



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-045

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student 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 detailed recitation of the student's educational history is not warranted.¹ Briefly, however, the CSE convened on June 18, 2014, to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Dist. Ex. 6 at pp. 1, 17-18, 22). Finding that the student remained eligible to receive special education and related services as a student with autism, the June 2014 CSE recommended an 8:1+1 special class placement at a community school with special education teacher support services (SETSS) (id. at pp. 17-18, 22).² In addition, the June 2014 CSE recommended the following related services: one 40-minute

¹ On May 30, 2014, the district issued related services authorizations (RSAs) for the student to receive related services during summer 2014 (see Parent Ex. B at pp. 1-6; see also Tr. pp. 24-25).

² The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

session per week of counseling in a small group, two 40-minute sessions per week of individual occupational therapy (OT), two 40-minute sessions per week of OT in a small group, three 40-minute sessions per week of speech-language therapy in a small group, two 40-minute session per month of individual speech-language therapy, and one 60-minute session per month of parent counseling and training (id. at pp. 17-18).³

A. Due Process Complaint Notice

In an undated due process complaint notice sent to the district via facsimile on October 1 and October 7, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see IHO Exhibit II at pp. 1-2, 11-13). Relevant to this appeal, the parent requested a "Pendency Order" that would continue the following related services the student received during "summer" 2014: five 45-minute sessions per week of individual speech-language therapy, five 30-minute sessions per week of individual speech-language therapy, six 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 60-minute sessions per week of individual counseling services (id. at pp. 9-10).

B. Impartial Hearing Officer Decision

On November 19 and 25, 2014, the parties proceeded to an impartial hearing, and argued their respective positions regarding the student's pendency (stay put) placement (see Tr. pp. 1-143; see generally Dist. Exs. 1-5; Parent Ex. B; IHO Exs. 1-3). In an interim order on pendency dated March 19, 2015, the IHO initially rejected the district's argument that a recently issued federal district court decision concerning this student and the 2011-12 school year terminated the student's pendency entitlement (see Interim IHO Decision at pp. 2-3.).⁴ Ultimately, the IHO determined that an unappealed pendency order issued on October 30, 2013 (October 2013 pendency order) formed the basis for the student's current pendency placement (id. at pp. 3-4). As such, the IHO ordered the district to provide and fund the following services as the student's pendency placement during the instant proceedings: an 8:1+1 special class placement; 15 hours per week of "ABA therapy (SETSS)," five 45-minute sessions per week of speech-language therapy, five 30-minute sessions per week of speech-language therapy, six 30-minute sessions per week of OT, two 30-minute sessions per week of PT, and two 60-minute sessions per week of individual counseling services (id. at p. 5).

IV. Appeal for State-Level Review

On appeal, the district argues that the IHO improperly determined that the unappealed October 2013 pendency order formed the basis for the student's pendency placement during these

³ Although the parent did not receive the May 2014 RSAs until July 2014, the student received the following related services pursuant to the May 2014 RSAs during summer 2014: six 30-minute sessions per week of individual OT, five 45-minute sessions per week of individual speech-language therapy, five 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual PT, and two 60-minute sessions per week of individual counseling services (see Parent Ex. B at pp. 1-6; see also Tr. pp. 25-31; IHO Ex. 2 at pp. 3-4).

⁴ See M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311 (E.D.N.Y 2013) (finding that the district offered the student a FAPE for the 2011-12 school year).

proceedings. The district argues that the student's pendency should be based on the November 2013 federal district court decision, which found in favor of the district. As relief, the district seeks to annul the IHO's interim order on pendency.⁵

The parent did not respond to the district's petition.

V. Discussion—Initiation of the 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]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).⁶

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's counsel who

⁵ In a letter to the Office of State Review dated April 28, 2015, the district argued that a recently issued SRO decision, dated January 30, 2015, concerning this student and the 2012-13 school year formed the basis for the student's pendency placement (see generally Application of a Student with a Disability, Appeal No. 13-090). However, since the district did not submit this letter with its petition as additional documentary evidence for consideration on appeal and as State regulations do not allow for the consideration of any additional pleadings—other than a petition, an answer, and a reply—the arguments set forth in the April 28, 2015 letter are not properly before an SRO for consideration (8 NYCRR 279.6).

⁶ 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."

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 this 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]). Here, the district's affidavit of service indicates that on April 22, 2015, the district served the "Notice with Petition and the Verified Petition" by "personally delivering the same" upon the advocacy group that represented the parent at the impartial hearing (compare Dist. Aff. of Service, with Tr. pp. 1, 3). 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). In addition, the district provided no evidence that the advocacy group continued to represent the parent in any proceedings after the conclusion of the impartial hearing held on November 19 and November 25, 2014, and the district did not seek authorization from the Office of State Review to use an alternate form of personal service in this case. The district also failed to provide any evidence that it attempted to contact the parent or the advocacy group 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.⁷

⁷ The district is aware of the procedural requirements associated with initiating an appeal for review of an IHO's decision, having had prior petitions dismissed for the failure to comply with the required procedures (see Application of the Dep't of Educ., Appeal No. 09-062 [dismissing the petition, in part, for failing to personally serve the parent]; Application of the Dep't of Educ., Appeal No. 08-139 [dismissing the petition for untimely service]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing the petition for failure to personally serve the parents and for untimely service]; Application of the Dep't of Educ., Appeal No. 06-078 [same]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing the petition for failure to personally serve the parents]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing the petition for failure to timely file the hearing record pursuant to Part 279]; Application of the Dep't of Educ., Appeal No. 05-073 [cautioning the district not to serve petition upon the parent by mail without consent and warning the district of possible dismissal for similar service in future]; Application of the Bd. of Educ., Appeal No. 01-048 [dismissing the petition for failure to personally serve the parents]).

VII. Conclusion

Having found that the district failed to properly initiate the appeal, the necessary inquiry is at an end.⁸

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 May 22, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

⁸ Accordingly, the IHO's interim order on pendency, dated March 19, 2015, remains in effect and the district must—to the extent it has not already done so—provide the student with the pendency services as set forth in that decision (see Interim IHO Decision at p. 5).