



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 19-052

**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**

### 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 for the costs of special education teacher support services (SETSS) at an enhanced rate for the 2019-20 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. Procedural History**

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

Given the disposition of this appeal and the contents of the hearing record, the student's educational history is not recited in this decision. The parent initiated the instant administrative due process proceeding by filing a due process complaint notice dated April 18, 2019 (see Due Process Compl. Notice). The parent alleged that, despite contacting numerous providers, she could not find a SETSS provider who would be able to deliver services to the student during the 2019-20 school year at the district rate (id. at p. 2). As a result, the parent requested an order directing the district to pay the SETSS provider chosen by the parent at an enhanced rate of \$125.00 for the 2019-20 school year (id.).

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

An impartial hearing convened and concluded on May 29, 2019 (Tr. pp. 1-42). In a decision dated June 7, 2019, the IHO found that the parent's testimony that she was unable to secure a SETSS provider was "plausible"; however, the IHO determined that the parent failed to

submit any documentation with respect to the parent's chosen SETSS provider's licenses or academic diplomas (IHO Decision at pp. 2-3).<sup>1</sup> The IHO also noted it was "unclear" as to why the parent's chosen SETSS provider charged more than the district rate (*id.* at p. 3). Accordingly, the IHO ordered the district to assist the parent in finding a SETSS provider or in the alternative pay the parent's chosen SETSS provider at the rate of \$45.00 per hour (*id.*).

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

The parent served, via mail, a request for review on the district. In the request for review, the parent asserts that the IHO's decision should be reversed in its entirety and requests that the district be required to pay her chosen SETSS provider at an enhanced rate of \$100.00 for the 2019-20 school year. Upon receiving the parent's request for review, the Office of State Review requested a copy of the hearing record from the district, which was received from the district on July 1, 2019. The district has not filed an answer.

#### **V. Discussion—Initiation of the Appeal**

As a threshold matter, it must be determined whether or not the request for review should be dismissed for improper service. 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 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]).

In general, the failure to properly serve an initiating pleading may result in the dismissal of the request for review by an SRO (8 NYCRR 279.8[a]; see 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]; 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 the Dep't of Educ.,

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<sup>1</sup> The IHO's decision was not paginated; for purposes of this decision, citations to the IHO's decision shall refer to the consecutive pages, with the cover page as page one (see IHO Decision at pp. 1-3).

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 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 Request for Review," a "Request for Review," an "Affidavit of Verification," and an "Affidavit of Service by Mail." The parent's affidavit of service indicates that, on June 18, 2019, the parent served the "Request for Review" on "(CSE7)#21" using an "overnight delivery service" (Parent Aff. of Service).<sup>2</sup> In this instance, there is no indication that the district agreed to accept service via mail and the district has not appeared in this matter. Therefore, because the parent did not personally serve the request for review upon the district, the appeal must be dismissed without prejudice. The matter is dismissed without prejudice because the parent's time to appeal the IHO's decision has not yet expired, and, therefore, the parent may still initiate a timely appeal by personally serving the district. Specifically, the request for review must be personally served on the district within 40 days after the date of the IHO's decision to be reviewed (8 NYCRR 279.4[a]); here, within 40 days after the IHO's June 7, 2019 decision.

## **VI. Conclusion**

In summary, the parent's appeal must be dismissed without prejudice for the failure to properly initiate the appeal.

### **THE APPEAL IS DISMISSED WITHOUT PREJUDICE**

**Dated:**           **Albany, New York**  
                          **July 5, 2019**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**

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<sup>2</sup> The Affidavit of Service by Mail used by the parent is on a form made available on the Office of State Review's website and notes the following in bold typeface at the top of the form: "Do not use Form F for proof of service for the request of review. The request for review must be personally served (See Form E). Form F may be used for proof of service for all papers served after the request for review" (Parent Aff. of Service). The Office of State Review 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>).