



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 09-007

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 Alvy, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed the parent's July 13, 2008 due process complaint notice. The appeal must be dismissed.¹

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. ¶ 1).

In a due process complaint notice, dated July 13, 2008 and submitted by e-mail to respondent's (the district's) impartial hearing office (hearing office), the parent requested an impartial hearing (IHO Ex. I). The parent's July 13, 2008 due process complaint notice included

¹ The July 13, 2008 due process complaint notice is identified by respondent (the district) as case number 116751. 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; Application of a Student with a Disability, Appeal No. 08-135; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 09-006.

allegations that the parent and the student "are aggrieved by the actions of the [district] who have acted in violations of city, state and or federal laws regarding the initiation, placement, and or evaluation" (id. at p. 1). The parent further alleged that the district does not conduct resolution sessions according to legal requirements; that a person placed inaccurate or misleading information in the special education records of the student "impacting" the student's right to a free appropriate public education (FAPE) from 2005 to the present; that such information was placed in the student's individualized education program (IEP) in 2005 and continues to be part of the student's "current IEP;" that the district does not have criteria for evaluations and has not provided the district criteria for evaluations to the parent; that "[s]uspicious and inaccurate information" was placed in the student's IEP by a certain person for the student to be admitted into a particular program; and that during the August 31, 2007 CSE meeting, the district continued to use "erroneous," "inaccurate" and/or "misleading" information, denying the student a FAPE (id.).

In response to the parent's due process complaint notice, the district filed a motion to dismiss and provided a copy of the motion to the parent by e-mail dated August 27, 2008 (Dist. Ex. II; Pet. Ex. 4 at p. 1).²

On August 28, 2008, at the parent's request, a prehearing conference was held and the parent participated by telephone (Tr. pp. 6, 11-12, 26-27). During the prehearing conference, the parent alleged that the location of the hearing office was not "reasonably convenient;" that the location "closest" to the parent's home was "reasonably convenient;" that any other location was inconvenient; and that a Saturday or Sunday was reasonably convenient (Tr. pp. 9-10, 11-18, 26-27, 28-30). The district contended that the impartial hearing should be held at the hearing office during normal business hours for the school district (Tr. p. 20). An impartial hearing officer (Hearing Officer 1) found that the parent failed to explain reasons "particular" to the parent to support his assertion that the impartial hearing location was not reasonably convenient (Tr. pp. 36, 41). A second hearing date had been previously scheduled for September 5, 2008, but the parent said that he would like more time (Tr. p. 41). Subsequently, when Hearing Officer 1 tried to clarify whether the parent wanted the September 5, 2008 date cancelled, the parent repeatedly indicated that he was not "cancelling" any date and that he would send Hearing Officer 1 an e-mail indicating the date that he would be available (Tr. pp. 41, 42, 43). Hearing Officer 1 said "we'll hold on to it for a day or two, but then we need to make a decision" (Tr. p. 43). Hearing Officer 1 agreed to schedule another prehearing conference to discuss the motion to dismiss, but the parties were unable to agree upon a future impartial hearing date because the parent ended the conference due to a time commitment (Tr. p. 45).

By correspondence dated August 29, 2008, the hearing office sent the parent a notice that Hearing Officer 1 recused herself and provided the name of a second newly appointed impartial hearing officer (Answer Ex. IV). By correspondence dated September 2, 2008, the hearing office sent the parent notice that the second impartial hearing officer recused herself and that a third impartial hearing officer was appointed (id.). By correspondence dated October 2, 2008, the hearing office sent the parent notice that the third impartial hearing officer had recused himself and that a fourth impartial hearing officer was appointed (id.). By correspondence dated October 3, 2008, the hearing office sent the parent notice that the fourth impartial hearing officer had

² The district's motion to dismiss is dated August 26, 2008 (Dist. Ex. II).

recused himself and provided the name of a fifth impartial hearing officer (Hearing Officer 5) who was appointed (id.).

On the second date of the impartial hearing, October 21, 2008, the parent did not appear (Tr. p. 53). Hearing Officer 5 attempted to telephone the parent on the date of the impartial hearing, but there was no response to the telephone call and Hearing Officer 5 left a message for the parent on a recording device (Tr. pp. 54-56). Hearing Officer 5 stated on the record that the parent had notice of the October 21, 2008 hearing based upon e-mails sent by the parent to her concerning the impartial hearing schedule (Tr. p. 55).

Hearing Officer 5 also noted for the record that a man appeared at the hearing room on October 21, 2008 who refused to identify himself when asked to do so by the court reporter and when directed to do so by Hearing Officer 5 (Tr. pp. 53-54).³ According to Hearing Officer 5, the man was taking photographs and would not leave until security came and removed him (Tr. p. 54). The hearing record indicates that the man returned to the hearing room and again refused to identify himself (Tr. p. 64). Hearing Officer 5 noted on the record that "[h]is actions in taking pictures and photographing everybody in the hallway and refusing to leave when asked to and refusing to identify himself were intimidating to staff and inappropriate and ...meant to be so" (Tr. p. 65).

Hearing Officer 5 noted for the record that the parent had not replied to the district's motion to dismiss and then she proceeded to consider the motion at the scheduled October 21, 2008 hearing date (Tr. pp. 56-60, 62-64). In a decision dated December 4, 2008, Hearing Officer 5 granted the district's motion to dismiss (IHO Decision at p. 3). Hearing Officer 5 held that "[t]he Parent did not appear, thus abandoning the action and ensuring default" (id.). Hearing Officer 5 also held that the due process complaint notice did not state a claim upon which relief could be granted; that the parent lacked standing because his proposed remedy failed to address the alleged violations; that the complaint was grounded in information requests under the Family Educational Rights and Privacy Act (FERPA) and Freedom of Information Law (FOIL), which are outside the scope of an impartial hearing brought pursuant to the Individuals with Disabilities Education Act (IDEA); and that the allegation about a 2005 IEP containing erroneous information was time-barred by the statute of limitations (id.). By correspondence dated December 4, 2008, the parent was provided with a copy of Hearing Officer 5's decision (Answer Ex. V).

This appeal by the parent ensued. The parent asserts, among other things, that the district prevented the parent's "assistant" from participating at the proceeding and that Hearing Officer 5's decision should be annulled and vacated on the basis of "untimeliness of rendering a decision."

³ At the hearing, counsel for the district informed Hearing Officer 5 that, upon information and belief, the unidentified individual was the student's uncle (Tr. p. 53). Hearing Officer 5 noted for the record that the unidentified individual knew what time the impartial hearing was scheduled to begin, as he complained to Hearing Officer 5 when it did not begin promptly at 2:00 p.m. (Tr. pp. 55-56). In her decision, Hearing Officer 5 wrote that the unidentified male "proceed[ed] to videotape and photograph people in the hearing room and in the hallway, pushing a camera just a few inches into the faces of startled individuals" (IHO Decision at p. 2). She also wrote that despite "repeated requests he refused to identify himself" and that he was informed that "he could not participate in a confidential hearing without identifying himself" (id.) She further noted that he "behave[ed]" in a loud, unruly, and intimidating manner and that security had to be called to eject him from district offices" (id. at p. 3).

The district submitted an answer, asserting that the petition was procedurally defective, that the decision below was factually and legally correct, that the parent's failure to appear resulted in abandoning the action, that the parent's claims were not within the jurisdiction of Hearing Officer 5, that the parent's claim pertaining to a 2005 IEP is time-barred, that the untimeliness of the decision is not a sufficient basis for invalidating Hearing Officer 5's decision, and that the parent's additional documents submitted with his petition should be rejected.

The parent's petition also contains numerous requests pertaining to procedural matters on appeal, which I shall briefly address. First, I deny the parent's request for oral argument before a State Review Officer as unnecessary (see 8 NYCRR 279.10). Second, the parent's request that a State Review Officer conduct a hearing is also denied as unnecessary. Third, the additional documents attached as exhibits to the parent's petition are rejected because such evidence is either not necessary for a decision and/or is duplicative. Likewise, I decline the parent's request to submit additional evidence, including audio and video recordings. Fourth, the parent's request for "compensatory, punitive and any other appropriate financial restitution" is denied as unavailable to remedy violations of the IDEA. As I have held in prior appeals brought by the parent, these claims are not properly before me (see 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. 08-146). Fifth, the parent's request that a State Review Officer conduct an independent verification of the rotational impartial hearing officer selection process is denied. I find the claim is waived as it was not raised at the impartial hearing below.

As to the parent's argument that the decision of Hearing Officer 5 should be annulled based upon untimely issuance, I find that there is no basis for concluding, even if the decision was determined to be untimely, that any tardiness, under the circumstances of this case, rose to the level of denying the student a FAPE (see J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] [relief is not warranted where hearing officer's untimely decision does not affect student's right to a FAPE]; 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Therefore, the parent's request to annul Hearing Officer 5's decision on this basis is denied.

I have given due consideration to all of the parent's other arguments on appeal and have found each of them to be without merit. Accordingly, the decision of Hearing Officer 5 dismissing the parent's July 13, 2008 due process complaint notice is affirmed.

Lastly, I note that individuals at a proceeding are expected to comply with the reasonable directives of an impartial hearing officer (Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-105; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-010).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 25, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**