



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 20-020

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

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 decision of an impartial hearing officer (IHO) which determined that the educational services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2019-20 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions

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 (8 NYCRR 200.5[j][3][v], [vii], [xii]; see 20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.510[b][2], [c], 300.515[a];). 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 (8 NYCRR 200.5[j][5]; see 34 CFR 300.515[c]). 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[a]). 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 (8 NYCRR 279.12[a]; see 34 CFR 300.514[b][2]). 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 (8 NYCRR 200.5[k][2]; see 34 CFR 300.515[b], [c]).

III. Facts and Procedural History

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, the evidence in the hearing record reflects that the student attended a general education class setting and received integrated co-teaching and paraprofessional services in the district until 2015 when the parent started to homeschool the student (see Parent Ex. C at p. 1; Dist. Exs. 1 at p. 1; 2 at p. 1). While homeschooled, the student was recommended to receive services through individualized education services plans (IESPs), including special education teacher

support services (SETSS), occupational therapy (OT), and speech-language therapy, at varying frequencies (see Parent Ex. C at p. 1; Dist. Exs. 1 at p. 1; 2 at p. 1).^{1, 2} For the 2017-18 school year, the student received 10 hours per week of SETSS, as well as OT services, but did not receive recommended speech-language therapy services (see Parent Ex. C at p. 1; Dist. Exs. 1 at p. 1; 4 at pp. 1, 2). The student received an increased number of SETSS services (25 hours per week) for the 2018-19 school year pursuant to a decision by an IHO but did not receive any related services (see Parent Exs. B at p. 10; C at p. 1; E at p. 1; Dist. Ex. 1 at p. 1).

A CSE convened on March 29, 2019 to conduct an annual review and develop an IEP and an IESP for the student for the 2019-20 school year (7th grade) (Parent Ex. C at pp. 1, 11; Dist. Ex. 1 at pp. 1, 19). Having found the student eligible for special education as a student with autism, the CSE recommended in both the IEP and the IESP that the student receive 10 periods per week of SETSS in a group, three 40-minute sessions of individual OT, and three 40-minute sessions of individual speech-language therapy, all to be delivered at a separate location of the provider's discretion, and that the parent receive four 60-minute sessions of parent counseling and training per year (Parent Ex. C at pp. 1, 9-10; Dist. Ex. 1 at pp. 1, 15-16, 19). The March 2019 IEP reflected July 1, 2019 as a projected date of implementation (encompassing 12-month services) and indicated that the placement recommended was a "[n]on-specialized" district school (Dist. Ex. 1 at pp. 1, 15-16, 18). The March 2019 IESP reflected a projected beginning date of services of September 5, 2019 and indicated that the student was parentally placed (Parent Ex. C at pp. 1, 9-10, 11).

During the CSE meeting, the parent expressed that the student was doing well with the increased amount of SETSS and that she wanted the student to continue to receive five hours of SETSS per day on a 12-month basis (Parent Ex. C at p. 3; Dist. Ex. 1 at p. 4). The parent further expressed concern that the student was not receiving speech-language therapy and shared that she wanted related services delivered in the home since it was "too difficult to go to an agency for services" (Parent Ex. C at p. 3; Dist. Ex. 1 at p. 4). Other members of the committee expressed concern that the student was receiving "a disproportionate amount of SETSS services relative to Home Schooling" and that "the 1:1 instruction [wa]s very restrictive" and did not serve to prepare the student for high school (Parent Ex. C at pp. 4, 5; Dist. Ex. 1 at pp. 4-5, 6).

¹ Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

² "SETSS" are not specifically identified among the services and programs included in the State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]).

A. Due Process Complaint Notice

The parent initiated an impartial hearing by filing a due process complaint notice dated June 1, 2019 (see Parent Ex. A). The parent alleged that, despite contacting numerous providers, she had been unable to find providers who would be able to deliver SETSS, OT, and speech-language therapy services to the student, beginning in October 2015 when the parent started to homeschool the student (id. at p. 3). According to the parent, a "court ordered" the district to fund a provider to deliver SETSS at an "enhanced rate of \$100 per hour" and only then was the parent able to find a provider to deliver services to the student as of "June 2017" (id.). Further, the parent indicated that "the court" ordered that the student's SETSS services be increased to "25 hours per week" for the 2018-19 school year (id. at p. 4). However, the parent asserted that the student remained without speech-language therapy since 2015 (id. at pp. 3-5). The parent alleged that the district's failure to deliver services to the student—including a lapse in the delivery of SETSS for two years and speech-language therapy for five years—resulted in the student's failure to progress to "the level that she could [have] reach[ed] if she received all the assigned services" (id. at p. 3). However, the parent noted that, due to the increase in services ordered for the 2018-19 school year, the student "started to show improvements in her academics" (id. at p. 4).

For relief, the parent requested that the district be required to fund 25 hours per week of SETSS for the 12-month 2019-20 school year at the "enhanced rate of \$100 per hour" (Parent Ex. A at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 14, 2019 and concluded on October 25, 2019, after two days of proceedings (Tr. pp. 1-162).³ In an interim decision dated August 18, 2019, the IHO found that the student's stay-put placement during the pendency of the proceedings was as set forth in an unappealed decision of an IHO dated October 23, 2018, which ordered the district to fund 25 hours of SETSS for the student for the 2018-19 school year at a rate not to exceed \$100.00 per hour (Interim IHO Decision at pp. 3-4).⁴

In a final decision dated January 5, 2020, the IHO found that the March 2019 CSE's recommendation of 10 hours per week of SETSS offered the student a FAPE (IHO Decision at pp. 10-13). First, the IHO discussed the purpose of SETSS and "credit[ed]" the testimony of the district representative, who attended the March 2019 CSE meeting, regarding the CSE's rationale for not recommending 25 hours per week of SETSS (id. at p. 11). The IHO further found that the hearing record did not support a finding that the student required 25 hours per week of SETSS (id.). The IHO opined that parent was relying on the SETSS for delivery of entire subject areas of instruction and that the 25 hours represented "nearly [the] complete weekly academic program of

³ The IHO held a prehearing conference on August 6, 2019 (IHO Ex. I).

⁴ The district did not object to the October 23, 2018 unappealed IHO decision forming the basis of the student's pendency placement (Tr. p. 6).

concern to the CSE" (*id.* at pp. 11-12). The IHO indicated that she was unwilling to order the increased hours of SETSS "to address the omission in the education provided the child by her parent" (*id.* at p. 12). Thus, the IHO found that the March 2019 CSE's recommendation for the student to receive 10 hours per week of SETSS in a group for the 2019-20 school year was appropriate (*id.*). With respect to the rate of the SETSS, the IHO took issue with the district's refusal to state a position at the impartial hearing and, therefore, reflected the rate sought by the parent in the order (*id.* at pp. 3, 12).

Based on the foregoing, the IHO found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at p. 13). The IHO denied the parent's request for 25 hours per week of SETSS but ordered the district to fund the 10 hours per week of SETSS for the 2019-20 school year at a rate not to exceed \$100.00 per hour (*id.*).⁵

IV. Appeal for State-Level Review

In a request for review, the parent asserts that the IHO erred in finding that 10 hours per week of SETSS for the 2019-20 school year was appropriate to meet the student's needs and in denying the parent's request for 25 hours per week of SETSS. More specifically, the parent asserts that the IHO erred in accepting the testimony of the district representative and not the testimony of the student's SETSS provider. The parent further asserts that the IHO erred in basing her ruling on a psychoeducational evaluation from December 2016 when there was a new evaluation available that had been completed in September 2019. The parent also challenges the IHO's impartiality and knowledge.

The district has not filed an answer.

VI. Discussion—Initiation of the Appeal

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for lack of personal service of the request for review.

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party, . . . , a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]).⁶ In addition, an appeal from an

⁵ The IHO's decision recited the parent's right to appeal, including the requirements that the notice of intention to seek review and the request for review be personally served upon the opposing party and that proof of service be filed with the Office of State Review (IHO Decision at p. 14).

⁶ The purpose of a notice of intention to seek review is twofold. First, in a case where the school district is the respondent, the service of a notice of intention to seek review facilitates the district's timely filing of the hearing record with the Office of State Review (see Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038). In addition, whether the respondent is a school district or a parent, the notice of intention to seek review (along with the accompanying case information statement) provides a respondent with advance notice of a petitioner's imminent challenge to an IHO's determination, which may give a respondent additional time to contemplate a position to

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 request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]). Thereafter, "the notice of intention to seek review, notice of request for review, request for review, and proof of service [must be filed] with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e] [emphasis added]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations, including the failure to properly serve an initiating pleading in a timely manner, may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-66 [S.D.N.Y. Sept. 6, 2013] [upholding an SRO's dismissal of a parent's appeal where, among other procedural deficiencies, the amended petition was not personally served upon the district]; Application of a Student with a Disability, Appeal No. 16-015 [dismissing a parent's appeal for failure to effectuate proper personal service of the petition upon the district where the parent served a district employee not authorized to accept service]; Application of a Child with a Disability, Appeal No. 06-117 [dismissing a parent's appeal for failure to effectuate proper personal service in a timely manner where the parent served a CSE chairperson and, thereafter, served the superintendent but not until after the time permitted by State regulation expired]; see also 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 where the parent served the district's counsel by overnight mail]; 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. 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]; Application of a Child with a Disability, Appeal No. 05-045 [dismissing a parent's appeal for, among other reasons, failure to effectuate proper personal service where the parent served a school psychologist]; 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]).

be stated in an answer—time that is particularly valuable in light of the short time frame allotted for a respondent to answer a request for review or serve a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[a]).

In this matter, the parent failed to initiate the appeal in accordance with the procedures prescribed in State regulations (see 8 NYCRR 279.4[b]). The parent filed the following documents with the Office of State Review: a notice of intention to seek review (dated January 19, 2020), a notice of request for review (dated January 19, 2020), a request for review (dated February 3, 2020), and an affidavit of verification (notarized on February 10, 2020). The parent's filing did not include proof of service of either the notice of intention to seek review or the request for review as required by State regulation (8 NYCRR 279.4[e]; see 8 NYCRR 279.2[b]; 279.4[b]).⁷

The Office of State Review received the parent's filing on February 12, 2020, but had not yet received a copy of the hearing record. Therefore, by letter to the district dated February 13, 2020, the Office of State Review noted the parent's filing (as well as the lack of proof of service) and directed the district to file a copy of the hearing record by February 18, 2020 absent a request for an extension of time. In addition, in a letter to the parent dated February 14, 2020, the Office of State Review directed the parent to file proof of service of the notice of intention to seek review and the request for review by no later than February 20, 2020. In a letter requesting an extension of time to file the hearing record, the district indicated that it had not been served with the notice of intention to seek review or the request for review and, therefore, had been unaware of the parent's appeal.^{8,9} The parent did not file proof of service by the February 20, 2020 deadline.

Subsequently, the parent sent an affidavit, notarized on March 6, 2020, indicating that she effectuated personal service of the notice of intention to seek review and the request for review on an unnamed receptionist at a regional office of the district on February 11, 2020 (Parent Aff. of Serv.).¹⁰ The affidavit of service was accompanied by a letter dated March 6, 2020, which was also notarized, in which the parent elaborated that she served the documents by bringing "all paperwork to the reception desk" of the regional office of the district and that the "receptionist accepted [her] paperwork, made a copy of the Notice of Intention to Seek Review, stamped it with the date it was received and gave it back to [her]." The parent also provided a copy of the notice of intention to seek review stamped with the date. The parent's letter indicates that the district was copied on the letter. The district has not filed an answer to the parent's request for review.

⁷ The Office of State Review's website includes a section dedicated to assisting pro se parents with drafting, serving, and filing appeals (see "Parent Guide to Appealing the Decision of an Impartial Hearing Officer" available at <https://www.sro.nysed.gov/book/filing-request-review-section-i>). The documents filed by the parent in this matter were prepared on forms made available on the Office of State Review's website (forms A, B, and D); however, the parent's documents did not include an affidavit of personal service (available on the website as form E).

⁸ The parent was copied on the district's letter.

⁹ In compliance with the extended timeline, the district filed a copy of the hearing record, which was received by the Office of State Review on February 19, 2020.

¹⁰ On March 5, 2020, the parent contacted the Office of State Review to inquire about the status of the decision in this matter. During a return phone call on March 6, 2020, the parent confirmed to a member of the Office of State Review staff that she had received the correspondence summarized above and indicated that she would send proof of service by overnight mail.

Here, even assuming that the parent had filed proof of service in a timely manner as required by State regulation (see 8 NYCRR 279.4[e]) or had cured this failure by February 20, 2020, as permitted in the February 14, 2020 letter from the Office of State Review, the parent did not personally serve the district in accordance with State regulation.¹¹ A receptionist in a regional office of the district is not among the individuals listed in State regulation as authorized to accept service (see 8 NYCRR 279.4[b]; see also Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service upon unidentified receptionist found improper]; Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696 [service upon the executive secretary to the superintendent found improper]).¹² In this instance, given the deficiency in service and the fact that the district has not filed an answer to the request for review, the appeal must be dismissed.

VII. Conclusion

In summary, the parent's appeal must be dismissed for the failure to properly initiate the appeal.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 19, 2020**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**

¹¹ Further, even if the notice of intention to seek review had been properly served, it was untimely. The parent served the notice of intention to seek review, along with the request for review, on the 37th day after the IHO's decision (see IHO Decision at p. 13; Parent Aff. of Service), whereas State regulation required that it be served no later than 25 days after the date of the IHO decision (8 NYCRR 279.2[b]).

¹² Although the parent avers that the receptionist "accepted" the papers, that does not amount to an affirmative representation that she was authorized to accept service on the district's behalf.