



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-018

**Application of a STUDENT WITH A DISABILITY, by her 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:**

The Legal Aid Society Juvenile Rights Practice, attorneys for petitioner, Gwyneth Horten, Esq., and Cara Chambers, Esq., of counsel.

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 determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2010-11 school year was appropriate. The appeal must be sustained.

### **Background**

The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). Due to the nature of the issues presented in this appeal, a detailed recitation of the student's educational history is unnecessary. Briefly, as noted on the student's August 25, 2010 individualized education program (IEP), the CSE had recommended placement in a 12:1+1 special class in a community school with related services of individual and group counseling for the 2010-11 school year (Dist. Ex. 2 at pp. 1, 3, 5, 9). Subsequently, the IEP was amended on September 29, 2010 to include a 1:1 crisis management paraprofessional (Tr. p. 8; Dist. Ex. 2 at pp. 2, 11, 12).

## **Due Process Complaint Notice**

In a November 2010 due process complaint notice, the parent requested an impartial hearing and asserted that the district had failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Dist. Ex. 1).<sup>1</sup> Among other things, the parent asserted that the district had failed to offer an appropriate placement for the student and had not fully implemented the services recommended in the IEP (*id.*). As relief, the parent requested that the district "reopen [the] IEP to consider alternate recommendations and continue 1:1 para[professional] in the interim" (*id.*).

## **Impartial Hearing and Decision**

On January 7, 2011, an impartial hearing was held (Tr. p. 1). The impartial hearing officer began the hearing by noting that the parent was absent, that it was past the scheduled hearing start time, and that the district was ready to proceed with its witnesses (Tr. p. 3). The district's representative indicated that the parent was aware of the impartial hearing, having been informed of it at a resolution session held in December 2010 (Tr. pp. 10-11). The district then submitted nine exhibits into evidence and presented the testimony of five witnesses (Tr. pp. 11-69). At no time during the hearing did the parent or a representative of the parent appear (Tr. pp. 1-69).

In a decision dated January 11, 2011, the impartial hearing officer determined that the August 25, 2010 IEP was appropriate to meet the student's needs and denied the relief requested by the parent (IHO Decision at p. 3).

## **Appeal for State-Level Review**

The parent appeals, asserting that it was improper for the impartial hearing officer to conduct the impartial hearing in her absence. According to the parent's verified petition, both she and an educational advocate contacted the district's impartial hearing office to inform it that the parent would be out of the country on the dates proposed for the impartial hearing. The parent notes that the hearing transcript reflects that no attempts were made to contact her on the day of the hearing. The parent also argues that, even were the hearing properly held in her absence, the district failed to offer evidence to show that it had recommended an appropriate placement to the student. As relief, the parent requests that the impartial hearing officer's decision be vacated and that the matter be remanded to a new impartial hearing officer to conduct an impartial hearing.

The district filed an answer, admitting that the parent did not participate in the hearing and conceding that it was error for the impartial hearing officer to conduct the hearing in her absence. The district further stated that it did not oppose the relief requested by the parent.

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<sup>1</sup> The due process complaint notice submitted by the district was signed by an education specialist advocating for the parent and dated November 19, 2010 (Dist. Ex. 1; Pet. Ex. A at p. 1). The parent executed a nearly identical due process complaint notice on November 18, 2010 (Pet. Ex. D).

## **Applicable Standards**

When a party appeals a decision of an impartial hearing officer, the State Review Officer must "[e]nsure that the procedures at the hearing were consistent with the requirements of due process" (34 C.F.R. § 300.514[b][2][ii]; see Educ. Law 4404[2]). Among other things, an impartial hearing officer must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an impartial hearing officer has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]), it is also an impartial hearing officer's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of the Bd. of Educ., Appeal No. 11-004; Application of a Student with a Disability, Appeal No. 11-002; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92). Furthermore, the "hearing . . . must be conducted at a time and place that is reasonably convenient to the parents and child involved" (34 C.F.R. § 300.515[d]; see 8 NYCRR 200.5[j][3][x]).

## **Discussion**

Upon examination of the hearing record, I find that the impartial hearing officer made little effort to determine whether the parent planned to participate in the hearing and offered an insufficient explanation for holding the hearing in the parent's absence. While the impartial hearing officer inquired of the district's representative as to whether the parent was aware of the hearing, the district representative's response that the parent had been aware of the scheduled hearing date at the time of the resolution session the previous month did not justify the impartial hearing officer's decision to hold a hearing without the parent's participation (Tr. pp. 10-11, 26). The impartial hearing officer's January 11, 2011 decision makes no mention of the parent's absence at the hearing and does not offer any further explanation of why the impartial hearing officer decided to proceed with the hearing in the parent's absence and decide the parties' dispute based on a record that was developed by only the district. Thus, I find under the circumstances of this case that the hearing failed to comport with the requirements of due process as the parent did not have the opportunity to present her case and be heard (see 34 C.F.R. § 300.514[b][2][ii]; Application of a Student with a Disability, Appeal No. 10-130).

Moreover, the parties agree that the impartial hearing officer erred in conducting an impartial hearing without the parent, and the district agrees with the parent's requested remedy. Accordingly, I find no reason under these circumstances to deny the parent's request to remand the matter for a new hearing before a different impartial hearing officer. Upon remand, the new impartial hearing officer shall ensure that each party has the opportunity to present evidence and testimony, and the impartial hearing officer shall render a written decision that comports with State regulations at 8 NYCRR 200.5(j)(5)(v).

**Conclusion**

Based on the foregoing, I find that the impartial hearing officer improperly held the impartial hearing in the parent's absence, in violation of the parent and student's due process rights. I have considered the parties' remaining contentions and, in light of my determination herein, find it unnecessary to address them.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated January 11, 2011 is annulled in its entirety; and

**IT IS FURTHER ORDERED** that unless the parties otherwise agree, this matter is remanded to a new impartial hearing officer to conduct an impartial hearing, hear testimony and/or receive evidence into the record consistent with this decision, and render a decision within 30 days from the receipt of this decision

**Dated:**            **Albany, New York**  
                         **May 20, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**