



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-012

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 a decision of an impartial hearing officer which determined that respondent (the district) made the requisite efforts to comply with its obligation to offer a free and appropriate education (FAPE) to the student, remanded the matter to the district's Committee on Special Education (CSE), and directed the CSE to re-open the student's case if the parent submits a written request to the CSE.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. ¶ 1).

¹ The October 28, 2008 due process complaint notice is identified by the district as case number 118859. 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; Application of a Student with a Disability, Appeal No. 09-011).

In a due process complaint notice dated October 28, 2008, the parent requested an impartial hearing (IHO Ex. 3). The parent's October 28, 2008 due process complaint notice alleged that the district did not provide the parent with a requested CSE meeting to review and challenge the student's current individualized education program (IEP) and preceding IEPs "which are the basis of the current IEP" (id. at p. 3). In his due process complaint notice, the parent challenged "the current IEP" and requested an "IEP meeting" (id. at p. 24).

The parent's October 28, 2008 due process complaint notice also included general allegations that the district and its employees had acted in violation of the law regarding "the initiation, placement, and or evaluation" of the student (IHO Ex. 3 at p. 2). The parent also alleged that the district had 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.). In addition, the parent alleged that the district did not conduct a resolution session(s) according to State and federal law, that the parent has been denied requests for prehearing conferences, and that the parent has been denied access to the student's records for all cases (id. at pp. 6, 20-21). The parent also alleged in the October 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 (id. at p. 2).

The impartial hearing convened on December 11, 2008 (Tr. p. 1). The parent did not appear at the impartial hearing (IHO Decision at p. 2). An individual identifying himself as the student's uncle and parent's "assistant" appeared before the impartial hearing officer (Tr. pp. 4-5).

In a decision dated December 16, 2008, the impartial hearing officer noted that she had presided over a previous impartial hearing regarding the student (district case number 115837)² and she determined that the issues raised in the instant proceeding had been litigated and dismissed with prejudice in the previous case (IHO Decision at p. 2). Accordingly, the impartial hearing officer found that the parent was precluded from relitigating those issues in the instant proceeding (id.). The impartial hearing officer also found that:

[b]ased on the record before me ... it has not been established that the school district failed to attempt to provide a free appropriate public education to the student. In my previous decision I found that the last IEP was developed in 2007 and that the student is entitled to a review of the IEP. At that hearing, the school district demonstrated that it made at least three attempts to evaluate the student, which is a preliminary step towards a full review by a review team of the student's current educational needs

(id. at pp. 2-3).

² District case number 115837 arises from the parent's September 6, 2008 due process complaint notice (Application of a Student with a Disability, Appeal No. 09-006). The decision by the impartial hearing officer in that matter was appealed and a decision was rendered by a State Review Officer on March 23, 2009 (id.).

As ordered in the prior case, the impartial hearing officer again directed the CSE to "re-open" the student's case, upon submission of a written request by the parent (id.; see Application of a Student with a Disability, Appeal No. 09-006). The impartial hearing officer further ordered that "[t]his impartial hearing is dismissed with prejudice" (IHO Decision at p. 3).

The parent appeals from the impartial hearing officer's decision, claiming, among other things, that the October 28, 2008 due process complaint notice did not seek the same relief as the parent had sought in his prior September 6, 2008 due process complaint notice. The parent alleges that the October 28, 2008 due process complaint notice sought a "[p]arent requested IEP meeting," not an annual review (Pet ¶ 20). The parent further alleges that the prior September 6, 2008 due process complaint notice concerned a June 1, 2007 IEP meeting "being not an [annual] [r]eview, being invalid & a request for an [annual] [r]eview in a timely manner" (id.). The parent further alleges that the impartial hearing officer's decision arising from the September 6, 2008 due process complaint notice granted an "IEP conference" and failed to provide the relief requested, a valid annual review, in a timely manner (Pet. ¶¶ 19, 20). For relief in the instant matter, the parent requests, among other things, the "opportunity for a [p]arent requested IEP [m]eeting" (Pet ¶ 42).³

In its answer, the district alleges that the petition should be dismissed because the parent is barred from relitigating the same claims as in the prior case, the parent is not aggrieved, and the parent did not appear at the impartial hearing.

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, the additional documents attached as exhibits to the parent's petition are rejected because such evidence is either not necessary for a decision and/or is duplicative. 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 damages is denied as unavailable to remedy violations of the Individuals with Disabilities Education Act (IDEA) (see Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]). 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. 09-011; 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).

Fifth, on appeal 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

³ The parent further alleges, among other things, that the impartial hearing officer's decision should be annulled on the basis of "misconduct" or "incompetence" and the failure to render a timely decision. The parent makes additional allegations regarding other impartial hearings and proceedings which are not related to the decision by the impartial hearing officer in the instant matter.

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). Here, 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. The evidence submitted by the district indicates that three impartial hearing officers were assigned on October 31, 2008; that each of the three assigned impartial hearing officers recused themselves; and that the fourth impartial hearing officer who ultimately presided over the matter was also appointed on October 31, 2008 (Dist. Ex. II). In support of the parent's allegation of impropriety in the rotational selection procedure, the parent asserts on appeal that the order of recusals was not alphabetical and that the assigned impartial hearing officer was already assigned to district case number 115837. Instead of addressing the parent's specific allegations, the district contends that the documents indicating the dates of recusals and appointment of the impartial hearing officers demonstrate that the rotational selection process was properly handled. I find that this issue was not raised at the impartial hearing; therefore, I decline to consider the matter on appeal. However I do remind the district to ensure compliance with the rotational selection process (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], 200.2[e][1], 200.5[j][3][i]).

I have conducted an independent review of the hearing record in the instant matter. I have also conducted an independent review of the hearing record that was before me in Application of a Student with a Disability, Appeal No. 09-006. To the extent that both cases raise concerns regarding the parent's request for an IEP for the student, and to the extent that, as such, these claims can be viewed as duplicative, I find that an appropriate remedy for the parent's claims has already been provided by remanding the matter to the CSE and directing the CSE to reconvene (see Application of a Student with a Disability, Appeal No. 09-006). That remedy will also address the parent's claims in the instant matter. In Application of a Student with a Disability, Appeal No. 09-006, the matter was remanded to the CSE ordering that it convene, unless the parties otherwise agree, within 30 days of the date of the decision, to develop an IEP for the remainder of the 2008-09 school year and to develop an IEP for the upcoming 2009-10 school year (Application of a Student with a Disability, Appeal No. 09-006). The CSE was directed to consider existing evaluation data and the need for additional evaluations (id.; see 34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). The parent and the district were encouraged to go forward with a comprehensive psychoeducational evaluation of the student, including, but not limited to an assessment of the student's cognitive functioning; social/emotional functioning; reading, writing, and math skills; and the need for any related services (Application of a Student with a Disability, Appeal No. 09-006). I continue to encourage the parties to cooperate to ensure that appropriate evaluations take place and that an appropriate IEP, if the student requires IDEA services, is formulated.

Lastly, I note that the parent requests that a State Review Officer determine that the impartial hearing officer engaged in "misconduct" or "incompetence." I find that the record on

appeal does not support a finding of misconduct or incompetence. Accordingly, the parent's request is denied.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated December 3, 2008 that requires the parent to submit a letter to request the CSE to "re-open" the student's case is hereby annulled.

Dated: **Albany, New York**
 April 3, 2009

PAUL F. KELLY
STATE REVIEW OFFICER