



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-130

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 Board of Education of the William Floyd Union Free School District

Appearances:

Bond, Schoeneck & King, PLLC, attorneys for respondent, Howard M. Miller, Esq. & Howard M. Wexler, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the determination of an impartial hearing officer, which dismissed her March 30, 2010 due process complaint notice. The appeal must be sustained in part.

The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (IHO Ex. 8 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).¹ The student is currently attending an 8:1+1 special class in one of respondent's (the district's) schools (IHO Ex. 8 at p. 1; see Petition; Ans.).

In a due process complaint notice dated March 30, 2010, the parent requested an impartial hearing (IHO Ex. 9). The parent sought a placement for the student in a 12:1+1 class (id. at p. 2). She also requested that the student be taught Spanish and receive individual and group speech services (id.).

¹ As explained in greater detail in this decision, an impartial hearing was not held on the merits of the parent's claims. While the record on review consists of correspondence as well as other documents submitted by the parties, the documents considered by the impartial hearing officer were not marked for identification with letters or numbers (see 8 NYCRR 200.5[j][5][v]). Consequently, the submitted correspondence 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 "IHO Exhibits." For ease of reference, the student's 2010-11 IEP will be referred to as IHO Ex. 8 and the parent's March 30, 2010 due process complaint notice will be referred to as IHO Ex. 9.

On March 27, 2010, the impartial hearing officer held a prehearing conference with the parties (IHO Exs. 1; 2; see 8 NYCRR 200.5[j][3][xi]). By letter to the parties dated May 28, 2010, the impartial hearing officer noted that at the prehearing conference, the parent alleged that the student should be placed in a 12:1+1 special class, receive speech-language services five times per week, and receive Spanish language instruction (IHO Ex. 2). He further determined that the parent needed assistance in presenting her arguments and asked the district to locate a representative for the parent (id.).

By letter to the parties dated June 9, 2010, the impartial hearing officer indicated that he had not yet heard from the district whether it had located a representative for the parent (IHO Ex. 3). The impartial hearing officer explained that State regulations at 8 NYCRR 200.5(j)(3)(ix) authorize the appointment of a guardian ad litem upon a determination by the impartial hearing officer that the interests of the parent are opposed to or are inconsistent with those of the student, or that the interests of the student would best be protected by the appointment of a guardian ad litem (id.). The impartial hearing officer indicated that the impartial hearing would continue upon the appointment of a representative "to assist the parent" (id.).

On June 22, 2010, the district's Board of Education approved the appointment of a guardian ad litem for the student (IHO Ex. 4). The impartial hearing officer advised the guardian ad litem by letter dated June 25, 2010 that he had determined that the parent "required an advocate to represent her child's interest in her Due Process Complaint" (IHO Ex. 5). He further advised the guardian ad litem that at the prehearing conference the parent had identified a number of issues that the impartial hearing officer believed were the main substances of her complaint (id.).

Following his appointment, the guardian ad litem reviewed the student's educational records, observed the student in his 8:1+1 class at the district, and spoke to district personnel (see IHO Exs. 4; 6). By letter to the impartial hearing officer dated November 17, 2010, the guardian ad litem reported that he was advised that the student was making "slow, but steady progress" in the district's 8:1+1 class (IHO Ex. 6 at p. 1). He noted that the student was reported to have "significant behavioral issues, such as impulsivity and a frustration level that needs to be closely supervised" (id.). However, he also noted that it was reported that the student's "behaviors have diminished and that [his] communication skills have increased" (id.). According to the guardian ad litem, the parent's main concern with the 8:1+1 placement was that it had only two students in the class (id. at p. 2). While he noted this was a "serious concern," he indicated that it appeared that the student had many opportunities to interact with his typically developing peers and that the district intended to place at least two other students in the 8:1+1 class (id.). The guardian ad litem further reported that he had observed the district's 12:1+1 class and that the students in that class appeared to be higher functioning than the student, did not require the same level of supervision as the student, and the classroom teacher advised the guardian ad litem that the 12:1+1 placement would not be appropriate for the student (id.). The guardian ad litem also reported that the student shows an interest in Spanish and that district personnel agreed to amend the student's IEP to include Spanish language instruction (id.). The guardian ad litem concluded his letter to the impartial hearing officer by recommending that the student remain in his current 8:1+1 placement and receive Spanish language instruction (id.).

By letter to the parties dated November 19, 2010, the impartial hearing officer indicated that he was in receipt of the guardian ad litem's November 17, 2010 letter (IHO Ex. 7). The

impartial hearing officer determined that the guardian ad litem's recommendations were "consistent with both federal and State Regulations [CR Part 200.4[2][i-v][viii-ix] [sic]" and thereby dismissed the parent's claims (id.).

This appeal by the parent ensued. Essentially, the parent's petition reveals that she disagrees with the impartial hearing officer's decision to dismiss her case and seeks a 12:1+1 placement for the student. The district filed an answer, asserting that an 8:1+1 placement is appropriate for the student and requesting that the parent's appeal be dismissed.

The Individuals with Disabilities Education Act (IDEA) was enacted to ensure that students with disabilities have available to them a free appropriate public education (FAPE), and ensure "that the rights of children with disabilities and parents of such children are protected" (Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 523 [2007]). The IDEA provides a comprehensive set of procedural safeguards with respect to the provision of a FAPE (20 U.S.C. § 1415[a]). A parent may file a due process complaint notice seeking an impartial hearing on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child" (20 U.S.C. § 1415[b][6][A]; 34 C.F.R. § 300.507; 8 NYCRR 200.5[i][1]). After notice to the school district of the parent's complaint, the parent has the opportunity for an impartial hearing conducted by an impartial hearing officer (20 U.S.C. § 1415[f][1][A], [f][3]). In New York, any party aggrieved by the findings of fact and the decisions of the impartial hearing officer may appeal to a State Review Officer (20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b]; 8 NYCRR 200.5[k]).

Pursuant to State regulation, an impartial hearing officer may appoint a guardian ad litem upon a determination "that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian ad litem" (8 NYCRR 200.5[j][3][ix]). Whenever a guardian ad litem is appointed, an impartial hearing officer must ensure that the procedural due process rights afforded to the student's parent are preserved throughout the impartial hearing (id.).

A party to an impartial hearing has the right to: (1) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to students with disabilities; (2) present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) obtain a written or (at the option of the parents) electronic verbatim record of the impartial hearing; and (4) obtain written or (at the option of the parents) electronic findings of fact and decisions (20 U.S.C. § 1415[h]; 34 C.F.R. § 300.512[a]; 8 NYCRR 200.5[j][3][v], [vii],[xii]).

Here, the impartial hearing officer dismissed the parent's claims upon receipt of the guardian ad litem's November 17, 2010 letter (IHO Ex. 7). Essentially, the guardian ad litem had conducted a fact investigation and ultimately concluded that the student should not be transferred from his 8:1+1 class to a 12:1+1 as the parent requested (see IHO Ex. 6). An impartial hearing was not held with respect to the parent's claims. The parent was not afforded the opportunity to present evidence at an impartial hearing or to confront, cross-examine, and compel the attendance of witnesses. There is no indication in the hearing record that the parent had the opportunity to respond to the guardian ad litem's findings or recommendations and, instead, the impartial hearing officer adopted the guardian ad litem's opinion as dispositive without describing any basis for his conclusion that the matter could be resolved without convening an impartial hearing (IHO Ex. 7).

Under the circumstances of this case, the lack of an impartial hearing and the parent not having the opportunity to present her case and be heard are significant infringements on her due process rights which necessitate a remand.

Thus, I find that the impartial hearing officer's dismissal of the parent's case did not comport with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]). Accordingly, I will vacate the impartial hearing officer's November 19, 2010 decision in its entirety and remand this matter to the same impartial hearing officer to conduct an impartial hearing. Upon remand, the impartial hearing officer shall ensure that the parties have the opportunity to present evidence and testimony, and the impartial hearing officer shall render a written decision that comports with State regulations at 8 NYCRR 200.5(j)(5)(v). While the impartial hearing officer's November 19, 2010 decision dismissing the parent's complaint is vacated by this decision, I make no determination at this juncture as to the merits of the parties' claims or whether it was appropriate for the impartial hearing officer to appoint a guardian ad litem to separately represent the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated November 19, 2010 dismissing the parent's complaint is annulled in its entirety; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, this matter is remanded to the same impartial hearing officer who issued the November 19, 2010 decision to reconvene the impartial hearing, hear testimony and/or receive evidence into the record consistent with this decision, and render a new decision within 30 days from the receipt of this decision; and

IT IS FURTHER ORDERED, that if the impartial hearing officer who issued the November 19, 2010 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed to issue a new determination which is consistent with this decision.

**Dated: Albany, New York
February 2, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**