



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-137

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her daughter's private 1:1 tutoring for the 2020-21, 2021-22, and 2022-23 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 matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary.

Briefly, CSEs convened on February 12, 2020 and September 27, 2021 to develop IEPs for the student for the 2020-21 and 2021-22 school years, respectively, found the student eligible for special education services as a student with a speech or language impairment, and recommended that the student attend a general education classroom placement and receive integrated co-teaching (ICT) services and related services consisting of two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group (3:1) speech-language therapy (Dist. Exs. 6 at pp. 1, 21-22; 10 at pp. 1,

21-22).¹ The September 2021 CSE additionally recommended full-time individual paraprofessional services (Dist. Ex. 6 at p. 22).

In March 2022, the student underwent a neuropsychological evaluation, based on which the student received diagnoses of a specific learning disorder in reading, written expression, and mathematics; mixed expressive-receptive language disorder, moderate; and attention deficit hyperactivity disorder (ADHD), combined type (Dist. Ex. 3 at pp. 1, 3, 10-11).

According to a prior written notice, on April 7, 2022, a CSE convened to create an IEP for the student, found the student eligible for special education as a student with a learning disability, and recommended a program that included ICT services, PT, speech-language therapy, and paraprofessional services (Parent Ex. F at p. 1).² On April 25, 2022, the parent emailed the district to request additional services in the form of afterschool special education teacher support services (SETTS) and weekend tutoring be added to the student's IEP based the recommendations in the March 2022 neuropsychological evaluation (Dist. Ex. 5). On September 23, 2022, the CSE reconvened, and added group SETTSS in math two periods per week and group SETTSS in ELA two periods per week to the student's IEP (compare Parent Ex. F at p. 1, with Dist. Ex. 4 at pp. 26-27).³

In December 2022, the parent and the district signed a mediation agreement, agreeing that the student would be provided with 80 hours of additional SETSS (Parent Ex. I).

By due process complaint notice dated March 22, 2023, the parent sought reimbursement for the out-of-pocket expenses she incurred to provide 1:1 tutoring to the student from July 2020 to November 2022 and alleged that she never received notice of her parental rights (Dist. Ex. 1 at p. 2). On April 3, 2023, the parent filed a subsequent due process complaint notice alleging that the student "was allotted" 80 hours of SETSS but the parent's request for additional hours was denied (Dist. Ex. 2 at p. 2). The parent requested additional 1:1 SETTSS for two hours per week to be provided outside of the school day "for the duration of each school year" (id.).⁴

After a prehearing conference on April 25, 2023, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on May 17, 2023 (see Tr. pp. 1-76; IHO Ex. II). In a decision dated June 9, 2023, the IHO addressed the district's motion to dismiss and the claims alleged in the parent's due process complaint notices (IHO Decision at pp. 2-15). Regarding the district's motion to dismiss, the IHO determined that the parent's claims

¹ The copy of District Exhibit 10 included in the record on appeal is not correctly paginated in that it repeats and omits page numbers; for purposes of this decision, the pages of the IEP will be referred to in consecutive order beginning with page 1 (see Dist. Ex. 10 at pp. 1-29).

² The hearing record does not include a copy of the April 7, 2022 IEP (see Parent Exs. A-K; M-P; Dist. Exs. 1-15; Tr. pp. 1-76).

³ The hearing record contains two copies of the September 2022 IEP (compare Parent Ex. H, with Dist. Ex. 4). As Parent Exhibit H is not as clear and legible as District Exhibit 4, for the purposes of this decision, District Exhibit 4 will be cited.

⁴ By interim decision dated April 25, 2023, the IHO consolidated the parent's March 22, 2023 and April 3, 2023 due process complaint notices (IHO Ex. I).

relating to a time before March 23, 2021 were barred by the statute of limitations and that no exception to the timeline applied (*id.* at pp. 2-4). Further, the IHO determined that the evidence submitted by the district proved that on February 27, 2020, the district sent a prior written notice which notified the parent in writing that a copy of the procedural safeguards notice could be downloaded on the district's website and that the parent's allegation contained in her due process complaint notice that she never received her procedural safeguards notice was unavailing (*id.* at p. 4).⁵

Regarding the parent's remaining claims, the IHO determined that the district offered the student a FAPE during the school years at issue from March 2021 through the end of the 2022-23 school year and denied the parent's requested relief (IHO Decision at p. 10). The IHO determined that the CSE created procedurally and substantively valid IEPs that were reasonably calculated to enable the student to receive educational benefit (*id.* at pp. 6, 12-13). Further, the IHO determined that the district offered credible testimony that "corroborated" the CSE's recommendations in the IEPs at issue (*id.* at pp. 11-12). The IHO also determined that the evidence submitted by the parent was insufficient to satisfy the parent's burden to establish the appropriateness of the unilateral services (*id.*). Finally, the IHO found that the equitable considerations did not support the parent's request for full reimbursement because she did not provide the district with notice of her intent to obtain private tutoring services (*id.* at pp. 14-15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review is also presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parent's appeal is that the IHO erred in finding that the district offered the student a FAPE from March 2021 until the end of the 2022-23 school year and that the parent did not meet her burden to prove that the private tutoring services were appropriate. The parent requests district funding for private 1:1 tutoring obtained between March 2021 and December 2022, as well as "ongoing and continuing" 1:1 SETSS.

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

⁵ The IHO also addressed the parent's objection to the timing of the district's submission of its proposed evidentiary disclosures, determining that the parent presented no evidence that she was prejudiced by the timing of the disclosure and further noted that, even if untimely, he would have used his discretion to allow the documents into the hearing record to ensure an adequate hearing record and to make a determination of whether the student received a FAPE based on substantive grounds (IHO Decision at p. 6).

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]).

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]).

On July 17, 2023, the parent filed the following documents with the Office of State Review: a notice of intention to seek review dated July 3, 2023, a notice of request for review, a request for review dated July 14, 2023, and two documents purporting to be affidavits of service.⁶ According

⁶ Prior to this, on July 10, 2023, the parent had filed, through the Office of State Review's electronic filing system two copies of a notice of intention to seek review dated July 3, 2023, with two copies of a document labeled as an affidavit of service, indicating that "appropriate documents" were served on "the other side" on July 3, 2023. In a letter dated July 10, 2023, the Office of State Review informed the parent that, because her filing did not include a request for review, no proceeding was pending before the Office of State Review. The letter also directed the parent to a section of the Office of State Review's website, which is dedicated to assisting pro se parents with drafting, serving, and filing an appeal, and specifically noted that an affidavit of service should

to an unnotarized "[a]ffidavit of [s]ervice," the parent "provided the other side with appropriate documents on 7/3/2023" (July 3, 2023 Parent Aff. of Service). The parent filed a second affidavit of service notarized on July 14, 2023 (July 14, 2023 Parent Aff. of Service). The second affidavit of service again recited that the parent "provided the other side with the appropriate documents" on July 3, 2023, but went on to describe that, initially, she attempted to serve the district in person at one of the office addresses of the district but that two school safety officers there informed her that no one was in the building that day due to the holiday (id.).⁷ The parent further indicated that she then emailed her "intent to appeal" to a CSE administrator on July 3, 2023 (id.).

Based on the parent's affidavits of service themselves, the parent did not personally serve the district in accordance with State regulation.

Initially, as to the parent's purported service of what appears to have been just the parent's notice of intention to seek review on July 3, 2023, the parent failed to personally serve the appropriate district personnel and, instead, emailed a CSE administrator who was not authorized to accept service on the district's behalf (see 8 NYCRR 279.4[b]; July 3, 2023 Parent Aff. of Service; July 14, 2023 Parent Aff. of Service).⁸ Had the district been served with a notice of intention to seek review on July 3, 2023, it would have been required to file a copy of the hearing record by July 13, 2023, 10 days after (8 NYCRR 279.9[b]). As the district had not yet file the hearing record as of July 17, 2023, when the parent filed her documents with the Office of State Review, the district was directed to file the hearing record. In response, the district denied having been served with the parent's notice of intention to seek review. The district further requested an extension to prepare and file the record and indicated that it contacted the parent regarding the extension but that she did not respond.

Further, the parent's request for review, dated July 14, 2023 postdates the parent's purported service of documents on the district on July 3, 2023 (compare Req. for Rev. at p. 8, with July 3, 2023 Parent Aff. of Service, and July 14, 2023 Parent Aff. of Service). The parent did not file any proof of service of the request for review. The district has not filed an answer to the parent's request for review or otherwise indicated in any way that it was served with the parent's request for review.

Based on the foregoing, it is clear that the parent did not serve the district in accordance with State regulation. While State regulations do not preclude a school district and a parent from agreeing to "waive" the personal service method and agree to service by an alternate delivery method (i.e., by email), there is no indication in this instance that the district agreed to service by email to one of its CSE administrators or, in any event, that the parent provided the district with a

identify what papers were delivered and the details of delivery and must be signed in front of a notary public (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>).

⁷ The parent does not include a date in her affidavit of service as to when she attempted to personally serve the district (July 14, 2023 Parent Aff. of Service).

⁸ Additionally, the notice of intention to seek review was not accompanied by a case information statement identifying the issues to be reviewed on appeal (see 8 NYCRR 279.2[e]).

copy of the request for review by any means of delivery. Under these circumstances, given the deficiencies in compliance with Part 279 and the defect in service on the district and its lack of response in an answer, the appeal must be dismissed.

VI. Conclusion

Having found that the request for review must be dismissed because the parent failed to properly initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 16, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**