



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-443

**Application of a STUDENT WITH A DISABILITY, by her 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:**

Shehebar Law PC, attorneys for petitioner, by Ariel A. Bivas, Esq.

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. 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 her daughter's private services delivered by Alpha Student Support (Alpha) 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 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**

A CSE convened on March 16, 2021 and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student for

implementation during the 2021-22 school year (Parent Ex. B).<sup>1</sup> The March 2021 CSE recommended that the student receive five periods per week of direct, group special education teacher support services (SETSS) in Yiddish; two 30-minute sessions per week of group speech-language therapy in Yiddish; one 30-minute session per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of individual occupational therapy (OT); and one 30-minute session per week of group counseling services in Yiddish (*id.* at p. 10).<sup>2</sup> The IESP noted that the student was parentally placed in a nonpublic school (*id.* at p. 14).

The hearing record does not include any information regarding what occurred during the 2021-22 or 2022-23 school years.

Turning to the 2023-24 school year, the hearing record includes a June 21, 2024 progress report indicating that Alpha provided the student with services during the 2023-24 school year and testimony of the Alpha program director indicating that Alpha provided five hours per week of SETSS to the student during the 2023-24 school year (Parent Exs. D at ¶¶ 14, 20; F).

### **A. Due Process Complaint Notice and Subsequent Events**

In a due process complaint notice dated June 20, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (*see* Parent Ex. A). The parent alleged that the district failed to implement the services recommended in the March 2021 IESP during the 2023-24 school year and that the district was obligated to ensure the student had an appropriate program by the start of the school year (*id.* at p. 2). The parent further asserted that, because she was unable to locate SETSS and related services providers at the district's rates, she unilaterally secured providers "at an enhanced rate" (*id.*). The parent also argued that the student had rights to services under pendency, which consisted of the March 2021 IESP, and requested district funding for the services recommended in the March 2021 IESP for the duration of the proceeding (*id.*). As a proposed resolution, the parent requested direct funding or reimbursement for the SETSS and related services recommended in the March 2021 IESP at an enhanced rate and also requested compensatory education for any services that were mandated in the March 2021 IESP but not provided to the student (*id.* at p. 3).

On June 25, 2024, the parent executed a contract with Alpha for the provision of SETSS services at a rate of \$195 per hour for the 2023-24 school year from September 7, 2023 through June 30, 2024 (Parent Ex. C at pp. 1-2).

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

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 7, 2024 (Tr. pp 1-38). In a decision dated September 5, 2024, the IHO found that under the March 2021 IESP the student was entitled to five sessions per week

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<sup>1</sup> 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]).

<sup>2</sup> 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.

of SETSS, two 30-minute sessions per week of group speech-language therapy, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of group counseling (IHO Decision at pp. 4, 9). The IHO determined that, in failing to provide the student with the services recommended in the March 2021 IESP for the 2023-24 school year, the district did not provide the student with services on an equitable basis and, therefore, failed to meet its burden of proving that it had provided the student with a FAPE for the 2023-24 school year (*id.* at pp. 7-8). The IHO also determined that the parent entered into a valid contract with Alpha at an enhanced rate of \$195 per hour for the provision of individual SETSS during the 2023-24 school year and that the progress report showed that SETSS was provided consistent with the March 2021 IESP (*id.* at p. 5). Turning to relief, the IHO held that she did not have jurisdiction to order an enhanced rate for equitable services (*id.* at p. 9). Accordingly, the IHO dismissed the parent's request for direct funding of SETSS at the rate contracted for with Alpha for the 2023-24 school year (*id.* at p. 9-10). The IHO also noted that the Alpha program director testified that Alpha provided the parent with financial assistance for legal representation and noted agreement with the district's position that attorneys' fees cannot be awarded; however, given the jurisdiction finding, the IHO declined to formally address the issue (*id.* at p. 10). Next, the IHO addressed the parent's request for compensatory education and found that the student was entitled to a bank of compensatory services consisting of 72 30-minute periods of group speech-language therapy, 36 30-minute periods of individual speech-language therapy, 72 30-minute periods of individual OT, and 36 30-minute periods of group counseling (*id.* at pp. 10-11).

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

The parent appeals, alleging that the IHO erred in holding that she lacked jurisdiction to award funding because of an August 2024 guidance issued by the New York State Education Department. According to the parent, the IHO should have applied a July 16, 2024 cutoff date set forth in an emergency regulation adopted in July 2024, which would have permitted the filing of the parent's June 20, 2024 due process complaint notice in this matter. The parent asserts that the IHO's finding that the student was entitled to receive five periods per week of SETSS for the 2023-24 school year should be upheld (*id.* at p. 4).<sup>3</sup> As relief, the parent requests that the IHO's determination that she did not have jurisdiction to order the district to fund five periods per week of SETSS at the contracted for rate be reversed or, in the alternative, that the matter be remanded to the IHO for a determination on the parent's request for funding of the unilaterally obtained services at an enhanced rate (*id.* at p. 5).<sup>4</sup>

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<sup>3</sup> In an apparent typographical error, the parent's appeal states the "student should have received 10 periods of SETSS per week for the entire 10-month 2023-2024 school year" (Req. for Rev. at pp. 2-3); however, the number of periods of SETSS the student received was not presented as an issue to be resolved during the impartial hearing, and the parent's contract with Alpha was for five periods of SETSS per week (*see* Parent Ex. C at p. 1).

<sup>4</sup> The request for review does not conform to practice regulations governing appeals before the Office of State Review. The request for review is single-spaced whereas State regulation requires the request for review to be double-spaced (8 NYCRR 279.8[a][2]). In addition, although the parent's attorney endorsed the request for review, he did not set forth his law firm, mailing address, or telephone number as required by State regulation (8 NYCRR 279.7[a]).

In an answer, the district argues the IHO's decision be upheld in its entirety. The district also asserts that the parent's appeal should be dismissed because the parent did not personally serve the request for review on the district.<sup>5</sup> The district contends that the parent emailed the district her request for review and supporting papers, that the district never consented to service by email, and that therefore the appeal was not properly served on the district.<sup>6</sup> Finally, the district asserts that the parent did not appeal the other determinations made by the IHO and therefore those should be considered final and binding upon the parties.

## 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];

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<sup>5</sup> The parent did not submit a reply responding to the district's assertion that the request for review was not properly served. It is permissible to respond in a reply to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal (NYCRR 279.6[a]).

<sup>6</sup> The district submits with its answer two documents to be considered as additional evidence on appeal consisting of: (1) a declaration of the attorney who represents the district on appeals signed October 22, 2024; and (2) an email chain consisting of a September 30, 2024 request from the parent's attorney for the district to consent to electronic service for the appeal, an October 15, 2024 email from the parent's attorney requesting that the district consent to a two-week extension, and an October 15, 2024 email from the parent's attorney with an attachment and a request that the district disregard the previous extension request (see SRO Exs. A; B). 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.

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]).

With the request for review, the attorney for the parent submitted an unsigned document titled "Attorney Affirmation of Service."<sup>7</sup> According to that unsigned document, the parent's attorney indicated that, on October 15, 2024, he served the notice of request for review and the request for review "on two attorneys for the district, including the attorney appearing for the district on appeal, "via electronic mail."<sup>8</sup>

According to the declaration of the attorney for the district, he received an email from the parent's attorney on September 30, 2024 requesting that he "consent to electronic service for this appeal" (SRO Ex. A ¶ 4).<sup>9</sup> The district attorney affirmed that, "[d]ue to an inadvertent oversight, [he] did not reply to this email" (*id.* ¶ 5). The district attorney further stated that there was no email communication between him and the parent's attorney until October 15, 2024 when the parent's attorney emailed him on the same email chain from the notice of intention to seek review and asked if the district would "be amenable to a two-week extension for [the parent's attorney's] office to submit [their] request for review" (*id.* ¶ 6). The district attorney affirmed that he did not

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<sup>7</sup> In addition to being unsigned, the "Affirmation" does not include language that the statements were affirmed under penalties of perjury in the State of New York (see CPLR 2106).

<sup>8</sup> The parent submitted a signed "Affirmation of Service" for the service of the notice of intention to seek review, which indicated that the notice of intention to seek review was served on the attorney appearing for the district in this matter on September 30, 2024 via electronic mail.

<sup>9</sup> Copies of the emails between the attorneys for the district and parent are contained in the district's additional evidence on appeal (SRO Ex. B).

reply to the October 15, 2024 email (id.). The district attorney then stated he received another email dated October 15, 2024 which attached the parent's request for review in this matter (id. ¶ 7). The district attorney affirmed that "[a]t no time did [he] or anyone from [his] office agree to waive personal service and agree to accept service via email for this case" and that "[his] office does not have a blanket acceptance of such email service with counsel's office" (id. ¶ 8). The parent's attorney did not submit a reply. Accordingly, the only facts upon which to make a decision as to the personal service are the unsigned affirmation of service submitted with the request for review and the sworn declaration of the district's attorney and accompanying documents.

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.

As indicated above, the request for review served on October 15, 2024 was not properly served because the district never consented to accept electronic service. In addition, even on the face of the unsigned "Affirmation of Service" of the request for review, the district's attorneys are not individuals designated in State regulation for service of a request for review and there is no indication that these individual attorneys were designated by the district to accept service (see 8 NYCRR 279.4[b]).

As October 15, 2024 was the last day the parent could have served a timely request for review pursuant to State regulation, and the evidence shows that she did not effectuate proper service on this date, the request for review was not properly served within the timeline (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  
December 4, 2024**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**