



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-128

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

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at Reach for the Stars (RFTS) for the 2012-13 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

This matter is an appeal from an IHO's decision upon remand from the Office of State Review (see Application of the Dep't of Educ., Appeal No. 13-207). The facts and procedural history of this matter need not be addressed at length because, as discussed more fully below, the

district has not properly initiated this appeal. Briefly, on February 8, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 1 at pp. 1, 16).¹

A. Due Process Complaint Notice

In a due process complaint notice dated November 5, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1-2). The parent contended that the February 2012 CSE was not properly composed, that the February 2012 CSE predetermined the student's placement, that the district did not provide a copy of the IEP to the parent when the February 2012 CSE meeting was completed, and that the district did not provide the parent with a copy of the minutes of the February 2012 CSE meeting (*id.* at pp. 2-3). Next, the parent contended that the district "failed to consider the information provided by [the student's] teacher concerning" the student's need for 1:1 teaching and instruction utilizing applied behavior analysis (ABA) (*id.* at p. 2). The parent also asserted that the district "failed to indicate how the health para[professional] would be properly trained to ensure [the student's] safety when eating" (*id.*). Furthermore, the parent asserted that the district failed to draft "appropriate" annual goals related to the recommendations in the February 2012 IEP for a 1:1 health paraprofessional and speech-language therapy or concerning the student's "significant delays in oral motor control" (*id.*). The parent also alleged that the district failed to conduct an appropriate functional behavioral assessment (FBA) and draft an appropriate behavioral intervention plan (BIP) (*id.*).

Regarding the assigned public school site, the parent contended that the district "failed to provide the parent with an opportunity to discuss" the public school site alternatives with district personnel, the assigned public school site could not implement the student's speech-language therapy mandate, and the assigned public school site did not utilize and the teachers were not appropriately trained to administer ABA (*id.* at pp. 2-3). As relief, the parent requested that the district pay the costs of the student's tuition at RFTS for the 2012-13 school year and provide school bus transportation to and from RFTS (*id.* at p. 3). Lastly, the parent requested a determination of the student's pendency placement (*id.* at p. 4).

B. Impartial Hearing Officer Decision

The impartial hearing convened on November 30, 2012 and concluded on August 9, 2013, after six days of proceedings (*see* Tr. pp. 1-373). By decision dated September 24, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year; that the parent satisfied her burden to establish that RTFS was an appropriate unilateral placement for the student for the 2012-13 school year; and that neither equitable considerations, nor the fact that the student's daily schedule included "arrival prayers," warranted a reduction in an award of tuition reimbursement (*id.* at pp. 9-12). As a result of his findings, the IHO ordered

¹ The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (*see* 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

the district to reimburse the parent for the costs of the student's tuition at RFTS for the 2012-13 school year (id. at pp. 11, 13).

C. Remand to Impartial Hearing Officer

On December 20, 2013 the undersigned issued a decision in this matter remanding this case to the IHO who issued the original decision – or, were he unavailable, an IHO appointed in accordance with the rotational selection procedures – to consider whether the following unaddressed claims in the parents' due process complaint notice resulted in a denial of FAPE to the student: (1) the composition of the February 2012 CSE; (2) the district's alleged predetermination with respect to the student's placement; (3) the district's failure to provide the parent with a copy of the CSE meeting minutes; (4) the IEP's alleged lack of sufficient annual goals with respect to the health paraprofessional, the student's speech-language therapy, or the student's oral motor control delays; (5) alleged deficiencies in the student's FBA and/or BIP; (6) the provision of a copy of the student's IEP after the February 2012 CSE meeting; (7) the parent's inability to discuss the student's placement with district personnel familiar with available 6:1+1 placements; and (8) the assigned public school site's claimed inability to provide the student with appropriate speech-language therapy (see Application of the Dep't of Educ., Appeal No. 13-207).

D. Subsequent Impartial Hearing Office Decision

Upon remand, the IHO conducted a prehearing conference and presided over two additional days of hearing to permit further testimony on the unaddressed issues identified above (see Tr. pp. 374-443). In a decision dated July 7, 2014, the IHO resolved the unaddressed claims in the parent's due process complaint notice in favor of the district (IHO Decision II at pp. 5-8). Notwithstanding his resolution of these claims, the IHO again found that the district failed to offer the student a FAPE for the 2012-13 school year (id. at p. 8).

IV. Appeal for State-Level Review

On August 7, 2014, the district, according to an Affidavit of Service, "personally served" a Notice of Petition and a Verified Petition upon an advocate who represented the parent at the impartial hearing. The Office of State Review received the Notice of Petition, Verified Petition, and Affidavit of Service on August 11, 2014. In its petition, the district argues that it offered the student a FAPE for the 2012-13 school year and that the IHO's conclusions to the contrary were erroneous. The parent did not respond to the petition.

V. Applicable Standards

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 the Commissioner (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]; 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).²

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 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 counsel who represented her at the impartial hearing 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]; 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]).

VI. Discussion

Here, petitioner's affidavit of service indicates that the district's petition was personally served on August 7, 2014 upon the lay advocate who represented the parent at the impartial hearing (*see* 8 NYCRR 275.8, 279.2[c]).³ The district did not personally serve the parent and

² 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."

³ The parent was represented by counsel in the previous appeal (Application of the Dep't of Educ., Appeal No. 13-207).

there is no indication in the record that either the parent or the advocate who represented her at the hearing consented to such service (Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058). Moreover, the record does not reflect that the advocate who represented the parent in the hearing below continues to represent her. The district has not offered any explanation for its failure to personally serve the petition upon the parent in this matter. If the district was unable to comply with this requirement, it was incumbent upon the district to explain why it could not do so and, if necessary, pursue alternative service as provided for by State regulations (8 NYCRR 275.8[a]). Given the absence of any showing that the district personally served the parent with the petition, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than personal service, it is an inescapable conclusion that the district failed to effectuate proper service in this matter (8 NYCRR 279.2[b]; see Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 09-075; Application of the Dep't of Educ., Appeal No. 09-062).⁴

As to the merits of the parties' dispute, I briefly note only that the hearing record contains scant evaluative information on the student performed by the district. A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). Additional evaluative information regarding the student could have provided greater clarity as to the appropriateness of the district's offered placement, whether the student required a particular methodology to achieve educational progress, and/or whether the student previously received instruction utilizing a methodology other than ABA (and, if so, whether it proved effective).⁵

VII. Conclusion

Based upon the aforementioned nonconformities with State regulations; namely, the district's failure to initiate the appeal in a timely manner using proper service, I will exercise my discretion and dismiss the petition, without a determination of the merits of the parent's claims (8 NYCRR 279.13; see 8 NYCRR 279.2[c]; New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's dismissal of petition for late service]; 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. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal

⁴ This deficiency is especially problematic here, as the parent did not respond to the district's petition. While the parent may have received the petition and simply chosen not to respond, I am unwilling to make such an inference given the district's unexplained failure to comply with the personal service requirement.

⁵ These observations are not intended to imply whether or not the district offered a FAPE in this instance or whether subsequent evaluations would necessarily result in a program recommendation that offered the student a FAPE.

of a late 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. 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; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; 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 district's remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 August 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER