



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-066

### **Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Valley Stream Central High School District**

#### **Appearances:**

Sanford S. Stevens, PC, attorney for petitioner, Sanford S. Stevens, Esq., of counsel

Guercio & Guercio, attorney for respondent, John P. Sheahan, Esq., of counsel

#### **DECISION**

Petitioner appeals from the decision of an impartial hearing officer which dismissed her March 2007 due process complaint notice without prejudice. The appeal must be dismissed.

At the outset, I must address a procedural matter. Respondent asserts as an affirmative defense in its answer that the petition for review was improperly served. As detailed below, I concur. Personal service of a petition on a respondent is required whether the petitioning party is a parent or a board of education (8 NYCRR 275.8, 279.1[a], 279.13; Application of the Dept. of Educ., Appeal No. 06-078; Application of the Bd. of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 01-048). Service of a petition upon a school district shall be made by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service (8 NYCRR 279.2[b], 275[a]). Here, petitioner failed to personally serve any of aforementioned individuals, nor did she request permission to use an alternate method of service (Ex. A).<sup>1</sup> Additionally, in his affirmation of service, counsel for petitioner stated that on or about June 19, 2007, via Federal Express, he served the notice of intention to seek review and verified petition on counsel for respondent (Pet. Aff. of Service ¶ 1). Under the circumstances presented herein, I find

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<sup>1</sup> Inasmuch as an impartial hearing has yet to take place on the merits in the instant case, unless otherwise specified, the exhibits cited in this decision are not differentiated as Parent Exhibits or District Exhibits.

that petitioner failed to effectuate proper service. Accordingly, I will dismiss the petition for lack of proper service (see Application of a Child with a Disability, Appeal No. 07-055).

Although I will dismiss the petition for failure to effectuate personal service, I have considered the underlying appeal. In the instant case, at the time that petitioner commenced the impartial hearing in March 2007, the student was 14 years old and enrolled in the eighth grade in Winston Preparatory School (Winston) (Application of a Child with a Disability, Appeal No. 07-046 at p. 1; Ex. A).<sup>2</sup> Winston has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7]). The student's eligibility and classification as a student with a speech-language impairment is not in dispute in this proceeding (Ex. H at p. 6; see 8 NYCRR 200.1[zz][11]).

By due process complaint notice dated March 27, 2007, petitioner commenced an impartial hearing seeking tuition reimbursement and related costs for Winston with respect to the 2005-06 school year (Ex. A). On April 13, 2007, respondent moved to dismiss petitioner's due process complaint notice on the grounds of insufficiency, among other things (Ex. C at pp. 1-2).<sup>3</sup>

Respondent contended that petitioner's due process complaint notice failed to identify the reasons why the program proposed in the student's 2005-06 individualized education program (IEP) was inappropriate, thereby failing to provide the district with "clear and specific notice" of the nature of the problem prior to the impartial hearing (id. at p. 2). Moreover, respondent argued that petitioner's due process complaint notice failed to set forth any proposed resolution to the problem, also in violation of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)<sup>4</sup> (id.). By letter dated April 22, 2007 to the impartial hearing officer, counsel for petitioner responded to respondent's motion to dismiss, wherein he claimed that the due process

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<sup>2</sup> The student's educational history is set forth in Application of a Child with a Disability, Appeal No. 07-046 and will not be repeated here.

<sup>3</sup> A due process complaint notice must meet the requirements of federal and state law relating to the sufficiency of the content of the complaint (see 20 U.S.C. § 1415[b][7][A]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5 [i][1]). A due process hearing may not proceed unless the due process complaint satisfies the sufficiency requirements (see 20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]). In pertinent part, a due process complaint notice shall include the name and address of the child and the name of the school which the child is attending, a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem (20 U.S.C. § 1415[b][7][A][ii], 34 C.F.R. §300.508[b], 8 NYCRR §200.5[i][1]). The Senate Report pertaining to this new amendment to the IDEA noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (id.).

<sup>4</sup> On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

complaint notice was sufficient and that the proposed resolution to the matter "should be self-evident" to respondent (Ex. G. at p. 1).

By letter dated May 3, 2007, the impartial hearing officer advised the parties that she determined that petitioner's March 27, 2007 due process complaint notice was insufficient, inasmuch that it failed to comply with IDEA's notice requirements (Ex. I). In light of her determination, she granted petitioner leave to amend the due process complaint notice in order to meet the statutory notice requirements of the IDEA (*id.*). The impartial hearing officer ordered that petitioner was required to amend the due process complaint notice by May 21, 2007, or the matter would be dismissed (*id.*).

By letter dated May 30, 2007, counsel for respondent advised the impartial hearing officer that he had yet to receive an amended due process complaint notice from petitioner's counsel (Ex. J). Accordingly, respondent's counsel requested that the impartial hearing officer dismiss the matter in its entirety (*id.*).

By decision dated May 31, 2007, the impartial hearing officer dismissed petitioner's due process complaint notice without prejudice (Ex. K at p. 2).

This appeal ensued. On appeal, petitioner does not assert that the impartial hearing officer erred in her decision; rather, she seeks to preserve her right to proceed with an impartial hearing. Respondent submitted an answer requesting that the petition be denied in its entirety. Respondent contends that petitioner's claim is moot, inasmuch as petitioner has already submitted an amended due process complaint notice, which a different, newly appointed impartial hearing officer has deemed insufficient as well.

As an affirmative defense, respondent argues that on June 7, 2007, petitioner's request to preserve her right to refile her due process complaint notice was rendered moot. I agree. In general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome (*Murphy v. Hunt*, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (*Christopher P. v. Marcus*, 915 F.2d 794, 802 [2d Cir. 1990]). Consistent with the mootness doctrine, State Review Officers (SROs) have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). In the instant case, petitioner admitted that at the time that she filed her petition, she had already submitted an amended due process complaint notice (Pet. ¶ 21). Petitioner submitted her amended due process complaint notice on June 7, 2007 (Ans. Ex. A at p. 1). Respondent again moved to dismiss the impartial hearing request on the ground of insufficiency (*id.* at p. 2). On June 19, 2007, a different impartial hearing officer was assigned to preside over the matter involving petitioner's claim for tuition reimbursement for the 2005-06 school year (*id.* at p. 1). By decision dated June 22, 2007, the impartial hearing officer determined that petitioner's amended due process complaint notice "failed to articulate any proposed resolution to the alleged problem in abrogation of 8 NYCRR 200.5[i][1][v]" and she concluded that it was

insufficient (*id.* at p. 3). Nevertheless, the impartial hearing officer granted petitioner leave to amend her pleadings until July 6, 2007 (*id.*). Based on the foregoing, since petitioner has already submitted an amended due process complaint notice in accordance with the first impartial hearing officer's May 3, 2007 decision/order, which has already been deemed insufficient by a different impartial hearing officer, no appropriate or meaningful relief can be granted to her. Moreover, petitioner has again been granted leave to amend her due process complaint notice, and may have already done so at this time (Ans. Ex. A. at p. 3).<sup>5</sup> Accordingly, petitioner's claim is moot.<sup>6</sup>

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated:**      **Albany, New York**  
**July 26, 2007**

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

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<sup>5</sup> In addition, I note that petitioner was not aggrieved by the impartial hearing officer's May 3, 2007 decision, as the matter was dismissed without prejudice; therefore, she had not lost any legal right to refile her claim for tuition reimbursement for the 2005-06 school year. "[T]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (*Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). Only a party aggrieved by an impartial hearing officer's decision may appeal to an SRO (34 C.F.R. § 300.514[b][1]; 8 NYCRR 200.5[k]; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, 99-029). Further, the SRO is not required to determine issues which are no longer in controversy or to review matters which would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60).

<sup>6</sup> I note that a recent SRO decision held that petitioner's due process complaint notice seeking tuition reimbursement for Winston for the 2006-07 school was insufficient, inasmuch as it failed to identify any concerns with respect to the challenged IEP (see Application of a Child with a Disability, Appeal No. 07-046).