



The University of the State of New York

The State Education Department State Review Officer

No. 08-106

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 Siligmuller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's March 10, 2008 due process complaint notice.¹ The appeal must be sustained in part.

The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

By due process complaint notice dated March 10, 2008, the parent requested an impartial hearing to challenge information in the student's educational records (Dist. Ex. 2).² The parent alleged that there was information in the student's educational records that was "inaccurate, misleading, or otherwise in violation of the privacy rights" of the student. The parent requested the following documents from the Committee on Special Education (CSE): CSE document dated August 9, 2007; CSE document dated August 31, 2007; occupational therapy summer evaluation document dated July 2, 2007; "RCM" document dated June 22, 2007; individualized education program (IEP) dated June 1, 2007; social history update dated May 21, 2005; early childhood literacy assessment system; missing video recordings; and teacher's qualifications. As relief, the parent sought to amend the student's educational records.

¹ The due process complaint notice is identified by the district as case number 115361.

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.

On March 12, 2008, the district challenged the sufficiency of the parent's March 10, 2008 due process complaint notice on the grounds that it did not contain a description of the nature of the problem, including the related facts, or a proposed solution (Answer Ex. 2; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). On March 17, 2008, an impartial hearing officer (Hearing Officer 1) found the due process complaint notice to be sufficient (Pet. Ex. 14-1). On April 15, 2008, Hearing Officer 1 was recused and a second impartial hearing officer (Hearing Officer 2) was appointed (Answer Ex. 3). On April 16, 2008, the Hearing Officer 2 was recused and a third impartial hearing officer (Hearing Officer 3) was appointed (Answer Ex. 4). Hearing Officer 3 did not hold a hearing on this matter. The hearing record reflects that on April 21, 2008, an individual from the district's impartial hearing office corresponded with Hearing Officer 3, and requested that she "advise immediately whether the hearing should go forward pursuant to IDEA or whether we should inform the parent to ... file the complaint pursuant to [the Family Educational Rights and Privacy Act (FERPA)]" (Dist. Ex. 6). The hearing record on appeal does not contain a response from Hearing Officer 3. On April 30, 2008, the district's impartial hearing office sent correspondence to the parent titled "Notice of Invalid Case" (Dist. Ex. 8). The notice states "This is to confirm that the request for an impartial hearing is invalid" (id.). The notice lists the name of the student, case number, region, district and name of Hearing Officer 3. The hearing record does not show that Hearing Officer 3 issued a written decision.

This appeal by the parent ensued. The parent asserts that Hearing Officer 3 erred in dismissing his due process complaint notice and that the failure of Hearing Officer 3 to provide an explanation and direct response to the parent regarding dismissal was improper. The parent seeks a hearing before a State Review Officer for submission of additional documentary evidence and the opportunity to present oral and written arguments. In its answer, the district concedes that the parent was not given proper written notice of Hearing Officer 3's determination in the instant matter.

Initially, I find that Hearing Officer 3 does not have jurisdiction to hear the parent's FERPA claim. The Individuals with Disabilities Education Act (IDEA) provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a free appropriate public education (FAPE) (20 U.S.C. § 1415[b][6][A]; 8 NYCRR 200.5[i][1], [j][1]). However, a separate portion of the IDEA (20 U.S.C. § 1417[c]) requires the Secretary of Education to promulgate regulations for the protection of the rights and privacy of parents and students in accordance with the provisions of FERPA (see 20 U.S.C. § 1232g). The relevant federal regulations under the IDEA prescribe a specific procedure for challenging alleged inaccuracies in a student's educational records (34 C.F.R. §§ 300.618-621). Parents who believe that information in the student's educational records is inaccurate or misleading may ask the participating agency that maintains the information to amend the record (34 C.F.R. § 300.618). If the agency decides not to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under (34 C.F.R. §§ 300.618-619).

However, the IDEA regulations (34 C.F.R. § 300.621) provide that such hearings are to be conducted in accordance with the procedures specified in 34 C.F.R. § 99.22, rather than an impartial due process hearing under 34 C.F.R. § 300.511. If, after a hearing, a board of education declines to amend a student's records, the student's parents have the right to place a statement disagreeing with the board's decision in the student's records (see 34 C.F.R. § 300.620[b]; see also

Application of the Dep't of Educ., Appeal No. 05-036; Application of a Child with a Disability, Appeal No. 01-099; Application of a Child with a Disability, Appeal No. 94-9). Based on the above, I find that in this case, Hearing Officer 3 does not have jurisdiction to hear the parent's FERPA claim.

Next, I find that the hearing record does not indicate that Hearing Officer 3 issued findings and a decision dismissing the parent's March 10, 2008 due process complaint notice, and as such, constitutes error (Dist. Exs. 7; 8). An impartial hearing officer shall "render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]; see 34 C.F.R. § 300.512[a][5]).

I decline to grant the parent leave to re-file his due process complaint notice because it would not promote the interests of judicial economy. To permit the parent to re-file the March 10, 2008 due process complaint notice, where the impartial hearing officer lacks jurisdiction to conduct a hearing on the claims raised therein, would be unduly burdensome to the impartial hearing process.

I note that by letter dated April 30, 2008, the parent was advised by the impartial hearing office that the parent's request to amend the student's educational records was not a function of the impartial hearing office and that the matter should be addressed to the student's particular school that is the custodian of the educational records at issue (Dist. Ex. 7). Also, the parent was advised that if he believes the school has violated rights to access the student's educational records, such would constitute a violation of FERPA, and the parent was advised of the procedure for filing a FERPA complaint (id.).

Lastly, I note that the parent requested oral argument before a State Review Officer. Such argument is authorized by the rules governing appeals to a State Review Officer only in the event that a State Review Officer determines that oral argument is necessary (8 NYCRR 279.10). I find that oral argument is not necessary in this matter, therefore this request is denied (see Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-041; Application of a Child with a Disability, Appeal No. 03-067).

In light of my decision herein, it is not necessary to address the parties' remaining arguments or direct any relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: Albany, New York
November 19, 2008

PAUL F. KELLY
STATE REVIEW OFFICER