



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-190

### **Application of a STUDENT SUSPECTED OF HAVING 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:**

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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which dismissed their due process complaint alleging that respondent (the district) failed to find their daughter eligible for special education services. 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**

The student has been the subject of a prior State-level administrative review (Application of a Student Suspected of Having a Disability, Appeal No. 24-038). For the 2020-21, 2021-22, 2022-23 and 2023-24 school years the student attended a nonpublic school, the Staten Island Academy (IHO Ex. I at p. 9). As described in Application of a Student Suspected of Having a Disability, Appeal No. 24-038, a copy of which is contained in the hearing record in this matter,

[i]n a due process complaint notice dated July 12, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE), in that it failed to locate and identify the student as a student with a disability in violation of the district's child find obligations during the 2020-21, 2021-22 and 2022-23 school years. Among other relief, the parents requested various forms of compensatory education, an individualized education services program (IESP), reimbursement for the costs of the private neuropsychological evaluation, and

tuition reimbursement for the costs of the student's attendance at [Staten Island Academy]

(see IHO Ex. IV at pp. 14-20 [internal citations omitted]). While the impartial hearing was pending, a CSE convened on December 21, 2023 and determined that the student did not meet the criteria for eligibility under the IDEA (IHO Ex. I at p. 9). On the day following the CSE meeting, December 22, 2023, an IHO issued a final decision dismissing the parents' claims in that proceeding holding that the district did not violate its child find obligations for the 2020-21, 2021-22 and 2022-23 school years and did not deny the student with a FAPE (December 2023 IHO decision) (IHO Ex. IV at pp. 22-43). However, the IHO ordered the district to "convene a meeting of the CSE, provide any evaluations that are needed in order to properly classify the student as a child with a disability, and develop an IEP for the student" (*id.* at p. 38). The parents appealed from the December 2023 decision; however, in Application of a Student Suspected of Having a Disability, Appeal No. 24-038 another SRO dismissed the parents' appeal on the basis that the parents' appeal from the December 2023 IHO decision was untimely (*id.* at pp. 44-49).

#### **A. Due Process Complaint Notice**

While the State-level review proceeding was pending in Application of a Student Suspected of Having a Disability, Appeal No. 24-038, the parents filed another due process complaint notice dated March 5, 2024, alleging once again that the district denied the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, 2022-23, and 2023-24 school years (IHO Ex. I at p. 9). The parents again alleged that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years by failing to properly classify the student and by failing to create an IEP or IESP for the student (*id.* at pp. 10-11). The parent also allege that the district failed to comply with the directive to convene the CSE in the December 2023 IHO Decision (*id.* at pp. 9-10). As relief, the parents requested reimbursement/direct payment of tuition for the Staten Island Academy for the 2020-21, 2021-22, and 2022-23 school years and an award of \$750,000 in damages (*id.* at p. 11). The parents further sought relief in the form of compensatory occupational therapy (OT) three times a week for 45-minutes and the creation of an IEP or IESP that includes an individual teacher's assistant and preferential seating (*id.* at p. 12).

#### **B. Impartial Hearing Officer Decision**

A prehearing conference convened before the Office of Administrative Trials and Hearings (OATH) on April 9, 2024 (Tr. pp. 1-37). The parents appeared with the assistance of two lay advocates (Tr. pp. 2-3). During the prehearing conference, the IHO informed the parties that the district had informed her that "the relief that's being sought in th[e] D[ue] P[rocess] C[omplaint] ha[d] already been heard before OATH by another IHO" (Tr. p. 4). On April 12, 2024, the district submitted a motion to dismiss the parents' due process complaint because the parents' substantive claims were barred by res judicata, the IHO lacked jurisdiction over the implementation of the December 2023 IHO decision, and compensatory damages were unavailable under IDEA (see IHO Ex. IV). The parents did not file a response to the district's motion to dismiss (IHO Ex. V at p. 1).<sup>1</sup> In a decision dated April 24, 2024, the IHO found that the parents' due process complaint was

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<sup>1</sup> The IHO reminded the parent of the opportunity to respond but the parents' advocate replied to the IHO's email notifying the advocate of the due date for the parents' response to the district's motion to dismiss by writing: "as

duplicative of issues already litigated in the prior proceeding and was barred by the doctrine of res judicata (IHO Decision at pp. 5-8). The IHO further found that she did not have enforcement authority regarding the December 2023 IHO decision and that money damages were unavailable in a due process proceeding (IHO Decision at p. 8). The IHO granted the district's motion to dismiss (id. at pp. 5, 8).

#### **IV. Appeal for State-Level Review**

The parents appeals pro se, alleging that the IHO erred in granting the district's motion to dismiss and requested that the case be remanded to another IHO to conduct an impartial hearing.<sup>2</sup> The parents continue to press their argument that the district failed to convene the CSE after the December 2023 IHO decision. The parents allege that their March 5, 2024 due process complaint notice challenged the determination of the CSE on December 21, 2023 that the student was ineligible for special education.

In an answer, the district requests that the parents' appeal be dismissed for failure to effectuate proper service upon the district and notes that the parents were cautioned previously regarding the rules for service in Application of a Student Suspected of Having a Disability, Appeal No. 24-038. In the alternative, the district asserts that the IHO correctly dismissed the parents' due process complaint notice for the reasons described therein and denies that the parents' March 2024 due process complaint notice contained any claims related to the 2023-24 school year.

The parents did not file a reply to the district's answer.

#### **V. Discussion – Initiation of the Appeal**

As a threshold matter, it must be determined whether or not the parents' 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];

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I, the parents lead Advocate had advised you at the prehearing conference, I / we will not be responding to the district's motion to dismiss the complaint..." (IHO Decision at p. 4; IHO Ex. V at p. 1).

<sup>2</sup> The student's father filed the request for review; however, this decision refers to parents in the plural because both were listed in the underlying impartial hearing.

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]).

The administrative record in the proceeding shows that on the parents filed the following documents with the Office of State Review: a notice of intention to seek review, a notice of request for review, a request for review, and an affidavit of verification. However, the parents failed to file proof of service of their request for review and supporting documents with the Office of State Review as required by 8 NYCRR 279.4(e).

In its answer, the district indicates that the parents attempted to serve their appeal documents upon the district via email account regarding subpoenas that was not designated to accept service of papers associated with appeals from decisions rendered by IHOs (Answer at Ex. 1 ¶¶ 4, 7).<sup>3</sup> Furthermore, an email from the community coordinator in the district's Office of General Counsel's Records Access Unit (community coordinator) shows that the community coordinator spoke with the parent over the telephone as well as the parent's mother-in-law in person and they were advised how the parents' notice of intention to seek review, notice of request for review, request for review, and affidavit of verification could be served upon the New York City Law Department (Law Department) (*id.* ¶¶ 5-6). Specifically, the community coordinator sent the parent a hyperlink to the Law Department's website to show the parent how to effectuate service of the appeal from the IHO's decision upon the Law Department that was authorized to accept service (*id.*). The district asserts that Law Department was not served with any appeal of the IHO's decision "by any other means" (*id.* ¶ 7).

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<sup>3</sup> With its answer, the district filed an attorney declaration under penalties of perjury with three attachments consisting of emails that are related to the improper service defense.

As noted above, the parents did not file a reply to the district's answer and, therefore, have offered no rebuttal of the district's defense of improper service.

Based on the failure of parents' to comply with requirements of Part 279 regarding the requirement to file proof of service of their request for review in accordance with the requirements for personal service of a request for review (8 NYCRR 279.4[c], [e]) and, further, the district's evidence that the parent attempted service via another method that was not authorized by the district, I find that the parents failed to properly initiate the appeal by service upon 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]). Additionally, 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, the district asserted in its answer that it "never agreed to waive personal service or accept service by e-mail (or any other means) for documents relating to this case or appeal" (SRO Ex. 1 ¶ 7). Furthermore, the parents failed to file proof of any kind of service at all, rendering their filing of the appeal defective in any event. Accordingly, the appeal must be dismissed for all of the reasons described above.

## **VI. Conclusion**

In summary, the parents' appeal must be dismissed due to failure to complete the threshold filing requirements of Part 279 as well as defective service upon the district, and as a result they have failed to properly initiate the appeal. I have considered the parties remaining contentions and find it is unnecessary to reach them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
July 12, 2024

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**