The University of the State of New York

The State Education Department
State Review Officer

No. 08-047

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 New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determinations of an impartial hearing officer, which dismissed the parent's December 27, 2007 due process complaint notice and January 21, 2008 amended due process complaint notice. The appeal must be sustained.

In the present case, an impartial hearing was never held on the merits of the parent's claim. Instead, as explained in greater detail below, the impartial hearing officer sustained respondent's (the district's) challenges to the sufficiency of the parent's due process complaint notices and dismissed the parent's requests for an impartial hearing. The impartial hearing officer dismissed the parent's initial due process complaint notice by a written order with leave to amend. The impartial hearing officer submitted his second determination dismissing the parent's amended due process complaint notice to an office within the district by e-mail, rather than directly to the litigating parties. The district's office – the "impartial hearing office" – then advised the parent that his complaint was being dismissed without leave to amend. The parent now appeals[1] the dismissals, contending that the due process complaint notices were sufficient and requesting a review of the procedures followed by the district and the impartial hearing officer. As set forth herein, I find that the parties were not properly notified of the impartial hearing officer's dismissal of the parent's January 21, 2008 amended due process complaint notice.

[1] The parent filed two other petitions for review concurrently with this matter (see Application of a Student with a Disability, Appeal No. 08-046; Application of a Student with a Disability, Appeal No. 08-048).

I begin by reviewing the facts leading up to the instant appeal. By due process complaint notice dated December 27, 2007, the parent requested an impartial hearing (Dist. Ex. 2).[2] The due process complaint notice sought information about the student's teachers (id.). The parent specifically requested the following information about the student's teachers for the 2005-06 and 2006-07 school years: licenses, certifications, qualifications, credentials, details regarding specific experience with special education, and the dates of all training (id.).

On January 3, 2008, the district challenged the sufficiency of the parent's December 2007 due process complaint notice on the grounds that it was not sufficient because it did not include a description of the nature of the problem, including the related facts, or a proposed solution (Answer Ex. B; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).

By written interim order dated January 8, 2008, the impartial hearing officer dismissed the December 2007 due process complaint notice without prejudice due to insufficiency, and granted the parent until January 22, 2008 to submit an amended due process complaint notice (IHO Interim Order dated January 8, 2008). The impartial hearing officer held in his interim order that the due process complaint notice was insufficient because it did not state the nature of the problem or the proposed solution (id.). It is not clear from the hearing record whether the interim order was provided to the parties. By letter dated January 8, 2008, a "case manager" from the district's impartial hearing office advised the parent that the impartial hearing officer had found the December 2007 due process complaint notice "insufficient/incomplete" and that the parent had an opportunity until January 22, 2008 to amend the request (Answer Ex. C).[3] The January 8, 2008 letter to the parent did not explain why the due process complaint notice was determined to be insufficient, nor did it attach the impartial hearing officer's interim order (id.).

On January 21, 2008, the parent amended the December 27, 2007 due process complaint notice (Dist. Ex. 1). The January 21, 2008 amended due process complaint notice stated that evaluations used at the student's Committee on Special Education (CSE) meetings were not provided to the parent before the meetings and that the qualifications and credentials of the evaluators and/or those in attendance at the meetings were not made available to the parent before the meetings (id.). The January 21, 2008 amended due process complaint notice requested the following relief in general terms: appropriate evaluation procedures and protocols; reimbursement for unspecified costs; and qualifications and credentials of those in attendance at all CSE meetings (id.).

On January 30, 2008, the impartial hearing officer made a determination by e-mail regarding the sufficiency of the January 21, 2008 amended due process complaint notice (Dist. Ex. 17). Instead of issuing a written order, as he had done previously, the impartial hearing officer

[2] The hearing record on appeal does not contain numbered exhibits. The exhibits provided by the district have been numbered sequentially by staff at the Office of State Review in order to provide a clear and efficient means of reference to the record on appeal and will be referenced herein as district exhibits.

[3] The January 8, 2008 letter was written on the letterhead of the district's "Impartial Hearing Office" with a caption stating "Hearing Officer's Determination on the Sufficiency of the Request."

sent the e-mail directly to a case manager in the district's impartial hearing office (id.). The hearing record does not indicate why the impartial hearing officer chose this procedure and there is no indication in the hearing record that the impartial hearing officer directly notified the parties of his determination. The January 30, 2008 e-mail sent to the case manager stated: "Request for amended decision is denied. Request is quite vague and fails to make out specific facts. It looks like a request for general information which is not covered under the [Individuals with Disabilities Education Act] IDEA or any related statutes. Proposed remedy does not make out specifics as to what costs did the petitioner incur. Amended request is too ambiguous and therefore denied" (id.). On January 31, 2008, the impartial hearing officer sent another e-mail to the case manager stating: "Will give the parent another chance to amend. He has another two weeks" (Dist. Ex. 18).

By letter dated January 31, 2008, the district's impartial hearing office advised the parent that the impartial hearing officer "has denied permission to the amendment" (Answer Ex. F).[4] The January 31, 2008 letter from the district's impartial hearing office to the parent did not state the specific reasons enunciated by the impartial hearing officer in his January 30, 2008 e-mail dismissing the amended complaint and did not advise the parent about the additional two weeks provided to amend the due process complaint notice as indicated in the impartial hearing officer's January 31, 2008 e-mail to the district's case manager (id.). It is evident, however, that the parent was given information about the two week extension, as an e-mail from the parent to the district's case manager on February 12, 2008 states: "With regard to submitting my amended form again – what is the date that the amended form needs to be submitted as the note mentions 'parent has another chance to amend. He has another two weeks'" (Dist. Ex. 11).[5] By letter dated February 21, 2008, the district's impartial hearing office notified the parent that his request for an impartial hearing was "withdrawn" and that it had been dismissed by the impartial hearing officer because of an "insufficient request not amended within specified timeframe" (Answer Ex. G).

This appeal ensued. The parent asserts that the impartial hearing officer erred in dismissing his due process complaint notices on the grounds of insufficiency and also seeks a review of the procedures followed by the district and the impartial hearing officer. As relief, the parent requests an opportunity to present additional evidence and argument relating to his claims. The district submitted an answer, arguing that the impartial hearing officer properly dismissed the due process complaint notices as insufficient, that the petition for review was not timely filed, that the petition for review is insufficient because it fails to comply with 8 NYCRR 279.4(a) and does not set forth the allegations in numbered paragraphs, and that the allegations raised in the petition are moot. The district also submitted an affidavit of service stating that it had served the parent with its answer.

[4] Again, the letter was written on the letterhead of the district's "Impartial Hearing Office" with a caption stating "Amended IH Request Rejected by Both District and Hearing Officer."

[5] The actual note sent to the parent advising of the two week extension was not submitted by any of the parties and is therefore unavailable as part of the hearing record on appeal. The date that the note was sent to the parent is unknown. It is also unclear as to who sent the note to the parent.

Preliminarily, I will address the procedural arguments raised by the district. The district asks that the petition be dismissed as untimely. I decline to find the petition for review untimely, as there was no final, dated decision by an impartial hearing officer from which to appeal. State regulations require that a petition be served upon the respondent within 35 days from the date of the impartial hearing officer's decision sought to be reviewed (8 NYCRR 279.2[b]). If the impartial hearing officer's decision has been served by mail upon petitioners, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). Here, there is no final, dated decision by the impartial hearing officer, therefore the parent cannot be required to comply with the timelines specified in the State regulations (see 8 NYCRR 279.2; see also 8 NYCRR 279.10[d]). I am also not persuaded by the district's argument that the petition for review fails to clearly indicate the reasons for challenging the impartial hearing officer's decision and fails to indicate what relief should be granted by a State Review Officer as required by 8 NYCRR 279.4(a). A review of the petition indicates that the parent disagrees with the insufficiency determinations regarding the due process complaint notices. It is evident that the parent seeks a finding that the due process complaint notices were sufficient, which, in turn, would permit the impartial hearing (relief) that he initially sought (see 20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]). Although the district correctly states that the parent failed to number the allegations in his petition for review (see 8 NYCRR 279.8[a][3]), I decline to dismiss the petition on this ground (see Application of a Child with a Disability, Appeal No. 07-099).

Turning to the arguments raised about the sufficiency of the parent's due process complaint notices, in pertinent part, a due process complaint notice shall include the name and address of the student and the name of the school which the student is attending, a description of the nature of the problem of the student 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]). Failure to conform to the minimal pleading requirements of the statute may render a due process complaint notice legally insufficient (see M.S.-G v. Lenape Regional High Dist. Bd. of Educ., 2007 WL 269240, at *3 [D.N.J. Jan. 24, 2007] [finding proper a dismissal of a due process complaint notice under the IDEA for failure to allege facts related to the problem and to propose a resolution of the problem]). An impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).[6] A party may amend its due process complaint notice if the other party consents in writing to such amendment or if the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs (20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i]). Where there has been

[6] The Senate Report pertaining to this 2004 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.).

the allegation of an insufficient due process complaint notice, State regulations provide "Within five days of the receipt of the notice of insufficiency, the impartial hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements . . . and shall immediately notify the parties in writing of such determination" (see 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300.508[d][2]). The Official Analysis of Comments to the federal regulations state: "If the hearing officer determines that the notice is not sufficient, the hearing officer's decision will identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate" (Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]).

The impartial hearing officer in the instant case made two determinations regarding the sufficiency of the December 2007 due process complaint notice and the January 21, 2008 amended due process complaint notice. Both determinations are problematic on notice grounds; however, only the latter need be discussed. As to the January 21, 2008 amended due process complaint notice, there is no indication in the hearing record that the impartial hearing officer properly notified the parties in writing of his sufficiency determination. The hearing record shows that his determination was not directed to the parties, and was instead directed to a case manager at the district's impartial hearing office (Dist. Ex. 17). The hearing record also shows that the case manager's January 30, 2008 letter did not accurately convey the specific determination articulated by the impartial hearing officer in his January 30, 2008 e-mail correspondence, nor did it attach the impartial hearing officer's decision (Dist. Ex. 17; Answer Ex. F). It also did not convey the information contained in the impartial hearing officer's January 31, 2008 e-mail which amended his e-mail from the day before. Accordingly, I find that the January 31, 2008 letter sent by the district's impartial hearing office to the parent, which advised that the due process complaint notice had been dismissed without leave to amend, did not constitute proper notification of the determination made by the impartial hearing officer pertaining to sufficiency. I will annul the determination dismissing, without leave to amend, the parent's January 21, 2008 amended due process complaint notice. Moreover, it appears that the case manager's February 21, 2008 letter again dismissing the parent's due process complaint was conveying a determination made by the caseworker, not by an impartial hearing officer. The notice, therefore, is inadequate. I will give the parent leave to resubmit his January 21, 2008 due process complaint notice or an amendment thereto within 30 days from the date of this decision.

I decline to review the merits on appeal as to whether or not the impartial hearing officer properly determined that the due process complaint notices were legally insufficient. The impartial hearing officer is reminded that in preparing his written determination, if he finds that a due process complaint notice is legally insufficient, his decision should sufficiently "identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate" (Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]). Should the matter proceed further, nothing in this decision shall be interpreted as precluding the district from raising any relevant affirmative defenses to the parent's due process complaint notice.

In light of my decision herein, it is not necessary to address the parties' remaining arguments, including the parent's assertion that he was not properly served with the district's answer.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's determination dismissing the parent's January 21, 2008 amended due process complaint notice is annulled.

IT IS FUTHER ORDERED that the parent has leave to resubmit his January due process complaint notice or an amendment thereto within 30 days from the date of this decision.

Dated: **Albany, New York**
August 8, 2008

PAUL F. KELLY
STATE REVIEW OFFICER