The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-216

**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 Emily A. McNamara, 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 that respondent (the district) fund the costs of special education teacher support services (SETSS) delivered by "Chanie Kohl/SYCK57 Corp." (SETSS provider) for 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 programing 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 detailed facts and procedural history of the case and the IHO's decision will not be recited.

Briefly, a CSE convened on November 25, 2019, and found the student eligible for special education as a student with a speech or language impairment and developed an IESP, with a projected implementation date of December 20, 2019 (Parent Ex. A).[1] The CSE recommended that the student receive three periods per week of SETSS along with two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 8).[2] The IESP reflects that for the 2019-20 school year the student was "Parentally Placed in a Non-Public School" (id. at p. 10).

The evidence in the hearing record is largely devoid of information concerning the educational programming or placement for the student between the 2019-20 and 2023-24 school years (see Tr. pp. 1-56; Parent Exs. A-H; Dist. Ex. 1).

According to the parent, she found the SETSS provider and the student was receiving three hours per week of SETSS from the provider for the 2023-24 school year (Parent Ex. H ¶4).[3]

The hearing record includes a contract, dated September 4, 2023, between the parent and the SETSS provider for the SETSS provider to deliver individual SETSS to the student for three 60-minute sessions per week after school at a specified rate, beginning September 4, 2023 and ending June 30, 2024 (Parent Ex. C).

In a due process complaint notice, dated January 31, 2024, the parent asserted that she "ha[s] been unable to find a SETSS provider for [the student] at the regular [district] rate" (Parent Ex. E at p. 2). She further asserted that she "found a provider that is requesting an enhanced rate" and as a proposed solution requested that the district pay the provider at "the enhanced rate that she charges" (id.).

On March 5, 2024, the parties attended a pre-hearing conference at which time the district advised that it would be asserting that the parent failed to comply with the June 1 deadline under Education Law § 3602-c as a defense at the subsequent hearing (Tr. p. 9).[4]

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on April 2, 2024 and concluded on the same day (Tr. pp. 13-55). The district argued that the parent did not notify the district of her intent to seek services by the first day of June as required by Education Law § 3602-c (Tr. p. 25). At the hearing, the parent's advocate conceded that the parent did not send a request for services for the 2023-24 school year until January 6, 2024 (Tr.

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] The parent testified that the 2023-24 school year was the student's second school year with the same provider (Tr. p. 31).

[4] An advocate appeared for the parent at the prehearing conference and at the subsequent hearing (Tr. pp. 1-56; Parent Ex. D). The same advocate drafted the parent's due process complaint notice in this matter (Parent Ex. E).

pp. 25, 34). According to the parent, she was not aware of the requirement for a June 1 notice and, when she realized in January 2024 that there was a notice requirement, she contacted the district and signed and sent back the district's consent form (Tr. pp. 33-34).

In a decision dated April 8, 2024, the IHO found that it was undisputed that the district failed to implement the SETSS outlined in the student's 2019 IESP or assign the student a related services provider (IHO Decision at p. 1). Moreover, the IHO found that the parent located a provider to implement the related services contained in the 2019 IESP at a specified rate (id.). However, based on the parent's testimony that she did not send the district a written request for equitable services prior to June 1, 2023, the IHO determined that the district was not on notice that the parent wanted equitable services and the parent's claim was thus barred (id. at pp. 4-5).

## IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's request for district funding of unilaterally obtained SETSS delivered by the SETSS provider on the ground that the district provided no evidence or testimony to support the affirmative defense asserted at the hearing. The parent further asserts that the district waived the June 1 defense by assuring her in email correspondence that the student would receive services, which she attaches as additional evidence on appeal.

In an answer, the district argues that the IHO decision should be upheld. The district also asserts that the parent's request for review should be dismissed because it was not timely served.

## V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]).

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [individualized education plan (IEP)]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## VI. Discussion

### Timeliness of Request for Review

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

Here, the district is correct that the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated April 8, 2024 (see IHO Decision at p. 7); thus, the parent had until May 20, 2024—a Monday, 42 days after the date of the IHO decision—to serve the district with a verified request for review (see IHO Decision at pp. 1, 7; see also 8 NYCRR 279.4[a]; 8 NYCRR 279.11[b]).[7]

As an initial matter, the parent's request for review, as filed with the Office of State Review, did not include proof of service of the notice of intention to seek review, notice of request for review, or the request for review as required by State regulation (8 NYCRR 279.4[e]). In the request for review, the parent acknowledged that the notice of intention to seek review and case information statement were not filed within the 25-day timeline for those documents and asked that she not be held to that deadline; however, the parent did not address the lateness of the request for review.

In its answer, the district proffers that it agreed to service by electronic mail on May 13, 2024; however, the parent did not serve the appeal via electronic mail until more than a week later on May 24, 2024, four days after the May 20, 2024 deadline. This office requested the delinquent proof of service be provided and no response was received from the parent. Moreover, the parent did not file a reply to the district's answer clarifying her position or providing good cause for failing to timely serve the district with the notice of request for review and request for review.

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is not sufficient good cause asserted in the request for review, in an exercise of my discretion, the appeal is dismissed (8 NYCRR 279.13; see Avaras v. Clarkstown Cent. Sch. Dist., 2019 WL 4600870, at *11 [S.D.N.Y. Sept. 21, 2019] [upholding SRO's decision to dismiss request for review as untimely for being served nine hours late notwithstanding proffered reason of process server's error]; New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-CV-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

[7] The 40-day deadline fell on May 18, 2024, which was a Saturday, thus, service on the district was due the following Monday, May 20, 2024. (8 NYCRR 279.11[b]).

## VII. Conclusion

Having found that the request for review must be dismissed because the parent failed to properly initiate the appeal, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

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

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**