The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 09-004

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, Vida Alvy, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's September 28, 2008 due process complaint notice. The appeal must be sustained in part.[1]

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. ¶ 1).

In a due process complaint notice, dated September 28, 2008 and submitted by e-mail to respondent's (the district's) impartial hearing office (hearing office), the parent requested an

[1] The September 28, 2008 due process complaint notice is identified by respondent (the district) as case number 118076. 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. 08-146; Application of a Student with a Disability, Appeal No. 08-156.

impartial hearing (Dist. Exs. 4-5).[2] 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" (Dist. Ex. 5 at p. 4). The parent also alleged that the district had prevented the student from receiving a free appropriate public education (FAPE), "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" (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.).

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 closest location to his home district was "reasonably convenient" and that "[a]ny other location" was inconvenient (Dist. Ex. 5 at p. 8). In addition, the parent alleged that procedural violations regarding the resolution process, "including but not limited to," a separate due process matter, district case number 117010,[3] "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. 8-10, 23, 25).

In correspondence dated October 2, 2008, the district challenged the sufficiency of the parent's September 28, 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. 3; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). The district alleged that the September 28, 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" (id.). The district also alleged that the issues raised in the complaint and the relief requested by the parent were beyond the scope of a due process complaint notice (Dist. Ex. 3).

In a decision dated October 3, 2008, and sent to a case manager at the hearing office by e-mail, the impartial hearing officer wrote: "After reviewing the parent's claim for relief, for which the parent requests this Impartial Hearing Officer order, this Hearing Officer finds that said relief is not in the jurisdiction of this Hearing Officer" (Dist. Ex. 2; Answer Ex. V). The impartial hearing officer concluded the decision by writing: "[t]herefore the parent's request for an impartial hearing is denied and dismissed" (id.). There is no indication in the record on appeal that the October 3, 2008 decision by the impartial hearing officer was provided to the parents by the impartial hearing

[2] The 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.

[3] An appeal of this matter was filed with the Office of State Review on March 10, 2009 and is currently pending.

officer or by the hearing office. In a letter dated October 6, 2008, the hearing office sent the parent a letter entitled "Hearing Officer's Determination on the Sufficiency of the Request" (Answer Ex. VI). 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 October 6, 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.). The October 6, 2008 letter from the hearing office to the parent failed to state the specific reason for dismissal as enunciated by the impartial hearing officer in his October 3, 2008 decision delivered by e-mail to the case manager at the hearing office, and did not include a copy of the impartial hearing officer's written e-mail determination (id.).[4]

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 he was not provided proper written notice of the determination by the impartial hearing officer. The parent also requests that a State Review Officer ensure the district's compliance with due process procedures.

The district submitted an answer, asserting that the petition filed by the parent is procedurally defective because it does not contain the particular reasons for appealing the determination of the impartial hearing officer. The district also asserts that the impartial hearing officer properly dismissed the parent's September 28, 2008 due process complaint notice as insufficient because the parent failed to clearly state the nature of the problem of the student. The district asserts that although the parent made "vague allegations" that the student has been "aggrieved" by procedural violations which impeded the student from receiving a FAPE, and that resolution procedures were not followed properly in other impartial proceedings, the parent failed to identify how such claims "prejudiced" the student. In addition, the district asserts that the parent failed to list any facts to support "vague allegations."

Initially, I will address several preliminary matters. 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). 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 additional documents attached as exhibits to the parent's petition should be rejected. Generally,

[4] The October 6, 2008 letter was written on the letterhead of the hearing office and provided the name, telephone number and e-mail address of a case manager at the hearing office and of a district contact from the Committee on Special Education (CSE) (Answer Ex. VI).

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 impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; 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). I find that the additional evidence submitted by the parent with the petition is not necessary for a decision and/or duplicative. Accordingly, these documents will not be considered. Likewise, I decline the parent's request 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 financial 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 properly before me and must be denied. Fifth, 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).

In addition, the parent requests that a State Review Officer conduct an independent verification of the rotational impartial hearing officer selection process used by the district. The parent alleges that the district did not timely select and appoint an impartial hearing officer. In its answer, the district provides documentary support for its contention that the parent was notified by correspondence dated September 29, 2008 of the appointed hearing officer and that the appointment was made on the same date that the due process complaint notice was filed (see Answer Ex. II).[5] 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]). "The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the due process complaint notice or mailing of the due process complaint notice to the parent" (id.). I find that there was no

[5] I note that September 28, 2008 was a Sunday, and that the September 28, 2008 due process complaint notice was e-mailed to the hearing office on that date (Dist. Ex. 4).

delay in the selection and appointment of an impartial hearing officer and therefore, the parent's request is denied.[6]

Next, the parent requests that a State Review Officer determine that the impartial hearing officer engaged in "misconduct" or "incompetence," but does not state any facts to support this allegation. After review of the record on appeal, I conclude that there is no evidence of misconduct or incompetence by the impartial hearing officer. Accordingly, the parent's request is denied.

Turning to the district's argument on appeal, the district requests that the petition be dismissed as procedurally defective because the petition on appeal does not contain particular reasons for appealing the decision of the impartial hearing officer. It is well established that a petition must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusion and orders to which exceptions are taken" (see 8 NYCRR 279.4[a]; see also Application of a Student with a Disability, Appeal No. 08-053, Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096). The district's request is denied, however, because the failure to provide the impartial hearing officer's decision to the parent rendered the parent unable to "clearly indicate" the basis for challenging the decision (see 34 C.F.R. § 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300. 515[a][2]; 8 NYCRR 200.5[j][5]).

There is no indication in the hearing record that the parties were provided with the impartial hearing officer's October 3, 2008 decision. The hearing record shows that the impartial hearing officer's written e-mail decision was not directed to the parties, and was instead directed to a case manager at the district's impartial hearing office (Dist. Ex. 2; Answer Ex. V). The hearing record also shows that the case manager neither accurately conveyed, in the October 6, 2008 letter from the hearing office to the parent, the substance of the decision articulated by the impartial hearing officer (Answer Ex. VI), nor attached the impartial hearing officer's decision. Accordingly, I find that the failure to provide the parent with the October 3, 2008 impartial hearing officer decision constitutes a violation of due process (see 34 C.F.R. § 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300.515[a][2]; 8 NYCRR 200.5[j][5]).[7] After an independent review of the entire hearing record, I decline to grant the parent leave to re-file his September 28, 2008 due process complaint notice for the reasons stated below. However, pursuant to my authority under Education Law § 4404[2], I will direct the district to review procedures at its hearing office pertaining to the provision of impartial hearing officer decisions to the parties involved in due

[6] The parent additionally requests that a State Review Officer review the impartial hearing officer rotational selection procedures and provide independent verification that the rotational selection process was used for current and previous assignments. Although the parent states that the district did not "timely select and appoint" an impartial hearing officer from the district's rotational selection list, the parent does not state any basis to support a conclusion that the rotational selection process was not followed. Therefore, I will not further address this issue.

[7] I note that the district attached a copy of the October 6, 2008 e-mail decision to its answer dated February 12, 2009 (Answer Ex. V).

process proceedings. The purpose of this ordered review is to ensure that an impartial hearing officer's written decision, or a copy thereof, if sent directly to the hearing office, is timely provided to the parties by regular U.S. mail or by electronic mail, the latter upon consent, consistent with federal and State law (see 34 C.F.R. § 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300.515[a][2]; 8 NYCRR 200.5[j][5]).

The parent contends that the impartial hearing officer erred in dismissing the parent's September 28, 2008 due process complaint notice. I find that dismissal of the September 28, 2008 due process complaint notice was proper; however, I base my decision on additional grounds than that of the impartial hearing officer.

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]).[8] 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]).

Upon an independent review of the record on appeal, I agree with the district that the September 28, 2008 due process complaint notice is 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 facts relating to anything that the district proposes to change or refuses to change pertaining to the student. As examples, I note the

[8] 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.).

following regarding the September 28, 2008 due process complaint notice: (1) it alleges that proposed sites for "proceedings" were inconveniently located, but it does not indicate any specific facts in support of that conclusion; (2) it alleges a failure to conduct a prehearing conference, but fails to allege how that prevented the parent from "meaningfully participating" in proceedings; (3) it alleges problems with procedures concerning the resolution process, but fails to articulate meaningful facts to support a denial of a FAPE; and (4) it alleges that the parent was not permitted to record proceedings, but does not explain how that prevented the parent's meaningful participation (Dist. Ex. 5 at pp. 8-10, 23, 25). The September 28, 2008 due process complaint notice is also insufficient because it fails to allege a description of the nature of the problem of the student, including facts relating to the problem (see Dist. Ex. 5). 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]; see also Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135).

In addition, I note that the Office of State Review is aware of three due process complaint notices filed by the parent in September 2008. The parent submitted one due process complaint notice by e-mail to the hearing office on September 13, 2008 (Application of a Student with a Disability, Appeal No. 08-135) and two due process complaint notices by e-mail to the hearing office on September 28, 2008 (see Dist. Exs. 4; 5; Application of a Student with a Disability, Appeal No. 08-146). These due process complaint notices contain duplicative arguments advanced by the parent. For example, all three due process complaint notices allege that the parent and the student have been denied the opportunity for any and all proceedings to commence in a reasonably convenient location, generally alleging that the closest location to the parent's home district was "reasonably convenient" and that any other location was inconvenient (Dist. Ex. 5 at p. 8; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135). Moreover, the due process complaint notice filed in the instant matter is strikingly similar to the one filed in Application of a Student with a Disability, Appeal No. 08-135. Both contain allegations about the district's procedures concerning the resolution process, "including but not limited to case 117010;" a denial of a pre-hearing conference or conferences; a denial of the opportunity to review the due process complaint notice and other documents; and a denial of meaningful participation by not permitting the parent to record proceedings (Dist. Ex. 5 at pp. 8-10, 23, 25; Application of a Student with a Disability, Appeal No. 08-135).

There is no authority for the filing of multiple due process complaint notices on the same issues. 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 a Student with a Disability, Appeal No. 08-125; 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, a decision was rendered by a State Review Officer in Application of a Student with a Disability, Appeal No. 08-135, on February 2, 2009, upholding the dismissal by an impartial hearing officer of the parent's September 13, 2008 due process complaint notice. I find that the September 28, 2008 due process complaint notice filed in the instant matter, although not identical to the September 13, 2008 due process complaint notice filed in Application of a Student with a Disability, Appeal No. 08-135, raises substantially the same issues. Accordingly, allowing the parent to re-file the instant September 28, 2008 due process complaint notice, after the issues have 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 (see Application of a Student with a Disability, Appeal No. 08-125). 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]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that within 30 days of this decision the district review, and revise as necessary, the procedures in place at the hearing office to ensure that written decisions issued by impartial hearing officers are provided to the parties as required by federal and State law.

Dated: **Albany, New York**
March 18, 2009

PAUL F. KELLY
STATE REVIEW OFFICER