



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-030

### **Application of a STUDENT WITH A DISABILITY, by her 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:**

The Patrick Donohue Law Firm, attorneys for petitioner, Patrick B. Donohue, Esq., of counsel

Charity Guerra, Acting General Counsel, attorneys for respondent, Gail M. Eckstein, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the International Academy of Hope (iHOPE) for the 2014-15 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**

Given the disposition of this appeal, a full recitation of the student's educational history is not warranted. Briefly, however, a CSE convened on March 4, 2014, to conduct the student's annual review and develop an IEP for the 2014-15 school year (Dist. Ex. 1 at pp. 1, 15, 17). Finding the student remained eligible for special education and related services as a student with multiple disabilities, the March 2014 CSE recommended a 12-month program in a 12:1+(3:1)

special class placement at a specialized school (*id.* at pp. 1, 11-12, 14-15).<sup>1</sup> The March 2014 CSE also recommended three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), one 30-minute session per week of PT in a small group, three 30-minute sessions per week of individual speech-language therapy, and three 30-minute sessions per week of individual vision education services, as well as the services of a group health paraprofessional (*id.* at pp. 11-12, 15).

In a prior written notice to the parent, dated March 18, 2014, the district summarized the special education and related services recommended in the March 2014 IEP (*see* Parent Ex. D at pp. 1-2).

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

By due process complaint notice dated June 5, 2014, the parent requested an impartial hearing regarding the 2014-15 school year (Dist. Ex. 4). The parent asserted that the student was misclassified as a student with multiple disabilities instead of as a student with a traumatic brain injury (TBI) and requested a change in the student's classification (*id.*). The parent alleged that the CSE ignored the medical and educational recommendations that the student be placed in a 6:1+1 special class (*id.*). The parent requested that the student placement be deferred to the district's central based support team for placement in a 6:1+1 special class (*id.*). The parent indicated that she had placed the student at iHOPE because there were no State-licensed schools located within the district for students with TBI disability classification that were appropriate for the student (*id.*). The parent requested that the district pay for the student's tuition at iHOPE for the 2014-15 school year, that the related services mandates in the student's IEP be increased in accordance with professional recommendations, and that the district issue related services authorizations (RSAs) for these services for the 2014-15 school year (*id.*).

### **B. Facts Post Dating the Due Process Complaint Notice**

On August 11, 2014, the parent executed an enrollment contract with iHOPE for the student's attendance for the 2014-15 school year (Parent Ex. N at pp. 1-3).

By amended due process complaint notice dated January 6, 2015, the parent alleged additional issues to be considered at the impartial hearing (Parent Ex. J). The parent alleged that the recommendation for a group service health paraprofessional on the March 2014 IEP instead of an individual paraprofessional would prevent the student from receiving an appropriate education (*id.*). The parent alleged that the student's services and programming should have been provided on a bilingual basis instead of in English given that the March 2014 IEP indicated that the student had limited English proficiency, needed a special education service to address her language needs as they related to the IEP, and was recommended for English as a second language (ESL) (*id.*). The parent further alleged that the ESL annual goal and the instructions on how to incorporate ESL services into the student's educational program were inadequate (*id.*).

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<sup>1</sup> Although this type of special class placement is commonly referred to as a 12:1+4 special class; State regulations define it as including no more than 12 students and, "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students," which "additional staff may be teachers, supplementary school personnel and/or related service providers" (8 NYCRR 200.6[h][4][iii]; *see* Tr. pp. 105, 133).

The parent alleged that the contradictory statements in the March 2014 IEP regarding the student's communication and assistive technology needs prevented the student from acquiring a communication device that could be used at home (id.).

A prehearing conference was held on January 13, 2015, at which the parties discussed the amended due process complaint notice (Tr. pp. 1-14). In an interim order dated January 20, 2015, the IHO originally appointed to conduct the impartial hearing granted the parent's request for permission to amend the complaint (Interim IHO Decision).<sup>2</sup>

### **C. Impartial Hearing Officer Decision**

A second prehearing conference was held on April 23, 2015 (Tr. pp. 15-30). An impartial hearing convened on April 30, 2015, and concluded on June 19, 2015, after six days of proceedings (see Tr. pp. 31-870). In a decision, dated August 10, 2015, the IHO concluded that the district offered the student a FAPE for the 2014-15 school year (IHO Decision at pp. 15-18). Specifically, the IHO found that the parent was provided an opportunity to participate at the CSE meeting (id. at p. 16). In regard to the student's disability classification, the IHO found that the student met the definition for both multiple disabilities and TBI (id.). However, the IHO found that any misclassification did not impact the types of services and educational program offered to the student (id. at p. 17). With respect to the recommendation for paraprofessional services included on the March 2014 IEP, the IHO agreed with the parent that the student required an individual paraprofessional but found that the inclusion of a group health paraprofessional was a typographical error (id. at p. 16). The IHO noted that the student's IEP for the 2013-14 school year included an individual paraprofessional and the hearing record indicated that this service would be continued for the 2014-15 school year (id.).<sup>3</sup> As to related services, the IHO found, based upon progress reports as well as the testimony of the student's classroom teacher and physical therapist, that the student made progress and a continuation of the same related services was appropriate (id. at p. 17). The further IHO found that the March 2014 IEP described the student's needs and strengths, language, use of a gait trainer, and the level of services she received (id. at p. 18). The IHO concluded that the district offered the student a FAPE (id.). Accordingly, the IHO denied the parent's request for tuition reimbursement (id. at p. 21).

For purposes of completeness, the IHO briefly addressed the appropriateness of iHOPE and equitable considerations (IHO Decision at pp. 18-20). With regard to iHOPE, the IHO found that the directed instruction provided to the student at iHOPE was not individualized but rather was prescribed for all students that attended the school (id. at p. 19). Accordingly, the IHO concluded that the parent failed to meet her burden of proof that the student's program at iHOPE was reasonably calculated to meet the student's unique needs (id.). With regard to equitable considerations, the IHO found that the parents cooperated with the district (id.). However, the IHO found that the parent did not have "informed consent" with respect to the June 2014 due

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<sup>2</sup> By letter motion dated April 3, 2015, the district requested that the first IHO recuse himself (Dist. Ex. 8 at pp. 1-6). On April 10, 2015, the first IHO recused himself and a second IHO (hereafter, the IHO) was appointed (see Tr. p. 17; IHO Decision at p. 3).

<sup>3</sup> Both the March 2014 IEP and the prior written notice indicated that the paraprofessional would be provided as a group service (Dist. Ex. 1 at p. 12; Parent Ex. D at pp. 1-2).

process complaint notice or August 2014 iHOPE enrollment contract because the documents were not provided to the parent in her primary language and the parent could not recall any of the provisions of the enrollment contract (id. at pp. 19-20). The IHO also found that the parent did not have an opportunity to adequately review and understand her obligations under the enrollment contract (id. at p. 20).

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

The parent appeals, asserting that the IHO erred by finding that the district offered the student a FAPE for the 2014-15 school year.<sup>4, 5</sup> Specifically, the parent asserts that the IHO erred in finding that the student's classification as a student with multiple disabilities rather than as a student with a TBI did not impact the types of services and educational program offered to the student. The parent argues that the IHO "ignored the district's burden" and erred in finding that the 12:1+4 special class and related services recommendation was appropriate. The parent asserts that the IHO failed to address the contradictory statements in the March 2014 IEP regarding the student's ESL and assistive technology needs, and that the failure to provide assistive technology denied the student a FAPE. The parent further asserts that the IHO erred in finding that iHOPE was not an appropriate placement for the student, as the student received appropriate services and made progress at iHOPE. The parent also argues that equitable considerations supported her request for relief. Lastly, the parent admits that her petition is untimely but argues that there is good cause for her late filing. The parent asserts as good cause that her daughter's medical needs made it difficult to meet with her attorney to discuss and prepare the petition and additionally that she had to travel abroad multiple times.

In an answer, the district denies the parent's allegations and argues to uphold the IHO's decision in its entirety. With regard to the issues that the IHO did not address, the district asserts that the March 2014 IEP sufficiently addressed the student's ESL and assistive technology needs. The district further asserts, as additional grounds for finding that equitable considerations favored the district, that the cost of tuition at iHOPE is unreasonable and the parent failed to notify the district of the student's removal from the district public school and placement at iHOPE. The district also asserts that the parent failed to demonstrate that she was legally obligated to pay tuition for the 2014-15 school year pursuant to a valid contract.<sup>6</sup>

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<sup>4</sup> The parent filed a notice of intention to seek review on September 4, 2015, but did not personally serve her petition on the district until May 5, 2016.

<sup>5</sup> The parent submits 10 exhibits with her petition as additional evidence (see Pet. Exs. A-J).

<sup>6</sup> The parent filed a reply that exceeds the permissible scope of a reply under State regulations and thus it will not be considered (see 8 NYCRR 279.6 [limiting a reply to any "procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"]).

## **V. Discussion**

### **A. Additional Evidence**

As noted above, the parent attaches 10 exhibits to her petition as additional documentary evidence for consideration on appeal (see Pet. Exs. A-J).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 16-028; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]).

Petition Exhibits A, B, C, and G were previously introduced as exhibits at the impartial hearing and, as such, are already included in the hearing record (compare Dist. Ex. 1, Dist. Ex. 4, Parent Ex. J., and Parent Ex. N, with Pet. Ex. A, Pet. Ex. B, Pet. Ex. C, and Pet. Ex. G.). Exhibit D and Exhibit E are required to be included in the record on appeal by virtue of State regulation (8 NYCRR 200.5[j][5][vi][c]; 279.4[a]). Exhibit F was available at the time of the impartial hearing, could have been offered at the impartial hearing, and is not necessary to render a decision. Exhibit I was not available at the time of the impartial hearing but is not necessary to render a decision. Exhibit J was offered into evidence as an exhibit at the impartial hearing but the IHO declined to admit it (see Tr. pp. 91-96). The Exhibit is not necessary to render a decision and thus will not be accepted as additional evidence. Exhibit H was not available at the time of the impartial hearing, is not necessary to render a decision, but even if accepted would not establish good cause for the parent's failure to timely appeal from the IHO's decision as discussed below, and thus will not be accepted as additional evidence.

### **B. Initiation and Timeliness of Appeal**

The parent's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). 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]). 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. 16-014 [dismissing a parent's appeal for failure to effectuate service of the petition in a timely manner]; 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 a 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 a parent's appeal for failure to timely effectuate personal service of the petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service of the petition upon the district]).

In this case, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The findings of fact and decision of the IHO was dated August 10, 2015 (IHO Decision at p. 21). Assuming the IHO's decision was transmitted to the parties by mail on the day following the date of issuance, the parent was required to personally serve the petition upon the district by no later than September 21, 2015 (see 8 NYCRR 279.2[b]). However, the petition was first served upon the district on May 5, 2016, making it more than seven months late (see Parent Aff. of Service). Accordingly, as acknowledged by the parent, the petition for review was not timely served on the district in accordance with State regulations.

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.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at \*5 [N.D.N.Y. Dec. 19, 2006]). In her petition, the parent asserts as good cause that her daughter's medical needs made it difficult to meet with her attorneys to discuss and prepare the petition and additionally she had to travel abroad multiple times. The parent claims that since August 2015, the student spent several days in the hospital for testing and went to numerous doctors' appointments. However, the parent provides no detail in her petition explaining why the student's medical needs, including her hospitalization for "several days," precluded the parent from timely initiating the appeal. To the contrary, the parent's signature on the notice of intention to seek review, dated September 4, 2015, indicates that the student's medical needs did not preclude the parent from finding time to meet with her attorneys to discuss initiating an appeal.<sup>7</sup> Although the parent also asserts that she traveled abroad multiple times, she does not indicate in her petition the dates when she traveled abroad or the length of time she was out of the country, and there is no basis appearing in her petition to conclude that the parent was unable to meet with counsel at any time after the issuance of the IHO's decision based on her foreign travels. Additionally, the petition was verified by the parent on April 6, 2016, but was not personally served upon the district until approximately one month later, on May 5, 2016 (see Parent Verification; Parent Aff. of Service). The parent provides no explanation for this month-long delay in serving the petition subsequent to its verification.

In this instance, the parent has not asserted good cause (the student's medical needs and the parent's travel abroad) for the significant delay in serving the petition (8 NYCRR 279.13; see New York City Dept of Educ. v. S.H., 2014 WL 572583, at \*5-\*7 [S.D.N.Y. Jan. 22, 2014])

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<sup>7</sup> In any event, it is unclear why the parent's participation was required to prepare the petition or memorandum of law, as counsel on appeal represented the parent during the impartial hearing.

[upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist. Bd. of Educ., 891 F. Supp. 2d 439, 440-41 [W.D.N.Y. 2012] [informing counsel for the parents that "an examination of pertinent SRO decisions would have informed her that delays due to scheduling difficulties or lack of availability on the part of parties or counsel are not typically found to be 'good cause' for untimely petitions"]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at \*4-\*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-cv-0006, at \*39-\*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 13-039 [finding that travel and temporary illness of one of the parents were not sufficient to establish good cause excusing the parents' failure to timely serve the district]; Application of a Student with a Disability, Appeal No. 08-143 [finding that the reason given for the parent's delay in initiating the appeal, the parent's hospitalization abroad, was too vaguely stated to establish good cause]). Accordingly, the IHO's determination that the district offered the student a FAPE for the 2014-15 school year has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

## **VI. Conclusion**

Having found that the parent failed to timely initiate the appeal, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
July 13, 2016**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**