



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-011

**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 M. Alvy, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's November 21, 2008 due process complaint notice. The appeal must be sustained in part.<sup>1</sup>

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 November 21, 2008 and submitted by e-mail to respondent's (the district's) impartial hearing office (hearing office), the parent requested an impartial hearing (Pet. Ex. 2). The parent's November 21, 2008 due process complaint notice included, in general terms, allegations that the parent and student had been "aggrieved" by the

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<sup>1</sup> The November 21, 2008 due process complaint notice is identified by respondent (the district) as case number 119384. 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; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-007.

actions of the district "in impeding the due process procedures" (id. 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" of the student (id. at p. 8). The parent further generally asserted in the November 21, 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 decision making, and "caused a deprivation of educational benefits" (id.).

The parent also alleged in the November 21, 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 (Pet. Ex. 2 at p. 8). In addition, the parent generally alleged in the November 21, 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 are in process; 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 November 25, 2008, the district challenged the sufficiency of the parent's November 21, 2008 due process complaint notice, alleging that it failed to state a problem, including related facts, as well as a proposed solution (Answer Ex. III).

In an undated decision the impartial hearing officer wrote: "Although the complaint is 28 pages long, it lacks specificity as to precisely what the [district] did wrong educationally and when. Parent has 10 days to provide a concise 1-paragraph description of the complaint. Insufficient as of now" (Undated IHO Decision). The record on appeal does not indicate whether this decision was provided to the parent and does not indicate whether it was provided by e-mail or regular mail.<sup>2</sup> By letter dated November 26, 2008 and titled "Hearing Officer's Determination on the Sufficiency of the Request," the hearing office advised the parent by regular mail that "in accordance with State regulations, the impartial hearing officer has found your complaint notice to be insufficient (incomplete)" (Answer Ex. IV). The November 26, 2008 letter also advised the parent that he had the opportunity to amend the request by December 8, 2008 (id.).<sup>3</sup> The November 26, 2008 letter from the hearing office to the parent did not state the specific reason for dismissal as enunciated by the impartial hearing officer in his undated decision. Also, the November 26, 2008 letter from the hearing office to the parent did not indicate that the impartial hearing officer's undated determination was enclosed or attached (id.). Subsequently, in an "Order of Dismissal" dated December 12, 2008, the impartial hearing officer dismissed the parent's complaint with

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<sup>2</sup> The record on appeal also does not indicate if the impartial hearing officer transmitted the undated decision to the hearing office. Presumably, it was provided to the hearing office by the impartial hearing officer as the undated decision was provided as part of the record on appeal by the district.

<sup>3</sup> The notice was addressed to the parent and identified the name of the student, case number, date of due process complaint notice, and name of the appointed impartial hearing officer (Answer Ex. IV). The notice also included the name of the hearing office case manager, address, and phone number and advised the parent to contact the case manager if the parent had any questions (id.).

prejudice based upon the failure to file an amended complaint in a timely manner (December 12, 2008 IHO Decision). The hearing office sent a copy of the Order of Dismissal to the parent by regular mail with a cover letter dated December 12, 2008 (Answer Ex. V).

This appeal by the parent ensued. The parent asserts, among other things, that the decision of the impartial hearing officer dismissing his November 21, 2008 due process complaint notice should be annulled because he was not provided proper written notice of the decision by the impartial hearing officer and the decision by the impartial hearing officer was untimely. 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 impartial hearing officer properly dismissed the parent's November 21, 2008 due process complaint notice and that the parent's due process complaint notice was insufficient because it failed to clearly state the nature of the problem of the student and the parent failed to list any facts to support vague allegations. The district also alleged that the impartial hearing officer timely complied with State regulations and that the parent's claims are not within the jurisdiction of the impartial hearing officer as the parent's requests "more properly" fall under the Family Educational Rights and Privacy Act (FERPA) and Freedom of Information Law (FOIL). In the district's answer, the district further alleges that, upon information and belief, "standard operating procedures" at the hearing office require that the parent be provided with a copy of the impartial hearing officer's "determination of sufficiency," in addition to the "standardized letter" sent by the impartial hearing office (Answer ¶ 25; see Answer Ex. IV). The district further asserts that "there is no basis to conclude that standard office procedures were not complied with" (Answer ¶ 25).

Preliminarily, I note that the parent raises several procedural matters on appeal, which I shall briefly address. First, I deny the parent's request for oral argument before a State Review Officer as unnecessary (see 8 NYCRR 279.10). Second, the parent's request that a State Review Officer conduct a hearing is also denied as unnecessary. Third, I note that the parent has submitted eight exhibits with his petition for review and that the district contends that the documents are not relevant or necessary for a State Review Officer to make a determination, with the exception of the parent's November 21, 2008 due process complaint notice (Pet. Ex. 2) and a December 9, 2008 e-mail from the district to the impartial hearing officer (Pet. Ex. 6). I have reviewed the exhibits and decline to accept the exhibits that the district objects to as they are not necessary for my review and/or are duplicative.<sup>4</sup> Likewise, I decline the parent's request to submit additional evidence, including audio and video recordings. Fourth, the parent's request for compensatory and punitive financial restitution is denied as unavailable to remedy violations of the Individuals with Disabilities Education Act (IDEA). As I have held in prior appeals brought by the parent, these claims are not properly before me (see Application of a Student with a Disability, Appeal No. 09-007; Application of a Student with a Disability, Appeal No. 09-006; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-146).

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<sup>4</sup> I note that the district has attached five exhibits to its answer (Answer Exs. I-V). The parent has not objected to the district's submission of this additional evidence. I will accept the district's exhibits because they are necessary to render a decision.

Fifth, the parent alleges that the district did not timely select and appoint an impartial hearing officer from the rotational selection list, using the rotational selection process. The appointment of an impartial hearing officer must be made in accordance with the rotational selection process mandated by State regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], 200.2[e][1], 200.5[j][3][i]) and in accordance with the timelines and procedures delineated in 8 NYCRR 200.5(j). The State regulations require that a list be maintained of eligible impartial hearing officers' names in alphabetical order, and that selection shall be made beginning with the first name appearing after the last impartial hearing officer who served (8 NYCRR 200.2[e][1][ii]; see Application of a Child with a Disability, Appeal No. 05-056). In the event that an impartial hearing officer declines or is unreachable after reasonable efforts documented by the district, the district must offer the appointment to the next name on the list, in the same manner, until such appointment is accepted (id.). "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" (8 NYCRR 200.5[j][3][i]; see Application of a Student with a Disability, Appeal No. 09-004). In this case, I find that the evidence submitted by the district supports a finding that there was no delay in the selection and appointment of an impartial hearing officer. Moreover, the evidence submitted indicates that an impartial hearing officer was first appointed on November 21, 2008, and that thereafter between November 24, 2008 and November 25, 2008, there were four recusals by impartial hearing officers, until appointment on November 25, 2008 of the impartial hearing officer of record in the instant matter (Answer Exs. I; II).

I will now address whether or not the record on appeal supports a finding that the parent was provided with the impartial hearing officer's undated decision. The record on appeal shows that the impartial hearing officer's written decision was not dated and nothing in the record on appeal indicates that it was provided to the parent. Moreover, the record on appeal does not indicate who the decision was sent to or the manner of transmission (Undated IHO Decision). The record on appeal also shows that the case manager did not accurately convey, in the November 26, 2008 letter from the hearing office to the parent, the substance of the determination articulated by the impartial hearing officer, nor does this letter indicate an attachment or enclosure of the decision (Answer Ex. IV). Although I note that the district asserted in its answer that it believed that the "standard operating procedures" at the impartial hearing office requires that the parent be provided with a copy of the impartial hearing officer's "determination of sufficiency" in addition to the "standardized letter" sent by the impartial hearing office (Answer ¶ 25), the record on appeal does not contain evidence showing what the procedures of the hearing office are and if they were followed in this case. I note that when providing the parent with the Order of Dismissal dated December 12, 2008, the hearing office also sent a cover letter dated December 12, 2008, which stated, in part, "Enclosed please find the hearing officer's decision in the above referenced matter" (Answer Ex. V).<sup>5</sup> Accordingly, I find that the apparent failure to provide the parent with the undated impartial hearing officer decision constitutes a violation of due process (see 34 C.F.R.

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<sup>5</sup> This correspondence was titled "Decision of Impartial Hearing" and was written on the letterhead of the hearing office (Answer Ex. V). The notice was addressed to the parent and identified the name of the student and the case number (id.).

§ 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]).<sup>6</sup>

After an independent review of the entire hearing record, I decline to grant the parent leave to re-file his November 21, 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 include this case in its review of procedures at its hearing office pertaining to the provision of impartial hearing officer decisions to the parties involved in due process proceedings, as previously ordered in Application of a Student with a Disability, Appeal No. 09-004. The purpose of the 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 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]).

Next, the parent contends that the impartial hearing officer erred in dismissing the parent's November 21, 2008 due process complaint notice. I have reviewed the November 21, 2008 due process complaint notice and, for the reasons set forth below, I agree with the impartial hearing officer that the complaint is legally insufficient.

The 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>7</sup> 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

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<sup>6</sup> I note that the district attached a copy of the undated decision to its answer dated February 27, 2009 (Answer Ex. IV at p. 2).

<sup>7</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.*).

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 impartial hearing officer that the November 21, 2008 due process complaint notice is insufficient. Although the November 21, 2008 due process complaint notice is lengthy, it contains only 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 following regarding the November 21, 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 specific facts supporting that claim (Pet. Ex. 2). The November 21, 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 (see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). As a result, the November 21, 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]). Accordingly, I find that the impartial hearing officer correctly dismissed the parent's November 21, 2008 due process complaint notice.

Moreover, 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 timelines set forth in the State regulations governing the dismissal of a due process complaint notice after a finding of insufficiency. The record on appeal shows that the district challenged the sufficiency of the parent's November 21, 2008 due process complaint notice on November 25, 2008 (Answer Ex. III). The record also indicates that the impartial hearing officer determined in an undated decision, that the parent's due process complaint notice was insufficient on November 26, 2008 (see December 12, 2008 IHO Decision).<sup>8</sup> Accordingly, one day after the district filed a notice on November 25, 2008, challenging the sufficiency of the November 21, 2008 due process complaint notice, the impartial hearing officer made a determination in compliance with the timelines set forth in the State regulations. Moreover, the impartial hearing officer's Order of Dismissal was also timely (December 12, 2008 IHO Decision). I note that the parent was given ten days to amend the November 21, 2008 due process complaint notice; that the hearing record indicates that the parent did not file an amendment; and that thereafter the impartial hearing officer properly dismissed the November 21, 2008 due process complaint notice by decision dated December 12, 2008 (id.).

In addition, I note that the parent previously submitted a due process complaint notice by e-mail to the hearing office on September 28, 2008 (Application of a Student with a Disability, Appeal No. 08-146) and that issues raised in the November 21, 2008 due process complaint notice are duplicative of the issues raised in the September 28, 2008 due process complaint notice, and much of the language is identical. For example, both due process complaint notices allege that the

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<sup>8</sup> I note that the December 12, 2008 impartial hearing officer decision specifically references the impartial hearing officer's initial sufficiency decision as being dated November 26, 2008 (December 12, 2008 IHO Decision).

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 (Pet. Ex. 2 at p. 8; Application of a Student with a Disability, Appeal No. 08-146). Moreover, both due process complaint notices allege that the parent has 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 is causing a "deprivation of educational benefits" (Pet. Ex. 2 at pp. 8-9; Application of a Student with a Disability, Appeal No. 08-146).

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. 09-004; 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, on February 5, 2009, a decision was rendered in Application of a Student with a Disability, Appeal No. 08-146 upholding an impartial hearing officer's dismissal of the parent's September 28, 2008 due process complaint notice. I find that the November 21, 2008 due process complaint notice filed in the instant matter, raises the same issues raised in Application of a Student with a Disability, Appeal No. 08-146 and that the due process complaint notices are substantially the same. Accordingly, allowing the parent to re-file the instant November 21, 2008 due process complaint notice would be inconsistent with the finality provisions set forth in the IDEA and its implementing regulations (see Application of a Student with a Disability, Appeal No. 09-004; 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]).

Lastly, I note that 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.

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 the district include this case in its review of procedures at its hearing office pertaining to the provision of impartial hearing officer decisions to the parties involved in due process proceedings, as previously ordered in Application of a Student with a Disability, Appeal No. 09-004, within 10 days of this decision.

**Dated:**           **Albany, New York**  
                          **April 2, 2009**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**