



# The University of the State of New York

## The State Education Department

### State Review Officer

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No. 14-150

### **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 New York City Department of Education**

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation 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 a determination of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice for lack of subject matter jurisdiction. 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**

In this case, the parties executed a stipulation of settlement on June 26, 2013, in full resolution of the parent's due process complaint notice dated March 14, 2013, which asserted claims pertaining to the 2011-12 and 2012-13 school years, and which further resolved all subsequent administrative proceedings thereto (see IHO Ex. V at pp. 1-5). Within the stipulation of settlement, the district agreed to issue the parent an authorization letter allowing the student to receive up to 135 hours of special education teacher support services (SETSS) that would be fully provided to the student on or before June 30, 2014 (id. at p. 2).

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

In an amended due process complaint notice dated March 31, 2014, the parent asserted that the district's delay in issuing the authorization letter to the parent to obtain the student's SETSS services resulted in a failure to offer the student a free appropriate public education (FAPE) for the

2013-14 school year (see IHO Ex. VII at pp. 1-17).<sup>1</sup> As relief, the parent requested an order directing the district to pay an enhanced rate to the student's SETSS provider, in addition to an award of compensatory or additional educational services in the form of SETSS (3 hours per week for 3.5 months) to be provided to the student during the 2014-15 school year and to be listed in the student's IEP as relief for the district's delay in issuing the authorization letter, which resulted in the student's inability to receive SETSS between July 8, 2013 through October 24, 2013 (*id.* at pp. 16-18).

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

On June 20, 2014, the parties continued and completed the impartial hearing with a different IHO (IHO 2) (see Tr. pp. 88-159).<sup>2</sup> By decision dated July 23, 2014, IHO 2 dismissed the parent's March 2014 due process complaint notice based on his finding that the parent sought to enforce the terms of the stipulation of settlement, and therefore, IHO 2 lacked jurisdiction over the matter (see July 23, 2014 IHO Decision at pp. 2-3; see generally IHO Ex. V-VI). Accordingly, IHO 2 dismissed the parent's March 2014 due process complaint notice (see July 23, 2014 IHO Decision at p. 3).

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

The parent appeals, and seeks to overturn IHO 2's decision in its entirety. Initially, the parent admits that she did not initiate the appeal of IHO 2's decision in a timely manner. However, the parent argues that the receipt of IHO 2's decision on August 10, 2014 and subsequent personal matters should excuse the untimeliness of the appeal as good cause shown. In support of the request to overturn IHO 2's decision, the parent alleges that the district delayed the scheduling of a resolution session, which ultimately never took place. She further asserts that IHO 2 did not adhere to the scheduling timelines for impartial hearings set forth in State regulation and did not schedule the impartial hearing in a timely manner. The parent contends that IHO 2 did not afford her due process and mishandled the matter because IHO 2 did not have the time to "handle this case and to read the documents to make a fair and lawful decision." Additionally, the parent argues that the June 20, 2014 impartial hearing date pertained to "[c]onsolidation," and therefore, the parent was not prepared to present her case on the merits on that particular date. With respect to the merits, the parent alleges that the March 2014 due process complaint notice was sufficient and alleged a failure to offer the student a FAPE based upon the district's failure to timely issue the authorization letter to the parent to obtain the student's SETSS services. As a remedy, the parent requests the

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<sup>1</sup> Initially, in a due process complaint notice dated November 25, 2013, the parent alleged that the district failed to timely issue the authorization letter to the parent to obtain the student's SETSS services in accordance with the stipulation of settlement (see IHO Ex. I at p. 6). As relief, the parent requested that the district pay an enhanced rate to the student's SETSS provider, noting further that the SETSS provider had not been paid for services rendered in October 2013 or November 2013 (*id.* at p. 7). On March 17, 2014, the parties proceeded to an impartial hearing (see Tr. pp. 1-87). In a decision dated March 26, 2014, an IHO (IHO 1) dismissed the parent's November 2013 due process complaint notice as insufficient and because the IHO lacked jurisdiction over the parent's request seeking to enforce the stipulation of settlement; however, IHO 1 granted the parent leave to amend the due process complaint notice (Mar. 26, 2014 IHO Decision at pp. 1-8).

<sup>2</sup> On April 11, 2014, and subsequent to the recusal of IHO 1, the district appointed IHO 2 to preside over the matter (see Tr. pp. 88, 90-91, 97-98; IHO Ex. XII at pp. 1-2).

immediate issuance of an authorization letter granting the student the "full 135 hours of SETSS," payment to the SETSS provider at an enhanced rate, and to list the 135 hours of SETSS on the student's IEP so that the services could be "transferred to the next school year."<sup>3</sup>

In an answer, the district responded to the parent's allegations and argues to uphold IHO 2's decision in its entirety. In addition, the district asserts that the parent is bound by the terms of the stipulation of settlement and that the student received the relief pursuant to the terms of the stipulation of settlement.<sup>4</sup> Next, to the extent that the parent requests an additional 135 hours of SETSS as relief, the district contends that the parent did not request this relief below, nor has she exhausted her administrative remedies. The district also contends that the parent is not entitled to an enhanced rate to pay the SETSS provider. Finally, the district contends that the parent has failed to exhaust her administrative remedies with respect to her request to amend the student's IEP, which is not at issue in this particular matter.

In a reply, the parent responded to the district's answer and to the district's objections regarding the additional documentary evidence submitted with the petition for review. Generally, the parent argues in further support of the request for an enhanced rate of pay for the SETSS provider, and to overturn the IHO 2's decision.

## 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]). 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 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

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<sup>3</sup> The parent submits additional documentary evidence for consideration on appeal (Pet. Exs. A-C). The district objects to the consideration of the submitted exhibits. 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 (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this instance, a review of the additional documentary evidence reveals that two exhibits were available at the time of the impartial hearing, and the third exhibit is not necessary to render a decision; accordingly, I will exercise my discretion and decline to consider the additional evidence.

<sup>4</sup> At the March 17, 2014 impartial hearing date, the student's SETSS provider testified that she provided the student with four hours per week of SETSS since approximately October 25, 2013 and that she had been paid for the services rendered (see Tr. pp. 46-47). In addition, the SETSS provider further testified that the student's 135 hours of SETSS would be provided—in full—by June 2014 (see Tr. p. 47). The SETSS provider also signed the authorization letter on October 18, 2013, and later agreed to the rate inserted in the authorization letter (see Tr. pp. 57-60; Dist. Ex. 1).

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 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 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 this case, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. Here, IHO 2's decision was dated July 23, 2014, and included the required statement advising the parties of their rights to seek review of the decision by an SRO, and further provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text (July 23, 2014 IHO Decision at p. 7; see 8 NYCRR 200.5[j][5][v], [k]). Assuming for the sake of argument that IHO 2's decision was transmitted by mail, the regulatory exception permitting the exclusion of the date of mailing and the four days subsequent thereto is applicable in calculating the 35-day period within which the petition could have been timely served; therefore, the parent was required to personally serve the petition upon the district no later than September 2, 2014 (8 NYCRR 279.2[b]). However, the parent did not serve the petition upon the district until September 23, 2014. Accordingly, the service of the petition on September 23, 2014 was untimely. Additionally, although the parent sets forth reasons why she failed to timely initiate the appeal, such reasons are not sufficient good cause to excuse the parent's failure to timely effectuate personal service of the

petition upon the district consistent with the State regulation (8 NYCRR 279.13).<sup>5</sup> Therefore, because the parent did not effectuate timely service of the petition upon the district or otherwise excuse the failure to timely initiate this appeal for good cause shown, the parent's appeal must be dismissed.

Notably, however, even if the parent had initiated her appeal in a timely manner, the district correctly argues—and IHO 2 correctly determined—that the parent's claims would ultimately otherwise fail. First, to the extent that the parent alleges that the IHO acted in a biased manner, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]).

An independent and careful review of the hearing record reveals that IHO 2 was not biased and IHO 2 observed the procedures of due process throughout this proceeding. Although the parent disagrees with the conclusions reached by IHO 2, that disagreement does not provide a basis for finding actual or apparent bias by IHO 2 (see Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). Thus, upon careful consideration of the hearing record, there is no evidence that IHO 2 displayed bias against the parent.

Furthermore, the district also correctly argues—and IHO 2 properly concluded—that the relief sought by the parent consists of the enforcement of the stipulation of settlement—a remedy that cannot be obtained through an impartial due process hearing. State regulations provide that

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<sup>5</sup> While I sympathize with the parent, the reasons set forth in the petition as good cause to excuse the failure to timely initiate this appeal and personally serve the petition by September 2, 2014 occurred on September 3 and September 7, 2014—after the date upon which the parent should have served the petition—or during the first week of August 2014—prior to when the parent admits receiving IHO 2's decision.

settlement agreements "shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Accordingly, the regulations do not confer jurisdiction to enforce settlement agreements at an impartial hearing or on appeal to a State Review Officer and the parent's claims that the district failed to implement the parties' settlement agreement will not be considered (see Application of the Bd. of Educ., Appeal No. 07-043). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that due process is not the appropriate procedure for enforcing the provisions of a settlement agreement (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 2144016 [2d Cir. 2009]). Nor have IHOs, or SROs for that matter, been granted authority to compel compliance or enforce prior decisions rendered by administrative hearing officers (see Application of a Child with a Disability, Appeal No. 07-110; Application of a Child with a Disability, Appeal No. 04-007 [recognizing that enforcement of prior orders of an impartial hearing officer and/or a State Review Officer are not properly determined by a State Review Officer]). Accordingly, both IHO 1 and IHO 2 properly dismissed the parent's due process complaint notices for lack of jurisdiction.

## **VII. Conclusion**

Having found that the parent failed to timely initiate the appeal, and alternatively, that the evidence in the hearing record supports IHO 2's decision dismissing the parent's March 2014 due process complaint notice for lack of jurisdiction, the necessary inquiry is at an end.

## **THE APPEAL IS DISMISSED.**

**Dated:**      **Albany, New York**  
**November 25, 2014**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**