



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 16-025

Application of the BOARD OF EDUCATION OF THE NANUET UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability.

Appearances:

Mario Spagnuolo, Esq., attorney for petitioner

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 ordered the district to fund an independent educational evaluation (IEE) of the respondent's (the parent's) son at public expense and which ordered the district to consider an award of 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

Due to the disposition of this appeal, a full recitation of the facts, including the student's educational history, is unnecessary. Briefly, the student has received diagnoses of pervasive developmental disorder-not otherwise specified, autism spectrum disorder, and apraxia (Dist. Exs. DD at p. 3; PP at p. 1).¹ The student's cognitive abilities, language functioning, academic skills, and adaptive behavior are all significantly below average (see Dist. Exs. DD; FF; PP). The student had attended a variety of placements, including general education class settings with special education services, special classes in board of cooperative educational services (BOCES) programs, a State-approved nonpublic school, and an out-of-district public school, and has

¹ Although a number of the district's exhibits are paginated with Bates numbers, some of the exhibits are not and citations in this decision are to the number of pages in each exhibit.

variously received 12-month, 1:1 aide, and related services (Dist. Exs. A at pp. 1, 12-14; B at pp. 1, 16-18; C at pp. 1, 16-18; D at pp. 1, 12-15-; E at pp. 1, 12-14).

During the 2013-14 school year, the student attended an 8:1+1 special class placement in an out-of-district public school with 1:1 aide services until February 2014 when his placement was changed to a 12:1+1 special class with the continued support of the 1:1 aide (Dist. Exs. F at pp. 1-2, 16-17; G at pp. 1-2). The student received ten hours of 1:1 home instruction and two hours of individual speech-language therapy during summer 2014 (Dist. Ex. H at pp. 1, 14-15). A CSE reconvened in August 2014 and continued the recommendation for a 12:1+1 special class placement with 1:1 aide services for the student for the 2014-15 school year; however, the student did not attend the program in fall 2014 as the parent was not in agreement with the recommended placement (Tr. pp. 191-92, 258, 315; compare Dist. Ex. H at pp. 1, 13-14, with Dist. Ex. I at pp. 1, 13-14). As a consequence of an order from a Family Court, the student attended the 12:1+1 special class placement in January 2015 and a triennial evaluation was conducted thereafter (Tr. pp. 181-82, 316; Dist. Exs. PP; QQ).

A CSE convened in March 2015 and recommended a 12-month 8:1+3 special class placement in a different out-of-district public school, along with 1:1 aide services, for the 2015-16 school year (Dist. Ex. L at pp. 1, 15-16). In April 2015, the parent communicated to the district her disagreement with the results of the district's triennial evaluation of the student and requested an IEE (Dist. Ex. T at pp. 2-4).² In August 2015, the parent revoked her consent for special education services and the student was declassified and began attending a general education class setting in a district public school (Tr. p. 281; Dist. Exs. N at p. 1; O at p. 1; P; Q). A CSE convened in October 2015, determined that the student was eligible to receive special education as a student with autism, and recommended a 12:1+1 special class life skills program in a district public school with the part-time support of a 1:1 aide (Dist. Ex. O at pp. 1-2, 15-16).

A. Due Process Complaint Notice

In a due process complaint, dated December 3, 2015 and amended on January 25, 2016, the parent alleged that the district failed to offer the student a FAPE for the 2013-14, 2014-15 and 2015-16 school years (IHO Exs. 1; 5). The parent further alleged that the district had denied the parent's request for an IEE for the student (IHO Ex. 5 at p. 16-17).³ The parent additionally asserted that the CSEs that convened during the time periods at issue: failed to follow certain "guiding principles" for IEP development relating, in part, to the parent's participation; included district participants who lacked proper "qualifications and specialized knowledge"; ignored "independent reports and recommendations" of private evaluators; did not understand the student's needs; did not recommend the correct disability classification to describe the student's eligibility

² Between May 2015 and February 2016, subsequent communications took place between the parent and the district regarding the parent's request for an IEE, the need for the parent to sign a release so that the district could communicate with the parent's chosen evaluator, the district's policies regarding IEEs including the reimbursement rate caps therefor, the rates charged by the parent's chosen evaluator, and the effect of the parent's revocation of consent for special education services on her request for the IEE (Dist. Exs. T at p. 1; U at p. 1; V at p. 1; W-AA; see Tr. pp. 173-80, 203-07).

³ Citations in this decision to the parent's due process complaint notice will conform to the consecutive pagination of the exhibit, rather than the page numbers included on the document (see IHO Ex. 5).

for special education; never developed an IEP to meet the student's specific needs; and changed the student's recommended placement multiple times (*id.* at pp. 3-6, 9-10, 12). Specific to the 2014-15 school year, the parent alleged that the student did not receive all of his mandated speech-language therapy sessions (*id.* at p. 14). As to the 2015-16 school year, the parent alleged that placement of the student in the special class life skills program during ongoing litigation in a different forum was a violation of State regulations and that the placement was inappropriate (*id.* at pp. 8-9). The parent also set forth claims of retaliation, violation of section 504 of the Rehabilitation Act of 1973 (section 504), deprivation of certain constitutional protections, and "educational malpractice" (*id.* at pp. 3-4, 6-13).

For relief, the parent requested that the student be placed back into the general education setting in the district high school, but with section 504 accommodations, and for the district to provide an IEE at public expense (IHO Ex. 5 at pp. 7, 20). The parent also requested that the district recommend a "[c]orrect IEP classification" and develop an IEP for the student consistent with the recommendations in the IEE (*id.* at p. 20). The parent further requested a "written apology" and "restitution for damages" (*id.* at p. 22). Finally, the parent requested compensatory education for the student (*id.* at p. 21).

B. Impartial Hearing Officer Decision

Following proceedings held on February 19, 2016, the IHO issued an interim order on pendency, identifying the 8:1+1 special class recommended in the May 2012 IEP as the student's pendency (stay put) placement (*see* Tr. pp. 1-101; IHO Ex. 10; *see* Dist. Ex. D). On March 3, 2016, the parties continued the impartial hearing, which concluded on March 11, 2016 after two days of testimony (*see* Tr. pp. 102-395). In an undated decision, issued on or around April 5, 2016, the IHO found that the district offered the student a FAPE for the 2013-14 and 2014-15 school years but denied the student a FAPE for the 2015-16 school year as a consequence of its failure to timely commence an impartial hearing to address the parent's request for an IEE (IHO Decision at pp. 3, 13-17).⁴ The IHO found that the district's failure to properly respond to the parent's request for an IEE impeded the parent's ability to participate in the decision-making process regarding the provision of a FAPE to the student (*id.* at pp. 3, 15, 17). As relief, the IHO ordered the district to fund the requested IEE and then reconvene the CSE to consider the results of the IEE and determine if any compensatory education services would benefit the student (*id.* at pp. 3, 18-19).⁵ Finally, the IHO directed that the student remain in the pendency placement until the CSE reconvenes so that "a level of consistency will be afforded the [s]tudent while the new evaluative materials are considered" (*id.* at pp. 3, 19).

IV. Appeal for State-Level Review

On appeal, the district argues that the IHO failed to consider the parent's "refusal to return" the consent for the district to contract with the parent's chosen provider when determining that the

⁴ While the IHO's decision is undated, a cover letter referencing transmittal of the decision to the parties is dated April 5, 2016.

⁵ In his ordering clause, the IHO specified that the district should fund a neuropsychological evaluation (IHO Decision at p. 18).

district failed to timely commence a hearing concerning the IEE. Further, the district argues the IHO ordered a neuropsychological examination despite the chosen provider's lack of qualifications to perform such an exam. Finally, the district asserts the student was properly placed with a "well developed" IEP. For relief, the district requests reversal of the portions of the IHO decision directing the district to fund the requested IEE and consider compensatory education.

In an answer, the parent argues that the IHO's decision is "correct" and should be upheld.⁶ The parent further asserts that the evaluator she chose to conduct the IEE is "highly qualified" and is familiar with the student. The parent additionally alleges that the district had "multiple consents on file" from the parent to complete the IEE. Accordingly, the parent argues to uphold the IHO's decision with regard to the IEE and consideration of compensatory education.^{7, 8}

VI. Discussion—Initiation of the Appeal

The district's appeal must be dismissed for non-compliance with State regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be 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 an SRO; (2) the parties may agree to waive personal service; or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Bd. of Educ., Appeal No. 12-207; Application of the Bd. of Educ., Appeal No. 11-129).⁹

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. 15-045 [dismissing a district's appeal for failing to properly effectuate personal service of the petition upon the parent]; Application of a Student

⁶ In her answer, the parent states her concerns with the role of the guardian ad litem, as well as with the conduct of the impartial hearing, and asserts her disagreement with the IHO's finding regarding the "appropriateness of the placements for 2013 through 2016"; however, the parent does not request reversal of the IHO's decision or any other form of relief relating to these assertions of error. In addition, the parent raises the issue of the appropriateness of the student's pendency placement, but does not indicate that she is challenging the IHO's pendency determination.

⁷ The parent filed an additional submission with the Office of State Review subsequent to her answer. State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer . . . except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; see 8 NYCRR 279.8). Thus, the parent's additional submission has not been accepted.

⁸ The IHO appointed a guardian ad litem for the student pursuant to 8 NYCRR 200.5(j)(3)(ix). The guardian ad litem was invited to make a submission to this office regarding the instant appeal and he chose not to do so.

⁹ 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."

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 [same]; Application of a Student with a Disability, Appeal No. 09-099 [same]; 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]).

In the present case, the district failed to initiate the appeal in accordance with the procedures prescribed in State regulations (see 8 NYCRR 279.2[c]; 8 NYCRR 275.8[a]). The parent was neither personally served nor was service made to a person of suitable age and discretion at the parent's residence. The district's affidavit of service indicates that, on May 2, 2016, the district served the "Notice with Petition and the Verified Petition" by affixing a "true copy" of the "Notice, Petition and Memorandum of Law" to the doors of the parent and the guardian ad litem after receiving no response at either address on April 29 and May 2, 2016 (Dist. Aff. of Service). Petitioner thereafter mailed a "true copy" to the same addresses on May 2, 2016 (id.). While State regulations contemplate alternate forms of personal service if a respondent cannot be found upon diligent search—and further provide that a party may seek authorization for alternate forms of personal service through the Office of State Review—the district provided no evidence that the parent could not be located upon a diligent search in order to personally serve the petition upon the parent (see 8 NYCRR 279.1[a]; 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). According to the affidavit of service, the district only attempted to effect personal service on the parent on April 29, 2016 at 3:45 p.m. and on May 2, 2016 at an unidentified time of the day (see Dist. Aff. of Service). Further, the district did not request authorization to implement an alternate form of personal service. Absent specific permission for such a form of alternate service, State regulations do not provide for "nail and mail" service (compare CPLR 308[4], with 8 NYCRR 275.8[a]). The district also failed to provide any evidence that it attempted to contact the parent in order to waive personal service or effectuate service through consent of the parties (see Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037). Therefore, because the district did not effectuate proper service in this matter by personally serving the petition upon the parent, the district's appeal must be dismissed. Accordingly, the IHO's determination 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]).

VII. Conclusion

Having found that the district failed to properly initiate the appeal, the necessary inquiry is at an end.¹⁰

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 3, 2016**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹⁰ Because of the disposition of this appeal on procedural grounds, I will not reach the merits of the parties' arguments. However, upon review of the parties' submissions, it appears that both the parent and the district agree that the IHO's decision should not have specified that the district fund a neuropsychological evaluation as the requested IEE. Given the apparent accord on this point, the parties are strongly encouraged to agree in writing that the district will fund an IEE that consists of an assessment other than a neuropsychological evaluation.