



# 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. 22-169

**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**

### **Appearances:**

Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 a decision of an impartial hearing officer (IHO) which determined that the parent failed to timely request equitable services pursuant to New York State Education Law section 3602-c for the 2022-23 school year and dismissed the parent's due process complaint notice. 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 (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 undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible; however, due to the disposition of this matter, a detailed review of the student's educational history is not necessary.<sup>1, 2</sup>

#### A. Due Process Complaint Notice

The parent filed a September 2, 2022 due process complaint notice, which included some descriptions of the district's program recommendations for the student during the 2018-19 and 2019-20 school years (IHO Ex. I at pp. 1-7). Initially, the parent asserted a right to pendency in accordance with an October 4, 2018 IESP, which the parent asserted was "the last agreed upon program" (*id.* at p. 2).<sup>3</sup> Briefly, according to the parent, the student's pendency consisted of 15 periods per week of group special education teacher support services (SETSS) in Yiddish, three 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual occupational therapy (OT) in English (*id.*). Next the parent alleged that a CSE convened on November 21, 2019, and developed an IESP, which recommended that the student receive ten periods per week of group SETSS in English, two 30-minute sessions per week of group speech-language therapy in English, one 30-minute session per week of group OT in English, and one 30-minute session of group counseling in English (*id.*).

The September 2, 2022 due process complaint notice further indicated that the parent was concerned with the "reduction in services" in the November 2019 IESP, and the "delay in convening a new IEP meeting to recommend FAPE or services" (IHO Ex. I at p. 2).<sup>4</sup> The parent asserted that the November 2019 IESP was "never agreed-to or implemented" and was "now outdated and expired" (*id.*). The parent alleged that the delay in convening a CSE "and recommending proper placement and services [wa]s a denial of a FAPE" (*id.*). Regarding the October 2018 IESP, the parent next claimed that she was unable to locate a provider "on [her] own accord and the [d]istrict ha[d] failed to implement the program that [the student wa]s entitled to

---

<sup>1</sup> The pages of the transcript of the proceedings were not numbered consecutively. For the purpose of clarity, the transcripts will be cited in this decision by the hearing date and corresponding page number.

<sup>2</sup> According to the transcript of the November 22, 2022 hearing date and the IHO's decision, the parent's attorney made a statement and then disconnected from the remotely-held proceeding before parent's exhibits A-C could be admitted into evidence (Nov. 22, 2022 Tr. pp. 8-11; IHO Decision at pp. 4-5). According to footnote 1 of the IHO's decision the parents' disclosure was marked by the IHO and the "documents [were] admitted for the limited purpose of providing a full account of the procedural history of this matter before, during, and after the hearing. The contents of these documents were not reviewed for purposes of reaching a decision on the merits of the claims in the [due process complaint notice]" (IHO Decision at p. 4). Accordingly all of the parent's proposed exhibits were duly marked as IHO exhibits and submitted to the Office of State Review as part of the hearing record on appeal.

<sup>3</sup> The September 2, 2022 due process complaint notice incorrectly references an October 4, 2018 individualized education program (IEP) (compare IHO Ex. I at p. 2, with IHO Ex. VI at p. 12).

<sup>4</sup> The September 2, 2022 due process complaint notice did not indicate the parent's position relative to the change in provision of services from Yiddish to English (IHO Ex. I at p. 2; compare IHO Ex. VI at p. 21, with IHO Ex. XIV at p. 36).

under pendency" (*id.* at pp. 2-3). "Without the supports," the parent contended that the student's "mainstream" parental placement was "untenable," and further asserted that the district's failure to implement the student's services or provide a placement was a denial of a FAPE (*id.* at p. 3).

According to the due process complaint notice, the parent attempted to locate a SETSS provider and related services providers using the district's "online resources" but that the providers rejected the district's standard rate or were unable to service the student "for other reasons as stated on the [p]arent's call sheet (*id.*).<sup>5</sup> The parent further asserted that she had "located an appropriate SETSS and related services provider independently for the 2022/2023 school year at their prevailing rate" (*id.*).

As relief, the parent sought a finding that the district's change in recommendation from 15 periods of SETSS (recommended for the 2018-19 school year), to ten periods of SETSS (for the 2019-20 school year) constituted a denial of a FAPE; a finding that the district's failure to timely convene and recommend placement of services was a denial of a FAPE; an order that the October 2018 recommended program "continue for the 2022-23 school year"; and an order that the district fund a bank of compensatory periods of SETSS and related services for any periods not provided during the 2022-23 school year, including any pendency services not provided (IHO Ex. I at pp. 3-4).

The parent filed the September 2, 2022 due process complaint notice with the district via email dated September 6, 2022 and included a proposed pendency program "form" that set forth services consistent with the student's October 2018 IESP (IHO Ex. I at pp. 5-7).

### **B. Proposed Amended Due Process Complaint Notice, Prehearing Conference, and Correspondence**

In an email dated September 15, 2022, the IHO in this matter recounted that she had previously been appointed to preside over an impartial hearing resulting from a June 3, 2022 due process complaint notice involving the same student and had also been appointed as a result of the September 2, 2022 due process complaint notice (IHO Ex. II at p. 1). The IHO further indicated in the email that she had decided that the matters should not be consolidated and attached an order on consolidation to the email denying the parent's request (*id.* at pp. 2-4).

By email dated September 29, 2022, the IHO scheduled a settlement conference and prehearing conference for October 13, 2022 (IHO Ex. III at pp. 1-2). By email dated October 13, 2022, the parent requested an adjournment of the scheduled date (*id.* at p. 1). A WebEx invitation sent by the IHO reflected that the settlement conference and prehearing conference were rescheduled for October 20, 2022 (*id.* at pp. 3-4).

The parties convened for a prehearing conference on October 20, 2022 (Oct. 20, 2022 Tr. pp. 1-12). The transcript indicates that a settlement conference was held off the record prior to commencing the prehearing conference (Oct. 20, 2022 Tr. p. 4). During the prehearing conference, the parent's attorney indicated that the district had not signed the proposed pendency agreement

---

<sup>5</sup> The parent's proposed evidentiary disclosures did not include the alleged "call sheet" kept by the parent or any other documentation of the parent's attempts to locate providers.

that had been included with the parent's September 2, 2022 due process complaint notice and requested a pendency hearing (Oct. 20, 2022 Tr. pp. 4-5). While the district's representative indicated the district's intention to implement pendency and interest in resolving the matter, the IHO stated that it was necessary for her to schedule a pendency hearing and an impartial hearing on the merits to be held on the same day (Oct. 20, 2022 Tr. pp. 7-8). Next, the IHO asked the district's representative if the district was conceding FAPE, to which the district's representative stated that she would "not be putting on a prong [I] case" (Oct. 20, 2022 Tr. at p. 8).<sup>6</sup>

By email dated October 20, 2022, the parent disclosed proposed parent exhibits A-C to the district and copied the IHO (IHO Ex. VI at pp. 1-28). In an email dated October 20, 2022, the IHO indicated that the matter was scheduled for an impartial hearing on the issues of pendency and the merits, and that a WebEx invitation had been sent to the parties (IHO Ex. VII at p. 1). A hearing notice that included directives from the IHO and a WebEx invitation indicated that an impartial hearing was scheduled for November 22, 2022 (IHO Ex. V at p. 1). The hearing notice further instructed that the parties were required to disclose evidence five business days before the hearing and to provide direct testimony by affidavit (*id.*).

By email dated November 9, 2022, the parent's attorney sent the district and the IHO an proposed amendment to the due process complaint notice (IHO Ex. VIII at pp. 1-5). In a response dated November 9, 2022, the IHO requested that the parent's attorney "state specifically what was amended in [the] complaint" and that based on her review, it appeared to be a "corrected" due process complaint notice (IHO Ex. IX at p. 1). In an email dated November 9, 2022, the parent's attorney indicated that the amended due process complaint notice included a request that the district fund the counseling services recommended in the November 2019 IESP in addition to the pendency program based on the October 2018 IESP (IHO Ex. X at p. 1; *see* IHO Ex. VIII at p. 4).

By email dated November 10, 2022, the IHO requested that the district notify her by November 14, 2022 whether or not the district accepted the parent's amended due process complaint notice (IHO Ex. XI at p. 1). The IHO further stated that if the district did not accept the amended due process complaint notice, the parent was instructed to explain to the IHO why the amendment should be granted by November 15, 2022 (*id.*).

In an email dated November 14, 2022, the parent's attorney replied to the IHO and the district stating that the purpose of the amendment was "to clarify that there [we]re parts of the 11/21/2019 IESP to which the parent does agree to, [sic] whereas the original filing erroneously stated that the parent completely rejects the 11/21/2019 IESP" (IHO Ex. XII at p. 1). The parent's attorney also stated that the "amendment minimize[d] the disagreement and also allow[ed] for the case to proceed without forcing the parent to withdraw and refile" (*id.*).

---

<sup>6</sup> Prong I refers to the first prong of the three-pronged Burlington/Carter analysis. A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

By email dated November 15, 2022, the IHO stated that the district did not accept the parent's request to amend the due process complaint notice and that, after reviewing the parent's proposed amendment, she declined to grant the parent's request (IHO Ex. XIII at p. 1). The IHO also reiterated that the matter was scheduled for a combined hearing and on both pendency and the merits on November 22, 2022 (*id.*).

By email dated November 21, 2022, the parent's attorney disclosed proposed parent exhibits A-G (IHO Ex. XIV at pp. 1-61). Shortly thereafter, the parent's attorney disclosed an "updated" version of the parent's proposed exhibits A-G (IHO Ex. XV at pp. 1-53).

### **C. Impartial Hearing and Impartial Hearing Officer Decision**

The IHO convened the impartial hearing on pendency and the merits of the parent's September 2, 2022 due process complaint notice on November 22, 2022 (Nov. 22, 2022 Tr. pp. 1-14). The transcript reflects that the parties and the IHO held a discussion off the record, which the IHO then summarized on the record (Nov. 22, 2022 Tr. pp. 4-5). According to the IHO, the parent's attorney indicated off the record that he was not prepared to proceed with the hearing because his evidentiary disclosure was untimely, having been sent to the district and the IHO on November 21, 2022, the day before the combined hearing on pendency and the merits (*id.*). According to the IHO, she asked the parent's attorney how he wanted to proceed, and he requested an adjournment in order to be in compliance with the five-business day disclosure rule, which the IHO denied (Nov. 22, 2022 Tr. p. 5). The district's representative stated that she would not waive the five-business day disclosure rule (*id.*).

The IHO then reviewed the claims in the parent's September 2, 2022 due process complaint notice (Nov. 22, 2022 Tr. pp. 5-6). The IHO noted that neither of the parties had offered timely documentary evidence and then requested that the parties provide their opening statements (Nov. 22, 2022 Tr. p. 6). In her opening statement, the district's representative stated that the district had not presented any evidence "for a prong one case" but argued that no evidence supported the parent's request for district funding of privately obtained services (*id.*). The district's representative further stated that the parent did not offer any evidence that the privately obtained services were appropriate and did not include any information about the provider such as a contract or rate for services (Nov. 22, 2022 Tr. p. 7). The district's representative also argued that the parent had not shown any financial need to justify direct funding and quoted several cases to support her argument (Nov. 22, 2022 Tr. p. 8). At the conclusion of the district's opening statement, the IHO requested that the district's representative send her the case authorities that she referenced in her opening statement (*id.*). The IHO then recalled that the parent's attorney had stated while off the record "that he was going to make a statement and then take up whatever decision [the IHO] had or [the IHO] would make to the SRO" (Nov. 22, 2022 Tr. pp. 8-9).

The parent's attorney indicated that he would make a statement on the record that would also serve as his opening statement (Nov. 22, 2022 Tr. p. 9). The parent's attorney stated that he had intended to offer into evidence the student's October 2018 IESP, which recommended 15 periods per week of SETSS and the student's November 2019 IESP, which recommended ten periods per week of SETSS (*id.*). The parent's attorney further stated that the district bore the burden of defending its recommended program and that the district had "presented nothing" (*id.*). Next, the parent's attorney noted that the district declined to waive the five-business day disclosure

rule even though three of the parent's proposed exhibits related to pendency were timely disclosed on October 20, 2022 (*id.*). The parent's attorney then argued that, "although [he] did not disclose five days prior to the hearing [he] did ask for an adjournment, which was not granted, and [he was] basically compelled to go forward in a hearing in which no adjournment would be considered, but also the documents . . . ha[d] not been entered into evidence" (Nov. 22, 2022 Tr. pp. 9-10). The parent's attorney further asserted that the parent had offered affidavits in lieu of direct testimony and that the affiants were available for cross-examination (Nov. 22, 2022 Tr. p. 10). At this point, the district's attorney objected to the parent's attorney's statement on the ground that he was testifying "about facts not in evidence," and the IHO sustained the objection (*id.*). The parent's attorney nevertheless continued, stating that he had come "to the conclusion that this forum is hostile towards my client" and over the objections of the district's attorney further asserted that "this is no longer a forum in which . . . my client is being given a fair shot. I have come to the position that despite my client being entitled to pendency there has been no, no avenue in which my client can obtain pendency" (Nov. 22, 2022 Tr. pp. 10-11). The parent's attorney reiterated that his exhibits related to pendency were timely submitted and that pendency was "an automatic state provision" (Nov. 22, 2022 Tr. p. 11). The parent's attorney then stated that he was "no longer authorized to appear in this matter" and that the IHO would "have to issue [her] decision as [she saw] fit" (*id.*). The parent's attorney then abruptly disconnected from the remote hearing (*id.*).

After the parent's attorney disconnected from the impartial hearing, the IHO noted for the record that the exit from the hearing had occurred and further stated that she had additional questions for the parent's attorney related to the student's pendency but that "[h]e elected to disconnect from this WebEx" (Nov. 22, 2022 Tr. p. 11). The IHO also indicated that her decision would be "consistent with what he just did" and that she would have to make determinations on matters about which she still had questions because the parent's attorney had chosen to leave the impartial hearing (Nov. 22, 2022 Tr. pp. 11-12). The IHO then asked the district's attorney to make a closing statement, wherein she asserted that the parent had failed to meet her prong II burden and that the parent's attorney's failure to comply with the disclosure rules and behavior in leaving the impartial hearing "deserve[d] some equitable considerations" (Nov. 22, 2022 Tr. p. 12). The IHO then concluded the impartial hearing (*id.*).

By email dated November 23, 2022, the IHO wrote to the parties (IHO Ex. XVI at p. 1). The IHO admonished the parent's attorney for his behavior at the impartial hearing and warned that she would impose sanctions if such behavior continued (*id.*). Next the IHO requested that the district's attorney send her copies of the cases to which she cited during the impartial hearing (*id.*). In an email dated November 23, 2022, the district's attorney responded to the IHO and provided the cases she had requested (IHO Ex. XVII at pp. 1-81). The hearing record does not reflect that the parent's attorney responded to the IHO's November 23, 2022 email.

In a written decision dated December 8, 2022, the IHO recounted the procedural history of the matter and indicated that during the off-the-record discussion on November 22, 2022, she declined the parent's attorney's request for an adjournment to comply with the disclosure rules (IHO Decision at p. 4). The IHO also indicated that during the off-the-record discussion she advised the parent's attorney that the matter had been previously adjourned, the parent's attorney had more than enough time to prepare for the hearing, and that she was required to render a timely decision (*id.*). The IHO further recollected that prior to going on the record, the parent's attorney stated that he was not going to withdraw the parent's due process complaint and that he would go

forward with the hearing (id.). According to the IHO's decision, the parent's attorney then advised the IHO and the district's attorney that he was going to make a statement on the record and "then leave it up to the SRO to decide" (id.). The IHO noted in her decision that the parent's attorney "was not dismissed, he elected to leave the hearing prior to its conclusion," and that "[h]e never rejoined the conference and did not submit an email explaining his departure, either on November 22 or at any time in the 18 days since" (id. at p. 5). The IHO also stated that, although the parent's witnesses were reportedly available to offer affidavits in lieu of direct testimony and cross-examination, "by him exiting and leaving the Webex hearing, his witnesses were not available to clarify the record" (id.).

With regard to pendency, the IHO noted that the parent's exhibits related to pendency were timely disclosed and would have been admitted into evidence had the parent's attorney not elected to disconnect from the impartial hearing (IHO Decision at p. 7). The IHO further stated that the parent had requested that the student's pendency program incorporate services from both the October 2018 and November 2019 IESPs, which was an issue to be addressed during the pendency portion of the impartial hearing (id.). The IHO stated that since the parent's attorney had left the impartial hearing, she "was not able to ascertain the 'source and substance of the pendency placement,' [and] a pendency order could not be rendered to the parties" (id. at p. 8). The IHO opined that the parent's attorney "elected to exit the hearing rather than act in his client's interests" (id.).

Turning to an analysis of the parent's FAPE claims for the 2022-23 school year, the IHO found that her directives to the parties were reasonable and within her duties as an IHO (IHO Decision at p. 8). The IHO further found that the parent's attorney's actions hindered the administrative process and "were a blatant disregard to this forum" (id.). In addition, the IHO stated that "[s]ince [p]arent's attorney decided to leave the hearing and failed to present his witnesses to clarify the record, the hearing was held, and a decision [wa]s now rendered" (id.). The IHO determined that the parent's attorney did not timely submit the parent's proposed exhibits and elected to proceed with the hearing (id. at p. 9).

The IHO also found that the parent's attorney offered no evidence that the parent had timely requested an IESP or timely requested that the district provide equitable services for the 2022-23 school year (IHO Decision at p. 10). The IHO further determined that the parent could not "claim any disagreement with services (or lack of services) for the 2022-2023 school year, because the [p]arent was not entitled to receive any services" (id.). For these reasons, the IHO found that the district did not violate federal or State law and was not obligated to provide equitable services for the 2022-23 school year (id. at pp. 10-11). The IHO denied the parent's requested relief and dismissed the parent's due process complaint notice with prejudice (id. at p. 11).

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

On December 23, 2022, the parent's attorney filed a notice of intention to seek review and case information statement dated December 12, 2022, a notice of request for review dated December 12, 2022, an undated, unsigned, and unnotarized affidavit of verification with the student's mother listed as petitioner, an undated request for review, and an affidavit of electronic service dated December 22, 2022 with Office of State Review.



By letter dated December 29, 2022, the undersigned SRO notified the parent's attorney that his filing with the Office of State Review failed to comply with the regulations governing practice before the Office of State Review and identified several deficiencies with the filing which were required to be corrected and refiled by the parent's attorney.<sup>7</sup> Specifically, the undersigned SRO advised the parent's attorney that (1) the affidavit of verification was not signed and not verified in violation of 8 NYCRR 279.7(b), (2) the case information statement failed to identify for the respondent any of the issues for which the parent was seeking review, in violation of 8 NYCRR 279.2(e), and (3) the affidavit of electronic service did not clearly identify which documents were actually served upon the respondent or when, and it appeared that the notice of intention to seek review was served with the request for review, in violation of 8 NYCRR 279.2(a), 279.2(b), and 279.4(a). Next, the undersigned SRO noted that the purpose of the case information statement had been undermined by the parent's attorney's lack of compliance and was no longer useful to the district. The undersigned SRO then directed the parent's attorney to "immediately file" with the Office of State Review a signed and notarized affidavit of verification, an affidavit of service showing when the notice of intention to seek review and case information statement were served upon respondent, and a separate affidavit of service showing when the notice of request for review, request for review, and fully executed affidavit of verification were served upon respondent.

The undersigned SRO also advised the parent's attorney that appeals filed by his office on behalf of parents of students with disabilities were almost always initially deficient in some respect. The undersigned SRO further cautioned the parent's attorney that "[w]hile a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a Request for Review (8 NYCRR 279.8[a]; 279.13), [the parent's attorney was] hereby warned that an SRO may be more inclined to dismiss or reject a pleading after an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 19-021). Such a dismissal could occur notwithstanding the representations of the parties that they wish to engage in settlement negotiations."

In closing, the undersigned SRO explained that the parent's attorney's "practice of serving the district with a Notice of Intention to Seek Review simultaneously with a Request for Review" to commence an appeal often caused unnecessary delay because the Office of State Review would receive the request for review before receiving the certified hearing record from the district. The undersigned SRO further explained that the parent's attorney's "practice further impede[d] the [SRO]'s process for considering the parents' claims" and the parent's attorney was "encouraged to take care in the future to give the district earlier and adequate notice of [his] clients' intention to seek review before serving the district with a Request for Review."

By letter dated January 5, 2023, the undersigned SRO again wrote to the parent's attorney noting that he had failed to respond to the December 29, 2022 letter.<sup>8</sup> The January 5, 2023 correspondence reiterated the documents requested in the December 29, 2022 letter, included a copy of the December 29, 2022 letter, and warned that by failing to comply with the requirements of Part 279 of the Commissioner's regulations, the parent's attorney risked dismissal of the request

---

<sup>7</sup> A copy of the December 29, 2022 letter to the parent's attorney was provided to the district's attorney.

<sup>8</sup> A copy of the January 5, 2023 letter to the parent's attorney was provided to the district's attorney.

for review. In closing, the undersigned SRO directed the parent's attorney to file the requested documents to the Office of State Review no later than January 12, 2023.

In correspondence dated January 10, 2023 and copied to the district's attorney, the parent's attorney provided the requested affidavits to the Office of State Review and, of particular relevance herein, stated in a cover letter that his "client came to [his] office and reviewed the Request for Review and signed the Verification prior to submitting [the] Request for Review. [H]e mistakenly served and filed a blank Form D and discarded the original. Attached [wa]s a new Affidavit of Verification that was notarized today."

In the request for review, the student who was the subject of the impartial hearing was identified on the first and second pages. However, the parent then alleges in a statement of facts that during an October 31, 2022 prehearing conference, the IHO refused to consider pendency on the mistaken belief that pendency was not in dispute despite the district's refusal to countersign the parent's pendency proposal. According to the statement of facts, on November 9, 2022, the IHO stated that she would not hold a pendency hearing and on November 23, 2022, "a hearing held in which the IHO denied [p]arent's adjournment request, and again refused to conduct a [p]endency hea[r]ing." The parent further alleges that "[t]he IHO presented [the p]arent with an ultimatum. Either withdraw the case or proceed immediately without [p]endency. [The p]arent attempted to make a record of why this was prejudicial but the IHO would not allow [the p]arent to make a statement for the record."

The parent next claims that, "[i]n refusing to conduct a [p]endency hearing, the IHO deprived the student of a basic fundamental right." Next, the parent alleges that "[r]efusing to grant a first[-]time adjournment request [ ]on consent[-] of [the] parties was unreasonable and an abuse of discretion." As a final claim, the parent alleges that "[e]ngaging in an hour[-]long discussion off[-]the[-]record and refusing to [p]ermit a [p]arent to make a brief statement on[] the[] record [wa]s improper." As relief, the parent requests that the termination order based on the parent's "withdrawal under duress be vacated, [p]endency should be established based upon the program set forth in the June 1[,] 2015 IEP, and [the p]arent afforded an opportunity to have their concerns addressed."

In an answer, the district denies each and every allegation in the parent's request for review and refers the SRO to the hearing record and September 2, 2022 due process complaint notice for an accurate recitation of the parent's claims. As a statement of facts, the district recounts the procedural history that is consistent with the hearing record and with the IHO's decision. Next the district argues that the parent's appeal should be dismissed because the request for review "appears to be an appeal from another case and does not explicitly appeal findings or determinations raised in the case at bar." Further, the district asserts that the request for review "makes several arguments and contains facts that did not occur in this matter." The district then recites the parent's specific claims and arguments from the request for review that did not occur in this matter. The district alleges that the parent did not appeal the IHO's actual determination on pendency and, therefore, the SRO should not address it. Next, the district contends that the SRO should not address the parent's claims related to a denial of an adjournment request raised in the request for review as they were not part of the hearing record and "not raised herein." Additionally, the district asserts that the parent "did not appeal the IHO's determination that the parent did not submit the requisite written request for services by June 1, 2022." The district further argues that since the parent's

failure to timely request services had formed the basis of the IHO's dismissal of the parent's due process complaint notice with prejudice, the parent's appeal should then likewise be dismissed.

The district also asserts that the parent's pendency claims lack merit. The district reiterates that the facts and claims in the request for review appear to relate to a different matter and further that the IHO in this matter did not refuse to hold a pendency hearing. Because the parent's attorney chose to leave the impartial hearing before offering the parent's exhibits related to pendency into evidence, there was not information in the hearing record from which to determine the student's pendency placement. Next, the district responds to the denial of the parent's attorney's second adjournment request, which occurred prior to the start of the November 22, 2022 hearing date. The district argues that the IHO conducted the hearing appropriately, gave reasonable directives and correctly precluded evidence which was not disclosed to the district five business days prior to the start of the impartial hearing. Lastly, the district contends that the hearing record reflects that the parent's attorney was permitted to make a record at the impartial hearing. As relief, the district requests that the parent's request for review be dismissed in its entirety.

In correspondence dated February 2, 2023 and copied to the district's attorney, the parent's attorney stated that his "office mistakenly submitted the wrong request for review in this matter." The parent's attorney indicated that he had learned of the error "only after reviewing the [district]'s" answer. The parent's attorney further stated that he was submitting "an amended appeal along with an affirmation explaining how this error came about." The parent's attorney also apologized for past errors and indicated that he had "instituted changes" in his office to ensure compliance with the Commissioner's regulations in the future.

In an affirmation in support of his request to amend the request for review, the parent's attorney averred that he had written a different request for review from that which was initially filed with the Office of State Review. The parent's attorney further averred that the correct request for review was reviewed and verified by the parent, however "[his] office" had "failed to insert the body of the [correct request for review] that [he] wrote in connection with this particular student" and had only changed the caption on a request for review prepared for a different appeal. While the parent's attorney maintains that the parent reviewed and verified the correct request for review, "in the abundance of caution, [his] amended appeal includes a new [a]ffidavit of [v]erification." The parent's attorney also averred that he was not aware that the wrong request for review was submitted until February 1, 2023, when he reviewed the district's answer in this matter.

In correspondence dated February 3, 2023 and copied to the parent's attorney, the district opposed the parent's request to submit an amended request for review. The district noted that the parent's attorney had not requested leave to amend the request for review from the Office of State Review and instead had elected to serve an amended request for review and request that it be considered. Next, the district asserted that the amended request for review did "not merely correct some limited amount of information, facts, or arguments raised in the original request for review, or expand upon issues already raised in the original request for review. Rather, the amended request for review (as Petitioner concedes) is an entirely new pleading." The district's attorney further noted the inequity of allowing the parent to amend her pleading after the district had served its answer in response.

The district's attorney opined that the parent's attorney's "explanation as to the genesis of the purportedly mistakenly filed request for review [wa]s confusing, at best," given that the parent's attorney's law office prepared the wrong request for review, yet the parent was able to review the correct request for review. The district's attorney further stated that the parent's attorney had multiple opportunities to seek leave to amend the request for review, specifically during the time when the parent's attorney was required to resubmit affidavits of service and verification to the Office of State Review and again when the parties were discussing the possibility of settlement before the district prepared and served its answer. The district's attorney asserted that the parent's proposed amended request for review also fails to comply with the Commissioner's regulations in that it over the length permitted by State regulations and requested that the parent's appeal be dismissed for repeated failures to comply with the practice regulations.

## **V. Applicable Standards**

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (*id.*).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

Section 279.8 of the State regulations requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
- (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

In addition, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

## **VI. Discussion**

The parties' positions were amply clear in the initial pleadings filed in this appeal. In its opposition to the parent's proposed amendment to the request for review, the district correctly asserts that the parent's attorney did not seek leave to amend the request for review and did so with the benefit of having first reviewed the district's answer, which would be less than equitable and would amount to a do-over of the entire appeal proceeding which I would not be inclined to allow. The district also correctly notes that the parent's attorney did not seek leave to amend the request for review when new affidavits of verification and service were prepared and submitted. More importantly however, there would be no point in allowing the amendment. The proposed amended request for review is unacceptable because it failed to comply with the page limitations set forth in State regulation. For those reasons, I decline to exercise my discretion and do not accept the parent's proposed amended request for review.

As indicated above, the parent's request for review does not appeal any of the IHO's findings and determinations. Therefore, the IHO's determinations that the district did not violate federal or State law, and that the district was not obligated to offer the student equitable services for 2022-23 school year are final and binding on the parties (34 CFR 300.514; 8 NYCRR 200.5[j][5][v]; see 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**

As the parent has failed to identify in the request for review any precise rulings, failures to rule or determinations made in error by the IHO in this matter, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
March 2, 2023**

---

**JUSTYN P. BATES  
STATE REVIEW OFFICER**