The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-566

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 denied her request that respondent (the district) fund the cost of her son's private services from EdZone, LLC (EdZone) for the 2023-24 school year. Respondent (the district) cross-appeals from those portions of the IHO's decision which rejected the district's arguments to dismiss the parent's claim. The appeal must be dismissed. The cross-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

At all relevant times, the student was parentally placed at a nonpublic school and eligible for special education as a student with a speech or language impairment (Parent Ex. B at pp. 1, 14).[1]

A CSE convened on December 14, 2022 and developed an IESP with a projected implementation date of December 23, 2022 (Parent Ex. B at p. 1). The December 2022 CSE recommended that the student receive the following services and supports: 15 periods of group special education teacher support services (SETSS) per week; two 30-minute sessions of individual speech-language therapy per week; two 30-minute sessions of individual occupational therapy (OT) per week; two 30-minute sessions of individual physical therapy (PT) per week; and testing accommodations (id. at pp. 6-7).

On August 8, 2023, the parent signed a contract with EdZone, a private educational agency, under which the agency would assign providers to deliver services to the student during the 10-month 2023-24 school year (Parent Ex. C at pp. 1-3).[2] Under her contract with EdZone, the parent agreed to be responsible for any fees not covered by the district (see id. at p. 1).

In a letter dated August 23, 2023, the parent, through a lay advocate, notified the district that it had "failed to assign a provider for" the student's mandated services during the 2023-24 school year (Parent Ex. D at p. 1).[3] The August 2023 letter requested that the district fulfill its mandate and stated that, if the district "fail[ed] to assign a provider, the parent [would] be compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

During the 2023-24 school year, the student received 1:1 SETSS through EdZone beginning on September 11, 2023 (see Parent Exs. E at p. 1; F at pp. 1-10).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) on an equitable basis for the 2023-24 school year (see Parent Ex. A at pp. 1-2). Specifically, the parent alleged that the district failed to convene a CSE meeting to review and update the student's educational program in advance of the 2023-24 extended school year (id. at p. 2). The parent further alleged that the district failed to supply providers to implement the services recommended in the student's most recent IESP for the 2023-24 school year, and, consequently, the parent had no choice but to retain an agency to provide

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][11]).

[2] EdZone agreed to deliver services to the student "in accordance with the last agreed upon IEP/IESP/FOFD/Pendency Order/Pendency Agreement/Court Order or Decision of SRO/Medi[]ation Agreement/Resolution Agreement" (Parent Ex. C at p. 3).

[3] The subject line of the August 2023 letter stated, "TEN (10) DAY NOTICE" (Parent Ex. D at p. 1).

the recommended services at an enhanced rate (id.). As relief, the parent requested funding of the cost of the SETSS and related services provided to the student during the 2023-24 school year, at the providers' enhanced rates, along with a bank of compensatory services to make up for any mandated services not provided (see id. at p. 3).

On or about September 4, 2024, the district moved for dismissal, arguing that the IHO lacked subject matter jurisdiction and that the parent's claims were unripe for adjudication (see Mot. to Dismiss at pp. 1-6). The parent's lay advocate served opposition papers on or about September 5, 2024 (see Opp'n to Mot. to Dismiss at pp. 1-5).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 1, 2024 and concluded the same day (see Tr. pp. 1-30). The parent offered various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 6-7; Parent Exs. A-J). Among the parent's exhibits was an affidavit of an administrative employee at EdZone, who also appeared for cross-examination during the hearing (see Tr. pp. 6-7, 15-21; Parent Ex. H). The district presented no witness testimony during the hearing (see Tr. pp. 7-12). Although the district's representative intended to present documentary evidence, none of the district's exhibits were accepted for admission into evidence due to the district's failure to provide timely disclosure to the other party (see id.).

In a decision dated October 17, 2024, the IHO denied the district's request for dismissal based on lack of subject matter jurisdiction (IHO Decision at pp. 7-8). The IHO determined that, because the district presented no evidence that it supplied a SETSS provider, the district denied the student a FAPE on an equitable basis for the 2023-24 school year (id. at pp. 2-4, 7-8).[4] Although the district raised the affirmative defense of the June 1 deadline, the IHO declined to dismiss the parent's claim on that basis (see Tr. pp. 26-27; Response to Due Process Compl. Not.

[4] Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]). State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public-school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web-based versions.

at p. 1; IHO Decision, at p. 7).[5] With respect to the 2023-24 school year, the IHO found that a June 1 letter was sent to the district (IHO Decision at p. 7). According to the IHO, the parent failed to meet her burden of proving that the services provided by EdZone during the 2023-24 school year were appropriate for the student (id. at pp. 4-5).[6] The IHO reasoned that the parent presented insufficient evidence regarding the SETSS provider's credentials, the student's needs, the student's levels of performance, topics covered during SETSS sessions, methodologies used, or how progress was assessed (id.).[7] The IHO also determined that, even assuming the unilaterally-obtained services were appropriate, equitable considerations did not favor the parent and warranted either a complete denial of an award or reduction of the requested fees to the lowest rate set by the district (id. at pp. 5-7).[8] Having determined that the parent failed to prove the appropriateness of the SETSS provided by EdZone during the 2023-24 school year, the IHO denied the requested relief (see id. at pp. 5, 11).

Lastly, the IHO addressed the 2024-25 school year (see IHO Decision at pp. 9-11).[9] With respect to the 2024-25 school year, the IHO declined to dismiss the parent's claim as unripe but granted the district's request for dismissal based on the June 1 affirmative defense (id. at pp. 9-10). According to the IHO, the hearing record included no correspondence from the parent or the

[5] The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school, and for whom the parents seek to obtain educational services, to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).

[6] The parent requested funding of the cost of the student's related services in her due process complaint notice (Parent Ex. A at p. 3). During the hearing, however, the parent presented no evidence that the student received privately-obtained related services during the 2023-24 school year (see generally Parent Exs. A-J).

[7] More specifically, the IHO found that the parent presented no testimony to confirm that the SETSS provider was certified as a special education teacher or to establish the provider's education, training or work experience; the parent's only witness lacked personal knowledge of the student's needs, the methodologies used, or how progress was assessed; the attendance sheets lacked any details on what was covered during SETSS sessions; the "end of year" progress report was undated and did not identify its author; and the "end of year" progress report lacked evaluative data and information regarding the student's academic levels at the start or end of the year (IHO Decision at pp. 4-5).

[8] More specifically, the IHO found that the parent failed to show that the providers were sufficiently qualified to provide services to the student or to justify the requested rates; the parent presented no evidence regarding actions taken to locate a provider at the district-approved rate; the parent's contract with EdZone was executed in August 2023, well before the start of the school year and before the parent notified the district of her inability to locate a provider; and the parent failed to demonstrate that the unilaterally-obtained services provided an educational benefit to the student (IHO Decision at pp. 5-7).

[9] I note that, while the district contends that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims in the first instance, neither party has appealed from the IHO's denial of services for the 2024-25 school year (see IHO Decision at pp. 11-12). Although the parent did not raise the 2024-25 school year in her due process complaint notice or during the impartial hearing (see generally Tr. pp. 1-30; Parent Exs. A-J), and it is unclear why the IHO reached this issue, it does not alter the fact that the IHO's decision made findings regarding the 2024-25 school that have gone unchallenged (IHO Decision at pp. 9-11). Accordingly, the IHO's findings regarding the 2024-25 school year have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 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]).

parent's representation requesting services for the 2024-25 school year, nor any testimony in that regard, thus precluding any award for the 2024-25 school year (id. at p. 10). The IHO then determined that, notwithstanding the June 1 defense, the parent would still be denied relief for the 2024-25 school year because the parent failed to prove that EdZone provided appropriate services (id.). The IHO also determined that equitable considerations did not favor the parent and precluded any award for the 2024-25 school year (id. at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals, through a lay advocate with Prime Advocacy, LLC. The district cross-appeals. The parties' familiarity with the issues raised in the parent's request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parties dispute the following issues: whether the IHO erred in determining that the parent failed to meet her burden of proving that the unilaterally-obtained services were appropriate for the student; and whether the IHO erred in determining that equitable considerations weigh against the parent's request for relief. The district also contends that the IHO erred in rejecting the district's June 1 defense, as pertaining to the 2023-24 school year, and declining to dismiss the parent's claim for lack of subject matter jurisdiction.

Finally, the district argues that the SRO should dismiss the parent's appeal based on procedural deficiencies. Specifically, the district asserts that the parent's notice of intention to seek review was untimely; and the parent's request for review was defectively verified. In the request for review, the parent's lay advocate alleges that their office received the IHO's decision while the office was closed for a religious holiday and that a backlog following the holiday caused the delay in serving the notice of intention to seek review. The parent's advocate argues that the delay caused the district no prejudice and should not bar the parent's appeal.

V. Discussion

The parent has not properly initiated an appeal in this case. First, the practice requirements of Part 279 of the State regulations, which govern appeals to the Office of State Review, require that an appeal from an IHO's decision be initiated by timely personal service of a notice of intention to seek review, followed by a notice of request for review, verified request for review, and other supporting documents, upon the respondent (see 8 NYCRR 279.2[a], 279.4[a]). A notice of intention to seek review shall be personally served within 25 days after the date of the IHO's decision to be reviewed (8 NYCRR 279.2[a]-[b]).[10] However, an SRO "may, in his or her

[10] The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision). Among other things, the "service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review" (see Application of a Student with a Disability, Appeal No. 24-083; Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]).

discretion . . ., review the determination of an [IHO] notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NYCRR 279.2[f]).

Here, the district correctly asserts that the parent failed to initiate the appeal in accordance with the timeline prescribed in the practice regulations. More specifically, the parent failed to effectuate timely service of a notice of intention to seek review upon the district. The parent had until Monday, November 11, 2024, 25 days after October 17, 2024, the date of the IHO's decision, to serve a notice of intention to seek review upon the district (IHO Decision at p. 12; 8 NYCRR 279.2[b]). The notice was not served until November 20, 2024 (see Notice of Intention to Seek Rev.; Aff. of Service of Notice of Intention to Seek Rev.).[11] Although an SRO may "review the determination of an [IHO] notwithstanding a party's failure to timely serve a notice of intention to seek review," I decline to exercise my discretion in that manner because the parent's papers suffer from further defects (8 NYCRR 279.2[f]).

The practice regulations require verification of all pleadings submitted to an SRO in connection with an appeal (see 8 NYCRR 279.7[b]). When the appeal is taken by the student's parent or parents, "[t]he request for review shall be verified by the oath of at least one" such petitioner (see id.). Verification of a document entails a sworn statement that the affiant knows the contents of the document and knows the contents of the document to be true; or, with respect allegations made "upon information and belief," the affiant believes the allegations to be true (see 8 NYCRR 279.7[b][1]).

Here, the district correctly asserts that the affidavit of verification that accompanied the request for review was executed on November 20, 2024, five days prior to November 25, 2024, the date of the request for review (see Req. for Rev. at p. 10; Parent Aff. of Verification). As the district asserts, the parent could not have verified the contents of a document that was not yet completed. The parent's affidavit of verification is, therefore, deemed a nullity. Consequently, the request for review is rejected as unverified.

In addition, the request for review does not conform to practice regulations governing appeals before the Office of State Review. The parent's lay advocate "signed" the request for review. This is not permitted under State regulation which requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]).

Lastly, the affidavit of service of the request for review is defective. According to the affidavit, the parent's advocate effectuated service by personal delivery to an attorney for the district at the address of the offices of the lay advocate, Prime Advocacy (see Aff. of Service of Req. for Rev.). Hence, the manner of service is unclear. It is likewise unclear whether service occurred within 40 days after the date of the IHO's decision, as the practice regulations require, because the date of service is not legible (see Aff. of Service of Req. for Rev.; 8 NYCRR 279.4[a]).

Since the initiation of this appeal, the parent's lay advocate has been frequently cautioned by SROs that failure to comply with the practice requirements of Part 279 of State regulations is

[11] I note that, while the holiday cited by the parent's advocate occurred from October 16th to 23rd 2024, the notice of intention to seek review was not due until November 11, 2024.

likely to result in rejection of submitted documents (see, e.g., Application of a Student with a Disability, Appeal No. 24-603; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-577; Application of a Student with a Disability, Appeal No. 24-574; Application of a Student with a Disability, Appeal No. 24-573; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-563; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-541; Application of a Student with a Disability, Appeal No. 24-515). Accordingly, in conformity with the concerns identified in the above decisions and given the number of procedural deficiencies present in the initiation of this particular appeal, as well as the district's arguments in its answer that the procedural defects warrant dismissal, I decline to exercise my discretion and consider the parent's appeal.

Finally, with respect to the district's cross-appeal, a cross-appeal is considered proper when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[a], [f]; 279.5); however, this is predicated upon the appeal itself being properly commenced. In this matter, the request for review was not properly initiated and, therefore, there is no basis to consider the cross-appeal (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]; Application of the Bd. of Educ., Appeal No. 12-059). Thus, the district's cross-appeal is also dismissed.

VI. Conclusion

In summary, the appeal and cross-appeal must be dismissed due to the parent's failure to initiate the appeal in accordance with the practice regulations governing appeals before the Office of State Review.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 28, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER