



# The University of the State of New York

## The State Education Department State Review Officer

No. 09-042

**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, G. Christopher Harriss, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals as a result of the failure by respondent's (the district's) impartial hearing office (hearing office) to process the parent's April 27, 2008 due process complaint notice and assign an impartial hearing officer.<sup>1</sup> 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).

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<sup>1</sup> The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; 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. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; 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 with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046.

On appeal, the parent apparently contends, among other things, that his April 27, 2008 due process complaint notice was not properly processed by the district's hearing office.<sup>2</sup>

I note that on appeal many of the requests in the parent's petition for review are beyond the scope of the issue on appeal. For example, the parent requests that a State Review Officer determine that the impartial hearing officer(s) "engaged in conduct which constitutes misconduct or incompetence," yet no impartial hearing officer was assigned to the April 27, 2008 due process complaint notice (Pet. ¶ 39). Further, as relief, the parent requests that the "[d]ecision" be "vacated and annulled," yet there is no decision (Pet. ¶ 43). As another example, although no impartial hearing officer was assigned, the parent requests that a State Review Officer independently verify that the rotational selection process was used for the "current" and "previous" cases (Pet. ¶ 28).<sup>3</sup>

Moreover, I note that many of the allegations in the parent's petition for review refer to claims allegedly arising from other cases concerning the parent and are unrelated to the parent's claim that the district failed to process the parent's April 27, 2008 due process complaint notice (Pet. ¶¶ 20-26, 32, 42). In addition, many of the parent's claims in the petition for review are conclusory, lack clarity, and do not relate to the issue on appeal, which concerns whether or not the district failed to process the parent's April 27, 2008 due process complaint notice (Pet. ¶¶ 3, 6, 7-15, 38).

In its answer dated May 8, 2009, the district asserts that the hearing office has no record of a due process complaint notice dated April 27, 2008 being filed by the parent and that it did not process an April 27, 2008 due process complaint filed by the parent. The district contends, however, that the parent's petition for review should be dismissed because the claims raised in the parent's April 27, 2008 due process complaint notice were not claims properly brought pursuant to the Individuals with Disabilities Education Act (IDEA) or the claims were barred by res judicata. Alternatively, the district argues that in the event that the parent's petition for review were to be granted, the parent should not be granted leave to re-file his April 27, 2008 due process complaint notice based on the concept of "judicial" economy. Although the district acknowledges that in two other proceedings involving the same parent, the hearing office failed to process the parent's due process complaint notices and a State Review Officer permitted the parent to re-file those due process complaint notices, the district contends that the instant case is distinguishable because the hearing office actually received the due process complaint notices in the two prior proceedings; whereas, here, the hearing office never received the due process complaint notice at issue (see Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-118). The parent filed a reply to the district's answer on May 12, 2009 and the district did not file an objection to the submission of the parent's reply.

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<sup>2</sup> The April 27, 2008 due process complaint notice asserts among other things, that the policy and procedures of a resolution meeting were not followed by the district (Reply at Ex. 2). The parent also notes in the April 27, 2008 due process complaint notice that the district does not provide timely notifications, does not allow parent access to student's records, and does not provide notification of the appointment of impartial hearing officers (id.).

<sup>3</sup> Such a complaint, as with many of the parent's concerns, could be addressed by filing a "State complaint" with the New York State Office of Vocational and Educational Services for Individuals with Disabilities according to the procedures identified in State regulation 8 NYCRR 200.5(l).

It is required that, upon receipt of a due process complaint notice, a board of education "shall arrange for an impartial due process hearing to be conducted" (8 NYCRR 200.5[j][3]) and shall appoint an impartial hearing officer to conduct the hearing (Educ. Law § 4404[1]; 8 NYCRR 200.5[j][3][ii]).

Based upon the record on appeal, I find that the parent's April 27, 2008 due process complaint notice was not processed by the hearing office. However, I am not persuaded by the district's contention that the parent should be denied leave to re-file the due process complaint notice (see Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-118).

Accordingly, the parent shall be allowed to resubmit the same April 27, 2008 due process complaint notice so that it may be properly processed by the hearing office and a case number and an impartial hearing officer may be assigned.

This decision does not preclude the district from requesting a sufficiency determination upon proper application if the April 27, 2008 due process complaint is re-filed (see 20 U.S.C. §§ 1415[c][2][A], [c][2][B][i][II]; 34 C.F.R. § 300.508[d]; 8 NYCRR 200.5[i][3], [6]; see also M.S.-G v. Lenape Regional High Sch. Dist. Bd. of Educ., 2009 WL 74396, at \*2-\*3 [3d Cir. 2009]), or from raising arguments below that it has raised here on appeal. Nor does it preclude the parent from attempting to resolve his concerns through mediation, a resolution session, or the State complaint procedures (see 8 NYCRR 200.5[h], [j][2][i], [l]).

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 parent has leave to resubmit the same April 27, 2008 due process complaint notice within 30 days from the date of this decision.

**Dated:** Albany, New York  
June 10, 2009

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