The University of the State of New York

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

No. 25-331

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 Frank J. Lamonica, 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) son and ordered it to fund the student's private services delivered by a private provider (private provider) for the 2024-25 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 disposition of this matter on procedural grounds, a detailed recitation of the facts relating to the student's educational history is not necessary. Briefly, a CSE convened on October 15, 2020 to develop an IESP for the student with an implementation date of November 6, 2020 (Parent Ex. C at p. 1). Finding that the student remained eligible for special education as a student

with a learning disability, the October 2020 CSE recommended that the student receive four periods per week of group special education teacher support services (SETSS) in Yiddish and in a separate location (id. at pp. 1, 9).

By letter, dated August 15, 2024, the parent informed the district that it failed to offer the student a SETSS provider for the 2024-25 school year and that the parent had located a SETSS provider who charged an enhanced rate (Parent Ex. E). The letter further advised the district that the parent would arrange for the enhanced rate services to be delivered to the student on September 1, 2024 and that she would request district funding for those services (id.).

On August 25, 2024, the parent signed a contract with a private provider for the provision of SETSS to the student for the 2024-25 school year at a rate of $200 per hour (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated December 24, 2024, the parent, through her advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A at p. 1). The parent alleged that the student still needed the special education program contained in the October 2020 IESP, namely four periods per week of SETSS, which the district failed to implement (id.). As relief, the parent requested that the district be ordered to fund the student's privately-contracted SETSS at the private provider's rate and to grant an award of compensatory education for any services not provided during the 2024-25 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on April 2, 2025 (Tr. pp. 1-45). In a decision dated April 29, 2025, the IHO noted that the district made a motion to dismiss for lack of subject matter jurisdiction on March 19, 2025, which the IHO denied during the impartial hearing after "[t]he parties were given an opportunity to place argument[s] on the record" (IHO Decision at p. 3; see March 19, 2025 Motion to Dismiss). The IHO found that it was the district's burden to prove that it had not received a June 1 notice which the IHO determined the district failed to do (id. at p. 5). The IHO then determined that the district denied the student a FAPE for the 2024-25 school year by failing to ensure that the student's services were provided pursuant to the October 2020 IESP (id. at pp. 5-6). The IHO then assessed the appropriateness of the unilaterally obtained SETSS and determined that "the parent had not demonstrated that the program provided educational instruction designed to meet the student's needs and that, therefore, the private SETSS were not appropriate for the student (id. at p. 6). Regarding equities, the IHO found that "the testimony and evidence demonstrate that the equities weigh in favor of the [district]" and that "[t]he record does not support a full award of the [private] [p]rovider's fees" (id. at p. 7). The IHO dismissed all unaddressed claims (id.). The IHO then determined that the parent was entitled to "appropriate relief" because the district failed to provide the student with a FAPE and directed the district to fund four hours of SETSS services per week for the 10-month 2024-25 school year "at the [district]'s regular hourly rate" (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred by: denying the district's motion to dismiss based on the IHO's alleged lack of subject matter jurisdiction to adjudicate the parent's implementation claims; failing to determine from the evidence in the hearing record that the parent did not request services by June 1, 2024 and that the district timely raised its June 1 affirmative defense; awarding the parent funding for SETSS after finding that the private provider's services were not appropriate; and awarding funding for SETSS after having held that equitable considerations favored the district. The district requests that the IHO's decision be overturned in its entirety.

The parent has not submitted an answer or other response to the request for review.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, 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]).[1] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[2] Thus, under State law an eligible New

[1] 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]).

[2] 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

York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion – Timeliness of Request for Review

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review (OSR).

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]-[c]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]).

Here, the IHO's decision was dated April 29, 2025, thus the district had until June 9, 2025, 40 days after the date of the IHO's decision, to personally serve the parent with a verified request for review (see IHO Decision; 8 NYCRR 279.4[a]).[3]

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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.

[3] 40 days from April 29, 2025 was Sunday, June 8, 2025. Therefore, the district had until the following weekday, which was Monday, June 9, 2025, to personally serve the parent with the request for review.

It this instance, the district requested guidance from OSR "regarding how to effectuate service of the Notice [of Intention to Seek Review]" (May 27, 2025 Corr.). The district's May 27, 2025 letter included an affirmation of attempted service, which reflected that the district attempted to serve a notice of intention to seek review on the parent three times at her last known address, "but there was no answer" (May 27, 2025 Corr. at p. 2). By letter dated May 28, 2025, OSR responded to the district's letter, granting the district alternative means to effectuate service, specifically informing the district that it may effectuate service by "affixing the notice of intention to seek review and any supporting papers to the door [of the parent]'s last known residence in an envelope bearing the legend 'personal and confidential'" and further directing the district to "send a copy of th[e] letter, the notice of intention to seek review, and any supporting papers to the parent's last known address by Certified Mail, Return Receipt Requested" and to "file an affidavit of service reflecting completion of the alternate service approved herein" (May 28, 2025 Corr. at pp. 1, 2). The letter from OSR also noted that the district had "indicated in [its] correspondence that the [parent] was represented by a lay advocate at the impartial hearing" and further directed the district " to provide a courtesy copy of th[e] letter, the notice of intention to seek review and any supporting papers in this matter to the lay advocate that represented the parent at the impartial hearing, via first class mail" (id. at pp. 1-2).

Instead of using the OSR-directed method of alternative service, the district appears to have contacted the parent's lay advocate and received a confirmation from her via an email dated May 28, 2025 that the lay advocate "w[ould] accept email service for the parents for the documents on this appeal" and the district subsequently emailed the parent's lay advocate the district's notice of intention to seek review and request for review on June 6, 2025 (June 6, 2025 email at pp. 1, 3). The district's June 6, 2025 Declaration of Service states that "on June 6, 2025 at approximately 10:30 A.M., [the district attorney] served a true copy of the Notice of Request for Review, the Request for Review, and Verification, dated June 6, 2025, upon [parent] by electronic mail to [name redacted], [parent]'s [a]dvocate, at [email address redacted]" and that "[p]rior to my electronic service on [parent's lay advocate], she confirmed with my office that she would accept [district]'s papers on [parent]'s behalf" (Req. for Rev. at p. 13). The district asserts that the parent's lay advocate "waived personal service" on the parent (id.). However, the district has not offered an explanation as to why service may be effected on an advocate without a written acknowledgment by the person being served.

The hearing record does not include any writing from the parent indicating that she either waived personal service or was informed by the advocate of what has taken place in this proceeding. Tellingly, the parent failed to submit an answer, or any response, to the district's appeal, suggesting that the parent has yet to receive the district's appeal. Although State regulation provides for alternate methods of service in the event that service of the request for review upon the parent cannot be made after diligent attempts, the district failed to employ any of the alternate service methods provided for in State regulation (see 8 NYCRR 279.4[c][1]-[3]; May 28, 2025 Corr. at p. 1). Additionally, the district was provided with a method for effectuating personal service of the request for review on the parent via alternative means in the May 28, 2025 OSR letter; however, the district elected to forego that process relying solely on service on the advocate who represented the parent at the hearing. Given the above, the request for review and supporting papers, as presented to OSR, do not show that the district properly served the request for review on the parent and the request for review is, therefore, untimely.

An SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012] [finding that "attorney error or computer difficulties do not comprise good cause"]).

In this case, because the district failed to properly initiate this appeal by effectuating timely service upon the parent, and there is no good cause asserted in the district's request for review, in an exercise of my discretion, the appeal is dismissed (8 NYCRR 279.13; see Avaras v. Clarkstown Cent. Sch. Dist., 2019 WL 4600870, at *11 [S.D.N.Y. Sept. 21, 2019] [upholding SRO's decision to dismiss request for review as untimely for being served nine hours late notwithstanding proffered reason of process server's error]; New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-CV-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

VII. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 15, 2025

STEVEN KROLAK
STATE REVIEW OFFICER