



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-073

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 from a decision of an impartial hearing officer which dismissed the parent's due process complaint notice with prejudice. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a private school (IHO Ex. 1). The private school has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*id.*; *see* 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this appeal (Dist. Ex. 1 at p. 1; *see* 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

On April 30, 2008, respondent (the district) convened to conduct an educational planning conference (EPC) for the student to develop the student's individualized education program (IEP) for kindergarten during the 2008-09 school year (Dist. Ex. 1 at pp. 1-2). Meeting participants included a school psychologist who also acted as a district representative, a regular education teacher, a school social worker, the student's special education itinerant teacher (SEIT) by telephone, and the parent (*id.* at p. 2). The resulting IEP recommended placement in a ten-month general education class with direct special education teacher support services (SETSS) five times per week, which included push-in services two times per week (*id.* at p. 1). The IEP also recommended bilingual instruction and related services of three 30-minute individual occupational therapy (OT) sessions in a separate location, two 30-minute individual physical therapy (PT) sessions in a separate location, and two 30-minute speech-language therapy sessions in a group of three in a separate location (*id.* at pp. 1, 9).

In a due process complaint notice dated March 3, 2009, the parent, through his attorney, requested an impartial hearing alleging that the April 30, 2008 IEP reduced services that had been on an IEP dated March 7, 2007 for the previous school year, by eliminating SEIT¹ services, reducing related services, and changing from an extended school year (ESY) to a ten-month school year (IHO Ex. 1).² The parent requested as relief that the district provide the services that were set out in the March 7, 2007 IEP (*id.*).

An impartial hearing consisting of four days began on March 11, 2009, and concluded on May 14, 2009 (Tr. pp. 1, 11, 31, 81). On the first day of the impartial hearing, the parties met to determine the student's placement pursuant to pendency and the parent's attorney appeared by telephone (Tr. p. 3). Subsequently, the impartial hearing officer issued a written interim order on pendency dated March 23, 2009, and determined that the student's pendency program was the program and services recommended in the student's last agreed upon IEP dated March 7, 2007 (IHO Interim Order dated March 23, 2009).

The second day of the impartial hearing took place on April 27, 2009 (Tr. p. 11). The impartial hearing officer inquired as to why the parent was not in attendance at the impartial hearing and the parent's attorney stated that he was not sure why the parent could not attend, but that the parent would attend the next impartial hearing date (Tr. p. 13). The district then called its witness, the school psychologist, who was to testify by telephone (Tr. p. 19). The parent's attorney objected to the witness testifying via telephone on the ground that an oath could not be administered over the telephone (Tr. pp. 21-24). The district's attorney stated that she would have made her witnesses available in person had she been advised that the parent's attorney would object to her testifying by telephone (Tr. pp. 23-24). The impartial hearing officer sustained the parent's objection to the district's witness testifying by telephone (Tr. p. 25). Also, at the April 27, 2009 impartial hearing, the district's attorney reiterated a request that the parent's attorney provide her with the name of the student's current SEIT provider so that the district could subpoena that person, and the parent's attorney agreed to do so (Tr. pp. 25-27). The next hearing date was scheduled for May 13, 2009, and a further date of May 14, 2009 was scheduled in the event that another date was required (Tr. p. 28).

The third day of the impartial hearing took place on May 13, 2009 (Tr. p. 31). The parent was not in attendance (Tr. pp. 31-32). The district's school psychologist testified in person, and on direct examination she described why she believed that the proposed program was appropriate for the student (Tr. pp. 34, 48-49). After direct examination concluded, the parent's attorney declined to cross-examine the witness and the district rested its case (Tr. pp. 54, 55). The impartial hearing officer then asked the parent's attorney to proceed with his case and the parent's attorney

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

² Although the parent was represented by an attorney during the impartial hearing, the parent appears pro se on appeal.

stated that he intended to "submit our testimony by means of an affidavit" and submitted an affidavit from the student's SEIT provider (id.). The impartial hearing officer inquired as to whether the SEIT would be made available for cross-examination and there was a discussion regarding who was responsible for producing the witness (Tr. pp. 55-76). Ultimately, the impartial hearing officer refused to accept the witness' testimony in the form of an affidavit if the witness was not going to be available for cross-examination (Tr. p. 59). The district's attorney stated that this same matter had been before a different impartial hearing officer in August 2008 and that that case had been dismissed, and the district's attorney alleged that that the parent's attorney was using the "same tactic" in the present case (Tr. p. 63). The district's attorney also stated that "for purposes of pendency, the student has been receiving the services for the entire year. I would object to another date of scheduling" (id.). The impartial hearing officer directed the parent's attorney to produce the parent at the impartial hearing scheduled for the following day (May 14, 2008) so that the district's attorney and the impartial hearing officer could question the parent (Tr. pp. 68-69). The parent's attorney stated that the parent was not able to take off work to attend the impartial hearing, though he admitted shortly thereafter that he did not know what the parent did for work (Tr. p. 69). The impartial hearing officer stated:

I'm directing you to produce the parent. We have a date tomorrow and the parent should be here tomorrow at 9 o'clock. If this witness, [the SEIT] is not here tomorrow, I will give you another date for [the SEIT] because it's such short notice ... But certainly, you've known about tomorrow's date and it was the expectation that tomorrow's date was reserved for your case. And so that's it. I'll see you tomorrow at 9 o'clock.

(Tr. p. 70).

The parent's attorney stated that he had no intention of producing the parent at the impartial hearing scheduled for the next day (Tr. p. 71). The impartial hearing officer stated that if the parent's attorney did not produce the parent at the impartial hearing, the case would be dismissed (Tr. p. 72).

The fourth day of the impartial hearing took place on May 14, 2009 (Tr. p. 81). Neither the parent nor the parent's attorney appeared at the impartial hearing or contacted the impartial hearing officer. The impartial hearing officer closed the impartial hearing and dismissed the parent's case with prejudice (Tr. pp. 83-84).

Thereafter, the impartial hearing officer issued a written finding of fact and decision dated June 8, 2009, which noted that the parent had failed to appear at the impartial hearing to be questioned by the district's attorney as directed by the impartial hearing officer and that the parent's attorney had also failed to appear at the May 14, 2009 impartial hearing date (IHO Decision at p. 2). The impartial hearing officer stated that as of the date of his decision, he had not heard from the parent's attorney regarding his failure to appear at the impartial hearing and; therefore, he dismissed the case with prejudice (id.).

The parent appeals the impartial hearing officer's decision dismissing the matter with prejudice, arguing that the impartial hearing officer erred in allowing the district three days to present its case; erred in finding that the parent was required to be present at the impartial hearing while represented by an attorney; and erred in holding the May 14, 2009 impartial hearing date without notice to the parent's attorney. The parent also asserts that the impartial hearing officer had no legal basis to dismiss the case "with prejudice" where the appropriateness of the IEP was challenged and that State regulations require an impartial hearing officer to make a finding regarding the appropriateness of the IEP. Lastly, the parent argues that the impartial hearing officer erred in failing to issue any formal decision whatsoever. The parent attached to the petition an affidavit executed by the attorney who represented the parent at the impartial hearing and eight exhibits (Attorney Aff.; Pet. Exs. A-H).³ Seven of the exhibits attached to the petition consist of e-mails between the parties and the impartial hearing officer regarding the contact information for and the scheduling of the student's SEIT's testimony, as well as the appearance of the parent at the impartial hearing (Pet. Exs. A-F; H).⁴ The eighth attachment consists of a cover letter to the transcript of the May 14, 2009 impartial hearing (Pet. Ex.G).

In its answer, the district requests an order dismissing the appeal with prejudice and ordering the parent to reimburse the district for funds expended by the district pursuant to the student's pendency placement.⁵ The district further alleges that the parent and the parent's attorney improperly manipulated the student's pendency entitlements.

Additionally, the district requests that a State Review Officer accept and consider several pieces of additional evidence attached to its answer, which it claims support the impartial hearing officer's dismissal of the parent's March 3, 2009 due process complaint notice because the parent failed to comply with the impartial hearing officer's reasonable directives and failed to prosecute the claim. The additional evidence offered by the district consists of eight documents, including a due process complaint notice signed by the parent's attorney dated August 22, 2008 (Answer Ex. 1). This due process complaint is worded, with the exception the date and the description of where the student was attending school, identically to the March 3, 2009 due process complaint that is at issue in this matter (compare IHO Ex. 1, with Answer Ex. 1). The district further offers an exhibit that shows that the parent withdrew the August 22, 2008 due process complaint notice on August 25, 2008, three days after the complaint was filed (Answer Ex. 2). The district alleges in its answer that this action by the parent constituted "judge shopping," which should result in an immediate dismissal of any new claims that were subject to the prior proceedings. The district also offers a due process complaint notice signed by the parent's counsel dated August 26, 2008 (Answer Ex. 3). This due process complaint notice is worded, with the exception the date, identically to the August 22, 2008 due process complaint notice that had been withdrawn the previous day (compare

³ One of the exhibits attached to the petition is unlabeled and has been labeled Pet. Ex. H by the Office of State Review.

⁴ In an e-mail to the impartial hearing officer dated May 13, 2009, the parent's attorney stated that "in accordance with your directive, the parent will appear at the next scheduled hearing date" (Pet. Ex. F).

⁵ The district asserts this argument as a defense, not as a cross-appeal.

Answer Ex. 3, with Answer Ex. 1). Next, the district offers a copy of the transcript of a September 2, 2008 pendency hearing conducted in connection with the August 26, 2008 due process complaint notice (Answer Ex. 4). The district further offers a copy of an impartial hearing officer's interim order on pendency in the matter commenced by the August 26, 2008 due process complaint notice (Answer Ex. 5). Next, the district offers a copy of the decision of the impartial hearing officer in the matter commenced by the August 26, 2008 due process complaint notice dated January 22, 2009, wherein the impartial hearing officer in that matter dismissed the complaint without prejudice because the parent's attorney failed to appear at an impartial hearing date (Answer Ex. 7 at p. 3).⁶ The district also offers a redacted copy of a decision from a recent, but unrelated matter where the parent's attorney had represented another family.

In the alternative, the district argues in its answer that it met its burden to show that it offered the student a free appropriate public education (FAPE) via the unrefuted testimony of the school psychologist, and that although there was no additional parent member at the April 30, 2008 EPC meeting, the parent has not demonstrated any harm resulting from this procedural flaw. The district also argues in the alternative that the parent's claim is moot because "virtually" all of the ultimate relief sought via the March 3, 2009 due process complaint notice was obtained by virtue of pendency and no claim for compensatory services has been made.

First, I will address the parent's and the district's requests to consider the additional evidence attached to their pleadings. 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 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). In this case, although much of the material offered as additional evidence was in existence at the time of the impartial hearing, the material did not become relevant until the impartial hearing officer dismissed the instant case with prejudice. Moreover, although the additional evidence offered by the district was not presented to the impartial hearing officer at the impartial hearing, the impartial hearing officer had been informed by the district's attorney of prior related impartial hearings that had been initiated by the parent's attorney for the 2008-09 school year and had subsequently been dismissed (Tr. p. 63). I will therefore accept the additional evidence offered by the parties as necessary to render a decision in this case.

After reviewing the hearing record, the arguments set forth by the parties, and the additional evidence proffered by the parties, I find that the evidence in this case compels the

⁶ The impartial hearing officer in that matter stated in her decision that "the purpose of the pendency order was not to serve as a final decision. After several months of trying to schedule this hearing and upon [the parent's attorney's] insistence of a full day of hearing I cannot grant another adjournment when the [district] and I appeared at the hearing" (Answer Ex. 7 at p. 3).

conclusion that the impartial hearing officer had a sufficient basis to dismiss the matter with prejudice. As a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the impartial hearing officer regarding the conduct of the impartial hearing (see Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). An impartial hearing officer is authorized to administer oaths and to issue subpoenas in connection with the administrative proceeding (8 NYCRR 200.5[j][3][iv]). An impartial hearing officer may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). The parents, school authorities, and their respective attorneys or representatives, shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the impartial hearing (8 NYCRR 200.5[j][3][xii]). The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]).

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 Individuals with Disabilities Education Act (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). Impartial hearing officers are expected to comply with the administrative timelines pursuant to the federal and State regulations which require that an impartial hearing officer render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]).

I find the parent's argument that the impartial hearing officer erred by allowing the district three days to present its case in contravention of State regulations⁷ to be without merit. The district was prepared to present its case on the first day of the impartial hearing; however, the parent's attorney objected to the district's witness testifying by telephone, requiring the scheduling of a second day of testimony so that the witness could appear in person (Tr. pp. 21-25). I note that although the parent's attorney insisted that the district's witness testify in person at the impartial

⁷ See 8 NYCRR 200.5(j)(3)(xiii).

hearing, he declined to cross-examine the witness (Tr. p. 54). Furthermore, the district rested its case after the conclusion of that witness' testimony.

I also find the parent's argument that the impartial hearing officer erred in requiring the parent to be present at the impartial hearing while represented by attorney to be without merit. The impartial hearing officer ordered the parent to attend the impartial hearing in order for the parent to be questioned by the impartial hearing officer and the district's attorney. I find that the parent was obliged to comply with this reasonable directive (Tr. pp. 68-70, 79). The parent's attorney repeatedly agreed to produce the parent at the impartial hearing and repeatedly failed to do so (Tr. pp. 13, 31-32, 68-70, 79, 83-84; Pet. Ex. F at p. 1).

I further find the allegation that the parent's attorney had no notice of the May 14, 2009 impartial hearing raised by the parent in his petition and in the parent's attorney's affidavit attached to the petition to be directly refuted by the hearing record (Tr. pp. 28, 68-70, 79; Pet. Ex. F at p. 1; see Attorney Aff.).

Lastly, I find the parent's argument that the impartial hearing officer had no legal basis to dismiss the case "with prejudice" where the appropriateness of the IEP was challenged and that 8 NYCRR 200.5 of the State regulations require an impartial hearing officer to make a finding regarding the appropriateness of the IEP to be without merit. The parent does not specify what provision of 8 NYCRR 200.5 of the State regulations the impartial hearing officer allegedly violated. The impartial hearing officer issued a written decision dated June 8, 2009 (IHO Decision at p. 2). The impartial hearing officer's decision properly dismissed the due process complaint notice with prejudice for failing to comply with the impartial hearing officer's reasonable directives and the impartial hearing officer had clearly cautioned the parent's attorney that the case was in danger of being dismissed (id.; Tr. p. 72). The impartial hearing officer's dismissal of the due process complaint with prejudice, based on the failure of the party to prosecute and comply with reasonable directives issued during the proceeding, was appropriate under the circumstances of this case (see Application of a Child with a Disability, Appeal No. 04-061).

Lastly, I note that the district alleges that the parent and the parent's attorney have deliberately "gamed[] the system" by improperly taking advantage of the injunctive nature of pendency without intending to prosecute an impartial hearing on the underlying merits. The purpose of the pendency provision is "intended to maintain some stability and continuity in a child's school placement during the pendency of review proceedings" (Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). In essence, the district argues that the parent and the parent's attorney have delayed the proceedings and filed multiple due process complaint notices regarding the same school year so that the student could be provided with the services that the parent prefers pursuant to pendency for as long as possible. The district contends that it is entitled to recoup the funds it spent pursuant to the student's pendency during the 2008-09 school year and during this appeal. Consistent with prior decisions, I will not order the recoupment of funds spent by the district to provide the student with pendency services (see Application of the Dep't of Educ., Appeal No. 09-032; Application of the Dep't of Educ., Appeal No. 09-019; Application of the Dep't of Educ., Appeal No. 08-134; Application of the Dep't of Educ., Appeal No. 08-061).

In conclusion, I find no basis on which to disturb the decision of the impartial hearing officer.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 August 14, 2009

PAUL F. KELLY
STATE REVIEW OFFICER