



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-112

**Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westbury Union Free School District**

### **Appearances:**

Frank X. Kilgannon, P.C., attorney for petitioners, Frank X. Kilgannon, Esq., of counsel

Jaspan, Schlesinger, Hoffman LLP, attorney for respondent, Carol A. Melnick, Esq., of counsel

### **DECISION**

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Vincent Smith School (Vincent Smith) for the 2005-06 and 2006-07 school years. The appeal must be dismissed.

Initially, a procedural matter must be addressed. In its answer, respondent asserts several affirmative defenses, including that the petition fails to state a cause of action upon which relief may be granted. In addition, respondent challenges many of petitioners' assertions based upon the failure to identify or refer to a specific time frame in connection with the statements set forth in their petition. Petitioners did not file a reply to respondent's answer.<sup>1</sup> For the reasons set forth below, the petition for review must be dismissed.

A petition for review must comply with section 279.4(a) of the Regulations of the Commissioner of Education, which provides, in pertinent part, that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision,

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<sup>1</sup> A petitioner may serve and file a reply for consideration by a State Review Officer "to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (see 8 NYCRR 279.6).

identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). In this case, the petition fails to meet this requirement (see Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).<sup>2</sup>

In this appeal, petitioners are represented by counsel. The statements in the petition for review are unduly vague and ambiguous, which precludes a meaningful review. Other than asserting in general terms that petitioners challenge the impartial hearing officer's decision and request reversal, petitioners provide no particulars as to the reasons why they challenge the impartial hearing officer's decision. For example, one of petitioners' general statements merely asserts that the impartial hearing officer "failed to comply with the rules and regulations of the Department of Education" without any further specification (Pet. ¶ 11[D]). Although petitioners alleged additional assertions, petitioners' counsel repeated to a significant extent the very same general assertions that were reviewed in Application of a Child with a Disability, Appeal No. 07-024 and Application of a Child with a Disability, Appeal No. 06-097, which were determined to be insufficient and which failed to comply with the provisions of 8 NYCRR 279.4(a), resulting in a dismissal of the petitions in those two appeals. Moreover, in this case, the petition for review relates to two school years, 2005-06 and 2006-07, and the petition is completely devoid of any reference as to which school year relates to which, if any, of the general assertions. The general assertions in the instant petition for review are also similar to a number of the general assertions reviewed in Application of the Bd. of Educ., Appeal No. 06-122, which were also found to be insufficient to conform with 8 NYCRR 279.4(a) and resulted in the dismissal of that petition. As noted in previous decisions, the petition for review is required to "clearly indicate the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[a]).

Petitioners also submitted a memorandum of law in support of their petition. However, a memorandum of law does not cure petitioners' failure to comply with 8 NYCRR 279.4(a). A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). To the extent that petitioners submitted a memorandum of law along with their petition for review, the memorandum is not a substitute for a properly drafted petition for review.

For the foregoing reasons, I find that the petition for review is deficient and fails to meet the requirements set forth in the Commissioner's Regulations, and thus, I will exercise my discretion to dismiss the petition for review on the merits (8 NYCRR 279.4, 279.8; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).

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<sup>2</sup> The petition also does not comport with the form requirements of 8 NYCRR 279.8.

Although I will dismiss the petition as deficient and failing to comply with the Commissioner's Regulations, I have reviewed the entire hearing record and I concur with the impartial hearing officer's decision which found that respondent offered the student a free appropriate public education (FAPE) for the 2005-06 and 2006-07 school years, that Vincent Smith did not appropriately meet the student's special education needs, and that petitioners were not entitled to tuition reimbursement on equitable grounds (IHO Decision at pp. 30-39). After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 45-page decision, correctly held that petitioners failed to sustain their burden to establish that respondent failed to offer their son a FAPE for the 2005-06 and 2006-07 school years (id. at pp. 30-36). The impartial hearing officer applied the proper legal analysis in determining whether the student was offered a FAPE, whether petitioners met their burden to establish the appropriateness of the unilateral placement at Vincent Smith, and whether petitioners were entitled to tuition reimbursement on equitable grounds (id. at pp. 36-38). The decision shows that the impartial hearing officer carefully considered and weighed all of the testimony and exhibits from both parties (id. at pp. 1-30). The hearing record amply supports the impartial hearing officer's conclusion that the student's 2005-06 and 2006-07 individualized education programs (IEPs) offered him special education programs and services appropriate to meet his special education needs and were designed to confer educational benefit. In short, based upon my review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the findings of fact or conclusions of law as determined by the impartial hearing officer (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]). I, therefore, adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 05-095; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
October 24, 2007

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**