



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-210

**Application of the XXXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

### **Appearances:**

Jaspan Schlesinger LLP, attorneys for petitioner, Carol A. Melnick, Esq., of counsel

John J. McGrath, Esq., attorney for respondent

## **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 district) appeals from a decision of an impartial hearing officer which determined that the educational programs and services provided by the district to respondent's (the parent's) son for the 2010-11 and 2011-12 school years were not appropriate and awarded compensatory education. 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 district's appeal need not be addressed because the district has not properly initiated this appeal. Briefly, however, at the most recent CSE meeting conducted for the purpose of developing an IEP for the student, the CSE met on May 4, 2011 for an annual review and to develop the student's IEP for the 2011-12 school year (Dist. Ex. 11 at p. 3). The CSE found the student eligible for special education programs and related services as a student with an other health-impairment and recommended placement in 12:1+1 special classes for reading, math, social studies, and English with three sessions of

speech-language therapy in a small group per six-day cycle (id.).<sup>1</sup> The CSE also recommended testing accommodations of waive spelling requirements, tests administered in a separate location or room in a small group with periodic monitoring, use of a calculator, test directions explained and clarified for understanding, test questions reworded and clarified, and extended (double) time (id. at pp. 10-11).

The student attended a district school for the duration of the 2011-12 school year and was graduated by the district in June 2012 with a local diploma (Dist. Exs. 15 at p. 4-5; 16 at p. 7).

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

By due process complaint notice dated April 25, 2013, the parent requested an impartial hearing, asserting, in sum, that the student was incapable of performing at a level that would allow him to receive a high school local diploma, and that the district deliberately inflated the student's grades and gave the student class credit and passing marks in order to graduate the student and "enable the [d]istrict to jettison an obviously severely developmentally delayed student at age 18 instead of age 21" (Parent Ex. B at p. 13). As relief, the parent requested, among other things, that the district provide educational services to the student until age 21, fund an IEE, convene a CSE to develop and provide an appropriate educational program, and reimburse the parent for the cost of the student's attendance at a community college as well as for any educational and training programs provided by the parent since the student's graduation (id. at pp. 15-16).

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

The impartial hearing convened on June 26, 2013 and concluded on July 10, 2013, after three days of proceedings (Tr. pp. 1-461). In a decision dated September 30, 2013, the IHO determined that the district failed to provide the student with a FAPE during the 2010-11 and 2011-12 school years on the basis that the reported grades and test scores in the hearing record were not an accurate reflection of the student's abilities and for the additional reason that the district failed to provide the student with adequate social skills training (IHO Decision). The IHO determined that the inaccurate grades and test scores constituted a "gross violation" of the IDEA because, had the student received grades and test scores that were an accurate reflection of his abilities, he would "not have been graduated in June of 2012" and would have remained eligible for services until he reached 21 years of age (id. at p. 33).<sup>2</sup> The IHO determined that compensatory education in the form of "3 additional years of academic services and social skills training" was appropriate, and ordered the district to convene a CSE, develop an IEP for the student for "the current school year and for two years thereafter," and directed that the district

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<sup>1</sup> The student's eligibility for special education and related services as a student classified as having an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>2</sup> Additional findings made by the IHO include that the statute of limitations should be tolled "approximately 8 months" to allow claims concerning the 2010-11 and 2011-12 school years, that the parent's claims were properly made under the IDEA, that the district provided the student with appropriate transition services, that the parent was not entitled to an independent educational evaluation (IEE) at public expense, and that the parent was not entitled to reimbursement for the costs of the student's attendance at a community college (IHO decision at pp. 19-23, 30-32).

develop a program including "individual reading instruction, functional math skills, a vocational component based on [the student's] interests and abilities and . . . sufficient social skills training, speech and language therapy and counseling services" (*id.* at pp. 33-34)

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

On November 5 and 6, 2013 the district served a petition and memorandum of law at the parent's residence and subsequently filed it with the Office of State Review. In its petition, the district asserts that the IHO erred in determining that the district failed to provide the student with a FAPE during the 2010-11 and 2011-12 school years on the basis that the reported grades and test scores in the hearing record were not an accurate reflection of the student's abilities and in determining that the district failed to provide the student with adequate social skills training. The district further asserts that the IHO erred in determining that deficiencies in the educational programs provided to the student constituted a "gross violation" of the IDEA, erred in determining that compensatory education in was appropriate, and contends that the hearing record instead supports a finding that the student achieved the goals of his programs and was properly graduated by the district with a local diploma. The district also asserts that the IHO erred in tolling the limitations period and erred in determining that he had jurisdiction to decide the parent's claims. However, the district contends that the IHO properly determined that the parent was not entitled to an IEE at public expense and that the parent was not entitled to reimbursement for expenses related to the student's attendance at a community college. The district requests that the IHO's decision be reversed to the extent it found the student eligible for compensatory education, and affirmed with regard to the IHO's rulings regarding public funding of an IEE and reimbursement to the parent for the student's community college expenses.

In an answer, the parent requests that an SRO dismiss the district's petition and affirm the IHO's decision in all respects.<sup>3</sup>

#### **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]). 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, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a];

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<sup>3</sup> For reasons that are not clear, the parent's answer is miscaptioned as a "Verified Reply" (Answer at p. 1).

Application of the Dep't of Educ., Appeal No. 08-056; 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 Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).<sup>4</sup>

A 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 expressly 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 Office of State Review 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]; see 8 NYCRR 279.2). If the last day for service of 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; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). 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 (8 NYCRR 279.13). 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, e.g., Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal];

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

Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

In the present case, this appeal was not initiated within the timelines prescribed in Part 279 of State regulations. The IHO's decision is dated September 30, 2013 upon the cover page to the decision as well as the page on which the IHO's signature appeared (IHO Decision at pp. 1, 34). In this case the IHO decision was transmitted to the parties by electronic mail (Pet. ¶ 4). As such, the regulatory exception permitting the exclusion of the date of mailing and the four days subsequent thereto is not applicable in calculating the 35-day period within which timely service of the petition could be effectuated; therefore, the petition was required to be personally served on the parent no later than November 4, 2013, a Monday (8 NYCRR 279.2[c]). The district attached two affidavits of service to its petition (Dist. Nov. 5, 2013 Aff. of Service; Dist. Nov. 6, 2013 Aff. of Service). The district's affidavit of service dated November 5, 2013 attests that the petition was served at the parent's address upon a person of suitable age and discretion on that date (Dist. Nov. 5, 2013 Aff. of Service). The district's affidavit of service dated November 6, 2013 attests that the petition was served at the parent's address upon the parent on that date (Dist. Nov. 6, 2013 Aff. of Service). Nowhere does the district assert that the alternate service upon a person of suitable age and discretion was conducted after the parent could not "be found upon diligent search" as specified by 8 NYCRR 275.8(a). Accordingly, the service of the petition conducted on November 5 was untimely, in that it was one day late, and improper, in that the regulatory condition for alternate service has not been alleged to have been met. Also accordingly, the personal service actually rendered upon the parent was conducted on November 6, 2013, and was also untimely in that it was served two days late. The district does not assert, either within its petition or elsewhere, good cause for its failure to timely effectuate personal service of the petition on the parent (8 NYCRR 279.13). To the extent that the district may have misconstrued the relevant regulations regarding the date by which timely service was required to have been made; I remind the district that State regulations do not rely upon the date of a party's actual receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of ascertaining the deadline for serving a petition (8 NYCRR 279.2[b], [c]; see Application of the Dep't of Educ., Appeal No. 12-120; Application of the Dep't of Educ., Appeal No. 11-151; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004).

Therefore, because the district did not effectuate timely, proper service upon the parent, the appeal must be dismissed.

## **VI. Conclusion**

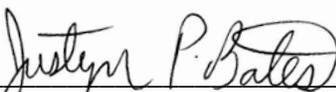
Based upon the aforementioned nonconformities with State regulations, including the district's failure to initiate the appeal in a timely manner with proper service, I will exercise my discretion and dismiss the petition, without a determination of the merits of the parties' claims (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; 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]; Application of a Student with a Disability, Appeal No. 12-042; Application of a Student with a Disability, Appeal No. 11-052; 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. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at \*4 [E.D. Pa. 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an IHO's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct., Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

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 29, 2013**

  
**JUSTYN P. BATES  
STATE REVIEW OFFICER**