

57 Ed Dept, Decision No. 17314 (NYCOMMED), 2018 WL 802000

New York State Education Department

Decisions of the Commissioner

Application to reopen the appeal of a STUDENT WITH A DISABILITY, by his parent, from action of the Board of Education of the Oyster Bay-East Norwich Central School District regarding residency and transportation.

Decision No. 17,314

Decided: January 24, 2018

\*1 Frazer and Feldman, LLP, attorneys for respondent, **Christie R. Jacobson**, Esq., of counsel

ELIA, Commissioner

Petitioner purports to appeal an alleged decision by the Board of Education of the Oyster Bay-East Norwich Central School District's ("respondent") to deny her son ("the student") admission to its schools. The application must be denied.

Although petitioner purports to commence a new appeal pursuant to [Education Law §310](#), a review of the record shows, instead, that petitioner seeks to re-open a previous appeal. Petitioner commenced an earlier appeal pursuant to [Education Law §310](#) challenging a homelessness determination by respondent that was dismissed in [Appeal of a Student with a Disability](#), 57 Ed Dept Rep, Decision No. 17,135). A review of the record indicates that, following that decision, the student was unenrolled from respondent's school. Petitioner did not attempt to re-enroll her son in respondent's schools and respondent has made no new determination concerning petitioner's residency.<sup>1</sup> By email dated August 30, 2017, petitioner contacted respondent's homeless liaison and stated she was "re-filing" the residency appeal. By email dated August 31, 2017, petitioner wrote to the homeless liaison and alleged that the decision contained "[f]actual mistakes, false information [and] inaccuracies." Petitioner has submitted a statement with her petition in the instant proceeding that begins "[t]he following errors were contained in the decision dated [July 31, 2017]." Accordingly, it appears that petitioner seeks reconsideration of the earlier decision, and as such, this appeal will be treated as an application to reopen [Appeal of a Student with a Disability](#), 57 Ed Dept Rep, Decision 17,135 (see [Appeal of Polistin](#), 45 *id.* 504, Decision No. 15,395).

Petitioner alleges that the decision contained factual "errors" and appears to argue that, because the decision contained those statements, the decision was rendered under a misapprehension of facts. Specifically, petitioner claims that the decision included incorrect information about the student's siblings who were not the subject of the appeal. She also claims that she and the student's father are divorced, not separated.

Petitioner also challenges certain statements contained in affidavits submitted by respondent from the district registrar and the homeless liaison that are referenced in the previous decision. For example, petitioner submits an unsworn, signed statement from the student's father denying that he told the district registrar that petitioner and the children moved in with her parents outside of the district. She also argues that the homeless liaison's description of the residence "is completely inaccurate."

\*2 Respondent argues that the application should be dismissed as untimely and for improper service. Respondent contends that the application should be denied on the merits because petitioner has not set forth a valid basis for reopening the prior appeal. Specifically, respondent contends that petitioner presents no evidence that the claims, or evidence which she submits in this application, were unavailable at the time the original decision was made.

Section 276.8 of the Commissioner's regulations governs applications to reopen a prior decision. It provides that such applications are addressed solely to the discretion of the Commissioner and will not be granted in the absence of a showing

that the original decision was rendered under a misapprehension of fact or that there is new and material evidence that was not available at the time the decision was made. A reopening may not be used to augment previously undeveloped factual assertions and arguments, to advance new legal arguments or to merely reargue issues presented in a prior appeal (Application to reopen the Appeal of Lanzilotta, 48 Ed Dept Rep 450, Decision No. 15,911; Application to reopen the Appeal of Zulawski, 47 *id.* 191, Decision No. 15,664). The regulation further states that an application to reopen must be made within 30 days of the date of the underlying decision (Appeal of Polistin, 45 Ed Dept Rep 504, Decision No. 15,395).

As a threshold matter, the application to reopen is untimely. The underlying decision was issued on July 31, 2017; therefore, petitioner had until August 30, 2017, to apply to reopen the appeal. According to respondent, petitioner attempted to commence this proceeding via facsimile<sup>2</sup> on September 6, 2017, when she faxed the homeless liaison a “Form Notice of Petition for an Appeal Involving a Homeless Child and Youth.” According to respondent, although the petition referenced exhibits A through G, none were included in the facsimile of September 6, 2017. By facsimile on September 7, 2017, petitioner transmitted all but two of the referenced exhibits. Respondent avers that on September 25, 2017, the student hand-delivered the petition and all exhibits to respondent's guidance department. In this regard I note that Section 276.8 of the Commissioner's Regulations provides that service of an application to reopen shall be made in the manner set forth in “275.8(b). The latter section provides in pertinent part that “all subsequent pleadings and papers shall be served upon the adverse party or, if the adverse party is represented by counsel, upon his attorney . . . Service of all pleadings subsequent to the petition shall be made by mail or by personal service” (see Application to reopen the Appeal of T.A and J.A., 56 Ed Dept Rep, Decision No. 17,074; Application to reopen the Appeal of Rheume-Wellenc, 38 *id.* 101, Decision No. 13,993). Even assuming, *arguendo*, however, that petitioner properly served a complete copy of the petition and exhibits on September 6, 2017, the application would still be untimely. Accordingly, the application must be denied as untimely (Appeal of Polistin, 45 Ed Dept Rep 504, Decision No. 15,395).

\*3 Regardless, even if timely, petitioner has failed to meet the standard required to reopen a prior appeal as she has failed to demonstrate that the original decision was rendered under a misapprehension of fact or that there is new or material evidence that was not available at the time the decision was made. Petitioner's arguments in her application simply restate arguments made in her original appeal. Moreover, the alleged factual errors identified by petitioner, even if true, are not relevant to the findings of fact and the reasoning of the prior appeal. While petitioner submits additional information that was not submitted in her original appeal, petitioner has not shown that the information which she submits herein was not available at the time the decision was made. For example, petitioner submits unsworn statements from the student's grandparents and father. Petitioner also submits additional details of the eviction which she claims caused the student to become “homeless” and details concerning her living arrangement. She also purports to include exhibits of hotel and motel receipts from June 2015 through November 2016, and photographs reflecting the location where she and the student reside. However, petitioner did not attach copies of these receipts or photographs with her petition.<sup>3</sup> More importantly, however, petitioner does not allege that this information was unavailable at the time of the prior decision.

Therefore, petitioner has failed to demonstrate that the original decision was rendered under a misapprehension of fact or that there is new and material evidence that was not available at the time the decision was made and the application must be denied.

In light of this disposition, I need not consider the parties' remaining contention. However, as noted in my July 31, 2017 determination in Appeal of a Student with a Disability, 57 Ed Dept Rep, Decision No. 17,135, petitioner retains the right to reapply for readmission to respondent's school on her child's behalf at any time, should circumstances change, and to submit any documentary evidence for respondent's consideration.

**THE APPLICATION IS DENIED.**

Footnotes

- 1 Although petitioner alleges, and respondent admits, that petitioner made a subsequent request for enrollment which was denied, the record indicates that, by email dated August 30, 2017, petitioner merely questioned the homeless liaison about why the student was not currently enrolled in the district's schools and indicated that she was going to initiate this action.
- 2 Respondent submits a chain of email communication between its homeless liaison and petitioner in which petitioner indicates that the paperwork would be hand-delivered the following day (August 31, 2017) that she will "drop off the appeal docs tomorrow [September 1, 2017]." However, according to an affidavit from the homeless liaison, she did not receive any documentation regarding this matter until the facsimile was received.
- 3 Respondent references the receipts in its answer and attaches a chart summary which allegedly demonstrates that the hotel and motel reservations were usually on Friday and Saturday.

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