



The University of the State of New York

The State Education Department State Review Officer

No. 08-063

Application of a STUDENT WITH A DISABILITY, by her parents, 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:

Sanford S. Stevens, P.C., attorney for petitioners, Sanford S. Stevens, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which dismissed their due process complaint notice seeking tuition reimbursement for the placement of their daughter at Winston Preparatory School (Winston) for the 2005-06 school year. The appeal must be dismissed.

For the 2005-06 school year, the student was enrolled by her parents in Winston, a private preparatory school (Tr. p. 115; IHO Ex. II at p. 3; see Parent Ex. 2 at p. 1). Winston has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Parent Ex. 2 at p. 1; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services and classification as a student with an other health impairment (OHI) are not in dispute in this proceeding (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][11]).

The student's educational programs have been the subject of three previous administrative appeals (see Application of the Dep't of Educ., Appeal No. 07-093; Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 07-046).¹

¹ By memorandum opinion and order dated June 10, 2008, Judge Cote for the Southern District Court of New York dismissed the parent's appeal of Application of the Dep't of Educ., Appeal No. 07-046 for improper service (Pierre v. Dep't of Educ., 2008 WL 2369224 [S.D.N.Y. 2008]).

The parties' familiarity with the student's prior educational history is presumed and will not be repeated here.

The matter on appeal involves an impartial hearing officer's June 4, 2008 decision in which she dismissed the parents' due process complaint notice as insufficient, with leave to amend within 14 days from the date of the impartial hearing officer's decision (IHO Decision at p. 4). The parents chose not to amend their due process complaint notice and instead have filed the appeal herein. As expressed in greater detail below, I agree with the impartial hearing officer that the parents did not file a due process complaint notice that met the required level of sufficiency.

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 to the extent known and available to the party at the time (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 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 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 statutory and regulatory sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).² 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 the allegation of an insufficient due process complaint notice, State regulations provide that "[w]ithin 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]; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047). 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]).

² The Senate Report pertaining to this 2004 amendment to the Individuals with Disabilities Education Act (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.*).

Here, the impartial hearing officer dismissed the parents' due process complaint notice as insufficient stating that the district "must know what it is defending" (IHO Decision at p. 3). The impartial hearing officer's decision provided the parties with the reasoning and the basis for the dismissal and gave leave to the parents to amend their complaint (*id.* at pp. 2-4). The impartial hearing officer's decision also informed the parents how to cure the defective due process complaint notice, having determined that the parents' due process complaint notice lacked specificity because it failed to indicate which individualized education program (IEP) the parents were challenging, as well as the nature of their concerns with respect to the challenged IEP (*id.* at pp. 3-4). She also ordered that should the parents' fail to properly amend their due process complaint notice within 14 days from the date of her decision, the "dismissal shall be deemed to be with prejudice" (*id.* at p. 4).

The impartial hearing officer's decision is supported by the hearing record. I find it to be a proper application of the law to the facts of this case and I see no reason to modify her decision (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]).

In light of my determination, it is not necessary to review the parties' remaining claims.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 August 18, 2008

PAUL F. KELLY
STATE REVIEW OFFICER