



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 23-201

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 Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found the respondent (the district) offered the student a free appropriate public education (FAPE) for the 2023-24 school year. 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. §§ 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 facts relating to the student is not necessary.

Briefly, the student had been attending a State-approved nonpublic school (NPS) in a therapeutic day program per the recommendation of the CSE since September 27, 2016 (Dist. Ex. 24 at p. 1; see Dist. Exs. 15 at pp. 21-22; 20 at p. 25).¹ For the 2020-21 and 2021-22 school years, the student attended school virtually, which was available due to the circumstances surrounding the COVID-19 pandemic (Dist. Ex. 24 at p. 1). However, for the 2022-23 school year, the student

¹ District exhibit 24 consists of documents provided by the NPS in response to a subpoena (see Tr. p. 83; Dist. Exs, 23; 24). The exhibit is not paginated and, for purposes of this decision, the pages of the subpoena responses will be referred to in consecutive order beginning with page 1 (see Dist. Ex. 24 at pp. 1-151).

did not attend the NPS in-person nor did the NPS offer a remote or virtual learning instruction (id.).²

A CSE convened on January 10, 2023, to formulate the student's IEP for the remainder of the 2022-23 school year and the beginning of the 2023-24 school year (see generally Dist. Ex. 1).³ The CSE continued to find the student eligible for special education as a student with an emotional disability and recommended that he attend a 12:1+1 special class for his core academic classes and receive related services of one 30-minute session per week of individual counseling services, one 30-minute session per week of group (3:1) counseling, two 30-minute sessions per week of group (2:1) occupational therapy (OT), and two 30-minute sessions per week of group (3:1) speech-language therapy, all on a 12-month basis (Dist. Ex. 1 at pp. 1, 23-24). The CSE recommended the special education program and services be provided in a district specialized school (id. at p. 28). The CSE also recommended special transportation from the closest safe curb location to school (id. at p. 27).

On January 18, 2023, the district sent the parent a prior written notice summarizing the recommendations contained in the January 2023 IEP and a school location letter identifying the particular public school site to which the district assigned the student to attend to receive the program and services recommended in the January 2023 IEP (see Dist. Exs. 4; 5).⁴

A. Due Process Complaint Notice

In a due process complaint notice dated May 17, 2023, the parent alleged that the district "unlawfully discharged" the student from his NPS placement without proof that such NPS was no longer appropriate for the student or a valid reason for the discharge (IHO Ex. XIII at p. 2). Additionally, the parent claimed that the district refused to implement prior orders directing it to provide specific special transportation to the student (id.). As relief, the parent requested an order directing the district to restore the student's NPS placement for the 2023-24 school year, including the 12-month program, and his "previously implemented specialized transportation services"; an order directing the district to refrain from making inaccurate and improper changes to the student's

² According to the principal of the NPS, the school no longer offered a "virtual synchronous or asynchronous platforms" during the 2022-23 school year and the parent was notified that the student not being physically present in the building caused the NPS to mark him absent everyday (Dist. Ex. 24 at p. 1). The principal also reported that, as a courtesy, the student's teachers at the NPS posted school work "sporadically" to a Google classroom online, but such work was not checked, graded, or supervised by any staff member of the NPS (id.). Further, the principal of the NPS indicated that the student received some virtual counseling to help alleviate the student's anxieties and fears centered around getting back onto the school bus and returning to the NPS building and that the NPS attempted to provide the student communication with his related service provides in an attempt to increase his comfort level with school staff and hopefully persuade him to return to in-person instruction (id.).

³ The hearing record contains two copies of the January 10, 2023 IEP (compare Dist. Ex. 1, with IHO Ex. I). For purposes of this decision, only the district exhibit will be cited.

⁴ The January 2023 prior written notice indicated that a 10-month program was recommended for the student, however, the January 2023 IEP recommended a 12-month program (compare Dist. Ex. 1 at p. 24, with Dist. Ex. 4 at p. 1). This is presumed to be in error as neither party has claimed that the student required a 10-month program rather than a 12-month program.

IEP without parent notification or participation; and an order directing the district to adhere to and implement a prior IHO's December 2022 pendency order (id.).

B. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The hearing record reflects that two pre-hearing conferences were held on June 21, 2023 and July 6, 2023 (June 21, 2023 Tr. pp. 1-19; July 6, 2023 Tr. pp. 1-33).⁵ On July 13, 2023, the parties attended a pendency hearing (July 13, 2023 Tr. pp. 34-66). On July 18, 2023, the IHO issued an interim decision on pendency (see Interim IHO Decision). The IHO determined the student's pendency program was based on the last agreed upon IEP dated March 31, 2022 in which the CSE recommended a 12:1+1.5 setting in the NPS therapeutic day program and a prior IHO decision dated May 26, 2022, in which the prior IHOs ordered that the student's special transportation services include a 30-minute travel time limitation (id. at pp. 3-4; see IHO Exs. II at pp. 19-20; V at p. 7).⁶ The IHO ordered the district to provide the student with such pendency program effective from the date of the parent's May 2023 due process complaint notice until a final decision was issued, or the matter was withdrawn (Interim IHO Decision at pp. 3-4).

An impartial hearing convened on August 1, 2023, and concluded on August 16, 2023 after three days of proceedings (Aug. 1, 2023 Tr. pp. 27-238; Aug. 8, 2023 Tr. pp. 239-87; Aug. 16, 2023 Tr. pp. 288-307). In a decision dated August 31, 2023, the IHO determined that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 8). In addition, regarding the issue of parental consent, the IHO determined that the district made several attempts to contact the parent via email, her preferred mode of contact, to sign consent forms to have the student reevaluated and that the parent's testimony to the contrary was inconsistent and self-serving (id. at pp. 8-9). The IHO determined that the parent "effectively impeded" the district's obligation to gather updated information on the student (id. at p. 9). Regarding the program recommended by the January 2023 CSE, the IHO determined that the hearing record contained evidence that showed the CSE considered "many different [special education] settings for the student" and that the hearing record was "devoid of any evaluative data supporting a more restrictive placement of the student in a [n]onpublic [d]ay [s]chool program" (id. at pp. 9-10).

Regarding special transportation, the IHO noted the January 2023 IEP contained a recommendation for special transportation but did not include a 30-minute travel time limitation accommodation that the parent argued was needed due to the student's medical conditions (IHO Decision at pp. 11-12). The IHO noted the hearing record contained a "brief note" from the student's doctor dated April 7, 2022, which indicated the student had received a diagnoses of attention deficit hyperactivity disorder (ADHD) and asthma and was prone to "frequent outburst that [could] trigger his asthma" but further determined that such note lacked specificity and detail regarding the correlation between the student's conditions and the need for a 30-minute special

⁵ The transcripts were not paginated consecutively. As such, in this decision, the transcripts cites will be preceded with the hearing date.

⁶ The IHO also noted another prior IHO decision dated March 10, 2023, found that the parent's claim for the 2022-23 school year was barred by the doctrine of res judicata given the order in the May 26, 2022 IHO decision (Interim IHO Decision at p. 3; see IHO Ex. IV at pp. 11-13).

transportation time accommodation (*id.* at p. 12; *see* Parent Ex. B).⁷ Additionally, the IHO determined that, based on the hearing record and the evaluative data considered by the January 2023 CSE, there was no basis for her to award the 30-minute special transportation time accommodation (IHO Decision at p. 12). However, the IHO also found that the district failed to demonstrate that the student did not need the 30-minute special transportation time accommodation that was previously ordered in prior IHO decisions (*id.*).

As relief, the IHO ordered: (1) the district to evaluate the student within 30 days of the date of the decision to determine whether the student needed a 30-minute special transportation accommodation of limited travel time, 30 minutes; (2) the CSE to convene within 15 days of the completion of such evaluation or within 45 days of the date of the decision to determine whether the student's IEP should be modified to include a 30-minute special transportation time accommodation; and (3) that if the district failed to complete such evaluation or failed to reconvene the CSE for any reason other than an inability to obtain consent from the parent after three attempts, the CSE must amend the student's IEP to include the 30-minute special transportation time accommodation (IHO Decision at p. 12). The IHO denied all other relief requested by the parent and dismissed the remaining issues relating to the 2023-24 school year with prejudice (*id.* at p. 13).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review is presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parent's appeal is that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year. In its answer, the district responds to the parent's material allegations and argues that the IHO's decision be upheld in its entirety. Additionally, the district argues that the parent's appeal should be dismissed on the basis that the parent failed to properly initiate the appeal.

V. Discussion – Initiation of the Appeal

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for lack of 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]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations, including the failure to properly serve an initiating pleading in a timely manner, may

⁷ The parent submitted the April 2022 doctor letter to the district as medical documentation to support her claim that the student needed a special transportation time accommodation of 30-minutes added to his IEP (*see* Dist. Ex. 25 ¶ 30).

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]).

On September 25, 2023, the pro se parent filed the following documents with the Office of State Review: a notice of intention to seek review and a notice of intention to cross-appeal both dated September 1, 2023 but signed on September 21, 2023, a notice of request for review dated September 21, 2023, a request for review dated September 21, 2023, an affidavit of verification dated September 21, 2023, two documents purporting to be affidavits of service both dated September 21, 2023, and the IHO's July 18, 2023 interim order on pendency.^{8,9} Regarding the first affidavit, the parent averred that, on September 21, 2023, she delivered the "Notice of Intention to Seek Review Appeal" to the CSE district office by mail (Parent Aff. of Service I). In the second affidavit the parent averred that she delivered the "Notice of Intention to Seek Review Package Appeal" to the CSE district office (Parent Aff. of Service II). The second affidavit listed the following documents as part of the notice of intention to seek review package served at the

⁸ The parent's request for review is also dated September 1, 2023 (on the first page of the attachment to the form request for review) but was signed by the parent on September 21, 2023 (see Req. for Rev.).

⁹ Both of the parent's affidavits of service submitted with the request for review were notarized on September 21, 2023. For purposes of this decision, the document entitled "Affidavit of Service by Mail," which refers to service of the "Notice of Intention to Seek Review Appeal," shall be referred to and cited as "Parent Aff. of Service I." The document entitled "Affidavit of Personal Service," which refers to services of the "Notice of Intention to Seek Review Package Appeal" shall be referred to and cited as "Parent Aff. of Service II."

CSE office: a notice of intention to seek review; a notice of request for review; a notice of intention to cross-appeal; a case information statement; and an affidavit of verification (id.). In the affidavit of personal service, the parent did not specify to whom the papers were delivered (id.).

Based on the parent's affidavits of service themselves, the parent did not personally serve the district in accordance with State regulation.

In its answer, the district indicates that the parent left the appeal documents with a district payroll liaison who was not designated by the district to accept service. Further, the district alleges that no staff member at the CSE district office was authorized to receive service. According to the affidavit of the CSE chairperson, on September 21, 2023, the parent arrived at the CSE district office and informed a payroll liaison that she was there "to serve papers to a supervisor at the [district]" (SRO Ex. I ¶ 4).¹⁰ The payroll liaison spoke to the CSE chairperson who instructed her to "take the paperwork from the Parent," and the payroll liaison made photocopies for the parent (id. ¶ 5). There was no discussion between the parent and the payroll liaison concerning the service of the papers or who may be authorized to accept service on the district's behalf (id. at ¶ 6).

The parent did not file a reply to the district's answer and, therefore, has offered no rebuttal of the sworn statements of the district employee.

Based on the parent's affidavits of service themselves and, further, the district's description of the manner in which service was attempted, the parent did not properly serve the district as required by State regulation (see 8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 20-020; Application of a Student with a Disability, Appeal No. 12-077; see also Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service under similar regulatory provisions upon unidentified receptionist found improper]; Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696 [service upon the executive secretary to the superintendent found under similar regulatory provisions improper]). While State regulations do not preclude a school district and a parent from agreeing to "waive" the personal service method and agree to service by an alternate delivery method, there is no indication in this instance that the district agreed to service to one of its CSE administrators or a payroll liaison. Under these circumstances, given the deficiencies in compliance with Part 279 and the defect in service on the district, the appeal must be dismissed.

While not reaching the merits, I comment briefly that it appears that the relationship between the parties is marked by contention and distrust and the consequence is that the student is being deprived of an educational placement. I encourage both parties to return to the collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra, 427 F.3d at 192-93). These efforts should first and foremost include, consistent

¹⁰ Along with its answer the district submits two proposed exhibits concerning the parent's initiation of this appeal, marked as SRO exhibits 1 and 2 (see SRO Exs. 1-2). The documents have been considered and, for purposes of this decision, are cited as marked by the district.

with the requirements of the IDEA and its implementing regulations, a battery of evaluations needed to assess the student's abilities and needs.¹¹

VI. Conclusion

In summary, the parent's appeal must be dismissed for the failure to properly initiate the appeal.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 11, 2023**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**

¹¹ Federal and State regulations provide that parental consent is not required to conduct a reevaluation if the district can demonstrate that it "made reasonable efforts to obtain such consent," and the student's parent "failed to respond" (34 CFR 300.300[c][2]; see 8 NYCRR 200.5[b][1][i][b]). Federal and State regulations also permit the use of consent override procedures, specifically through due process, if the parent refuses to consent to a reevaluation (34 CFR 300.300[c][1][ii]; 8 NYCRR 200.4[a][8]; 200.5[b][3]).