



The University of the State of New York

The State Education Department State Review Officer

No. 08-135

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 September 13, 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]). According to the parent, the student is currently attending a private school (Pet. ¶ 5).

In a 25 page due process complaint notice dated September 13, 2008² and submitted by e-mail to respondent (the district), the parent requested an impartial hearing (Dist. Ex. 1). The parent's September 13, 2008 due process complaint notice included, in general terms, allegations that the parent and student had been "aggrieved" by "the actions of the [district] in impeding the

¹ The September 13, 2008 due process complaint notice is identified by respondent (the district) as case number 117679. 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; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-156.

² The September 13, 2008 due process complaint notice was submitted by e-mail to the district's impartial hearing office (hearing office) on Sunday September 14, 2008 and processed by the hearing office on September 15, 2008 (Pet. Exs. 15 at p. 1; 16 at p. 1).

due process procedures" (id. at p. 4). The parent generally asserted in the September 13, 2008 due process complaint notice that the district had prevented the student from receiving a free appropriate public education (FAPE),³ "which is continuing to the present day" (id.). In addition, the parent generally asserted that the district and its employees had acted in violation of the law regarding "the initiation, placement, and or evaluation" of the student (id. at p. 6). The parent further generally asserted in the September 13, 2008 due process complaint notice that procedural violations by the district prevented the student from receiving a FAPE, "significantly impeded" the parent's opportunity to participate in the decision-making process, and "caused a deprivation of educational benefits" (id.).

The parent alleged in the September 13, 2008 due process complaint notice, that the parent and the student had been denied the opportunity for any and all proceedings to commence in a reasonably convenient location, generally alleging that the hearing location offered by the district was inconvenient (Dist. Ex. 1 at p. 6). In addition, the parent alleged that procedural violations regarding the resolution session in a separate due process matter, district case number 117010,⁴ "impeded" the student's right to a FAPE; that the district does not conduct resolution sessions in accordance with State and federal law; that the parent has been denied "requests for pre-hearing conference [sic] to meaningfully participate in all proceedings;" that the parent has been denied the right to review his due process complaint notice and other documents; and that the district has "impeded the parent from meaningfully participating in proceedings, by not permitting the parent to record proceedings" (id. at pp. 6-8, 21).

By letter dated September 18, 2008, the district challenged the sufficiency of the parent's September 13, 2008 due process complaint notice, alleging that it did not provide sufficient notice of the parent's claims as required under State and federal regulations (Dist. Ex. 5). The district alleged that the September 13, 2008 due process complaint notice failed to "clearly articulate the facts that relate to the problems pertaining to this student for a specific school year" and that the issues raised in the complaint are outside the scope of a due process complaint notice (id.). In an accompanying document entitled "Motion for Insufficiency," dated September 18, 2008, the district argued that the due process complaint notice did not "articulate problems for a specific school year, related facts or a proposed solution that conforms to any possible relief through an impartial hearing" (Dist. Ex. 6 at pp. 2-3).

In an e-mail dated September 26, 2008, and sent to a case manager at the hearing office, the impartial hearing officer wrote: "Upon review of the [district's] motion to dismiss, I am granting same, as the Parents [sic] impartial hearing [r]equest is insufficient & does not request

³ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

⁴ An appeal of this matter has not been filed with the Office of State Review at this time.

relief that I can address" (Dist. Ex. 3 at pp. 1-2). The e-mail was forwarded by the case manager at the hearing office to the parent (id. at p. 1).

In correspondence dated September 26, 2008, the hearing office sent the parent a letter entitled "Hearing Officer's Determination on the Sufficiency of the Request" (Pet. Ex. 32 at p. 1). The letter referenced the student by name, and included the case number, receipt date of the due process complaint notice and the name of the impartial hearing officer (id.). The letter stated that "on September 26, 2008, in accordance with State regulations, the impartial hearing officer has found your complaint notice to be insufficient (incomplete). Accordingly, the case is closed." (id.). This letter provided the name, telephone number and e-mail address for a case manager at the hearing office and for a district contact from the Committee on Special Education (CSE) (id.).

This appeal by the parent ensued. The parent asserts, among other things, that the impartial hearing officer erred in dismissing his September 13, 2008 due process complaint notice by failing to provide an explanation for the basis of the insufficiency determination.

In its answer, the district asserts that the impartial hearing officer properly granted the district's motion to dismiss. The district notes that while the parent alleged in the September 13, 2008 due process complaint notice that the district "impeded" the student's right to a FAPE, the parent failed to provide any details as to how the student was denied a FAPE or how the actions of the district caused the alleged denial of a FAPE. The district also concedes that, although the parent was informed by e-mail that the motion to dismiss had been granted, the parent did not receive proper written notice of the impartial hearing officer's determination.

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. 08-156; 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. 03-067).⁵ Second, the parent requests that a State Review Officer conduct a hearing. This request is also denied as unnecessary. Third, the parent asks for relief pertaining to a number of issues that were not raised before the impartial hearing officer in the parent's September 13, 2008 due process complaint notice, relating to the operations of the 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. 08-156; Application of a Student with a Disability, Appeal No. 08-125; 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). Fourth, the parent filed a reply to the district's answer. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to

⁵ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the reply does not respond to additional documentary evidence served with the answer or to any procedural defenses interposed by the district as none were asserted; therefore, I will not consider the reply (see 8 NYCRR 275.14[a], 279.6; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009). Fifth, the parent appears to contend in his petition that the impartial hearing officer in this case was not impartial (Pet. ¶ 47 [referring to the impartial hearing officer as the "non-impartial" hearing officer]). Upon 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. 08-125; 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).⁶

Next, I turn to the parent's contention that the impartial hearing officer erred in dismissing the September 13, 2008 due process complaint notice on grounds of insufficiency. 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]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). 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 Sch. Dist. Bd. of Educ., 2009 WL 74396, at *2-*3 [3d Cir. 2009] [affirming the district court's finding that dismissal of a due process complaint notice under the IDEA for failure to allege facts related to the problem was proper]). 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]).⁷ A party may amend its due process complaint notice if the other party consents in writing to such

⁶ The parent requests that a State Review Officer review the impartial hearing officer rotational selection procedures. Impartial hearing officers must be appointed by the board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1]; 200.5[j][3][i]). However, the parent has not alleged any impropriety in the selection of the impartial hearing officer appointed to preside at the impartial hearing pertaining to his due process complaint notice. Therefore, I will not address this issue.

⁷ 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.*).

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 "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]; see Application of a Student with a Disability, Appeal No. 08-047).

Upon review of the record on appeal, I find that the record does not show that the impartial hearing officer erred in concluding that the September 13, 2008 due process complaint notice was insufficient. Although the September 13, 2008 due process complaint notice is lengthy, it contains general allegations and conclusory statements that a FAPE was denied, without identifying the nature of the problem of the student relating to a proposed or refused initiation or change (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). It does not identify anything that the district proposes to change or refuses to change pertaining to the student. Moreover, the due process complaint notice does not identify facts relating to anything that the district proposes to change or refuses to change pertaining to the student. As examples I note the following regarding the September 13, 2008 due process complaint notice: (1) it alleges that a proposed hearing site was inconveniently located, but it does not indicate any facts in support of that conclusion; (2) it alleges that a resolution session conducted by telephone impeded parent participation, but does not allege underlying facts to support that claim;⁸ (3) it alleges a lack of access to student records but does not allege facts supporting that claim; and (4) it alleges a failure to conduct a prehearing conference, but fails to allege how that prevented the parent from "meaningfully participating" in proceedings. The September 13, 2008 due process complaint notice is insufficient because it fails to allege a description of the nature of the problem of the student, including facts relating to the problem (*id.*). As a result, the September 13, 2008 due process complaint notice fails to provide an awareness and understanding of the issues forming the basis of the complaint (see S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]).

Lastly, the decision of the impartial hearing officer fails to inform the parent how the parent's due process complaint notice was insufficient. The error was not necessarily in providing the decision to the parent by e-mail,⁹ but in the failure of the impartial hearing officer to identify "how the notice [was] insufficient." (see Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student

⁸ Federal and State regulations do not preclude conducting resolution sessions by telephone (see 34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][2]).

⁹ 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]).

with a Disability, Appeal No. 08-047).¹⁰ I will therefore sustain the parent's appeal to the extent that I find that the impartial hearing officer failed to provide such notice in his decision. The failure to inform the parent, in the decision of how the parent's due process complaint notice was insufficient constitutes an error, but does not, in the instant case, render the impartial hearing officer's conclusion invalid (Dist. Ex. 3; see Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-106). I will uphold the impartial hearing officer's conclusion dismissing the due process complaint notice for insufficiency, but I caution the impartial hearing officer to ensure that future sufficiency determinations adequately inform the parties as to the basis for his determination.

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
February 2, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

¹⁰ It is not clear, however, it appears from the impartial hearing officer's decision that he made two determinations: (1) that the due process complaint notice was insufficient and (2) that the complaint sought relief that could not be awarded. Having addressed the sufficiency determination, I need not address the second determination.