



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-173

Application of a STUDENT WITH A DISABILITY, by her parents, 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:

Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the International Academy of Hope (iHope) for the 2022-23 school year.¹ 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.

¹ The Commissioner of Education has not approved iHope as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

§§ 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[a]). 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, however, a CSE convened on March 31, 2022 and developed an IEP for the student for the 2022-23 school year (see Parent Ex. O at pp. 1, 29).² In

² At the time of the March 2022 CSE meeting, the student was attending Imagine Academy, where she had been enrolled since September 2020 (see Dist. Ex. 3 at p. 1). The Commissioner of Education has not approved Imagine Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR

a due process complaint notice dated September 8, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year based on procedural and substantive violations (see Due Process Compl. Not. at pp. 1-5). An IHO with the Office of Administrative Trials and Hearings (OATH) was appointed on October 26, 2022, and on November 2, 2022, the IHO conducted a prehearing conference (see IHO Ex. 2 at p. 1). The parents, thereafter, prepared an amended due process complaint notice, dated November 22, 2022, alleging that the district failed to offer the student a FAPE for the 2022-23 school year (see generally Parent Ex. A). The IHO then conducted a status conference with the parties on December 19, 2022 (see IHO Ex. 3 at p. 1). Consistent with the IHO's prehearing conference summary and order, the parties submitted "Joint Uncontested Facts," dated April 14, 2023, into the hearing record as evidence (see IHO Ex. 1 at pp. 1-2).

On April 18 and May 11, 2023, the parties proceeded to present testimonial evidence at the impartial hearing (see Tr. pp. 1-180).³ In a decision dated June 28, 2023, the IHO concluded that the district offered the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 15-23). In reaching this conclusion, the IHO first set forth the applicable legal standards and then turned to address the parents' claim that they were unable to tour the assigned public school site (id. at pp. 15-18). Here, the IHO pointed to guidance from the United States Department of Education's Office of Special Education Programs (OSEP)—which stood for the proposition that the IDEA did not provide a "general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children"—and found that two district witnesses' testimony had established that the "recommended school was available to tour, in person or virtually," and the assigned public school site had "no record" of the parents requesting a tour (id. at pp. 17-18, citing Letter to Mamas, 42 IDELR 10 [OSEP 2004] and collected caselaw). The IHO noted the parents' "vague" testimony on this issue, which, according to the IHO, "lacked detail as to when [the parents] called the school and who [the parents] spoke with at the public school" (IHO Decision at p. 18). In contrast, the IHO found that the two district witnesses were "clear and credible as to the protocols and procedures in place for tours, the school's ability to implement the [s]tudent's IEP and the lack of a request by [the p]arents to tour the school" (id.).

Next, the IHO set forth the applicable legal standard regarding the burden of proof at the impartial hearing, and turned to an analysis of whether the March 2022 IEP offered the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 18-23). Overall, the IHO found that the district witnesses' testimonial evidence, together with the documentary evidence, was sufficient to "identify the [s]tudent's needs and whether the recommended program and services in the [March 2022] IEP appropriately addressed those needs" (id. at p. 19). Initially, the IHO noted that the March 2022 IEP set forth the student's present levels of performance and individual needs as "per the neuropsychological and educational report conducted" in May 2021, as well as the "annual report" from the nonpublic school the student was then-currently attending (id.). As further noted, the IHO indicated that the March 2022 CSE relied on the student's then-current "teacher's report for academic achievement, functional performance and learning characteristics," since the student

200.1[d], 200.7).

³ Both parties also submitted closing briefs to the IHO (see generally IHO Exs. 4-5).

was not yet enrolled at iHope (*id.*). The March 2022 IEP reflected that the student's "physical limitations and expressive language [we]re the main barriers to her learning and development" (*id.*). In addition, the IHO found that the IEP described the student as a "verbal, intentional communicator who produce[d] three constituent verb relations coding a range of content categories to communicate for a variety of communication functions"; the student's "speech, though intentional, [wa]s moderate-severely unintelligible, secondary to dysarthria (i.e., speech motor impairment) and developmental delays"; and the student's "[i]ntelligibility [wa]s improved in known contexts with familiar listeners" (*id.*, citing Parent Ex. O at p. 3). Next, the IHO indicated that the principal of the student's then-current nonpublic school, as well as a teacher, both attended the March 2022 CSE meeting, and the IEP documented the parents' concerns (recent hip surgery, regression of skills due to missed school for surgery, the student's need for 1:1 learning tailored to the student and her changing medical needs, the student performed best with applied behavior analysis [ABA] and Floortime, and the parents' requests for special education itinerant teacher [SEIT] services and home-based board certified behavior analyst [BCBA] therapy) (*see* IHO Decision at p. 19). In addition, the IHO noted that the parent did not "testify at the [impartial] hearing as to the [s]tudent's need for ABA/Floortime," but instead, requested CME PT services (*id.*).⁴

Next, the IHO found that the March 2022 IEP reported the student's present levels of social development, noting that she was a "sociable and happy child," she was "non-ambulatory," her "fine and gross motor delays [we]re being addressed via" OT and PT, the student participated in adapted physical education, and she required the services of a full-time, individual health paraprofessional (IHO Decision at p. 19). The IHO listed within the decision the numerous strategies recommended in the IEP to address the student's management needs, and further noted that, due to her global delays, the student required—as per the IEP—a "highly structured learning environment precluding her access to the general education curriculum at this time," as well as the provision of related services (OT, PT, speech-language therapy) and the services of the paraprofessional (*id.* at pp. 19-20). In addition, the IHO indicated that, as noted in the March 2022 IEP, the CSE denoted that the student "need[ed] a particular device or service to address her communication needs, but in a somewhat contradictory manner," the CSE did not denote that the student required assistive technology or services (*id.* at p. 20). The IHO stated that, according to the March 2022 IEP, the CSE further indicated that the student required "educational support systems such as but not limited to assistive technology, personal care services, health/medical services, or behavioral interventions" (*id.*, citing Parent Ex. O at p. 27). As noted by the IHO, a district witness testified at the impartial hearing that the parents had not requested an assistive technology evaluation—or it would have been reflected in the IEP—and a student's need for assistive technology was generally "assessed once the student [wa]s in the classroom" (IHO Decision at p. 20, citing Tr. pp. 42, 52-55). The IHO also noted, however, that the parents did not "mention that the IEP was deficient in this area" but that it would have been "better if the IEP was more specific and detailed on this issue" (IHO Decision at pp. 20-21). Based on the evidence, the IHO concluded that this "lack of detail did not rise to the level of [a] deprivation of [a] FAPE, especially given that the IEP acknowledged the [s]tudent's assistive technology needs" and

⁴ As explained in the hearing record, "CME" PT refers to "Cuevas Medek Exercise" PT, which is a "form of physiotherapy that focuses on improving the gross motor skills of young children with physical disabilities and movement disorders" (Parent Ex. S ¶ 5).

testimony reflected that those needs could be addressed once the student was in a classroom (id. at p. 21). The IHO then opined that the "IEP plan was well-considered and tailored to the [s]tudent's needs" (id.).

Next, the IHO noted that the March 2022 IEP included 15 annual goals with "detailed short-term objectives and/or benchmarks" (IHO Decision at p. 21). Thereafter, the IHO recited the special education program recommendations in the IEP, which were to be delivered on a 12-month basis, as well as the recommendations for the student to participate in alternate assessments (id.). The IHO further noted that the March 2022 IEP included that the student required an accessible school building, she had limited mobility, and she used a wheelchair (id.). Based on a district witness's testimony, the IHO found that the assigned public school site was "fully accessible to a student with limited mobility" (id.).

With respect to the March 2022 CSE's recommendation for a 6:1+1 special class placement, the IHO found that the CSE considered, but rejected, other special class placement options—such as those with student-to-staff ratios of 8:1+1 and 12:1+1—because those alternatives would "not sufficiently support the [s]tudent's academic and developmental needs" (IHO Decision at p. 22). As a final analysis, the IHO reviewed the related services recommendations in the March 2022 IEP compared to the frequencies and durations of the related services the student had been receiving at her then-current nonpublic school and also would be recommended for the student to receive at the nonpublic school for the 2022-23 school year (id.). Overall, the IHO found that the student would receive the same amounts of speech-language therapy, OT, PT, and adapted physical education in the March 2022 IEP as she had received at her then-current nonpublic school; additionally, the IHO noted that while the nonpublic school had recommended that the student receive assistive technology (i.e., communication device) for the 2022-23 school year, the student had not yet been using the same during the 2021-22 school year (id.).

Based upon her review and consideration of the evidence in the hearing record, the IHO concluded that the March 2022 IEP offered the student a FAPE (see IHO Decision at p. 23). Specifically, the IHO determined that, "[w]hen taken in its totality the IEP provided: (i) information as to the [s]tudent's level of performance and academic, developmental, and functional needs; (ii) performance support for the [s]tudent's management needs; (iii) annual goals; (iv) health and ambulatory paraprofessional; (v) OT; (vi) PT; (vii) [speech-language therapy]; (viii) [a]dapted [p]hysical [t]herapy, which addressed the [s]tudent's identified needs" (id.). Consequently, the IHO denied the parents' request for funding for the student's unilateral placement at iHope (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2022-23 school year. Initially, the parents challenge the IHO's credibility finding with regard to the two district witnesses who testified about the lack of any request from the parents to tour the assigned public school site. The parents assert that the inability to tour the assigned public school site deprived them of gathering information concerning whether the assigned public school site could accommodate the student's extensive mobility challenges, her other physical needs, and if the site had the staff required to provide paraprofessional, nursing, and related services mandated in the IEP. The parents further assert that the IHO erred by failing to

consider the district's lack of response to their 10-day notice of unilateral placement, wherein the district had the opportunity to rectify their concerns about visiting the assigned public school site.

Next, the parents contend that the IHO erred by finding the March 2022 IEP was substantively appropriate because it failed to include annual goals for assistive technology, and the IHO improperly relied on retrospective testimony to rehabilitate the "IEP's deficiencies in assistive technology." The parents claim that their inability to tour the assigned public school site further compounded this error. In addition, the parents contend that the IHO erred by finding that the March 2022 IEP was appropriate when the CSE copied the annual goals from the student's 2021-22 progress reports, other than the assistive technology annual goals. The parents argue that the annual goals in the progress reports from the student's previous nonpublic school were created to be implemented in a 1:1 instructional setting using ABA and Floortime methodologies, and therefore, could not be implemented in a public school setting.

Finally, the parents assert that the IHO disregarded evidence that the student required more services than those recommended in the March 2022 IEP, including ABA/SEIT services and CME PT services.

In an answer, the district generally argues to uphold the IHO's decision in its entirety.

V. Discussion—Timeliness of Appeal

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). 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]). However, 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]).

Here, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The parents were required to serve the request for review upon the district no later than August 7, 2023, 40 days from the date of the June 28, 2023 IHO decision (*see* 8 NYCRR 279.4[a]). However, the parents' affidavit of service indicates that the parents served the district on August 8, 2023 (Aug. 16, 2023 Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parents have failed to assert good cause in the request for review for the failure to timely initiate the appeal from the IHO's decision, as required by State regulation (see 8 NYCRR 279.13; see generally Req. for Rev.). Thus, because the parents failed to properly initiate this appeal by effectuating timely service upon the district, and there is no good cause asserted in the 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]).⁵

Assuming for the sake of argument that the parents timely initiated the appeal, a review of the hearing record demonstrates that the evidence supports the IHO's findings that the district offered the student a FAPE for the 2022-23 school year. After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, the evidence does not support the parents' arguments to reverse the IHO's finding that the student's March 2022 IEP was substantively appropriate because the IEP did not include annual goals for assistive technology or because alleged deficiencies in the annual goals, themselves, were bases upon which to conclude that the district failed to offer the student a FAPE. This is due to the fact that the parents never raised any issues concerning the sufficiency of the annual goals or the alleged failure to recommend assistive technology in the March 2022 IEP—or more specifically, assistive technology annual goals in the IEP—in either the September 2022 due process complaint notice or in the November 2022 amended due process complaint notice (see generally Parent Ex. A; Due Process Compl. Not.) and, therefore, such issues were outside the scope of the impartial hearing (see 20 U.S.C. § 1415[c][2][E][i]; [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187 n.4 [2d Cir. 2012] ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]).⁶

⁵ In their reply, the parents belatedly assert that the request for review was not served in a timely manner due to a "clerical error" related to the failure of parents' counsel to attach the request for review to an email to the district on August 7, 2023. Even if this explanation had been included in the request for review, as required by State regulation (see 8 NYCRR 279.13), it would not constitute good cause as it is akin to process server error (Avaras, 2019 WL 4600870, at *11 & n.8 [citing authority that process server error does not amount to good cause for untimely service]). Waiting until the last day to execute a pleading and effectuate service and omitting attachments to an email does not constitute a matter outside the control of a party.

⁶ Moreover, to the extent that the IHO addressed the issue of assistive technology in the decision and the parents had not raised this as an issue in the September 2022 due process complaint notice or the November 2022 amended due process complaint notice, the IHO exceeded her jurisdiction by sua sponte reaching the issue in the first instance. The Second Circuit has held that issues not included in a due process complaint notice may be ruled on

In addition, an independent review of the hearing record reflects that the IHO properly found that the district sustained its burden to establish that the assigned public school site was capable of implementing the student's March 2022 IEP and that the parents' inability to visit the assigned public school site did not result in a failure to offer the student a FAPE. To the extent that the parents challenged the IHO's finding that the district witnesses who testified concerning whether the assigned public school site was capable of implementing the student's March 2022 IEP were credible, generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the parents do not point to any non-testimonial evidence in the hearing record that would justify a conclusion contrary to the IHO's credibility determination, or that the hearing record, when read as a whole, compelled a contrary conclusion (see generally Req. for Rev.; Tr. pp. 1-180; Parent Exs. A-U; Dist. Exs. 1-4; IHO Exs. 1-5). In addition, the evidence in the hearing record contains sufficient evidence to uphold the IHO's finding that the assigned public school site was capable of implementing the special education recommended in the March 2022 IEP (see generally Tr. pp. 1-180; Parent Exs. A-U; Dist. Exs. 1-4; IHO Exs. 1-5).

Overall, the evidence in the hearing record demonstrates that the IHO carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (see IHO Decision at pp. 1-15). In addition, the hearing record reflects that the IHO accurately identified and analyzed the crux of the parents' arguments related to their alleged inability to visit the assigned public school site and regarding their assertion that the March 2022 IEP failed to include sufficient special education services and home-based services—such as ABA and CME PT services—and that the March 2022 CSE disregarded evidence supporting the student's need for additional home-based services (id. at pp. 17-23). A review of the IHO's decision demonstrates that the IHO reached the conclusion that the district offered the student a FAPE for the 2022-23 school year by relying on the relevant facts and proper legal standards in order to reach her conclusions of law on this issue (id. at pp. 15-23). The IHO's decision also shows that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and furthermore, that she carefully marshaled and weighed the evidence in support of her conclusions (id.).

by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]). Here, the issue of assistive technology was first raised by the parents during the cross-examination of a district witness, and thus, the district did not open the door to such claim (see Tr. p. 41; see generally Parent Ex. A).

VII. Conclusion

Having found that the request for review must be dismissed because the parents failed to timely initiate the appeal, and that alternatively, the evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 September 20, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER