The University of the State of New York

The State Education Department
State Review Officer
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No. 24-523

**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:**
Bochner PLLC, attorneys for petitioner, by David Kahane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian 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 those portions of a decision of an impartial hearing officer (IHO) which rendered a pendency determination and ordered respondent (the district) to partially fund her son's special education services from Kids Further Inc. (Kids Further) during the 2022-23 and 2024-25 school years. 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 programing for students with disabilities under the 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 § 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, 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 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 the facts and procedural history is not necessary. Briefly, on March 8, 2016, a Committee on Preschool

Special Education (CPSE) convened, found the student eligible for special education as a preschool student with a disability, and developed an IEP for the student (Parent Ex. F at pp. 1, 17). The CPSE recommended that the student receive four two-hour sessions per week of individual Special Education Itinerate Teacher (SEIT)services, three 30-minute sessions per week of individual speech-language therapy, two 45-minute session per week of individual occupational therapy (OT), and two 30-minute sessions per week of physical therapy (PT) for a 12-month extended school year (id. at pp. 17-18).

On February 10, 2017, a CSE convened in anticipation of the student's transition to school-aged programming, found the student eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of September 7, 2017 (Parent Ex. G).[1] The parties anticipated that the student would be parentally placed in a nonpublic school (Parent Ex. G at p. 13). The CSE recommended that the student receive five periods per week of direct, group Special Education Teacher Support Services (SETSS) in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute periods per week of individual OT in English, and two 30-minute periods of individual PT in English for a 10-month school year (id. at pp. 9, 13).[2]

On July 1, 2022, the parent electronically signed a contract with Kids Further to provide services recommended in the March 2016 IESP for the 12-month extended 2022-23 school year. (Parent Ex. I). In the contract the services were listed as "SETSS/SEIT" and were to be provided at $218.00 "per period" (id.). Speech-language therapy was listed in the contract at $175.00 "per period" (id.).

On June 7, 2023, a CSE convened and developed an IESP with a projected implementation date of September 7, 2023 (Parent Ex. H). The IESP listed evaluation results from an assessment conducted on April 20, 2023 (id. at p. 1). The CSE recommended the student receive three periods per week of direct, group SETSS in English for a 10-month school year (id. at p. 7).

On July 4, 2024, the parent electronically signed a contract with Kids Further to provide services recommended in the March 2016 IEP for the 12-month extended 2024-25 school year. (Parent Ex. J). Similar to the previous year, SETSS/SEIT services were to be provided at $218.00 per period and speech-language therapy was to be provided at $175.00 per period (id.).

By a due process complaint notice dated July 15, 2024, the parent asserted that the district failed to provide the student a FAPE for the 2022-23 school year and seeking, in pertinent part, an order scheduling a pendency hearing and directing the district to fund the SEIT and related services

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (8 NYCRR 200.1 [zz][11]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

recommended in the March 2016 IEP for an extended 12-month school year at enhanced rates (Parent Ex. A).[3]

In an "amendment" to the July 15, 2024 due process complaint notice, dated August 14, 2024, the parent initiated an impartial hearing asserting that the district failed to provide the student a FAPE for the 2024-25 school year and seeking, in pertinent part, an order scheduling a pendency hearing and directing the district to fund the SEIT and related services recommended in the March 2016 IEP for an extended 12-month school year at enhanced rates (Parent Ex. C).[4,5]

An impartial hearing convened on September 24, 2024 before an IHO appointed by the Office of Administrative Trials and Hearing (OATH) (Tr. pp. 1-42). The district did not appear (Tr. p. 1). In a decision dated October 6, 2024, the IHO first concluded that the 2016 CPSE IEP established the student's then current educational placement for purposes of pendency and awarded pendency based on the services recommended therein (IHO Decision at pp. 10, 20).[6]

Next, the IHO further concluded that the district failed to provide the student a FAPE for the 2022-2023 and 2024-25 school years (IHO Decision at pp. 11-12). Notably, the district failed to appear at the hearing and provided no proof as to whether it delivered the services to the student that recommended in the IESPs for the school years in question (id. at p. 11).

With respect to the relief demanded by the parent for the 2022-23 and 2024-25 school years, the IHO determined that the parent sought direct funding of a "parentally created program" consisting of four two-hour sessions per week of SETSS, three 30-minute sessions per week of individual speech-language therapy, two 45-minute session per week of OT, and two 30-minute sessions per week of PT for an extended 12-month school year (IHO Decision at p. 13).

As to the appropriateness of the privately obtained services, the IHO undertook a Burlington/Carter analysis (IHO Decision at p. 12).[7] Initially, the IHO noted that the district did not appear and made no arguments with respect to the appropriateness of the parentally created program or the privately obtained services (id.). Next, the IHO concluded that the parent's

[3] The parent filed a duplicate due process complaint notice also dated July 15, 2024 seeking the same relief (Parent Ex. B; Tr. p. 5). In a Consolidation Order dated July 26, 2024, the IHO consolidated the duplicate July 15, 2024 due process complaint notice with the first (IHO Decision at p. 3).

[4] In an Order On Consolidation dated August 19, 2024, the IHO consolidated the "amendment" dated August 14, 2024 due process complaint notice with the July 15, 2024 due process complaint notice (Parent Ex. D).

[5] At the impartial hearing, the parent confirmed that the due process complaint notices were limited to the 2022-2023 and 2024-25 school years (Tr. p.5). In addition, the parent limited her pendency claim to the 2024-25 school year (id. p. 9).

[6] While the IHO Decision refers to the "2017 CPSE IEP." it is apparent that the decision should read the "2016 CPSE IEP" (see Parent Ex. F). The only IEP in this matter was created in 2016. More specifically, the services recited by the IHO in her ordering clause regarding pendency specifically match those recommended in the 2016 IEP created by the CPSE (compare IHO Decision at pp. 10, 20 with Parent Ex. F at p. 1).

[7] Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993].

evidence demonstrated significant student regression and supported a finding that the student required a 12-month extended school year (id.). However, the IHO concluded that the evidence did not support eight periods of SETSS per week and consequently concluded that five periods of SETSS per week were appropriate, due in part to the parent's later agreement to five periods per week of group SETSS as described in the 2017 IESP (id.). Finally, the IHO denied the request for speech-language therapy, PT, and OT based on a lack of sufficient evidence to support either the provision or the need for the services (id. at p. 14).

Regarding the 2022-23 school year, the IHO directed the district to fund the cost of 12 months of five periods per week of group SETSS at a rate of $218.00 per hour upon the district's receipt of an itemized bill, progress reports and sessions logs from the provider (IHO Decision at p. 20). With respect to the 2024-25 school year, the IHO directed the district to directly fund the cost of five periods per week of group SETSS at $218.00 per hour during the school year upon the district's receipt of an itemized bill, progress reports and sessions logs from the provider (id.).

The IHO further ordered that within 35 days of the date of the IHO Decision, the district shall provide a SETSS provider to the student for five periods of group SETSS per week and that pending the assignment of the provider, the district shall continue to fund the SETSS at the hourly rate of $218.00 per hour (IHO Decision at p. 20).

In addition, the IHO ordered the district to provide a bank of compensatory services consisting of 42 hours of speech-language therapy that will expire two years from the date of the IHO Decision (IHO Decision at pp. at 20-21). Further the IHO ordered the district to provide a speech-language therapy provider to the student "by a DOE provider at a reasonable market rate" within 35 days of the IHO Decision and if the district failed to do so, the district shall fund the services from a provider of the parent's choosing at the provider's customary rate but not to exceed $175.00 per hour (id.).

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

The parent appeals, alleging in pertinent part, that the IHO incorrectly recited the date of the IEP upon which pendency was awarded; and erred in declining to award funding of speech-language therapy for the 2022-23 and 2024-25 school years, in limiting the funding of SETSS for those years to five periods per week, and in limiting the funding of SETSS in 2024-25 to a 10-month school year.

In its answer, the district asserts that the appeal must be dismissed because the parent improperly served the request for review.

**V. Discussion – Service of Pleadings**

As a threshold matter, it must be determined whether the appeal should be dismissed due to the parent's failure to effectuate timely personal service of the request for review. The district alleges that it did not consent to alternative electronic service in this matter and thus the parent did not serve the district in accordance with the State practice regulations governing the initiation of appeals.

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]).

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]).

With the request for review, the attorney for the parent submitted an "Affidavit of Personal Service" (Req. for Rev. at p. 14). According to his sworn statement, on November 15, 2024, he served the notice of intention to seek review, notice of request for review, request for review, and affidavit of verification by delivering and leaving same with an attorney from the district at a street address in the Washington Heights area of Manhattan (id.).

Accompanying the district's answer are declarations from two attorneys for the district (Answer at pp. 8-11). The first attorney averred that on November 15, 2024 at 1:30 pm, the parent's attorney emailed him asking if the district "would consent to receive and exchange all documents concerning the matter electronically by email" (Reimels Declaration ¶ 4). The email included several attachments, including the notice of intention to seek review and the request for review

(id.). The attorney further stated that he was out of the office on November 15, 2024 but his email account included an automated reply message which stated, inter alia, that inquiries relating to appeals to the Office of State Review (SRO) should be directed to a colleague identified in the auto-response (id. at ¶ 5). The parent's attorney next forwarded the email to the attorney identified in this auto-reply message (id. at ¶ 6). The district's attorney maintains that the November 15, 2024 email was the sole communication between he and the parent's attorney, that he did not reply to the email nor did the parent's attorney follow up with him regarding the appeal (id. at ¶ 7). Moreover, he asserted that at no time did he agree to waive personal service nor agree to accept service via electronic mail for this case (id. at ¶ 8). Finally, the district's attorney averred that the office did not have a blanket policy with the office of the parent's attorney to accept service by electronic mail nor had the parent's counsel served the office with any pleading in this case by any means other than electronic mail (id.).

The second declaration was authored by the attorney for the district identified in the email auto-response (Pourhosseini Declaration). That attorney averred that her first communication with the parent's attorney in this matter occurred on November 15, 2024 at 1:40 pm (id. at ¶ 4). At that time, the parent's attorney forwarded the 1:39 pm November 15, 2024 email and attachments to her via an email (id.). The attorney stated that the forwarded email was the sole communication received by her from the parent's attorney in the case and that she did not reply to the forwarded email, nor did parent's attorney follow up with her regarding the appeal (id. at ¶ 5). Finally, the attorney asserted that at no time did she or anyone else from the office agree to accept service via electronic mail in this case (id. at ¶ 6). Further, the office did not have a blanket policy with the office of the parent's attorney to accept service by electronic mail nor had the parent's counsel served the office with any pleading in this case by any means other than electronic mail (id.).

In addition to the two attorney declarations, the district submitted with its answer, two documents. The first was labeled by the district as "SRO Exhibit A" and contained the parent's attorney's November 15, 2024 1:39 pm email to the district (see SRO Ex. A at p. 2). The second was labeled by the district as "SRO Exhibit B" and contained the forwarded email directed to the district that same day at 1:40 pm (see SRO Ex. B at pp. 2-3). Based on the foregoing, the district asserts that it was not properly served with the request for review and, as such, the appeal should be dismissed (Answer at pp. 3-6).

The parent did not file a reply to the district's answer and therefore, has offered no rebuttal of the district's evidence of improper service.

While State regulations do not preclude a school district and a parent from agreeing to waive personal service and consent to service by an alternate delivery method, it is undisputed that the district did not agree to electronic service in this particular instance. As November 15, 2024 was the last day the parent could have served a timely request for review pursuant to State regulation, and the evidence shows that she did not effectuate service in a permissible manner on or before this date, the evidence leads to the conclusion that the request for review was not properly served within the timeline (see 8 NYCRR 279.4[b], [c]). I am not convinced that the attorney for the parent filed an accurate affidavit of service with the Office of State Review as to either the method of service or the alleged location of personal service. Accordingly, the appeal must be dismissed for the reasons described above.

## VII. Conclusion

In summary, the appeal must be dismissed due to the parent's failure to timely initiate the appeal pursuant to the practice regulations governing appeals before the Office of State Review. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determination above.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**January 27, 2025**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**