *T.W. v Spencerport Cent. School Dist.,* 891 F. Supp. 2d 438 [W.D.N.Y. 2012]; *R.P. v Pelham Union Free School District,* 2017 WL 4382190 [S.D.N.Y. 2017]; *New York Dept. Of Educ.v S.H. ex rel D.H.*, 2014 WL 572583 [S.D.N.Y. 2014]; *see J.E. v Chappaqua Central School District,* 2015 WL 4934535 [S.D.N.Y. 2015]. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. *Matter of Pell v Board of Educ.*, 34 NY2d 222 [1974]; *Matter of Caso v New York State Public High School Athletic Assn.,* 78 AD2d 41 [4th Dept 1980].

Regardless of whether the mandatory forty-day time period is viewed as a jurisdictional predicate or a condition precedent, the court finds that, based on the record, the SRO officer's decision to dismiss petitioner's appeal due to the untimely filing of the required notice was not arbitrary or capricious. Of note, the SRO provided rational grounds for refusing to exercise his discretion in favor of petitioner, and cited caselaw that supported that conclusion. Further, petitioner failed to show good cause for untimely service as, even if a department employee dispensed inaccurate advice to petitioner's attorney, the confirmation of the time limitation for appeal is ultimately the responsibility of petitioner's lawyer. In any event, even if proven, a department employee's mistake is not a bar to or limitation upon the SRO's authority to exercise discretion. Accordingly, it is hereby

ORDERED and ADJUDGED that the motion of petitioner MOUNT VERNON CITY SCHOOL DISTRICT, made pursuant to Article 4 of the Civil Practice Law and Rules and Education Law §4403(a) and (b), for an order vacating the June 4, 2018 decision of THE OFFICE OF STATE REVIEW OF THE NEW YORK STATE DEPARTMENT OF EDUCATION ("Office of State Review"), which dismissed petitioner's appeal of an impartial hearing officer's decision, on procedural grounds, and upon so doing, remanding petitioner's appeal to the Office of State Review for a decision on the merits, as against respondents R.N., by his Parent and Natural Guardian and the Office of State Review is denied, and the petition is dismissed.

[*4]

The foregoing constitutes the decision, order and judgment of the court.

Dated: White Plains, New York
January 3 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Law Offices of Douglas A. Spencer, PLLC
Attorney for Petitioner
Via NYSCEF

Barbara D. Underwood, Attorney General, State of New York
Attorney for Respondents
Via NYSCEF

01-09-2019