



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-110

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, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which granted respondent's (the district's) motion to dismiss the parent's due process complaint notice dated May 31, 2009.^{1,2} The appeal must be dismissed.

The student is currently attending a private school (Pet. ¶ 1). The hearing record reflects that in a previous impartial hearing commenced by the parent, district case number 120347, a guardian ad litem who was appointed for the student reported that the student was attending a

¹ The May 31, 2009 due process complaint notice is identified by the district as case number 121770. The following prior State Review Office decisions have been issued regarding this student: Application of a Student with a Disability, Appeal No. 09-042; Application of a Student with a Disability, Appeal No. 09-029; Application of a Student with a Disability, Appeal No. 09-012; Application of a Student with a Disability, Appeal No. 09-011; Application of a Student with a Disability, Appeal No. 09-007; 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. 08-156; Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135; 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 with a Disability, Appeal No. 08-048; Application of a Student with a Disability, Appeal No. 08-047; Application of a Student with a Disability, Appeal No. 08-046.

² I note that the parent's May 31, 2009 due process complaint notice has not been submitted as part of the record on appeal.

private school and "doing well" at that private school (Tr. pp. 32-33).³ The student's eligibility for special education programs and 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]).

The parent's May 31, 2009 due process complaint notice, a seventy-five page document, was reviewed by the impartial hearing officer on the record on July 20, 2009, the date that the impartial hearing convened (Tr. pp. 10-12, 15).

The parent did not personally appear at the impartial hearing on the initial date of the impartial hearing, July 20, 2009, or on the second date, August 11, 2009 (Tr. p. 42; IHO Decision at p. 2). On July 20, 2009, someone who identified himself as the student's father appeared by telephone at the beginning of the impartial hearing (Tr. pp. 3-4). The impartial hearing officer advised the person on the telephone that he expected the litigants to personally appear in this case given the lengthy history of litigation concerning the student and prior "misrepresentations of an apparent uncle as the parent of the [student]" (Tr. pp. 4, 6, 16-17). The hearing record reflects that, ultimately, the parent did not appear in person at the impartial hearing and the person on the telephone ended his telephone call before the impartial hearing had concluded for the day (Tr. pp. 4-17).

At the July 20, 2009 hearing date, the district orally moved to dismiss the parent's due process complaint notice based upon legal insufficiency, res judicata or collateral estoppel, and the parent's refusal to cooperate with the development of the student's individualized education program (IEP) or with the resolution process (Tr. pp. 18, 24; see U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]). The guardian ad litem for the student consented to the motion to dismiss and stated that he had "a firm belief" that the person who filed the May 30, 2009 due process complaint notice did not have the "legal authority to represent [the student] in this proceeding" (Tr. pp. 26, 36).

The impartial hearing officer scheduled a date by which the parent could respond to the district's motion to dismiss and scheduled the impartial hearing to reconvene on August 11, 2009 for a decision on the district's motion (Tr. p. 27).

On August 11, 2009, the parent failed to appear personally or by telephone at the impartial hearing and failed to submit a response to the district's motion to dismiss (Tr. pp. 31, 39, 42). The district renewed its arguments for dismissal and the guardian ad litem continued to support the motion, stating that there was no new evidence since the last hearing date, and that the parent was not present to discuss the issue (Tr. pp. 37-38).

In a decision dated August 21, 2009, the impartial hearing officer found that the parent's claim for tuition reimbursement for the 2008-09 school year was barred under the doctrine of res judicata (IHO Decision at p. 7). The impartial hearing officer reached this determination after

³ The impartial hearing officer in the instant case noted that an attorney was appointed as guardian ad litem for the student in the prior proceeding (case number 120347) because of information "that the student was possibly not attending school and because of the difficulty in dealing with the person who presented himself as a parent, and apparently on another occasion as the uncle, and also as a concern for the welfare of the child" (Tr. pp. 6-7). The hearing record further reflects that the attorney agreed to again act as guardian ad litem for the student at the impartial hearing in the instant proceeding (Tr. p. 7).

finding that the claim had been previously brought before him and dismissed, in district case number 120347,⁴ as well as having been previously brought before other impartial hearing officers in other proceedings regarding the student (*id.* at pp. 2, 7).

The impartial hearing officer found that, as to the parent's claim for tuition reimbursement for the 2009-10 school year, the parent's failure to respond to the district's motion to dismiss constituted "an abandonment of the action, a failure to plead and also a neglect to proceed" (IHO Decision at p. 8). The impartial hearing officer noted that individuals at an impartial hearing are expected to comply with reasonable directives of an impartial hearing officer⁵ and that the parent's lack of cooperation with the Committee on Special Education (CSE) and at impartial hearings has been documented (*id.* at p. 7). Specifically, the impartial hearing officer noted that the parent either overtly or surreptitiously continued to attempt to record the impartial hearing proceedings despite instructions to the contrary; that the parent refused to allow the student to be evaluated by the district despite an interim order in prior case number 120347; and that the parent failed to attend a scheduled CSE meeting, a resolution session, and an impartial hearing proceeding (*id.* at pp. 7-8). The impartial hearing officer indicated that the parent's failure to cooperate and produce the student for the purpose of having updated evaluations conducted may also constitute equitable grounds to deny a request for tuition reimbursement (*id.* at p. 8).

The parent appeals from the impartial hearing officer's decision and requests that the decision be vacated and annulled.

The district answered, asserting that the impartial hearing officer's dismissal of the parent's claims was proper and that the additional documents attached to the petition should not be considered on appeal.

The parent filed a "reply" dated October 23, 2009. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the parent's reply did not respond to any procedural defenses or any additional documentary evidence and contained arguments that are substantive in nature. Therefore, I will not consider the reply (see 8 NYCRR 275.14[a], 279.6; Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a

⁴ According to the impartial hearing officer in the instant matter, case number 120347 consisted of the following cases that had been consolidated: case number 120424, case number 120451, case number 120557, case number 120560, case number 120569, case number 120573, case number 120590, case number 120608, case number 120613, case number 120627, and case number 120634 (Tr. p. 5).

⁵ Parties to an impartial hearing are obligated to comply with the reasonable directives of an impartial hearing officer (see Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 09-007; 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).

Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009).

At the outset, I will address a procedural matter arising on appeal. State regulations provide, in pertinent part that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). The petition in this case fails to comply with 8 NYCRR 279.4(a) (see Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096).

Although the parent requests that the impartial hearing officer's decision be "vacated and annulled," the petition does not, even when broadly read, provide sufficient particulars as to the reasons why the impartial hearing officer's decision should be annulled. A review of the entire petition reveals that it fails to identify any findings, conclusions or orders of the impartial hearing officer to which exception is taken (see 8 NYCRR 279.4[a]).⁶

State regulations provide that pleadings that fail to comply with the above mentioned requirements may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080).

Due to the non-compliance with 8 NYCRR 279.8(b) and 279.4(a), the petition for review is deficient and fails to meet the requirements set forth in the State regulations. I will therefore exercise my discretion under 8 NYCRR 279.8(a), and dismiss the petition (8 NYCRR 279.4; Application of a Student with a Disability, Appeal No. 08-022; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122).

⁶ In addition to not comporting with 8 NYCRR 279.4(a), I find that the petition fails to reference the hearing record as required by 8 NYCRR 279.8(b). State regulation directs that "[t]he petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-003 [dismissing a petition that inter alia did not reference the hearing record]). In the instant appeal, there are no citations to the hearing record contained in the petition.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 November 24, 2009

PAUL F. KELLY
STATE REVIEW OFFICER