



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-146

### **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, Emily Goldman, Esq., of counsel

#### **DECISION**

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's due process complaint notice dated September 28, 2008.<sup>1</sup> The appeal must be dismissed.

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 private school (Pet. ¶ 7).

By due process complaint notice dated September 28, 2008 and submitted by e-mail, to respondent (the district), the parent requested an impartial hearing (IHO Ex. 1). The parent's September 28, 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 due process procedures" (*id.* at p. 4). The parent also asserted that the district had prevented the student

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<sup>1</sup> The due process complaint notice is identified by the district as case number 118075. The following prior State Review Office decisions have been issued regarding this student: 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. 08-135; Application of a Student with a Disability, Appeal No. 08-156).

from receiving a free appropriate public education (FAPE),<sup>2</sup> "which is continuing to the present day" (id.). In addition, the parent generally asserted that the district and its employees have acted in violation of the law regarding "the initiation, placement, and or evaluation" (id. at p. 8). The parent further generally asserted in the September 28, 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.). In addition, the parent generally asserts that the student is being deprived of services (id. at p. 18).

The parent also alleged in the September 28, 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 (IHO. Ex. 1 at p. 8). In addition, the parent generally alleged in the September 28, 2008 due process complaint notice that the parent had been denied access to the student's educational records in a timely manner for impartial hearings; that the district is not following the written district policy and procedures for access to educational records; and that the district is impeding the parent's opportunity to participate in the decision making process and causing a "deprivation of educational benefits" (id. at pp. 8-9).

In correspondence dated October 2, 2008 submitted to the district's impartial hearing office (hearing office), the district challenged the sufficiency of the parent's September 28, 2008 due process complaint notice pursuant to 8 NYCRR 200.5(i)(6) (IHO Ex. 2). The district alleged that the parent's September 28, 2008 due process complaint notice failed to clearly articulate the facts that relate to problems pertaining to the student for a specific school year; that all of the issues raised in the September 28, 2008 due process complaint notice are outside the scope of an impartial hearing; and that the relief requested by the parent fails to conform to any possible relief that can be afforded through an impartial hearing (id.).

In a written decision<sup>3</sup> dated October 7, 2008, the impartial hearing officer found that the parent's September 28, 2008 due process complaint notice was "insufficient on its face" and granted the parent 20 days leave to file an amended complaint (October 7, 2008 IHO Decision at p. 6). The impartial hearing officer found that the parent's September 28, 2008 due process complaint notice contained numerous statements and allegations that were irrelevant to the identification, evaluation, placement or provision of a FAPE, and that it failed to identify a problem

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<sup>2</sup> 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]).

<sup>3</sup> The two decisions issued in the instant matter were provided to the Office of State Review by the hearing office, accompanied by a certification dated November 25, 2008. I decline the parent's request that I determine their authenticity.

of the student, including facts relating to such problem (*id.* at pp. 4-5). The impartial hearing officer stated that "neither I nor the District should have to presume what the Parent's complaint is. It was specifically to avoid such that the regulations were amended to require a Complaint to contain a description of the nature of the problem of the student, including facts relating to such problem" (*id.* at p. 5). The impartial hearing officer further found that "without having a clear statement of the problem, it is impossible to evaluate" whether the parent has complied with the regulations in setting out a proposed resolution (*id.*). The impartial hearing officer further found that the "solutions" contained in the parent's September 28, 2008 due process complaint notice failed to comply with regulations because they did not address any of the parent's identified problems (*id.* at pp. 5-6).<sup>4</sup>

The record on appeal indicates that the hearing office sent the parent a copy of the October 7, 2008 decision with a cover letter entitled "Hearing Officer's Determination on the Sufficiency of the Request," also dated October 7, 2008 (Pet. Ex. 20 at p. 1).

On October 28, 2008, the impartial hearing officer issued an "Order of Dismissal with Prejudice" (October 28, 2008 IHO Decision at p. 2). In the October 28, 2008 Order of Dismissal, the impartial hearing officer noted that he had not received an amendment to the parent's September 28, 2008 due process complaint notice (*id.* at p. 2). The record on appeal indicates that the hearing office provided the parent with a copy of the October 28, 2008 Order of Dismissal, with a cover letter entitled "Decision of Impartial Hearing" and dated October 30, 2008 (Dist. Ex. 1).<sup>5</sup>

This appeal by the parent ensued. The parent asserts, among other things, that the impartial hearing officer erred in dismissing his September 28, 2008 due process complaint notice and that the failure of the impartial hearing officer to provide an explanation for the basis of the insufficiency determination and direct response to the parent regarding the dismissal was improper. The parent also requests that a State Review Officer ensure the district's compliance with due process procedures.

In its answer, the district asserts that the impartial hearing officer correctly determined that the due process complaint notice was insufficient and that the impartial hearing officer properly followed the guidelines regarding decisions on insufficiency. The district contends that the impartial hearing officer correctly dismissed the September 28, 2008 due process complaint notice because it failed to clearly state the nature of the problems. In addition, the district contends that the September 28, 2008 due process complaint notice failed to list any facts to support the parent's "vague allegations." The district contends that the September 28, 2008 due process complaint notice did not challenge the student's identification as a student with a disability, did not appear to contest any evaluations and did not dispute the student's educational placement. The district also

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<sup>4</sup> The impartial hearing officer's decision also found that the September 28, 2008 due process complaint notice was insufficient based on the parent's failure to include the student's home address in complaint, as required by 8 NYCRR 200.5(i)(1)(ii) (October 7, 2008 IHO decision at p. 4).

<sup>5</sup> The hearing record on appeal does not contain numbered exhibits. This exhibit, was provided by the district and has been numbered as exhibit one 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 "Dist. Ex. 1."

contends that the impartial hearing officer correctly dismissed the September 28, 2008 due process complaint notice because it did not contain the student's address.

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. 08-125; 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 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).<sup>6</sup> Second, the parent requests that a State Review Officer conduct a hearing. This request is also denied as unnecessary. Third, the district asserts that the 53 additional documents attached as exhibits to the parent's petition, with the exception of five, should be rejected.<sup>7</sup> 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 a Child with a Disability, Appeal No. 06-046, Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; 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). I find that, except for Exhibit 16 (which is a copy of the parent's September 28, 2008 due process complaint notice),<sup>8</sup> and Exhibit 20 (which is the parent's copy of the October 7, 2008 decision with cover letter from the hearing office), that the evidence is not necessary for a decision and/or duplicative. Accordingly, these documents will not be considered. Likewise, I decline the parent's offer to submit additional evidence, including audio and video recordings "to complete" the record on appeal, as unnecessary. Fourth, the parent requests "compensatory, punitive and any other appropriate restitution as part of the relief deemed fair and appropriate in this forum." With regard to the parent's claim for monetary compensation, it is well settled that monetary damages, including compensatory and punitive damages, are not available to remedy violations of the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). Consequently, these claims are not

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<sup>6</sup> The New York State Education Department's Office of State Review maintains a website at [www.sro.nysed.gov](http://www.sro.nysed.gov). The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

<sup>7</sup> The district acknowledges that the following exhibits (although duplicative of the record on appeal) submitted with the petition are relevant to the impartial hearing officer's determination: Exhibit 16 (the September 28, 2008 due process complaint notice); Exhibit 18 (the district's October 2, 2008 challenge to the sufficiency of the parent's September 28, 2008 due process complaint notice and the district's motion to dismiss); Exhibit 26 (October 28, 2008 IHO Decision); Exhibit 47 (October 7, 2008 IHO decision); Exhibit 48 (a second copy of the October 28, 2008 IHO Decision).

<sup>8</sup> I accept the September 28, 2008 due process complaint notice because three pages that are illegible in the record on appeal are legible in the parent's copy of the September 28, 2008 due process complaint notice, included with the parent's petition (Pet. Ex. 16 at pp. 17-19).

properly before me and must be denied. Fifth, 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 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; therefore, I will not consider the reply (see 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). Sixth, the parent asks for relief pertaining to a number of issues that were not properly raised before the impartial hearing officer in the parent's September 28, 2008 due process complaint notice, relating to the operations of the hearing office. I decline to address those issues, in part because 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).<sup>9</sup>

Next, I turn to the parent's contention that the impartial hearing officer erred in dismissing the parent's September 28, 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]).<sup>10</sup> A party may amend its due process complaint notice if the other party consents in writing to such

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<sup>9</sup> 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]). Although the parent states that, based upon "belief" and "understanding," the district did not select and appoint the impartial hearing officer from the district's rotational selection list, the parent does not state the basis for his "belief" and "understanding." Therefore, I will not address this issue.

<sup>10</sup> 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]).

After a review of the record on appeal, I agree with the district that the impartial hearing officer in the instant case complied with the requisite procedural regulations governing dismissal of a due process complaint notice after a finding of insufficiency. First, five days after the district filed a notice on October 2, 2008, challenging the sufficiency of the September 28, 2008 due process complaint notice, the impartial hearing officer rendered a decision in accordance with State regulations (October 7, 2008 IHO Decision at pp. 1-6; IHO Ex. 2; see 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300.508[d][2]). Second, a review of the October 7, 2008 decision by the impartial hearing officer reveals that the impartial hearing officer stated the reasons for finding the September 28, 2008 due process complaint notice legally insufficient (October 7, 2008 IHO Decision at pp. 4-6; see Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]). Moreover, I note that the impartial hearing officer gave the parent 20 days to amend the September 28, 2008 due process complaint notice (October 7, 2008 IHO Decision at p. 6). Subsequently, the impartial hearing officer dismissed the parent's September 28, 2008 due process complaint notice with prejudice on October 28, 2008, after 20 days from the date of the decision passed and the parent failed to file an amended due process complaint notice (Oct. 28, 2008 IHO Decision at pp. 1-2). Accordingly, I find that the procedures followed by the impartial hearing officer in dismissing the parent's September 28, 2008 due process complaint notice were proper.

Moreover, 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 28, 2008 due process complaint notice was insufficient. Although the September 28, 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 28, 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; and (2) it alleges a lack of access to student records, but does not allege facts supporting that claim. The September 28, 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 28, 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]).

I agree with the impartial hearing officer that the parent's September 28, 2008 due process complaint notice is legally insufficient (see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). Accordingly, I find that the impartial hearing officer correctly dismissed the parent's September 28, 2008 due process complaint notice.<sup>11</sup>

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 5, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>11</sup> I note that the impartial hearing officer correctly determined that the student's address is required to be identified in a due process complaint notice (October 7, 2008 IHO Decision at p. 4). The parent listed the student's address on the line provided for that purpose on the "form" attached to his September 28, 2008 due process complaint notice (IHO Ex. 1 at pp. 26-27; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1][ii]).