



The University of the State of New York

The State Education Department State Review Officer

No. 08-117

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, Vida M. Alvy, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's September 6, 2008 amended due process complaint notice.¹ The appeal must be dismissed.

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]). It appears from the petition that the student is attending private school. On appeal, there are no specific allegations that the student is not receiving appropriate special education services.

In the present case, an impartial hearing was never held on the merits of the parent's September 6, 2008 amended due process complaint notice. Instead, as explained in greater detail below, the impartial hearing officer found, by written decision, that the parent's September 6, 2008 amended due process complaint notice was insufficient and dismissed the parent's request for an impartial hearing with prejudice (IHO Decision at pp. 2-3).² The parent appeals the dismissal of the September 6, 2008 amended due process complaint notice, contending, among other things, that the amended due process complaint notice was sufficient and requesting a review of the

¹ The September 6, 2008 amended due process complaint notice is identified by the district as case number 114416.

² The hearing record on appeal does not contain numbered exhibits. The exhibits provided by the district have been numbered sequentially by 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.

procedures followed by respondent (the district), the district's impartial hearing office and the impartial hearing officer to ensure that the procedures followed were in accordance with due process requirements. As set forth herein, upon review of the hearing record, I find that the impartial hearing officer correctly dismissed the parent's September 6, 2008 amended due process complaint notice.

Several preliminary matters must be addressed. First, I deny the parent's request for oral argument before a State Review Officer. Such argument is authorized by the rules governing appeals to a State Review Officer only in the event that a State Review Officer determines that oral argument is necessary (8 NYCRR 279.10). I find that oral argument is not necessary in this matter (see Application of a Student with a Disability, Appeal No. 08-090; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-041; Application of a Child with a Disability, Appeal No. 03-067). Second, the parent requests that a State Review Officer conduct a hearing and accept additional evidence. I decline to accept the additional evidence as it was either available for submission at the time of the hearing request or it is unnecessary for me to review to render a decision. 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 hearing and the evidence is necessary in order to render a decision (see Application of the Bd. of Educ., Appeal No. 04-068; see generally Application of a Child with a Disability, Appeal No. 04-030; Application of a Child with a Disability, Appeal No. 04-020). I deny the parent's request for a hearing as unnecessary. Third, the parent asks for relief pertaining to a number of issues, presented for the first time on appeal and not raised before the impartial hearing officer, related to the operations of the district's hearing office. I decline to address these issues as they were not properly raised below and are not properly before me (see Educ. Law § 4404[2]; 8 NYCRR 200.5[j][1][ii], [k]; Application of a Student with a Disability, Appeal No. 08-118; Application of a Child with a Disability, Appeal No. 07-085). Fourth, the district asserts 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 insufficiency determination regarding the September 6, 2008 amended due process complaint notice. It is evident that the parent seeks a finding that the September 6, 2008 amended 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]). I therefore decline to dismiss the petition solely on the basis of 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.

I now turn to the relevant facts leading up to the instant appeal, which arose under Application of a Student with a Disability, Appeal No. 08-047. Initially, by due process complaint notice dated December 27, 2007, the parent requested an impartial hearing (Application of a Student with a Disability, Appeal No. 08-047). The due process complaint notice sought information about the student's teachers (*id.*). The parent specifically requested the following information about the student's teachers for the 2005-06 and 2006-07 school years: licenses, certifications, qualifications, credentials, details regarding specific experience with special education, and the dates of all training (*id.*).

By written interim order dated January 8, 2008, the impartial hearing officer dismissed the December 27, 2007 due process complaint notice without prejudice due to insufficiency, and granted the parent until January 22, 2008 to file an amended due process complaint notice (Application of a Student with a Disability, Appeal No. 08-047). On January 21, 2008, the parent amended the December 27, 2007 due process complaint notice (id.). The January 21, 2008 amended due process complaint notice stated that the evaluations used at the student's Committee on Special Education (CSE) meetings were not provided to the parent before the meetings and that the qualifications and credentials of the evaluators and/or those in attendance at the meetings were not made available to the parent before the meetings (id.). The January 21, 2008 amended due process complaint notice requested the following relief in general terms: appropriate evaluation procedures and protocols; reimbursement for unspecified costs; and the qualifications and credentials of those in attendance at all CSE meetings (id.). Subsequently, the parent's January 21, 2008 amended due process complaint notice was dismissed without a written decision by the impartial hearing officer via the district's hearing office and the parent appealed (id.). Application of a Student with a Disability, Appeal No. 08-047 rendered on August 8, 2008, sustained the parent's appeal and provided the parent with leave to resubmit his January 21, 2008 due process complaint notice or an amendment thereto. On September 6, 2008, the parent submitted an amended due process complaint notice (Dist. Ex. 8).

In accordance with the decision in Application of a Student with a Disability, Appeal No 08-047, the impartial hearing officer issued a written determination dated September 12, 2008 on the sufficiency of the parent's September 6, 2008 amended due process complaint notice (IHO Decision at pp. 1-3). The September 6, 2008 amended due process complaint notice included the prior January 21, 2008 amended due process complaint notice as well as a list of additional allegations (Dist. Ex. 8). The impartial hearing officer found the additional allegations to be unrelated and "have no bearing on the issue of sufficiency" and determined that it was not necessary to address the "totally unrelated allegations" (IHO Decision at p. 2). As to the portion of the amended due process complaint notice initially submitted on January 21, 2008 and re-submitted on September 6, 2008, the impartial hearing officer found that it was "insufficient on its face" in that it did not state the nature of the problem or a proposed solution (id.). The impartial hearing officer found that the nature of the problem noted by the parent was "vague, ambiguous and unclear" (id.). The impartial hearing officer further found that the parent alleged that the district withheld information from the parent, but did not state what information was withheld and how it was relevant to the impartial hearing (id.). In addition, the impartial hearing officer stated that the complaint was vague, ambiguous and unclear as to what school year was at issue and what specific CSE meetings were at issue (id.). Also, the impartial hearing officer stated that the proposed solution was vague, ambiguous and unclear (id.). The impartial hearing officer concluded that the parent's September 6, 2008 amended due process complaint notice was insufficient to make the parties aware of and understand the issues formulating the basis of the complaint (id. at p. 3).

This appeal ensued. The parent asserts, among other things, that the impartial hearing officer erred in dismissing his September 6, 2008 amended due process complaint notice on the grounds of insufficiency and also seeks a review of the procedures followed by the district, the district's impartial hearing office and the impartial hearing officer. The district submitted an answer, arguing that the impartial hearing officer properly dismissed the September 6, 2008 amended due process complaint notice as insufficient.

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 dismissal of a due process complaint notice under the Individuals with Disabilities Education Act (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 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).³ Where there has been the allegation of an insufficient due process complaint notice, State regulations provide that "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]).

Moreover, impartial hearings conducted under the IDEA are limited in scope to issues concerning the identification, evaluation and educational placement of a student with a disability, or the provision of a free appropriate public education (FAPE) to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 08-071; Application of a Child with a Disability, Appeal No. 03-070; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a school district's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]).

Upon review of the parent's September 6, 2008 amended due process complaint notice, I find that the allegation that the district failed to provide the parent's requested CSE meeting/annual review for the 2007-08 school year constitutes a legally sufficient description of the nature of a problem (Dist. Ex. 8 at p. 4; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).⁴ However, a review of the hearing record related to a prior appeal, filed by the parent, contains two IEPs resulting from CSE meetings for the 2007-08 school year.⁵ A CSE for the

³ 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.*).

⁴ However, no solution is proposed by the parent in the September 6, 2008 amended due process complaint notice.

⁵ See Dist. Exs. 7; 8 in Application of a Student with a Disability, Appeal No. 08-046.

student was held on June 1, 2007 for the 2007-08 school year for the student's annual review and a "requested" CSE review was conducted on August 31, 2007 for the 2007-08 school year, which provided additional occupational therapy and speech services to those previously recommended.⁶ State regulation (8 NYCRR 279.1[a]) provides that the provisions of Parts 275 and 276 shall govern the practice on reviews of hearings for students with disabilities, except as provided in Part 279. Section 276.6 provides authority for a State Review Officer to exercise discretion, in the determination of an appeal, and take into consideration official records or reports on file in the Education Department which relate to the issues involved in the appeal (Application of the Bd. of Educ., Appeal No. 07-009; Application of the Bd. of Educ., Appeal No. 02-070; Application of the Bd. of Educ., Appeal No. 02-072). I have taken into consideration the two IEPs that were made part of Application of a Student with a Disability, Appeal No. 08-046 as they relate to the parent's allegation in the instant appeal. The two IEPs contradict the parent's allegation that no annual review was held in preparation for the 2007-08 school year. Accordingly, the allegation that the district failed to provide the parent with a CSE meeting/annual review for the 2007-08 school year lacks merit. I further find that the remainder of the issues raised by the parent in the September 6, 2008 amended due process complaint notice were properly dismissed by the impartial hearing officer.

Accordingly, I find that the dismissal of the September 6, 2008 amended due process complaint notice was proper.

In light of my decision herein, it is not necessary to address the parties' remaining arguments.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 19, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁶ According to conference notes (Dist. Ex. 9) in the hearing record for Application of a Student with a Disability, Appeal No. 08-046, this CSE meeting lasted four hours.