



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-156

### **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 the determination of respondent's (the district's) impartial hearing office (hearing office), which dismissed the parent's May 11, 2008 due process complaint notice.<sup>1</sup> The appeal must be sustained in part.

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]). According to the parent, the student is currently attending a private school (Pet. ¶ 12).

Several preliminary matters must be addressed. First, the parent requests 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, therefore the parent's request is denied (see 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 Suspected

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<sup>1</sup> The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 08-046; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-090; Application of a Student with a Disability, Appeal No. 08-106; Application of a Student with a Disability, Appeal No. 08-117; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-125.

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).<sup>2</sup> Second, the parent requests that a State Review Officer conduct a hearing. This request is also denied as unnecessary. Third, the parent asks for relief pertaining to a number of issues that were not raised in the parent's May 11, 2008 due process complaint notice, relating to the operations of the district's hearing office. I decline to address those 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. 08-125; 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 Child with a Disability, Appeal No. 07-085). Fourth, the parent requests "compensatory, punitive and any other appropriate restitution as part of the relief deemed fair and appropriate in this forum." With regard to the parent's claim for monetary compensation, it is well settled, that monetary damages, including compensatory damages, are not available to remedy violations of the IDEA (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). Consequently, these claims are not properly before me and must be denied.

On May 11, 2008, the parent sent an e-mail entitled "Due Process Complaint Notice: Request for Impartial Hearing" to the hearing office (Dist. Ex. 1).<sup>3</sup> A staff person at the hearing office declined to assign a case number and impartial hearing officer based on a determination that "[t]he issues mentioned in this complaint and the solutions recommended thereto were already expressed in the Due Process Complaints dated and amended on April 20, 2008" (see Corrected Certification, dated Dec. 30, 2008). The district did not file a response to the due process complaint notice (see 8 NYCRR 200.5[i][4]).

On appeal, the parent contends, among other things, that the May 11, 2008 due process complaint notice was not properly processed by the hearing office. The parent requests that a State Review Officer review the record to ensure compliance with due process requirements, and the opportunity to resubmit his May 11, 2008 due process complaint notice.

The district asserts in its answer dated December 31, 2008, that the issues raised in the parent's May 11, 2008 due process complaint notice were previously raised in the parent's April 20, 2008 due process complaint notice and fully litigated by the parent and the district, resulting in a decision on the merits by an impartial hearing officer on or about December 3, 2008 (see Answer Exs. 1 at pp. 10-12; 2 at pp. 1-13; 3 at pp. 1-6).<sup>4</sup> The district admits that the hearing office

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<sup>2</sup> The New York State Education Department's Office of State Review maintains a website at [www.sro.nysed.gov](http://www.sro.nysed.gov). The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

<sup>3</sup> The 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.

<sup>4</sup> The parent filed an initial and amended due process complaint notice on April 20, 2008, both of which are herein referred to as the "April 20, 2008 due process complaint notice" (see Answer Ex. 2; Application of a Student with a Disability, Appeal No. 08-048). The parent's April 20, 2008 due process complaint notice was the subject of Application of a Student with a Disability, Appeal No. 08-048, which granted leave to the parent to re-file his April 20, 2008 due process complaint notice. The parent subsequently filed an amended due process complaint notice on September 7, 2008, and a decision was rendered after an impartial hearing on December 3, 2008 (Answer Exs. 2; 3).

should have processed the May 11, 2008 due process complaint notice in the normal course of business and assigned it a case number. The district alleges, however, that the parent failed to state a claim for which relief can be granted; that the petition is moot; that the parent's purported claims are barred in whole or in part by the doctrines of res judicata and/or collateral estoppel; that the parent's purported claims are barred in whole or in part by equitable considerations; that the parent's purported claims are barred in whole or in part by the doctrine of laches; that a State Review Officer does not have subject matter jurisdiction over some and/or all of the parent's purported claims; and that the parent is not aggrieved. The district requests that the petition be dismissed with prejudice or, in the alternative, that the petition only be sustained to the extent that the parent is permitted to re-file the same May 11, 2008 due process complaint notice.

The parent filed a reply dated January 5, 2009 to the district's answer. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, much of the reply does not respond to the procedural defenses interposed by the district and contains allegations and responses outside the scope of a reply and such will not be considered. However, I will accept the reply for the limited purpose of considering the parent's argument relating to the additional documentary evidence (Corrected Certification dated Dec. 30, 2008) served with the district's answer and to the extent that the reply can be construed as applying to procedural defenses interposed by the district.

Upon receipt of a due process complaint notice, a board of education "shall arrange for an impartial due process hearing to be conducted" (8 NYCRR 200.5[j][3]) and shall appoint an impartial hearing officer to conduct the hearing (Education Law 4404[1]; 8 NYCRR 200.5[j][3][ii]). The appointment of an impartial hearing officer must be in accordance with the rotational selection process mandated by State statute and regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], 200.2[e][1], 200.5[j][3][i]) and in accordance with the timelines and procedures delineated in 8 NYCRR 200.5(j). The impartial hearing officer is required to render a decision (see 8 NYCRR 200.5[j][5]; see also 34 C.F.R. § 300.512[a][5]).

After reviewing the record, I find that the failure of the hearing office to process the parent's e-mail entitled "Due Process Complaint Notice: Request for Impartial Hearing," and assign an impartial hearing officer constituted an error.

Accordingly, the hearing office's dismissal of the parent's May 11, 2008 due process complaint notice shall be annulled and the parent shall be allowed to resubmit the same May 11, 2008 due process complaint notice so that it may be properly processed by the hearing office, by assignment of a case number and an impartial hearing officer.

This decision does not preclude the district from requesting a sufficiency determination upon proper application if the May 11, 2008 due process complaint is re-filed (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][3]; see M.S.-G v. Lenape Regional High Dist. Bd. of Educ., 2007 WL 269240, at \*3 [D.N.J. Jan. 24, 2007]), or from raising arguments below that it has raised here on appeal. Nor does it preclude the parent from attempting to resolve his concerns through mediation, the State complaint procedures, or a due process hearing.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that respondent's hearing office's dismissal of the parent's May 11, 2008 due process complaint notice is annulled; and

**IT IS FURTHER ORDERED** that the parent has leave to resubmit his May 11, 2008 due process complaint notice within 30 days from the date of this decision.

**Dated:**            **Albany, New York**  
                      **January 15, 2009**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**