



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-104

**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 XXXXXXXXX**

### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed his due process complaint notice, which challenged the appropriateness and implementation of the respondent's (the district's) recommended educational program for the student for the 2010-11 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

As discussed more fully below, the merits of the parent's appeal need not be addressed because the parent did not properly initiate this appeal. Briefly, however, on May 18, 2010, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented for a period of one year, commencing May 19, 2010 (Dist. Ex. 5 at pp. 1-2). Finding the student eligible to receive special education as a student with a speech or language impairment, the May 2010 CSE recommended that the student attend a general education classroom (id. at p. 1).<sup>1</sup>

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Additionally, the May 2010 CSE recommended that the student be provided with speech-language therapy in a separate location once per week for 40 minutes in a group of 5 students (*id.* at p. 11). The May 2010 CSE also indicated that the student benefited from "no more than four questions with an enlarged font on a page for test[s] and quizzes," as a support for the student's management needs, and recommended testing accommodations, a transition plan, and annual goals (*see id.* at pp. 4, 7-8, 11-13).

### **A. Due Process Complaint Notice**

In a September 2011 due process complaint notice, the parent asserted that the district violated the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. §§ 701-796[1]) (Dist. Ex. 1 at p. 3).<sup>2</sup> The parent alleged that neither the student's speech-language therapist, nor a school psychologist, attended the May 2010 CSE meeting (*id.*). Additionally, the parent alleged that the May 2010 IEP did not "accurately reflect" the student's "present levels" of academic, speech-language, or social and emotional functioning (*id.* at p. 5). The parent also asserted that the IEP "lack[ed] specific, measurable, attainable, realistic and timely" annual goals, and that the annual goals included "inadequate evaluative criteria" and were otherwise not appropriate for the student (*id.*). Furthermore, the parent alleged that the district "failed to implement" the academic management needs and testing accommodations in the student's May 2010 IEP and "continuously refused to make reasonable accommodations for [the student] to participate successfully in assessments" (*id.* at p. 2). The parent asserted that, as a result, the student's grades were "adversely impacted;" he received "failing grades" or "marginally passing" grades on certain tests, which impacted his grade point average; and the student's class rank was substantially affected, which, in turn, impacted his eligibility for college and/or potential scholarships (*id.* at pp. 2, 4-5). As relief, the parent requested a finding that the district failed to implement the student's academic management needs and testing accommodations from the May 2010 IEP and an equitable remedy consisting of the elimination of the student's "flawed" test scores, and a "reconsideration" or "recalculat[ion]" of the student's grades (*id.* at pp. 1, 2, 5).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on January 9, 2012 and concluded on February 8, 2012, after two days of proceedings (Tr. pp. 1-129). In a decision dated March 26, 2012, the IHO granted the district's motion to dismiss the parent's due process complaint notice (IHO Decision at p. 9). The IHO held that he did not have the authority under the IDEA and related provisions of law to order the district to change the student's grades (*id.* at pp. 7-8). In particular, the IHO found that: (1) "monetary damages, including compensatory damages, [were] not available to remedy violations of the IDEA;" (2) "due process hearings before an IHO [could] not be used as a general mechanism to assert claims under other federal or state laws;" (3) "non-IDEA

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<sup>2</sup> The parent's September 2011 due process complaint notice consisted of a one page signed letter, dated September 6, 2011, and a three page accompanying document, both of which were filed with the district under cover of a signed and completed "Request For Due Process Proceedings" form, dated September 7, 2011 (*see* Dist. Ex. 1 at pp. 1-5). The September 6, 2011 letter is also included in the hearing record as Parent Exhibit B; however, this decision will cite to the district's exhibit.

educational disputes [could] be pursued through the State complaint procedures rather than through the impartial hearing system;" and (4) the Commissioner decisions, relied on by the parent, were issued by the Commissioner relative to his authority under sections 1709(3) and 2590-h of the Education Law and were not based on the district's obligation to offer the student a FAPE under the IDEA or its implementing regulations (id.).

#### **IV. Appeal for State-Level Review**

In a letter to the district and copied to the Office of State Review (OSR), dated May 7, 2012, the parent requested "an extension of the 35[-] day timeline" to appeal the IHO's decision.<sup>3</sup> The parent stated that he was submitting his "pleading on time, due today" but was requesting permission "to amend the pleading to amplify details" and "argue" why he believed that the IHO's decision "was faulty." The parent attached the following documents to the letter: a completed notice of petition, also dated May 7, 2012; an affidavit of verification form; and an affidavit of personal service form. Neither the "affidavit of verification," nor the "affidavit of service," was notarized.

By letter to the parties, dated May 17, 2012, the parties were advised that I the parent's request for leave to amend the petition and the parent was directed the parent to serve the district with the notice of petition, amended petition, a new affidavit of verification, and any other supporting papers by May 25, 2012 and to file the same, along with proof of service, with the OSR by May 29, 2012. By letter to the OSR, dated June 7, 2012, the parent stated that he had been "out of New York State on work related business" and therefore that he did not receive the letter granting his request to amend the petition until the deadline had already passed. The parent requested "an opportunity for more time" and also indicated that he would not have access to his mail until June 16, 2012. By letter dated June 11, 2012, I granted the parent's request for additional time to amend his petition and directed the parent to serve his amended petition on the district by First Class United States mail, personal delivery, or private carrier by June 25, 2012 and, thereafter, to file the amended petition, together with an affidavit of service by mail, with the OSR within three business days after service of the amended petition. I further directed the parent that, if he did not timely serve the original petition upon the district, he was to comply with 8 NYCRR 279.13 by setting forth, with particularity, good cause in the amended petition why the SRO should accept a late petition.

On June 29, 2012, the parent filed an amended petition with the OSR. The amended petition consisted of a two page letter to the district, dated June 25, 2012, attached to which was a letter dated September 6, 2011 and copies of certain evidence offered by the parent at the impartial hearing. The amended petition was not verified and the parent did not submit an affidavit stating that the amended petition had been served on the district. With respect to the allegations set forth in the amended petition, the parent asserts that, after concluding that he could not provide the remedy requested by the parent, the IHO should have fashioned an alternative remedy rather than dismissing the due process complaint notice. The parent further contends that the IHO's refusal to review the merits of his case resulted in a denial of due

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<sup>3</sup> In the May 7, 2012 letter, the parent states that the IHO decided the matter on March 27, 2012; however, the IHO Decision is dated March 26, 2012 (see IHO Decision at p. 9).

process. The parent also asserts that the district failed to implement the May 2010 IEP. The parent seeks declaratory relief only.

In a letter, dated July 2, 2012, the OSR advised the parent that State regulations required that he submit proof of service of the amended petition on the district as well as a completed affidavit of verification. The OSR enclosed with its July 2, 2012 letter blank affidavit of service and affidavit of verification forms and asked that the parent complete both and file them with the OSR.

The district answers the parent's amended petition and requests that it be dismissed in its entirety. In particular, the district asserts that the amended petition is procedurally defective because: (1) the parent did not serve upon the district the required notice of intention to seek review; (2) the parent did not properly verify his letter dated May 7, 2012 or his amended petition; (3) the parent did not timely serve an amended petition as directed by the OSR; and (4) the amended petition does not set forth why the parent did not file his amended petition on May 29, 2012, as directed by the OSR. With respect to the merits of the parent's appeal, the district asserts that the IHO correctly determined that he lacked the authority to change the student's grades as requested by the parent. Alternatively, the district asserts that it offered the student a FAPE, in that the May 2010 CSE sufficiently described the student's present levels of performance and recommended appropriate annual goals. Additionally, on the basis that the parent did not disclose documents to the district five days before the impartial hearing, the district asserts that documentary evidence offered by the parent at the impartial hearing should not be considered in determining whether the district offered the student a FAPE. Finally, the district requests that, if the evidence in the hearing record is insufficient evidence to conclude that the district offered the student a FAPE, the matter be remanded to the IHO for a determination on the merits.

## **V. Discussion**

### **A. Timeliness of Appeal**

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; 279.7). When the respondent is a district, personal service is effected by personal delivery to the district clerk, a district trustee or member of the district's board of education, the district superintendent, or to a person in the superintendent's office who has been designated by the board of education to accept service (8 NYCRR 275.8[a]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening; (2) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]);<sup>4</sup> or (3) the parties may agree to waive personal service (see Application of the Dep't of

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<sup>4</sup> Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 [of Title 8 of the NYCRR] shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

Educ., Appeal No. 07-037).

Further, a parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than 10 days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). A notice of intention to seek review is not required when the school district seeks review of an IHO's decision (8 NYCRR 279.2[c]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the OSR (Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Additionally, the petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations provide that, if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the OSR the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown (id.). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 2013 WL 4779012, at \*7 [S.D.N.Y. Sept. 6, 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at \*5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at \*5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; see also, e.g., Application of the Dep't of Educ., Appeal No. 12-120; Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student with a Disability, Appeal No. 12-042 ; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 09-099; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Bd. of Educ., Appeal No. 07-055; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 05-060; Application of a Child with a Disability, Appeal No. 05-045; Application of the Dep't of Educ., Appeal No. 01-048).

In the present case, the parent's appeal was not initiated consistent with the procedures and timelines prescribed in Part 279 of State regulations. First, the parent did not serve the notice of intention to seek review (see 8 NYCRR 279.2[a]). As a consequence of this failure, the hearing record was not prepared and provided to the OSR in a timely fashion. Second, neither the parent's original petition, nor the amended petition, was verified (see 8 NYCRR 279.7). As indicated above, the parent's May 7, 2012 petition was accompanied by an affidavit of verification that was not notarized and the June 25, 2012 amended petition was accompanied only by a blank affidavit of verification form. Further, notwithstanding the OSR's letters to the parties, advising the parent of his obligation to do so, to date, the parent has not filed an affidavit of verification or an affidavit of service with respect to either the original petition or the amended petition (see 8 NYCRR 279.4[a]). Accordingly, the parent failed to comply with State regulations in the commencement of his appeal and, consequently, the petition is dismissed.

## **VII. Conclusion**

Based on the aforementioned nonconformities with State regulations, I will exercise my discretion and dismiss the petition and amended petition, without a determination of the merits of the parties' claims (8 NYCRR 279.13; see 8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 12-042; Application of a Student with a Disability, Appeal No. 08-022; Application of a Child with a Disability, Appeal No. 05-045).

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  
December 6, 2013

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**