



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-030

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 an interim order of an impartial hearing officer which, among other things, ordered respondent (the district) to provide the impartial hearing officer with certain information and ordered the appointment of a guardian ad litem for the student.^{1,2} The appeal must be dismissed.

¹ The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 10-024; Application of a Student with a Disability, Appeal No. 10-017; Application of a Student with a Disability, Appeal No. 10-016; Application of a Student with a Disability, Appeal No. 09-042; 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.

² Petitioner's due process complaint notice in this matter has been identified by the district's impartial hearing office as case number 126040.

By amended due process complaint notice dated March 1, 2010, submitted by e-mail to the district, the parent requested an impartial hearing (Dist. Ex. 1. at pp. 1-8).³ The impartial hearing began on March 5, 2010, but has not yet come to conclusion and no final determination has been rendered (Tr. p. 1). Subsequent to the hearing date, the impartial hearing officer issued three interim orders dated March 9, 22 and 29, 2010 (IHO First, Second, and Third Interim Orders). This appeal by the parent ensued. The parent does not specify in his petition which interim order he is challenging on appeal.

In its answer, the district argues, among other things, that a State Review Officer has no jurisdiction to consider this appeal because the parent is appealing one or more of the interim orders issued by the impartial hearing officer, none of which concerns the student's pendency placement.

Pursuant to State regulations, a party may not appeal an impartial hearing officer's interim order on an interlocutory basis unless the appeal concerns a student's pendency rights (8 NYCRR 279.10[d]);⁴ see Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 00-073). A review of the interim orders in the hearing record does not

³ The hearing record submitted on appeal in this case consisted initially of the transcript of the March 5, 2010 hearing date; the impartial hearing officer's first interim order dated March 9, 2010; and an unlabeled collection of documents consisting of an eight-page e-mail cover letter and amended due process complaint notice, and a four-page notice of challenge to the sufficiency of the complaint with an e-mail cover letter (Dist Ex. 1 at pp. 1-12). It is unclear from the hearing record which party entered this exhibit into evidence and it was not marked by the impartial hearing officer. For ease of review, this Office has marked the exhibit "Dist. Ex. 1." A March 12, 2010 certification of the hearing record consisting of these documents was submitted by the district to the Office of State Review. Thereafter, a second certification of the hearing record dated April 20, 2010, was submitted by the district to the Office of State Review, which noted that an attached affirmation was mistakenly omitted from the hearing record and additionally enclosed a computer disk (CD-ROM) containing copies of due process complaint notices and amended due process complaint notices made by the parent that were consolidated into the case by the impartial hearing officer and the district's impartial hearing office. Also on the CD-ROM, among other materials, were two additional interim orders of the impartial hearing officer dated March 22, 2010 (second interim order) and March 29, 2010 (third interim order). The affirmation attached to the second certification and the materials on the CD-ROM are not listed on an exhibit list appended to any of the interim orders and were not entered into evidence at a hearing date, as reflected in the transcript of the March 5, 2010 impartial hearing. As such, with the exception of the second and third interim orders, the materials identified by and attached to the second certification are rejected and will not be considered as part of this appeal. Additionally, the district is reminded that, pursuant to State regulations, the district shall file with the Office of State Review a "copy of the decision of the impartial hearing officer" and "a copy of the original exhibits accepted into evidence at the hearing and an index to the exhibits," among other things (8 NYCRR 279.9[a]). The State regulations also require that a bound copy of the written hearing transcript before the impartial hearing officer be filed with the Officer of State Review, along with an electronic copy of the written transcript (id.). As such, the materials filed with the Office of State Review by CD-ROM only were improperly filed.

⁴ State regulation 8 NYCRR 279.10(d) provides, in pertinent part, the following:

Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

reveal any discussion or determinations related to the student's pendency rights. Accordingly, the parent's appeal is premature and not properly before me.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 May 5, 2010

PAUL F. KELLY
STATE REVIEW OFFICER