



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-186

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of math tutoring services delivered to her son during 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 programming 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of this case and the IHO's decision will not be recited here in detail.¹ Briefly, the student has received a diagnoses of attention-deficit/hyperactivity disorder, combined presentation, and

¹ The student has been the subject of a prior impartial hearings and a State-level administrative review (see Parent Ex. K; Application of a Student with a Disability, Appeal No. 21-112).

specific learning disorder with impairments in reading, written expression, and mathematics (Parent Ex. A at pp. 1, 9).² The student began receiving private literacy tutoring services in January 2021 and the provider (literacy tutor) delivered "an average of 2-4 hours a week per the impartial hearing and pendency orders" issued pertaining to the student (Parent Ex. B).

An IHO decision issued in a prior matter involving the student (prior IHO decision) indicated that a CSE convened on June 15, 2021 and developed an IESP recommending four periods per week of special education teacher support services (SETSS), two 45-minute sessions per week of individual occupational therapy (OT), and one 45-minute session per week of individual counseling services (Parent Ex. K at p. 6).³ The prior IHO decision further reflected that a CSE did not convene to conduct an annual review and develop an IESP for the 2022-23 school year (id. at p. 7). The prior impartial hearing addressed the 2022-23 school year, and, in a decision dated November 17, 2022, the IHO in that matter ordered, among other things, that the district fund four hours per week of tutoring from the literacy tutor or a comparable provider at a specified rate (id. at p. 13).

In a document signed by the parent on April 24, 2023, the parent notified the district that the student would be parentally placed at a nonpublic school for the 2023-24 school year and requested special education services from the district (Dist. Ex. 3).

A. Due Process Complaint Notices, Prehearing Conference, and Intervening Events

The parent originally filed a due process complaint notice on August 28, 2023 (IHO Ex. I). The parent claimed that the student continued to struggle in literacy, math, and executive functioning and "require[d] additional support to make appropriate progress" (id. at p. 1). The parent alleged that the district had not convened an annual review to develop an IESP for the student since June 2021 (id.). In addition, the parent asserted that the district had not provided the student with OT or counseling services as recommended in the "last IESP on file" (id.). The parent requested pendency based on the November 2022 IHO decision (id. at p. 2). For relief, the parent requested private tutoring, with an increase from four to six hours per week "to include designated tutors/time for literacy, homework support and math" at an hourly rate higher than that ordered in the November 2022 IHO decision (id. at p. 2). The parent noted that a private neuropsychological evaluation recommended that the student receive tutoring from providers available at the student's nonpublic school but that such providers "[we]re not required to be" State certified and that, therefore, she could not use district "SETSS providers" (id.). The parent also sought district funding for private organizational skills training and "other counseling/neurological services" to fulfill the student's OT and counseling mandates (id.).

The matter was assigned to an IHO (IHO I) with the Office of Administrative Trials and Hearings (OATH). IHO I held a prehearing conference on October 3, 2023 at which the parent clarified that the school year at issue in the due process complaint notice was the 2023-24 school

² The hearing record contains duplicative exhibits (compare Parent Ex. A, with Dist. Ex. 4, and Parent Ex. D, with Dist. Ex. 1). For purposes of this decision only the parent's exhibits will be cited in instances where both a parent and district exhibit are identical in content.

³ A copy of the student's June 2021 IESP was not entered into the hearing record.

year and that she wanted to amend the due process complaint notice to reflect that she sought tutoring services, not SETSS, as relief for the 2023-24 school year (see Tr. pp. 8-10). The parent also clarified that the private tutors who delivered services to the student during the 2023-24 school year were qualified but not State certified (Tr. pp. 14-15).⁴ The district representative stated that she had no information that SETSS were being provided to the student and that the district conceded it failed to provide the student a FAPE for the 2023-24 school year (Tr. pp. 18-20).⁵

Beginning on September 13, 2023, the literacy tutor began delivering tutoring services to the student for the 2023-24 school year (see Parent Ex. M).

In an amended due process complaint notice dated October 3, 2023 the parent reiterated the allegations from the August 2023 due process complaint notice that the district failed to convene a CSE to develop an IESP for the student for the 2023-24 school year and, for relief, requested district funding of six hours per week of tutoring services provided by the student's then-current provider and a math tutor that the student's school was helping to identify at a specified hourly rate (IHO Ex. II at p. 2).⁶

On October 30, 2023, a CSE convened and developed an IESP for the student with an implementation date of November 13, 2023 that recommended six periods per week of direct individual SETSS in a general education classroom and one 30-minute session per week of individual counseling (Parent Ex. D at p. 15).⁷

Beginning on November 6, 2023, the student began receiving math tutoring from a private provider (math tutor) (see Parent Ex. N).

⁴ The parent also indicated during the prehearing conference that she received related services authorizations (RSAs) from the district to obtain OT and counseling services, which she had not received when she filed the original due process complaint (Tr. p. 12).

⁵ According to a pendency implementation form signed by the district on October 3, 2023, the district agreed that the student's pendency program arose from the November 2022 IHO decision and further agreed, for purposes of pendency, to fund six instead of four hours per week of tutoring services at a higher hourly rate (see Parent Ex. O).

⁶ The IHO in his decision noted that the amended due process complaint notice was not processed by the impartial hearing office as a formal amendment because the amendment did not change the parent's requested relief but instead clarified what was discussed at the October 3, 2023 prehearing conference (IHO Decision at p. 3).

⁷ The October 2023 IESP set forth two separate recommendations for three periods per week of SETSS but did not reflect whether the separate recommendations were dedicated to different subjects like English language arts (ELA) or math (see Parent Ex. D at p. 15). According to the IESP, the CSE developed annual goals for the student for ELA, math, and counseling (*id.* at pp. 10-14). The parent in the written closing statement stated her understanding that the October 2023 IESP mandated six "hours of SETSS (3 hours ELA/3 hours Math)" (Parent Ex. P at p. 1).

C. Impartial Hearing Officer Decision

After a status conference on November 2, 2023, the parties then proceeded to an impartial hearing on January 19, 2024 (Tr. pp. 31-93). After the close of the impartial hearing, IHO I recused herself, and another IHO (IHO II) was appointed to render a decision (see IHO Decision at p. 3).

In a decision dated April 9, 2024, IHO II found that the district made a formal concession during the impartial hearing that it denied the student a FAPE for the 2023-24 school year on an equitable basis and that, therefore, the parent was entitled to "certain relief" (IHO Decision at pp. 4-5, 7-8). In addition, IHO II found that the parent met her burden to prove that the literacy tutoring services she obtained for the student constituted educational instruction specially designed to meet the student's unique needs (id. at pp. 5, 13). However, IHO II determined that the hourly rate previously charged for services by the literacy tutor was reasonable and there was no evidence to justify the tutor's increased hourly rate for the 2023-24 school year (id. at p. 15). IHO II also determined that, based on the record, he was unable to find that the parent met her burden to show that the math tutoring services she arranged for in November 2023 were "reasonably serving [the s]tudent's individual needs" and accordingly denied funding for such math tutoring services (id. at p. 14).

As relief, IHO II ordered: (1) the district to fund three hours per week of ELA tutoring for the 2023-24 school year at a specified hourly rate provided by the literacy tutor or a comparable provider of the parent's choosing with similar experience for up to a maximum of 108 hours in total, less any tutoring hours already funded pursuant to the pendency agreement; (2) the district to implement three periods per week of 1:1 SETSS in math as mandated on the student's October 2023 IESP for the remainder of the 2023-24 school year; (3) the district to fund three periods per week of compensatory 1:1 SETSS in math to be provided by a State certified special education teacher of the parent's own choosing "at a market rate" for the weeks between September 1, 2023, and the date of the decision; (4) that, if the district failed to appoint a service a provider to provide the 1:1 SETSS in math to Student within fifteen days of the date of the decision, then the district would be required to fund an additional three periods per week of compensatory 1:1 SETSS in math for the period of April 10, 2024, through June 30, 2024; (5) the district to provide and fund a maximum of 108 hours of 1:1 SETSS in math for the 2023-24 school year either pursuant to the IHO's order to implement the IESP or provide compensatory education or pursuant to its pendency obligation; and (6) that the banks of compensatory 1:1 SETSS in math were to be provided during the regular school year, during the summer, on weekdays, weekends, on holidays, or during school vacations, and would expire after eighteen months from the date of the decision (IHO Decision at pp. 16-17).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. Generally, the issue raised by the parent on appeal is whether IHO II erred by determining the parent did not meet her burden to prove the private math tutoring services were appropriate and denying funding for such services. The parent also alleges that the student should be able to work with providers who are not State-certified and the IHO erred by ordering the 1:1 SETSS in math be provided by a State-

certified special education teacher or a State-certified SETSS provider.⁸ As relief, the parent requests for the student to be able to "continue working with [his] current math tutor" for the remainder of the 2023-24 school year and that the compensatory education award be modified to allow her to select a provider of her own choosing who may or may not be State-certified.

The district did not file an answer responding to the allegations in the parent's request for review.

V. Discussion

As a threshold matter, it must be determined whether 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 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

⁸ The parent also alleges that IHO I should not have granted an extension of the decision timeline and that, if the decision was issued sooner, she would have had sufficient time to "try and locate an alternate math provider since our current provider was not approved in the [decision]" (Req. for Rev. at p. 4).

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 May 13, 2024, the parent filed the following documents with the Office of State Review: a notice of intention to seek review with case information statement dated May 2, 2024, a notice of request for review dated May 9, 2024, a request for review dated May 8, 2024, an affidavit of verification notarized on May 8, 2024, and three affidavits of personal service notarized on May 8, 2024.^{9, 10}

In the email thread between the parties, on May 2, 2024, the parent described that the student's father attempted to "hand deliver [the notice of] intent[ion] to [seek review] form to the District 2, CSE 9 Office" but someone at that office "told him he was in the wrong place and had to hand deliver the form to the NYC Law Department" (SRO Ex. 1 at p. 3). On the same day the clerical associate for the local CSE office responded to the parent indicating that she was "told by the law department to instruct [the student's father] where the form need[ed] to be filed" and that she additionally "gave the notice to the CSE 9 Chairperson who also filed the form" with the impartial hearing office (id. at pp. 2-3).

According to the first affidavit of personal service, the father served an individual at the "NYC Law Dep[artment]" with the notice of intention to seek review on May 2, 2024 (Parent Aff. of Service I). According to the second affidavit of personal service, the father also served the

⁹ All three of the affidavits of service are notarized on May 8, 2024. For purposes of this decision, the affidavit of personal service which refers to service of the "Form A Notice of Intention to Seek Review" by leaving it with a person from the "NYC Law Dept." shall be referred to and cited as "Parent Aff. of Service I." The affidavit of personal service which referred to service of "Form A Notice of Intention" by leaving it with a "Clerical Associate III, CSE 9" shall be referred to and cited as "Parent Aff. of Service II." The affidavit of personal service which referred to service of "Notice of Request for Review, Request for Review, [and] Affidavit of Verification of the Request for Review" by leaving it with the "CSE 9 Chairperson" shall be referred to and cited as "Parent Aff. of Service III."

¹⁰ Additionally, the parents submit the following documents as additional evidence to be considered on appeal: an email thread between the parties regarding service of the pleadings on appeal dated from April 9, 2024 to May 7, 2024, a copy of the student's math grades from spring 2023, and a copy of the student's math grades purported to be for spring 2024. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the email thread between the parties concerns where and upon whom the parent served the request for review and, therefore, could not have been offered at the time of the impartial hearing and is necessary for the purpose of addressing whether the parent effectuated proper personal service upon the district. Accordingly, that document has been considered and shall be cited as SRO Exhibit 1 and the paginated cited consecutively starting at page 1 and ending with 4 (e.g., SRO Ex. 1 at pp. 1-4). Regard the copies of the student's spring 2023 and spring 2024 grades, given the ultimate decision below to dismiss the parent request for review for lack of personal service, these documents are unnecessary and shall not be considered further on appeal.

notice of intention to seek review on the "Clerical Associate III, CSE 9" on May 2, 2024 (Parent Aff. of Service II). Based on the foregoing, the parent properly served the notice of intention to seek review on the district by serving the document at the New York City Law Department, which has been designated by the district to accept service on its behalf. As indicated above, the parent also attempted to serve the notice of intention to seek review at the local CSE office but was promptly told that office could not accept service and was advised as to where the parents needed to personally serve the document (see SRO Ex. 1 at pp. 2-3). Moreover, there is no other indication that an individual at the local CSE office was permitted to accept service on behalf of the district.

Although the parent did successfully serve the notice of intention to seek review to the New York City Law Department, which had been designated by the district to accept service, the parent did not properly serve the district with the notice of request for review, the request for review, or the affidavit of verification of the request for review.

In the email thread between the parties, on May 2, 2024, the parent requested that the CSE chairperson advise where the parent would be required to "submit" the notice of request for review, request for review, and affidavit of verification (SRO Ex. I at pp. 1-2). The CSE chairperson responded on May 3, 2024 only that she sent the parent's request "to the impartial hearing managers inbox" (id.). On May 7, 2024, the parent again contacted the CSE chairperson and informed her that she "plan[ned] to drop off" the request for review and accompanying documents the following morning and requested confirmation of the correct location for services (id. at p. 1). It does not appear that the parent received a response to the May 7, 2024 email.

According to the third affidavit of personal service filed with the parent's appeal, the parent served the notice of request for review, the request for review, and the affidavit of verification of the request for review at the "District 2, CSE 9" by leaving such documents with the "CSE 9 Chairperson" (Parent Aff. of Service III).

Based on the parent's affidavit of service and corresponding email thread, the parent did not properly serve the district the notice of request for review, the request for review, or the affidavit of verification of the request for review in accordance with 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 upon one of its CSE administrators.

I empathize with the parent and her attempts to initiate proper personal service and understand her frustration that came with attempting to seek clarification from the CSE chairperson about where and upon whom to effectuate service. Nevertheless, the parent was informed regarding the proper location for service and successfully effectuated service of the notice of intention to seek review but elected not to repeat that course of action for the request for review.

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

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
June 11, 2024**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**