



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-138

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District

Appearances:

Ingerman Smith, LLP, attorneys for respondent, Joseph E. Madsen, Esq., of counsel

DECISION

Petitioner (the parent)¹ appeals from the interim decision of an impartial hearing officer granting respondent's (the district's) motion to dismiss the parent's June 2011 due process complaint notice on the grounds that the student's mother, as the non-custodial parent, did not have standing to initiate an administrative due process proceeding for the purpose of challenging the educational program recommended by the district's Committee on Special Education (CSE) for her son. The appeal must be dismissed.

Background and Procedural History

In this case, the parent initiated the instant administrative proceeding with a due process complaint notice dated May 17, 2011, which was later amended on June 13, 2011 after the impartial hearing officer sustained the district's challenge to the sufficiency of the May 2011 due process complaint notice (IHO Exs. I at p. 1; III at pp. 1-2; IV-V). In a motion to dismiss dated June 14, 2011, the district argued, among other things, that the parent—as the student's non-custodial parent—lacked standing to challenge the student's special education programs, classification, or educational setting, and requested that the impartial hearing officer dismiss the parent's June 2011 due process complaint notice with prejudice (IHO Ex. VI at pp. 1-3). The parties presented oral arguments and submitted documentary evidence at an impartial hearing

¹ For purposes of clarification, the term "parent" in this case refers only to the student's mother.

held on August 11 and 18, 2011, to specifically address the district's motion to dismiss (see IHO Ex. VII; see also Tr. pp. 1, 115; Dist. Exs. 1-10; Parent Ex. A; IHO Exs. I-VIII).

Impartial Hearing Officer Decision

On September 28, 2011, the impartial hearing officer issued a "Decision and Order on School District's Motion to Dismiss" (IHO Interim Decision at pp. 1, 7). In her decision, the impartial hearing officer concluded that based upon a temporary custody agreement the parent did not have "any decision-making authority regarding the [s]tudent's educational placement," and therefore, she did not have "the standing to challenge the [s]tudent's special education program and placement" (id. at pp. 4-7). According to the temporary custody agreement, the impartial hearing officer determined that the student's father—who was not a party to the administrative proceeding—retained the authority to "make all educational decisions" regarding the student (id. at p. 4).

Based upon her findings, the impartial hearing officer dismissed those portions of the parent's June 2011 due process complaint notice challenging the student's "classification, evaluation, program, and placement," as well as the parent's claim for "reimbursement for the cost of transportation" (IHO Interim Decision at p. 7). In light of these findings, the impartial hearing officer identified the "sole remaining issue in this proceeding" as the parent's request for access to the student's CSE file (id.). Consequently, the impartial hearing officer vacated a previous interim ruling she had made during the impartial hearing, which directed the appointment of a guardian ad litem to represent the interests of the student, because it was no longer necessary (id. at pp. 6-7).

At the conclusion of her decision, the impartial hearing officer set forth the following language bold typeface:

Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue. Section 279(10)(d).

(IHO Interim Decision at p. 7).

Appeal for State-Level Review

The parent appeals, and asserts that she does not agree with the impartial hearing officer's interim decision. Among other things, the parent argues that the due process proceeding should go forward and that she should be permitted to represent the student, or alternatively, that "another individual should be appointed to represent" the student (Pet. at pp. 3-4). In addition, the parent argues that while the student's father had been granted temporary legal custody of the

student for the past two years, the impartial hearing officer failed to cite to any legal authority that denies standing to a non-custodial parent based upon a temporary order of custody.

In addition, the parent argues that since the student's interests are opposed to or inconsistent with the interests of the student's father, either she or a guardian ad litem should be appointed to protect the interests of the student. The parent also appeals the impartial hearing officer's dismissal of her request to be reimbursed for the costs of the student's transportation. Finally, the parent asserts that she has been denied access to the student's reports and has been denied attendance at any meetings related to the student. The parent seeks to reverse the impartial hearing officer's dismissal of her challenges to the student's placement and educational decisions and to allow the case to go forward on the merits.

In its answer, the district contends that the impartial hearing officer properly dismissed the parent's June 2011 due process complaint notice because, as the non-custodial parent, she lacked standing to pursue the instant administrative proceedings.² To further support its position, the district argues that the parent's current dispute regarding the student's educational program and placement also lacks merit because she agreed—in a court stipulation, dated June 6, 2011—to the student's continued placement in the State-approved nonpublic school. The district also asserts that it relied upon duly executed custody orders granting temporary custody of the student to the student's father from August 2009 through the present, and further, that the student's father has been authorized to make educational decisions for the student. Ultimately, the district seeks a dismissal of the parent's appeal and to uphold the impartial hearing officer's interim decision in its entirety.

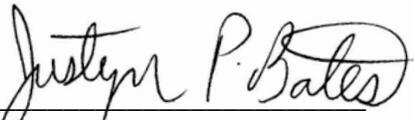
² The district concedes, however, that the parent remains entitled to access to the student's CSE file. In a letter to this State Review Officer dated November 29, 2011, the district advised that the remaining issue related to the parent's access to the student's CSE file will be determined at an impartial hearing yet to be held and scheduled for December 13, 2011. I also note that the interim decision is dated September 28, 2011, there is no documentation in the hearing record thus far regarding extensions and the following hearing date was scheduled over two months later. Both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). In this case, the hearing record indicates that the 30-day resolution period expired on July 14, 2011 (IHO Ex. VIII). Moreover, the hearing record does not include documentation of any extensions granted by the impartial hearing officer to adjust the applicable timeline to render a decision. Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In particular, an extension "shall be for no more than 30 days" and absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). Moreover, an "[a]greement of the parties is not a sufficient basis for granting an extension" (*id.*). Additionally, impartial hearing officers are not permitted to accept appointment unless they are available to conduct a hearing in a timely manner (8 NYCRR 200.5[j][3][i][b]). State regulations further set forth that each party shall have "up to one day" to present its case, and additional hearing days shall be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][xiii]). I remind the impartial hearing officer to comply with State regulations by including a written response in the hearing record for each extension request that shows how the impartial hearing officer considered all of the factors for granting each extension beyond the 45-day timeline (see Application of a Student with a Disability, Appeal No. 11-112).

Discussion and Conclusion

State regulation governing the practice of appeals for students with disabilities limits appeals from an impartial hearing officer's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10 [d]; see Educ. Law § 4404 [4]). Here, the impartial hearing officer's interim decision, dated September 28, 2011, did not address a pendency dispute, but instead, resolved issues raised in the district's motion to dismiss (see IHO Interim Decision at pp. 2-7). At the conclusion of her decision, the impartial hearing officer clearly and accurately recited the State regulation governing appeals from an impartial hearing officer's interim determination (see id. at p. 7). Therefore, to the extent that the parent appeals from the impartial hearing officer's interim decision on the district's motion to dismiss and State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, the parent's appeal must be dismissed as premature.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
December 9, 2011


JUSTYN P. BATES
STATE REVIEW OFFICER