The University of the State of New York

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

No. 24-228

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Chrystal O'Connor, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found the district failed to offer the student a free appropriate public education (FAPE) and ordered it to provide direct funding for respondent's (the parent's) unilaterally obtained services 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 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

This proceeding, as well as eight similar proceedings like it challenging similar decisions by the same IHO, were recently filed with the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 24-229; Application of the Dep't of Educ., Appeal No. 24-223). Given the disposition of this matter on procedural grounds, as well as the procedural posture of the matter,

the hearing record includes only two exhibits admitted during a pendency hearing. There was no impartial hearing held and no further development of an evidentiary record regarding the student through testimony or additional exhibits entered into evidence. Accordingly, the description of the facts and history of this matter is limited to the parent's due process complaint notice and an April 2022 IESP, upon which a pendency determination was based (Parent Exs. A-B).

A CSE convened on April 5, 2022 to develop an IESP with an implementation date of April 26, 2022 (Parent Ex. B at pp. 1, 9). The April 2022 CSE found the student eligible for special education as a student with a learning disability and recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in English and delivered in a general education classroom (id. at p. 9).[1, 2] According to the IESP, the student was "Parentally Placed in a Non-Public School" (id. at p. 12).

A. Due Process Complaint Notice

By due process complaint notice dated September 7, 2023, the parent alleged that the district denied the student a FAPE by failing to develop and implement a program of services for the 2023-24 school year (Parent Ex. A at p. 1). The parent asserted that the last program developed for the student was an April 2022 IESP (id.). According to the due process complaint notice, the April 2022 IESP recommended that the student receive five periods per week of direct, group SETSS (id. at p. 2). The parent contended that the district did not supply providers for the services it recommended for the student and failed to inform the parent how the services would be implemented (id.). The parent also argued that the district had improperly and impermissibly shifted its responsibility to provide the services to the student onto the parent (id.). The parent alleged that, in preparing for the 2023-24 school year, she was unable to locate a provider to deliver the student's services at the district's rates and had no choice but to retain the services of a private company to provide the mandated services at an enhanced rate (id.). The parent further alleged that she notified the district that, if it did not fulfill its obligations to the student, she would take unilateral action to implement the necessary services for the student and would request funding from the district for such services obtained (id.). The parent invoked the student's right to receive pendency services and sought a declaration that the district failed to provide the student with a FAPE and/or appropriate equitable services (id. at p. 3). As additional relief, the parent requested an award of funding for five periods per week of group SETSS at an enhanced rate for the 2023-24 school year, an award of all related services set forth on the student's last IESP for the 2023-24 school year, and a bank of compensatory education services to make-up for any mandated services not provided by the district (id.).

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[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.

B. Impartial Hearing and Impartial Hearing Officer Decisions

An IHO was appointed to the matter and, on October 16, 2023, the parties convened for a pendency hearing (Tr. pp. 1-10). Two exhibits were admitted into evidence (Parent Exs. A-B). In an interim decision on pendency dated October 16, 2023, the IHO ordered the district to provide the student with "services consistent with" the April 2022 IESP, which consisted of five periods per week of SETSS "for the duration of this pendency agreement" (Oct. 16, 2023 Interim IHO Decision at p. 4).[3] A prehearing conference was held on November 8, 2023, at which neither party appeared (Tr. pp. 11-14). The IHO stated on the record that he could not extend the timeframe for issuing a decision (compliance date) without the parties' permission and if not addressed, he would be forced to dismiss the parent's due process complaint notice without prejudice (Tr. p. 13). Status conferences were held on November 29, 2023, December 22, 2023, January 26, 2024, February 15, 2024, March 4, 2024, March 27, 2024, April 2, 2024, and April 15, 2024 (Tr. pp. 15-74).

The parent's advocate and the IHO appeared for the November 29, 2023 status conference (Tr. p. 15). The parent's advocate stated that the district had not contacted the parent for a resolution meeting and the parent wanted to withdraw the due process complaint notice "without prejudice" (Tr. p. 16). The IHO inquired about the parent's reasons for requesting to withdraw the due process complaint notice and surmised that it had something to do with the district's general counsel "sen[ding] a memo to the O[ffice of] A[dministrative] T[rials and] H[earings], capping all hourly rates at $125 an hour, and that, therefore, [the parent's advocate] ha[d] to reorient [her] practice to go to full due process hearings" (Tr. p. 17). The parent's advocate responded that the memo was part of the reason but that "the [p]arent [wa]s not able to proceed" based on the amount of preparation required for a full hearing on the merits (id.). The IHO then stated his opinion about the letter and further stated that it was not binding on him (Tr. pp. 17-18, 20-21). The IHO further stated that, in the absence of evidence of a market rate, he could do what he wanted in terms of issuing a rate (Tr. p. 18). The parent's advocate then requested a final order for the district to fund the private services "at the rate that we have on the contract for the student," but the IHO responded he could not do that (id.). The IHO then encouraged the parent's advocate to wait and see if a resolution agreement could be reached (Tr. pp. 18-19). The parent's advocate then reiterated that "it would be better just for the [p]arent to have this withdrawal without prejudice," to which the IHO responded that the parent needed to appear "to ensure that that's what they want to do as well" and then denied the request to withdraw the due process complaint notice (Tr. p. 19). The IHO then stated that it would be a disservice to the parent to withdraw the due process complaint notice (Tr. p. 21).

During the February 15, 2024 status conference, the district's attorney stated that a hearing should be scheduled but that she was "fine with one more status" (Tr. p. 46). At the March 4, 2024 status conference, the district's attorney stated that she thought "we could put it on for merits at some point" (Tr. p. 51). The IHO scheduled another status conference to give more time for a possible resolution (Tr. pp. 51-54). During the March 27, 2024 status conference, the parent's advocate stated that a resolution meeting had been scheduled for the next day and requested another status conference (Tr. pp. 58-59). At the April 2, 2024 status conference, the parent's

[3] The IHO also issued an interim decision on November 8, 2023, wherein he sua sponte struck paragraphs from the district representative's notice of appearance, which he had found objectionable (Nov. 8, 2023 Interim IHO Decision at p. 6; see IHO Ex. I).

advocate reported that a resolution meeting had occurred and the district indicated that the parent was "missing certain documents" and that they would email the parent "which information they're missing" and then requested an additional status conference (Tr. p. 66). On April 15, 2024, the IHO appeared without the parties, he stated that he was late due to another impartial hearing running late and he "excused" the absences of the parties (Tr. pp. 72-73). The IHO further stated that he would schedule another status conference and that he would "be in touch with the parties" (Tr. p. 73).

In a final decision dated April 28, 2024, the IHO recounted that the final status conference in the matter occurred on April 15, 2024 and "[a] hearing did not go forward as it [wa]s unnecessary due to a lack of any controversy" and that the compliance date had been extended (IHO Decision at p. 3). Next the IHO indicated that "[u]pon information and belief the [district] conducted a resolution meeting . . . but failed to notify [the p]arent of the result of the resolution meeting" and "thus, ha[d] delayed the prosecution of this matter" (id.). The IHO then determined that "[n]o [j]usticiable [c]ontroversy [e]xist[ed]" due to the district having the burden to implement the student's April 2022 IESP and failing to do so (id. at p. 4). The IHO further found that there was no evidence in the hearing record that the parent obstructed or was uncooperative with the district's efforts to meet its obligations, and that the district could not delegate its burden to locate a provider onto the parent (id.). Next, the IHO noted that a private school need not employ certified special education teachers and determined that the district was "precluded from raising the issue of the SETSS or other provider's certification as a bar to recovery (id.). The IHO further found that the district was "equitably barred from objecting to the rate of payment for services due to its nonfeasance" (id. at p. 5). Next, the IHO determined that the parent was entitled to direct payment to the provider and that the district was barred from raising the June 1 notice requirement as it "failed to raise it" (id.).

The IHO then ordered relief based on a finding that the district failed to offer the student a FAPE for the 10-month 2023-24 school year by failing to implement the April 2022 IESP (IHO Decision at p. 6). The IHO ordered the district to pay the parent's SETSS provider at the contracted rate for five 60-minute sessions per week of SETSS for the entire 10-month 2023-24 school year, upon provision of the applicable attendance records invoices and service contract (id.). The IHO further ordered the district to "immediately begin funding and continuing through the remainder of the [s]tudent's ten month 2023-2024 school year, the same service set forth above at the same rate of pay and frequency," upon presentation of the applicable invoices and attendance records (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in failing to allow the parties to develop the hearing record and denied the district its right to due process. The district asserts that due process requires a full hearing before an IHO makes a substantive determination on the parent's claims. The district contends that there was no evidence in the hearing record of the district conceding that it denied the student a FAPE or waived any affirmation defenses or agreed that the parent had satisfied her burden of demonstrating the appropriateness of her unilaterally obtained SETSS. The district also argues that the IHO improperly failed to provide notice to the parties that he intended to issue a final decision without holding an impartial hearing on the merits. The district further asserts that the IHO erred in finding that there was no justiciable case or controversy and

that the district was barred from raising any defenses at the impartial hearing. The district argued that there was no evidence that the parent provided a June 1 notice and thus, no basis to conclude that the district failed to provide equitable services for the 2023-24 school year. The district also contends that issues related to the appropriateness of the unilaterally obtained services and equitable considerations under the Burlington/Carter analysis also remain justiciable. The district further alleges that the IHO's erroneous assertions shifted the parent's burden onto the district and improperly barred the district from raising equitable considerations. Lastly the district asserts that the issue of appropriate relief remains a justiciable issue. The district requests that the IHO's decision be vacated and that the matter be remanded for a full and complete hearing.

The parent has not interposed an answer in this matter.

V. Discussion

As a threshold matter, it must be determined whether or not the district's appeal should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). Exceptions to the general rule requiring personal service on a parent include the following: (1) if personal service on the parent cannot be made after diligent attempts, a district may effectuate service by delivering and leaving the request for review at the parent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening and mailing the same by certified mail, or as otherwise directed by a State Review Officer (8 NYCRR 279.4[c]); or (2) the parties may agree to waive personal service (see, e.g., Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037). State regulation provides that a petitioner shall file proof of service of the notice of intention to seek review and of the request for review with the Office of State Review (8 NYCRR 279.4[d]). Proof of service should consist of a sworn statement describing what papers were delivered and where, when, how, and to whom the papers were delivered (see Application of a Student with a Disability, Appeal No. 24-097).

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]).

Here, the district has not demonstrated that it served the parent in accordance with State regulation. The IHO issued his decision on April 28, 2024, thus the district had until June 7, 2024, 40 days after the date of the IHO's decision, to personally serve the parent with a verified request for review (see IHO Decision; see also 8 NYCRR 279.4[a]).

According to the June 6, 2024 declaration of service filed with the district's appeal, the district "served upon Respondent the annexed Notice of Request for Review, Request for Review, and a Verification of such (all dated June 6, 2024) upon advocate/counsel by electronic mail on June 6, 2024 at 4:30PM." The declaration of service further stated that: "Advocate/Counsel for Respondent agreed to accept service on behalf of the Respondent and consented to service via email of pleadings in this case on May 15, 2024." The June 6, 2024 declaration of service does not name any individuals or law firm associated with the matter.[4, 5] The parent has not filed an answer to the district's request for review or otherwise indicated in any way that she was served with the district's request for review.

[4] The appeal guide on the Office of State Review's website provides form Affidavits of Service and notes the type of information that should be included to prove service, including the name of the individual served (see Office of State Review, Overview To Part 279 (as revised Effective January 1, 2017): Filing a Request for Review (Section I), available at https://www.sro.nysed.gov/book/serve-and-file-request-review). Moreover, civil practice standards uniformly require proof of service to state the name of the person who was served (see, e.g., NY CPLR Rule 306).

[5] According to a May 16, 2024 declaration of service, the district served a notice of intention to seek review by electronic mail addressed to "counsel/advocate" for the respondent and then named an individual who did not appear on behalf of the parent at any time during the proceedings. The parent's due process complaint notice was prepared by an attorney from Prime Advocacy, LLC (Parent Ex. A at p. 3). The parent was represented by a different attorney from Prime Advocacy, LLC for the pendency hearing on October 16, 2023 (Tr. pp. 1-10). The parent was thereafter represented by four different advocates for the subsequent status conferences (Tr. pp. 11-74). While the declaration of service of the notice of intention identifies an individual by name, this does not, without more, demonstrate that the request for review, the document that initiates the appeal, was served by electronic means on the same individual.

While State regulations do not preclude a parent and a school district from agreeing to "waive" the personal service method and agreeing to service by an alternate delivery method, there is no indication in this instance that the district served the individual purportedly representing the parent insofar as no individual is named on the district's declaration of service. Moreover, as the parent has not filed an answer to the district's request for review, this is not an instance where the party's appearance tends to show that service was completed.

Under these circumstances, where the parent has not interposed an answer in this appeal and the district's declaration of service does not demonstrate that the parent was personally served or sufficiently demonstrate that service by alternative means was effectuated, the appeal must be dismissed.

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 3, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER