The University of the State of New York

The State Education Department
State Review Officer

No. 08-125

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 determination of an impartial hearing officer which dismissed the parent's June 21, 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]; 8 NYCRR 200.1[zz][1]). It appears from the petition that the student is currently attending a private school. On appeal, the parent makes a general allegation that the student is being deprived of services; however, no further description of the alleged deprivation is provided.

In the present case, an impartial hearing was not held on the merits of the parent's June 21, 2008 due process complaint notice. By due process complaint notice dated June 21, 2008 and submitted by e-mail, the parent requested an impartial hearing to challenge information contained

[1] The June 21, 2008 due process complaint notice is identified by the district as case number 116472. Prior State Review Office decisions have been issued regarding this student, they are: Application of a Student with a Disability, Appeal No. 08-046; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-118.

in the student's educational records (Dist. Ex. 1).[2] The parent alleged that there was information in a document titled "Social History Update," dated May 21, 2005, that was "erroneous" or "misleading," "impacting" the student's right to a free appropriate public education (FAPE), and that the parent had not been permitted to amend the May 21, 2005 social history update (id. at p. 1). As relief, the parent requested the written policy and procedures for preparing a social history, sworn testimony about the "validity, authenticity and content" of the social history update and an impartial hearing to amend the document (id.). This is essentially the same claim that was raised and denied on November 19, 2008 by the decision in Application of a Child with a Disability, Appeal No. 08-106.

On August 1, 2008, by e-mail to the district's impartial hearing office (hearing office) and the parent, the district submitted a motion to dismiss the parent's due process complaint notice, contending that the complaint should be dismissed because it constituted a Family Educational Rights and Privacy Act (FERPA) claim, and was therefore outside the jurisdiction of the "Impartial Hearing Office" (Dist Ex. 6). On August 1, 2008, the impartial hearing officer sent an e-mail to the district's case manager at the hearing office consisting solely of the following statement: "Then the District's motion is granted. Please make sure the [sic] my decision to grant the motion includes that the parent should be mailed a hard copy of the FERPA document to address the parent's problem. This issue is not within the jurisdiction" (Dist. Ex. 3). On August 1, 2008, the district's case manager forwarded the above referenced e-mail, sent by the impartial hearing officer, to the parties by e-mail (Pet. Exs. 26; 27). By notice dated August 5, 2008, the hearing office sent a "Notice of Case Withdrawal/Dismissal" to the parent, indicating that the impartial hearing officer dismissed the case and that the hearing date had been cancelled (Pet. Ex. 28).

This appeal by the parent ensued. The parent asserts, among other things, that the impartial hearing officer erred in dismissing his June 21, 2008 due process complaint notice and that the failure of the impartial hearing officer to provide an explanation and direct response to the parent regarding the dismissal was improper. In its answer, the district states that the parent was not given proper written notice of the impartial hearing officer's determination in the instant matter; however, it asserts that the parent should not be given permission to re-file the due process complaint notice because the impartial hearing officer does not have jurisdiction to hear the parent's FERPA claim. The district further asserts that the parent raised the same claims in a prior due process complaint notice dated March 10, 2008 (see Application of a Student with a Disability, Appeal No. 08-106).

Several preliminary matters must be addressed. First, the parent requests 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 the parent's request is denied (see Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-106; 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.

[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.

03-067). Second, the parent requests that a State Review Officer conduct a hearing. This request is also denied because there is no need for a hearing. Third, the parent asks that I accept additional documentary evidence attached to his petition. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see Application of the Bd. of Educ., Appeal No. 04-068; see generally Application of a Child with a Disability, Appeal No. 04-030; Application of a Child with a Disability, Appeal No. 04-020). Here, the district does not object to the parent's submission of the additional evidence attached to the petition and relies on the additional evidence in its answer. I will therefore accept the parent's submitted additional evidence. Fourth, the parent asks for relief pertaining to a number of issues that were not raised before the impartial hearing officer in the parent's June 21, 2008 due process complaint notice, relating to the operations of the district's impartial hearing office. I decline to address those issues, as they were not properly raised below and are not properly before me (see Educ. Law § 4404[2]; 8 NYCRR 200.5[j][1][ii], [k]; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Child with a Disability, Appeal No. 07-085).

Upon review of the record on appeal, I find that the record does not show that the impartial hearing officer issued written findings and a decision dismissing the parent's June 21, 2008 due process complaint notice that was provided to the parties that comported with the requirements of 8 NYCRR 200. 5(j)(5) and 200.5 (j)(5)(v). The error was not necessarily in providing the decision to the parent by e-mail,[3] but in the failure of the decision's content to adequately comport with the aforementioned regulations. The failure to do so constitutes an error, but does not, in the instant case, render the impartial hearing officer's conclusion and order invalid (Dist. Ex. 3; Parent Exs. 26; 27; 28; see Application of a Student with a Disability, Appeal No. 08-106). I will therefore sustain the parent's appeal in part.

Next, I turn to the parent's contention that the impartial hearing officer erred in concluding that she 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 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 (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

[3] Presuming that the parent elected to receive the decision by e-mail (see 34 C.F.R. § 300.512[a][5]; 8 NYCRR 200.5[j][5])

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. The Official Analysis of Comments to the federal regulations states that 34 C.F.R. §§ 300.618, 300.619 and 300.621 address the process "that parents must use to seek changes" in a student's records if the parent believes that the record is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student (Amendment of Records at Parent's Request [§ 300.618] and Opportunity for a Hearing [§ 300.619], 71 Fed. Reg. 46735 [Aug. 14, 2006]). 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 a Student with a Disability, Appeal No. 08-106; 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. 99-51; Application of a Child with a Disability, Appeal No. 94-9; Application of a Child with a Handicapping Condition, Appeal No. 92-38). Based on the above, I find that the impartial hearing officer correctly determined that she did not have jurisdiction to hear the parent's complaint and properly granted the district's motion to dismiss the parent's June 21, 2008 due process complaint notice.

In addition, this same issue, amendment of the student's May 21, 2005 social history update, was raised by the parent in a prior due process complaint notice and addressed in Application of a Student with a Disability, Appeal No. 08-106 (finding that an impartial hearing officer does not have jurisdiction to conduct a hearing on the parent's FERPA claims).[4] There is no authority for the filing of multiple due process complaint notices on the same issue. To allow parties to file multiple due process complaint notices on the same issues would undermine the interests of judicial economy, create unnecessary duplication of time, expense, witnesses, exhibits and other resources, and place an unwarranted burden on families and school districts (see Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 04-061). Permitting multiple due process complaint notices on the same issue is also inconsistent with the extensive due process provisions of the IDEA that are intended to provide the parties with an inexpensive and expeditious method for resolving disputes (see generally Does v. Mills, 2005 WL 900620, at *8 [S.D.N.Y. April 18, 2005] [The IDEA contemplates and concurrent federal and State regulations have been enacted relating to the "efficient, expeditious administration of IDEA benefits"]); Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 03-018; Application of a Child with a Disability, Appeal No. 97-11).

Moreover, allowing a party to file a duplicative due process complaint notice after the issue has been decided in an appeal to a State Review Officer is inconsistent with the finality provisions set forth in the IDEA and its implementing regulations. Where, there is an appeal to a State Review Officer, the independent decision on review becomes final unless a party seeks judicial review of the decision (34 C.F.R. § 300.514[d]; 8 NYCRR 200.5[k][3]).

After carefully reviewing the entire hearing record, I find that the impartial hearing officer did not err in granting the district's motion to dismiss the parent's June 21, 2008 due process

[4] In the context of Application of a Student with a Disability, Appeal No. 08-106, by letter dated April 30, 2008, the parent was advised of the proper procedure to request amendment of the student's educational records.

complaint notice based upon a finding that the impartial hearing officer lacks jurisdiction to adjudicate a FERPA claim. I further find that the parent's June 21, 2008 due process complaint notice is barred by the finality provisions set forth in the IDEA and its implementing regulations (34 C.F.R. § 300.514[d]; 8 NYCRR 200.5[k][3]).

Accordingly, 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 June 21, 2008 due process complaint notice, where the impartial hearing officer lacks jurisdiction to conduct a hearing on the claims raised therein and where the due process complaint notice is barred by the finality provisions of the IDEA and its implementing regulations, would be unduly burdensome to the impartial hearing process (see Application of a Student with a Disability, Appeal No. 08-106).

Lastly, the parent appears to contend in his petition that the impartial hearing officer in this case was not impartial (Pet. ¶ 33 [referring to the impartial hearing officer as the "non-impartial" hearing officer]). Upon careful review of the record, I find no basis in the record that supports the parent's allegation that the impartial hearing officer displayed bias or prejudice against the parent. Although the parent disagrees with the conclusions reached by the impartial hearing officer, that disagreement does not provide a basis for finding actual or apparent bias by the impartial hearing officer (Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75).

In light of my decision herein, it is not necessary to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: Albany, New York
January 8, 2009

PAUL F. KELLY
STATE REVIEW OFFICER