



The University of the State of New York

The State Education Department State Review Officer

No. 08-048

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, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's April 20, 2008 due process complaint notice.¹ The appeal must be sustained.

In the present case, an impartial hearing was never held on the merits of the parent's claim. Instead, as explained in greater detail below, the impartial hearing officer sustained respondent's (the district's) challenge to the sufficiency of the parent's due process complaint notice and dismissed the parent's request for an impartial hearing. The hearing record indicates that the impartial hearing officer submitted her determination dismissing the parent's due process complaint notice to an office within the district by e-mail, rather than directly to the litigating parties. The district's office – the "impartial hearing office" – then advised the parent that his complaint was being dismissed. The parent now appeals² the dismissal, contending that the due process complaint notice was sufficient and requesting a review of the procedures followed by the

¹ The parent filed an amended due process complaint notice on April 20, 2008, the same day that the initial due process complaint notice was filed. The amended due process complaint notice was essentially the same as the initial due process complaint notice, except that it added a statement indicating that the parent was precluded from filing a timely due process complaint notice because the school district withheld information (Dist. Ex. 3). For the purpose of this appeal, I shall refer to the due process complaint notice at issue as the April 2008 due process complaint notice, in order to avoid confusion and maintain consistency with the pleadings and record on appeal.

² The parent filed two other petitions for review concurrently with this matter (see Application of a Student with a Disability, Appeal No. 08-046; Application of a Student with a Disability, Appeal No. 08-047).

district and the impartial hearing officer. As set forth herein, I find that the parties were not properly notified by the impartial hearing officer of the dismissal of the parent's April 20, 2008 due process complaint notice.

I begin by reviewing the facts leading up to the instant appeal. By due process complaint notice dated April 20, 2008, the parent requested an impartial hearing (Dist. Ex. 4).³ The April 2008 due process complaint notice alleged that evaluations, assessments and/or information, as well as the procedural safeguards notice, were not provided to the parent before the student's June 1, 2007 Committee on Special Education (CSE) meeting (*id.*). The due process complaint notice also alleged that evaluations, assessments and information from the parent were not considered at the June CSE meeting (*id.*). The proposed solution indicated in the due process complaint notice sought provision of the written policy and procedures for a CSE meeting, writing a quality individualized education program (IEP), the written district criteria for the evaluations that were used at the CSE meeting, and written minutes of the CSE meeting (*id.*). The parent also sought written criteria regarding procedures for changing a student's classification (*id.*).

On April 22, 2008, the district challenged the sufficiency of the parent's April 2008 due process complaint notice on the grounds that it was not sufficient because it did not include a proposed solution (Answer Ex. E; *see* 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). On April 25, 2008, the impartial hearing officer made a determination regarding the sufficiency of the April 2008 due process complaint notice which she reduced to an e-mail (Dist. Ex. 1). Instead of issuing a written determination directly to the parties, the impartial hearing officer sent the e-mail directly to a "case manager" in the district's impartial hearing office (*id.*). The hearing record does not indicate why the impartial hearing officer chose this procedure and there is no indication in the hearing record that the impartial hearing officer directly notified the parties of her determination. The April 25, 2008 e-mail sent to the case manager by the impartial hearing officer stated: "The parent's request is not a legal basis for an impartial hearing under the [Individuals with Disabilities Education Act] IDEA. The school district should provide h[im] with the documents [he] requests and [he] can be referred to NY state website to obtain the additional information" (*id.*). On April 27, 2008, the impartial hearing officer sent a second e-mail to the case manager stating "Dismissed without prejudice" (Dist. Ex. 2). By letter dated April 30, 2008, the district's impartial hearing office advised the parent that the impartial hearing officer found the notice to be "insufficient (incomplete)" and that the parent may submit a new due process complaint notice (Answer Ex. F). By letter dated May 5, 2008, the district's impartial hearing office again advised the parent that the impartial hearing officer found the notice to be "insufficient (incomplete)" and that the parent may submit a new due process complaint notice (Answer Ex. G). Both letters from the district's impartial hearing office to the parent failed to state the specific reasons for dismissal as enunciated by the impartial hearing officer in her April 25, 2008 e-mail to

³ The hearing record on appeal does not contain numbered exhibits. The exhibits provided by the district have been numbered sequentially by the staff at the Office of State Review in order to provide a clear and efficient means of reference to the record on appeal and will be referenced herein as district exhibits.

the case manager at the impartial hearing office, and did not attach the impartial hearing officer's written determination (Answer Exs. F; G).⁴

This appeal ensued. The parent asserts that the impartial hearing officer erred in dismissing his due process complaint notice on the grounds of insufficiency and also seeks a review of the procedures followed by the district and the impartial hearing officer. As relief, the parent requests an opportunity to present additional evidence and argument relating to his claims. The district submitted an answer, arguing that the impartial hearing officer properly dismissed the due process complaint notices as insufficient, that the petition for review is insufficient because it fails to comply with 8 NYCRR 279.4(a) and does not set forth the allegations in numbered paragraphs, and that the allegations raised in the petition are moot. The district also submitted an affidavit of service stating that it had served the parent with its answer.

Preliminarily, I will address the procedural arguments raised by the district. I am not persuaded by the district's argument that the petition for review fails to clearly indicate the reasons for challenging the impartial hearing officer's decision and fails to indicate what relief should be granted by a State Review Officer as required by 8 NYCRR 279.4(a). A review of the petition indicates that the parent disagrees with the sufficiency determination regarding the due process complaint notice. It is evident that the parent seeks a finding that the due process complaint notice was sufficient, which, in turn, would permit as relief the impartial hearing that he initially sought (see 20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]). Although the district correctly states that the parent failed to number the allegations in his petition for review (see 8 NYCRR 279.8[a][3]), I decline to dismiss the petition on this ground (see Application of a Child with a Disability, Appeal No. 07-099).

Turning to the arguments raised about the sufficiency of the parent's due process complaint notice, in pertinent part, a due process complaint notice shall include the name and address of the student and the name of the school which the student is attending, a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). Failure to conform to the minimal pleading requirements of the statute may render a due process complaint notice legally insufficient (see M.S.-G v. Lenape Regional High Dist. Bd. of Educ., 2007 WL 269240, at *3 [D.N.J. Jan. 24, 2007] [finding proper a dismissal of a due process complaint notice under the IDEA for failure to allege facts related to the problem and to propose a resolution of the problem]). An impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20

⁴ Both letters were written on the letterhead of the district's "Impartial Hearing Office" with both letters containing a caption stating "Hearing Officer's Determination on the Sufficiency of the Request" (Answer Exs. F; G).

U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).⁵ A party may amend its due process complaint notice if the other party consents in writing to such amendment or if the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs (20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i]). Where there has been the allegation of an insufficient due process complaint notice, State regulations provide "Within five days of the receipt of the notice of insufficiency, the impartial hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements . . . and shall immediately notify the parties in writing of such determination" (see 8 NYCRR 200.5[i][6][ii]; see also 34 C.F.R. § 300.508[d][2]). The Official Analysis of Comments to the federal regulations state: "If the hearing officer determines that the notice is not sufficient, the hearing officer's decision will identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate" (Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]).

The impartial hearing officer's determination regarding the sufficiency of the April 2008 due process complaint notice is problematic because there is no indication in the hearing record that the impartial hearing officer properly notified the parties in writing of her sufficiency determination. The hearing record shows that the impartial hearing officer's written determination was not directed to the parties, and was instead directed to a case manager at the district's impartial hearing office (Dist. Ex. 17). The hearing record also shows that the case manager neither accurately conveyed the substance of the determination articulated by the impartial hearing officer in her April 25, 2008 e-mail correspondence, nor provided a copy of the correspondence to the parent (Dist. Ex. 17; Answer Ex. F). Accordingly, I find that the April 30, 2008 and the May 5, 2008 letters sent by the district's impartial hearing office to the parent, which dismissed the due process complaint notice without leave to amend, did not constitute proper notification of the determination made by the impartial hearing officer pertaining to sufficiency. I will annul the determination dismissing, without leave to amend, the parent's April 2008 due process complaint notice. I will give the parent leave to resubmit his April 2008 due process complaint notice or an amendment thereto within 30 days from the date of this decision.

I decline to review the merits on appeal as to whether or not the impartial hearing officer properly determined that the due process complaint notice was legally insufficient. The impartial hearing officer is reminded that in preparing her written determination, if she finds that the due process complaint notice is legally insufficient, her decision should "identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate" (Due Process Complaint, 71 Fed. Reg. 46698 [Aug. 14, 2006]). Should the matter proceed further, nothing in this decision

⁵ The Senate Report pertaining to this 2004 amendment to the IDEA noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (*id.*).

shall be interpreted as precluding the district from raising any relevant affirmative defenses to the parent's due process complaint notice.

In light of my decision herein, it is not necessary to address the parties' remaining arguments, including the parent's assertion that he was not properly served with an answer.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's determination dismissing the parent's April 2008 due process complaint notice is annulled.

IT IS FUTHER ORDERED that the parent has leave to resubmit his April 2008 due process complaint notice or an amendment thereto within 30 days from the date of this decision.

Dated: **Albany, New York**
 August 8, 2008

PAUL F. KELLY
STATE REVIEW OFFICER