



The University of the State of New York

The State Education Department State Review Officer

No. 08-118

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 respondent's (the district's) impartial hearing office (hearing office), which dismissed the parent's July 23, 2008 due process complaint notice. 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]; 8 NYCRR 200.1[zz][1]). On appeal there are no specific allegations that the student is not receiving appropriate special education services.

As a preliminary matter, I deny the parent's request for 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 (see Application of a Student with a Disability, Appeal No. 08-090; 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 addition, on appeal the parent asks that a State Review Officer: 1) conduct a hearing; 2) issue subpoenas; 3) accept additional evidence; and 4) obtain impartial hearing reporting systems reports "to reveal" generally alleged "suspicious activities." These requests are also denied as unnecessary.

On July 23, 2008, the parent sent an e-mail entitled "Due Process Complaint Notice: Request for Impartial Hearing" to the hearing office and to the State Education Department (Dist.

Ex. 2).¹ A staff person at the hearing office determined that the parent's due process complaint notice was "misabeled" and "misdirected," and viewed the e-mail as a request for a State complaint investigation pursuant to 8 NYCRR 200.5(l), rather than a request for an impartial hearing pursuant to 8 NYCRR 200.5(i) (see Certification of the Record on Appeal;² Answer ¶ 16). Staff at the hearing office neither advised the parent of that determination nor processed the parent's due process complaint notice by assigning an impartial hearing officer (id.). There is no indication in the hearing record that the State Education Department responded to the e-mail or that the hearing office contacted the State Education Department. The district did not file a response to the due process complaint notice (see 8 NYCRR 200.5[i][4]).

On appeal, the parent contends, among other things, that the July 23, 2008 due process complaint notice was not properly processed by the hearing office and requests that a State Review Officer review the hearing record to ensure compliance with due process requirements.

The district asserts in its answer that the content of the parent's e-mail did not raise concerns suitable for adjudication through an impartial hearing (8 NYCRR 200.5[i][1], [j][1]). The district asserts that the parent raises general allegations against the district, its employees and an impartial hearing officer; some of which have been the subject of a previous administrative adjudication (Application of Student with a Disability, Appeal No. 08-090) and are more suitable for resolution through the State complaint process (8 NYCRR 200.5[l]), through the procedures in place for filing complaints against impartial hearing officers (8 NYCRR 200.21[b]), or through an appeal of Application of Student with a Disability, Appeal No. 08-090. The district also concedes, in light of two recent State Review Officer decisions,³ that the parent's e-mail should have been processed by the hearing office as a due process complaint notice under 8 NYCRR 200.5(i) and requests that the parent's appeal be sustained in part and that the parent be "permitted to re-file the complaint within 30 days" of this decision.

After reviewing the hearing record, I find that the failure of the hearing office to process the parent's July 23, 2008 due process complaint notice under 8 NYCRR 200.5(i), assign a case number and assign an impartial hearing officer constituted an error. While 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]),⁴ where there has been

¹ 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.

² I note that the actual certification is not dated, but the cover letter included with the certification is dated October 22, 2008.

³ Application of a Student with a Disability, Appeal No. 08-047 and Application of a Student with a Disability, Appeal No. 08-048.

⁴ 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 that "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" (8 NYCRR 200.5[i][6][ii]; see 34 C.F.R. § 300.508[d][2]). Here, an impartial hearing officer was not assigned at all; therefore, no impartial hearing officer rendered a sufficiency determination pursuant to State and federal regulations.

I note that in the instant due process complaint notice, the parent has raised claims against the impartial hearing officer that are similar to claims that he raised in his appeal of the impartial hearing officer's prior decision in Application of a Student with a Disability, Appeal No. 08-090. The allegations that the parent raised against the impartial hearing officer in Application of a Student with a Disability, Appeal No. 08-090, were found by a State Review Officer to be without merit. Absent an appeal to federal or State court of Application of a Student with a Disability, Appeal No. 08-090, the decision becomes final and the determinations therein may not be raised again for adjudication in a due process complaint notice brought pursuant to 8 NYCRR 200.5(i) (see Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 02-043). In addition, such allegations could have been brought via the State complaint procedures of the Regulations of the Commissioner of Education (8 NYCRR 200.5[l]) or regulations pertaining to impartial hearing officers (8 NYCRR 200.21[b]).

I decline to decide whether the parent may have otherwise alleged viable claims in the July 23, 2008 due process complaint notice. Accordingly, the hearing office's dismissal of the parent's July 23, 2008 due process complaint notice shall be annulled and the parent shall be allowed to resubmit the July 23, 2008 due process complaint notice so that it may be properly processed by the hearing office by assignment of a case number and an impartial hearing officer. I remind both parties that this decision does not preclude the assigned impartial hearing officer from making a sufficiency determination upon proper application if a due process complaint is refiled (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i]; see M.S.-G v. Lenape Regional High Dist. Bd. of Educ., 2007 WL 269240, at *3 [D.N.J. Jan. 24, 2007]). Nor does it preclude the parent from attempting to resolve concerns through mediation or the State complaint procedures

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent's hearing office's dismissal of the parent's July 23 2008 due process complaint notice is annulled; and

IT IS FURTHER ORDERED that the parent has leave to resubmit his July 23, 2008 due process complaint notice within 30 days from the date of this decision.

Dated: Albany, New York
December 18, 2008

PAUL F. KELLY
STATE REVIEW OFFICER