



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-130

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 Board of Education of the Garden City Union Free School District

Appearances:

Guercio & Guercio, LLP, attorneys for respondent, by Douglas A. Spencer, Esq.

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 to be reimbursed for her daughter's tuition costs at the Devereux Glenholme School (Devereux Glenholme) for the 2020-21 and 2021-22 school years. 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 full recitation of the student's educational history is unnecessary. Briefly, the evidence in the hearing record reflects that the student last attended a district public school during the 2017-18 school year, when the student was in eighth grade (Parent Ex. J at p. 7). For the 2018-19, 2019-20 school years and for part of the 2020-21 school year, the student attended Winston Preparatory School (Winston Prep) (Parent Exs. J at p. 7; U at p. 1; Dist. Ex. 23 at pp. 1, 5).

By letter dated October 12, 2020, the parent advised the district that the student would be placed at Seven Stars Residential Treatment Center (Seven Stars) in Utah (Parent Ex. T at p. 1). The student was admitted to Seven Stars on October 19, 2020 (Dist. Ex. 32 at p. 1). Via a letter sent by the parent's first attorney in this matter on November 20, 2020, the parent requested a CSE meeting (Parent Ex. U at p. 1). By notice dated December 8, 2020, the parent was invited to attend

a CSE meeting on December 11, 2020 (Dist. Ex. 12 at p. 1). A CSE convened on December 11, 2020 to review the student's current programming, and evaluative information from the student's private psychologist, the staff of Seven Stars, and the student's prior teacher(s) from Winston Prep (Dist. Ex. 3 at pp. 1-2). According to the meeting information included with the December 2020 IEP, the CSE recommended that the district conduct a psychiatric evaluation and recommended an increase in individual counseling services to two 30-minute sessions per week (id. at p. 2). The meeting information further indicated that "[a]ll other program recommendations, goals, program modifications and test accommodations as recommended at the July 29, 2020 CSE remain in place, pending the review of [a] psychiatric evaluation, as well as based on further progress reports and recommendations from Seven Stars" (id.). In addition, the meeting information noted that the CSE had recommended that should the student abruptly return home from Seven Stars, participation in a district program, via in person, or remote instruction would be appropriate (id.). According to the meeting information, the CSE determined that it "was not in receipt of sufficient information in order to make a recommendation on programming for when [the student] [wa]s discharged from Seven Stars," and that "[a]ll information and reports of [the student]'s functioning in a school environment indicate[d] the [student] was making progress towards goals in her last academic setting, and that the program, related services, and goals as recommended at her July 29, 2020 CSE remain[ed] appropriate" (id.). The meeting information further reflected that the CSE determined that it would reconvene after the completion of the district's psychiatric evaluation of the student to review the results (id.). The meeting information also indicated that Seven Stars reported that at the time of the CSE meeting, they were not able to make recommendations regarding potential discharge, or future programming needs until the student was "nearer" to program completion (id.).

By prior written notice dated January 13, 2021, the district requested consent from the parent to conduct a psychiatric evaluation of the student (Dist. Ex. 9 at p. 1). In another prior written notice dated January 15, 2021, the district summarized the December 11, 2020 CSE meeting and recommended a district psychiatric evaluation and an increase of the frequency in the student's individual counseling services (Dist. Ex. 8 at pp. 1-3).

The student was evaluated on February 23, 2021 by a private psychologist located in Utah and obtained by the parent (Parent Ex. J at pp. 1-35). By notice dated March 4, 2021, the parent was invited to attend a CSE meeting scheduled for March 15, 2021 (Dist. Ex. 13 at p. 1).¹ By notice dated April 5, 2021, the parent was invited to attend a CSE meeting scheduled for April 9, 2021 (Dist. Ex. 14 at p. 1).

A CSE convened on April 9, 2021 at the request of the parent to review the student's current program due to the student's imminent discharge from Seven Stars (Dist. Ex. 4 at p. 1). According to the meeting information included with the April 2021 IEP, the parent's Utah-based private psychologist reviewed the results of her evaluation with the CSE, the student's therapist from Seven Stars reported that the student had made progress, and the parent reported that the student required around the clock supervision (Dist. Ex. 4 at pp. 1-2). The meeting information further reflected that the CSE recommended that the district continue to attempt to secure a psychiatric evaluation when the student returned to New York (id. at p. 2). In addition, the meeting

¹ It is not clear from the hearing record why the March 15, 2021 CSE meeting was not held (Dist. Ex. 43 at pp. 1-2).

information noted that based upon "the evaluations, parent and staff reports, and committee discussion, the committee recommended that [the student] receive an interim Home Instruction program of 10 hours per week (1:1) pending the process of an acceptance in an out-of-district therapeutic day program" (id.). The CSE also recommended two 30-minute sessions per week of individual counseling, and two 30-minute sessions per week of individual speech-language therapy at home (id.). The meeting information also indicated that the CSE would send packets for review to therapeutic day programs and reconvene to review acceptance opportunities (id.).

In addition, the meeting information from the April 2021 CSE meeting reflected that "[t]he option of a Residential Program was discussed and considered" and at that time, the CSE had considered the student's last academic setting, "as well as the structures and supports in place at her current Residential Setting" and determined that the student could "make progress in all areas of need in a supportive, structured learning environment, with a small setting, and a therapeutic component" and that "criterion c[ould] be met in the least restrictive environment of a Therapeutic Day Program" (Dist. Ex. 4 at pp. 2-3). Next, the meeting information noted that it was discussed that while the student's mother contended that she required "intensive 24-hour surveillance," it was the responsibility of the CSE to recommend a placement where the student would "make progress towards the goals in all areas in which she [wa]s deficient - including academic, social, and emotional" (id. at p. 3). The CSE found that based on the student's functioning and progress at Winston Prep, as well as her progress while at Seven Stars, a residential program was determined to be too restrictive an environment for the student at that time (id.).

By letter dated April 16, 2021, the parent notified the district of her disagreement with the recommendations of the April 2021 CSE, of her intention to unilaterally enroll the student at Devereux Glenholme for the remainder of the 2020-21 school year, and to seek public funding including transportation costs (Parent Ex. V at pp. 1-2). By prior written notice dated April 22, 2021, the district summarized the April 9, 2021 CSE meeting and recommendation for a therapeutic day program (Dist. Ex. 15 at pp. 1-2). In addition, the CSE continued to recommend that the district conduct a psychiatric evaluation and provide a program of home instruction if the student returned to the district before a therapeutic day program was located (id. at p. 2).

On April 27, 2021, the parent entered into an enrollment contract with Devereux Glenholme for the period of April 30, 2021 through June 30, 2021 (Parent Ex. P at p. 1). On May 6, 2021, the parent entered into a general agreement with Devereux Glenholme (Parent Ex. EE at pp. 1-2).²

By notice dated June 18, 2021, the parent was invited to attend a CSE meeting scheduled for June 25, 2021 (Dist. Ex. 18 at p. 1).³ A CSE convened on June 25, 2021 to conduct the student's annual review and to develop an IEP for the 2021-22 school year (Dist. Ex. 5 at p. 1). According to the meeting information included with the IEP, the CSE noted that no new information was

² The parent's exhibit list indicates that this agreement was an enrollment agreement for the 2021-22 school year, however the document does not include any dates relating to the term of the agreement (Parent Ex. EE at pp. 1-2).

³ The hearing record indicates that the district attempted to schedule CSE meetings on June 18, 2021 and June 21, 2021, however they were cancelled by the parent (see Dist. Exs. 16 at p. 1; 17 at p. 1).

provided to the CSE to be reviewed and that no one from Devereux Glenholme participated in the CSE meeting (id.). The meeting information indicated that as a result, the discussion focused on the student's annual review and acceptance of the student by the Board of Cooperative Educational Services (BOCES) Center for Community Adjustment program (id.). The CSE found that the student remained eligible for special education and related services as a student with an other health-impairment recommended that the student attend a 6:1+1 special class and receive the related services of one 30-minute session per week of individual counseling, one 30-minute session per week of group (5:1) counseling, one 30-minute session per week of individual speech-language therapy, and one 30-minute session of group (2:1) speech-language therapy (id.).⁴ The CSE further recommended that the student receive 12-month services consisting of two 30-minute sessions per week of individual counseling, two 30-minute sessions per week of individual speech-language therapy, and two one hour sessions per month of parent counseling and training (id.). The meeting information further indicated that the parent disagreed with the recommendations of the CSE and requested consideration of a residential placement for the student (id.). According to the meeting information, the CSE reported that it had not received any new information since the April 2021 CSE meeting and that the student's current unilateral placement, Devereux Glenholme, "declined to participate in the [a]nnual [r]eview" (id.). The parent reportedly stated that Devereux Glenholme was "still in the process of initial intake and information gathering and felt that they could not make representations about [the student] at th[at] time" (id. at pp. 1-2). The meeting information also stated that in the absence of any new information, the April 2021 CSE recommendations for a therapeutic day program remained appropriate (id. at p. 2). The meeting information further reflected that the parent continued "to contend that it [wa]s the responsibility of the CSE to provide 24 hour supervision for [the student]" (id.). According to the meeting information, the "[c]ommittee reiterated that it [wa]s the responsibility of the CSE to recommend a placement where [the student would] make progress towards the goals in all areas in which she [wa]s deficient - including academic, social, and emotional" (id.). The meeting information noted that based on the student's functioning and progress at Winston Prep, as well as her progress at Seven Stars, a residential program was determined to be too restrictive of an environment for the student at that time (id.).

By letter dated June 28, 2021, BOCES notified the district that the student had been accepted into the Center for Community Adjustment with an anticipated start date of September 1, 2021 (Dist. Ex. 60 at pp. 1-4). By prior written notice dated June 30, 2021, the district summarized the June 2021 CSE meeting and reiterated its recommendation for a therapeutic day program (Dist. Ex. 10 at pp. 1-2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 16, 2021 filed through the parent's second attorney, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (Parent Ex. B at p. 1).⁵ The

⁴ The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁵ The parent filed an initial due process complaint notice on June 24, 2021 (see Parent Ex. A).

parent alleged that the district failed to recommend residential placement and failed to adopt the recommendations set forth in the parent's privately obtained evaluations (*id.* at pp. 2, 4). In addition, the parent contended that the district failed to recommend an appropriate program and placement for the student, failed to properly evaluate the student, and failed to develop appropriate goals and management needs (*id.* at pp. 5-7, 9-12, 15-18). As relief, the parent sought reimbursement or prospective funding of the cost of the student's attendance and transportation to and from Seven Stars and Devereux Glenholme for the 2020-21 and 2021-22 school years (*id.* at p. 19).⁶

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing on November 8, 2021, which concluded on June 29, 2022, after 14 nonconsecutive days of proceedings (Tr. pp. 1-1710).⁷ By decision dated September 7, 2022, the IHO determined that the district offered the student a FAPE for the 2020-21 and 2021-22 school years (IHO Decision at pp. 46-52, 60). The IHO further found that residential placement would not be appropriate for the student and that the student's classification was appropriate (*id.* at pp. 57, 60). The IHO next considered the appropriateness of the parent's unilateral placement at Devereux Glenholme and found it was appropriate (*id.* at p. 62). With regard to equitable considerations, the IHO determined that the parent gave varying versions of the severity of the student's needs, provided evasive responses when the IHO sought to clarify matters in the record, and that the IHO could not tell which version of events was accurate. The IHO concluded that the parent's testimony lacked credibility and that as a result equitable considerations did not favor reimbursement (*id.* at p. 65). The IHO dismissed the parent's case.

IV. Appeal for State-Level Review

The parent filed an appeal and argued that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 and 2021-22 school years and that equitable considerations did not favor reimbursement. On October 7, 2022, the undersigned notified the parent that her request for review had been rejected because it failed to comply with the requirements of Part 279; however, the parent, who was no longer represented by counsel, was granted leave to amend in order to correct the deficiencies and then re-serve her request for review upon the district in accordance with the requirements of Part 279.

The parent filed an amended request for review. In an answer the district denies the parent's allegations and asserts, among other things, that the request for review should be dismissed for failure to comply with the Regulations of the Commissioner of Education.

⁶ During the February 4, 2022 hearing the date, the parent withdrew her request for reimbursement of the cost of the student's treatment at Seven Stars (Tr. p. 1065; *see* IHO Decision at p. 42). The Commissioner of Education has approved Devereaux Glenholme as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d]; 200.7).

⁷ According to the IHO's decision, a prehearing conference was held on September 13, 2021, which appears to have been unrecorded (IHO Decision at p. 2).

V. 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.

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]). 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]).

After the parent was granted leave to correct the deficiencies in her original request for review, the parent nevertheless 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 October 3, 2022), a notice of request for review (dated October 20, 2022), a request for review (dated October 20, 2022) (the amended request for review), and an affidavit of verification (notarized on October 20, 2022). The parent failed to comply with Part 279 because she failed to include proof of service of the request for review as required by State regulation (8 NYCRR 279.4[e]; see 8 NYCRR 279.4[b]).⁸

In a letter to the parent dated October 26, 2022, the undersigned provided the parent a second opportunity to correct the deficient filing and directed the parent to file proof of service of the request for review by no later than November 2, 2022.

Subsequently, the parent sent an affidavit of service, notarized on October 28, 2022, indicating that the request for review was served on the district by delivering to and leaving with "School District" on October 20, 2022, with the information related to the "receiver of papers" left blank (Parent Aff. of Serv.). The affidavit of service was accompanied by a letter dated October 27, 2022, in which the parent elaborated that the request for review "was not delivered to an individual" but that the parent's spouse placed "on top of the box that has the buzzer" for the door to the district offices. The parent further indicated that she later attempted to retrieve the request for review from where her spouse had left it to attempt personal service, however "the package was no longer sitting where it was left," so the parent "presumed that it was taken inside by a member of the District staff." The parent further stated that she realized "that the service should be to an individual and it was not".

Based on the parent's affidavit of service itself and, furthermore, on the statements provided by the parent in her accompanying letter, it is clear that the parent did not personally serve the district in accordance with State regulation. According to the parent, no individual was served, let alone an individual authorized to accept service on behalf of the district in accordance with State regulation (see 8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 20-020; Application of a Student with a Disability, Appeal No. 12-077; see also Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service under similar regulatory provisions 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 under similar regulatory provisions improper]). Moreover, there is no indication that the district agreed to waive the personal service requirements of Part 279. The parent in this appeal was provided opportunities to correct deficiencies to comply with the requirements of State regulation, more so than most parties are afforded in this forum in light of her current pro se status. Nevertheless, the district was not properly served. Under these circumstances, given the continuing deficiencies in

⁸ 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).

compliance with Part 279 and the parent's admissions describing the defective in service as argued by the district, the appeal must be dismissed.

VI. Conclusion

Based on the foregoing, the appeal is dismissed for failure to properly initiate the appeal.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 December 7, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER