The University of the State of New York

The State Education Department
State Review Officer
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No. 24-193

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:
Brain Injury Rights Group, attorneys for petitioner, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which denied her request for direct funding for special transportation services 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

Due to the limited nature and disposition of the appeal, a detailed recitation of the student's educational history is unnecessary.

Briefly, the student—who is eligible for special education and related services as a student with a traumatic brain injury—has attended iBrain since November 2022 (see Parent Ex. H ¶ 5; Dist. Ex. 10 at p. 1).[1, 2]

A CSE convened on June 1, 2023, and developed an IEP for the student for the 2023-24 school year (see generally Dist. Ex. 10). The June 2023 IEP recommended that the student attend a 12-month program in a 8:1+1 special class in a district specialized school and receive three periods per week of adapted physical education, as well as related services of four 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of OT in a group of 2, five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group of 3, and two 60-minute sessions per week of individual vision education services (Dist. Ex. 10 at pp. 57-58). The CSE also recommended that the parent be provided with one 60-minute session per month of group parent counseling and training (id. at p. 58). Additionally, the June 2023 CSE recommended that the student be provided with the assistance of a full-time, individual paraprofessional for health, ambulation, safety and feeding (id.).

In a letter dated June 20, 2023, the parent notified the district of her intentions to unilaterally place the student at iBrain for the 2023-24 school year and to seek public funding from the district (see Parent Ex. F at p. 1).

On June 27, 2023, the parent executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year, from July 5, 2023 through June 21, 2024 (see Parent Ex. D at pp. 1, 6). The parent also executed a "School Transportation Annual Service Agreement" with "Sisters Travel and Transportation Services, LLC" (Sisters Travel) for the 2023-24 school year effective from July 1, 2023 through June 30, 2024 (Parent Ex. E at pp. 1, 6).[3]

By due process complaint notice dated November 20, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural and substantive violations (see Parent Ex. A at pp. 1, 6-7). As relief, the parent sought an order directing the district to fund the costs of the student's tuition, related services, and transportation services for the 2023-24 school year (id. at p. 8). In addition, the parent requested an interim order directing the district to fund an independent educational evaluation (IEE) of the student (neuropsychological) (id.).

[1] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12].

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

[3] The transportation agreement does not bear a date identifying when the parent executed the contract (see generally Parent Ex. E).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on December 21, 2023 and concluded on February 26, 2024 after five days of proceedings inclusive of a prehearing conference (Tr. pp. 1-329). In a decision dated April 4, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, iBrain was an appropriate unilateral placement, and equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 1, 5-8). In addition, the IHO denied the parent's request for special transportation costs finding the parent "received [] transportation accommodation forms and failed to return them to the [district] for additional transportation accommodations to be appropriately recommended" (id. at p. 9). The IHO found that the private school provided the parent with a transportation contract and the parent did not reach out to any other transportation providers before executing the contract, nor did she reach out the district (id.). The IHO determined that email correspondence between the district school psychologist and iBrain director of education demonstrated that the district attempted in good faith to provide transportation for students who attended the private school (id.). She further noted that although the district served a subpoena on the director to testify to address legitimate concerns, the director failed to appear (id.). The IHO concluded that the actions of the director coupled with the parent's failure to return the requested transportation forms to the district warranted a denial of the parent's request for transportation funding (id.). Additionally, the IHO denied the parent's request for an IEE finding the parent did not demonstrate "the grounds upon which [she] disagree[d] with the [district's] February 2022 psychological evaluation" (id. at p. 10). As relief, the IHO ordered the district to fund the cost of the student's placement at iBrain for the 2023-24 12-month school year (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying direct funding for the special transportation provided to the student by Sisters Travel during the 2023-24 school year.

In an answer, the district denies the material allegations contained in the request for review and argues that the IHO's decision should be upheld entirely. The district also argues the parent's request for review should be dismissed for lack of personal service of the notice of intention to seek review and the request for review. The district submits with its answer five additional documents to be considered as additional evidence on appeal consisting of: an email from a law clerk at the parent attorney's law firm dated April 29, 2024 with the notice of request for review attached; an email from a law clerk with the parent attorney's law firm dated May 14, 2024 with the request for review attached; a declaration of the attorney who represented the district during the impartial hearing signed June 3, 2024; an email between the parent's attorney and the district's representatives dated May 15, 2024 ; and a declaration of the district's attorney who represents the district on appeals signed June 3, 2024 (see SRO Exs. 1-5). 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 additional evidence concerns the parent's service of the pleadings

on appeal and, therefore, could not have been offered at the time of the impartial hearing and is necessary for addressing the district's argument concerning the lack of timely personal service of the parent's pleadings. Accordingly, the documents have been considered.

In a reply, the parent through her attorney alleges the appeal should not be dismissed for improper service arguing that the district has consented to alternative service in the past and that there was nothing to suggest that the district would deny electronic service in this instance.

V. Discussion – Service of Pleadings

As a threshold matter, it must be determined whether the appeal should be dismissed due to the parent's failure to effectuate timely personal service of the request for review. The district alleges that it did not consent to alternative electronic service in this matter and thus the parent did not serve the district in accordance with the State practice regulations governing the initiation of appeals.

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 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 17, 2024, the parent through her attorney filed the following documents with the Office of State Review: a notice of intention to seek review with case information statement dated April 29, 2024, an affidavit of service by e-mail notarized April 29, 2024, a notice of request for review dated May 14, 2024, a request for review dated May 14, 2024, an affidavit of verification notarized May 14, 2024 and an affidavit of service by e-mail notarized May 14, 2024. According to both affidavits of service by email, a law clerk at the parent's attorney's law firm served the pleadings via email to the email address associated with the district representative who handled the impartial hearing, and the affidavits also stated such email address was "conceited [sic] to and designated by Respondent's Counsel for service of such papers" (Apr. 29, 2024 Aff. of Service; May 14, 2024 Aff. of Service).[4] An email from the parent's attorney on May 15, 2024, also confirms that the request for review was served upon the district representative via email on May 14, 2024 (SRO Ex. 4 at p. 1).

According to the declaration of the district representative, she received the parent's notice of intent to seek review via email on April 29, 2024 accompanied by a request that the district consent to accept electronic service of the parent's "RFR and related papers"; however, she did not respond to the email (SRO Ex. 3 ¶ 5). Further, the district representative stated that she received the parent's request for review via email on May 14, 2024, but again did not respond (id. ¶ 6). The district representative further stated that she did not previously give consent to accept service via email or on behalf of the district (id. ¶ 7). The emails submitted by the district with its answer confirm the statements made by the district representative in her declaration (see SRO Ex. 1-3, 4). The parent in her reply also confirms these events (see Reply ¶ 8).

In its answer, the district indicates that it did not consent to service via email in this matter nor did it agree to an alternative delivery method. The district's attorney who manages the appeals division of the "Office of the General Counsel, Special Education Unit" also stated in a declaration that he did not give consent to accept email service on behalf of the district in this matter (SRO Ex. 5 ¶ 5). The parent in her reply conceded that the district did not consent to personal service via electronic service by stating "[n]either [the district representative from the impartial hearings]

[4] The parent's affidavits of service do not indicate that the district consented to service via email but rather "conceited to" (Apr. 29, 2024 Aff. of Service; May 14, 2024 Aff. of Service). Taking this statement into consideration with the parties' arguments on appeal, it appears the law clerk may have made a typographical error and was attempting to represent that the email address to which she served the parent's pleadings had been "consented to and designated by" the district as a means of alternative service. However, to the extent the affidavits of service were meant to indicate that consent had been obtained by the district, there is ample evidence in the hearing record reflecting that the district, in fact, did not consent to alternative service (see SRO Ex. 1-3, 4; Reply ¶¶ 7-9).

nor any [district] counsel or representative, objected to substitute electronic service" (Reply ¶ 9). However, while the district did not object to the request to accept alternative service there is no evidence that it affirmatively consented to the service by email. The parent's attorney further argues that "[i]n dozens of previous matters before the Office of State Review involving Brain Injury Rights Group, [] ("BIRG") and the [district], BIRG attorneys and advocates and [district] legal counsel have mutually agreed and consented to substitute personal service of all appeal-related documents with service by email" and that there was no reasonable basis to believe that district would deny electronic service in this instance (id. ¶¶ 7-8). However, although the parties may have agreed in prior matters to accept alternative electronic service, it does not follow that the parties could then assume for purposes of future appeals between them that electronic service would be automatically acceptable. Indeed, parent's attorney's own statement indicates that the parties' agreement and consent to use alternative electronic service was routinely obtained on a case-by-case basis and not pursuant to any sort of blanket agreement. While State regulations do not preclude a school district and a parent from agreeing to waive personal service and consent to service by an alternate delivery method, there is no evidence that the district had agreed to electronic service in this particular instance.

Additionally, an attorney for the parent emailed the district's attorney on May 15, 2024 asking him if he had received the request for review (SRO Ex. 4 at p. 1). The district agency attorney responded the same day stating "no, we did not. What is the case number?" (id.). The parent's attorney responded again on the same day, referencing the IHO case number, and stated that the request for review had been "Served on [district] Counsel," namely the district representative who had appeared at the impartial hearing (id.). In this email exchange, the district's attorney also did not give consent to accept electronic service (see SRO Exs. 4 at p. 1; 5 ¶ 5). In any event, it does not appear that the parent attempted to again serve the district the request for review on May 15, 2024, and even if the parent had done so, it would have been one day late (see 8 NYCRR 279.2[b] [mandating that a petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and with the request for review no later than 40 days after the date of the IHO's decision]). The IHO's decision was dated April 4, 2024 and, therefore, the parent had until May 14, 2024 to serve the request for review (see IHO Decision). According to the evidence, and as acknowledged by the parent in her reply, the district never gave consent for electronic service as an alternative to personal service in this particular matter (see SRO Ex. 1-3, 4; Reply ¶ 9).

The parent also argues that the district cannot claim prejudice because it "actually and timely received the Petitioner's [request for review] and was able to timely respond thereto" (Reply ¶ 12). However, as indicated above, the request for review served on May 14, 2024 was not properly served because the district never consented to accept electronic service, and the district representative who had appeared at the impartial hearing was not a person designated by the district to accept service. As May 14, 2024 was the last day the parent could have served a timely request for review pursuant to practice regulations, and the evidence shows that she did not effectuate proper service on this date, the request for review remains untimely regardless of when the district actually became aware of the parent's pleading.

Based on the foregoing, the totality of the evidence shows that the district did not consent to alternative service via email and, accordingly, the parent did not timely effectuate personal service of the appeal (see 8 NYCRR 279.4[b], [c]).

VI. Conclusion

In summary, the appeal must be dismissed due to the parent's failure to properly initiate the appeal pursuant to the practice regulations.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 25, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER