The University of the State of New York

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

No. 25-313

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Nicole Daley, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to fund the student's private services delivered by EdZone, LLC (EdZone) for the 2023-24 school year. 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 dismissal of this matter on procedural grounds, a detailed recitation of the facts and procedural history of this matter is not necessary. Briefly, a CSE convened on November 9, 2022, found the student eligible for special education and related services as a student with a speech or language impairment, and developed an IESP for the student that recommended four

periods per week of direct group special education teacher support services (SETSS), along with one 30-minute session per week of group speech-language therapy and two 30-minute sessions per week of individual speech-language therapy (Parent Ex. B at pp. 1, 6, 9). In an undated contract for the 2023-24 school year, the parent entered into an agreement with EdZone for the provision of services "in accordance with the last agreed upon [IESP]" (Parent Ex. C at pp. 1-3). In a 10-day notice letter to the district dated August 23, 2023, the parent, through Prime Advocacy, advised the district that it had failed to assign a provider to deliver the student's services for the 2023-24 school year and that the parent intended to "unilaterally obtain the mandated services through a private agency at an enhanced market rate" (Parent Ex. D). According to the hearing record, EdZone provided the student with SETSS during the 2023-24 school year (see Parent Exs. E ¶¶ 2, 4; F at pp. 1-4; G at pp. 1-4).

In a due process complaint notice dated July 14, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to supply a provider to deliver the student's special education services, and sought funding for private services "at an enhanced rate" and compensatory education for services not provided (Parent Ex. A at pp. 1-3).[1]

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on January 6, 2025 and concluded on March 11, 2025 (Tr. pp. 1-92). In a decision dated April 15, 2025, the IHO found that the district failed to meet its burden to prove that it was not provided with a June 1 request for equitable services, that the district admitted it did not implement the student's IESP, and awarded the student a bank of 160 hours of compensatory SETSS to be provided by a licensed teacher of the parent's choosing at the provider's rate at the time of the delivery of the service (IHO Decision at pp. 4-10).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in failing to dismiss the parent's due process complaint notice due to the parent's failure to provide the district with a June 1 request for equitable services. Further, the district argues that the IHO erred in using the compensatory education analysis for relief as the appropriate legal standard was the three-pronged Burlington/Carter analysis, and that the parent failed to meet her burden of demonstrating that her unilaterally-obtained services were appropriate for the student.

The parent has not interposed an answer or otherwise appeared in this matter.

[1] The parent alleged in the due process complaint notice that a January 31, 2023 IESP was the last IESP developed for the student, however, the hearing record does not include a January 31, 2023 IESP (compare Parent Ex. A at p. 1, with Parent Exs. B-J; IHO Exs. I-II). Following a discussion on the record, it was established that the due process complaint notice was not correct and that the operative IESP for the 2023-24 school year was the November 9, 2022 IESP (Tr. pp. 26-29). The IHO's decision acknowledged this error and found that the case could proceed (IHO Decision at p. 2).

V. Discussion

As a threshold matter, it must be determined whether the appeal should be dismissed due to the district's failure to effectuate 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]). State regulations provide in relevant part that, "[i]n the event that a parent of a student with a disability is named as a respondent in a request for review, personal service of the request for review shall be made by delivering a copy thereof to the parent" (8 NYCRR 279.4[c]). When personal service upon a parent cannot be made after diligent attempts, an alternative form of service may be effectuated on a person of suitable age and discretion at the parent's residence along with a certified mailing or as directed by an SRO (8 NYCRR 279.4[c]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]). Thereafter, "the notice of intention to seek review, notice of request for review, request for review, and proof of service [must be filed] with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]).

Here, according to the declaration of service filed with the district's appeal, the district served the request for review upon a lay advocate from Prime Advocacy by electronic mail on May 27, 2025 (see Dist. Decl. of Serv.). Although the district states in its declaration of service that the lay advocate agreed to waive personal service on the parent and to accept service on the parent's behalf via electronic mail, the district does not indicate that the parent agreed to waive personal service (see id.). The parent has not appeared in this matter; nor has an attorney or lay advocate appeared on the parent's behalf.

Given the description in the district's declaration of service, the district did not serve the parent with the request for review in the manner required by State regulation, as personal service on the parent was not made, and there is no evidence demonstrating that the parent agreed to waive personal service (see 8 NYCRR 279.4[c]).

State regulations do not preclude a school district and a parent from agreeing to "waive" personal service of the request for review, and it is generally permitted for parties to agree to service by an alternate delivery method (see Application of a Student with a Disability, Appeal No. 25-313). The Office of State Review's website reflects this option as follows:

> The State regulations do not preclude a school district and a parent from agreeing to "waive" the personal service method. Waiver of personal service is not permitted unless the party being served agrees to accept papers in an alternate delivery method. If both sides agree, it is strongly advisable for the parties to have such an agreement in writing.

(Overview to Part 279: Filing a Review for Review (Section I): Serve and File the Request for Review [emphasis in the original], available at https://www.sro.nysed.gov/book/serve-and-file-request-review).

Here, there is no indication in this instance that the parent agreed to accept service of the request for review and supporting documents by electronic mail to the lay advocate identified in the district's declaration of service. Absent explicit waiver of personal service by the parent, service on an attorney or lay advocate is only appropriate once the matter is pending (8 NYCRR 279.5[e]; 279.6[c]; see CPLR 2103[b]). An attorney, or, as in this case, a lay advocate is not automatically cloaked with the authority to accept service of process and, even if counsel represents that he or she can accept process, it is not binding on the client unless the client is aware of the representation (Redbridge Bedford, LLC v. 159 N. 3rd St. Realty Holding Corp., 175 A.D.3d 1569, 1571[2d Dep't 2019]; Broman v. Stern, 172 A.D.2d 475, 476-77 [2d Dep't 1991]). The district's declaration of service makes no reference to an agreement with the parent regarding service and does not indicate that the district elicited from the lay advocate confirmation of the parent's awareness of the advocate's acceptance of service in this matter. Accordingly, there is insufficient basis to conclude that the parent agreed to waive personal service or consented to service by an alternate delivery method (see Application of the Dep't of Educ., Appeal No. 25-331 [dismissing a district's appeal for failing to effectuate alternate service on the parent as directed by the SRO and instead serving a lay advocate who represented that she would accept email service on the parent's behalf]; Application of a Student with a Disability, Appeal No. 24-443 [dismissing a parent's appeal, for failure to effectuate proper personal service of the request for review on the district where the parent served the district's attorney by email without obtaining a waiver of personal service from the district]).

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]).

Under these circumstances, given the deficiencies in compliance with Part 279 and the defect in service on the parent, the appeal must be dismissed.

VII. Conclusion

The request for review is dismissed due to the district's failure to initiate the appeal through personal service on the parent pursuant to State regulations; therefore, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 29, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER