The University of the State of New York

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

No. 23-084

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for, or to directly fund, the costs of the student's special education teacher support services (SETSS) and speech-language therapy for the 2022-23 school year and which denied her request for a bank of compensatory educational services. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-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 Individuals with Disabilities Education Act (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 §§ 3602-c; 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 related to IESPs, 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 of the IDEA and the analogous State law provisions 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[a]). 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

Given the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary. Briefly, the student has been parentally placed in the same nonpublic religious school for the past seven years, beginning in preschool when the student was three years old (Tr. pp. 68-70; see Parent Ex. A at p. 1). As a preschool student with a disability, the student received 12-month school year programming consisting of 10 hours per week of bilingual special education itinerant teacher (SEIT) services, as well as bilingual speech-language therapy and counseling services, and occupational therapy (OT) services, pursuant to a November 2016 Committee on Preschool Special Education (CPSE) IEP (see Parent Ex. B at pp. 1, 23-24). When the student transitioned from receiving CPSE (preschool) services to receiving CSE (school-age) services, a November 2019 CSE found the student eligible for special education as a student with a speech or language impairment and developed an IESP that included recommendations for the following: bilingual SETSS for five periods per week and related services of bilingual speech-language therapy and OT (see Parent Ex. D at pp. 1, 5). Similarly, in a June 2021 IESP, a CSE found the student remained eligible to receive special education, and recommended the following services: five periods per week of bilingual SETSS and related services consisting of bilingual speech-language therapy (see Dist. Ex. 1 at pp. 1, 8-9).

By due process complaint notice dated July 6, 2022, the parent initially asserted the student's right to pendency services as set forth in a last agreed-upon IEP, dated November 21, 2016 (see Parent Ex. A at p. 2). Next, the parent alleged that the June 2019 CSE failed to recommend an appropriate placement for the student by reducing the amount of services from 10 periods per week of individual SEIT services to 5 periods per week of SETSS in a group (id. at pp. 2-3). The parent also alleged that the June 2019 CSE failed to recommend 12-month school year programming (id. at p. 3). The parent also noted that SETSS were not appropriate as they were "more limited services that d[id] not address the broader organizational, executive functioning, [and] social skills" the student required in order to meet her goals (id.). As a result of the district's violations, the parent indicated that she had "no choice but to implement the SEIT program independently and seek reimbursement" from the district (id.). The parent also asserted a reservation of rights to seek compensatory educational services for "SETSS and related services for any periods not provided during the current 2021[-]22 school year" (id.). As relief, the parent requested the following: a determination that the student's June 2019 IESP was "outdated, expired, and constitute[d] a denial of a FAPE"; a finding that the district's failure to continue to recommend a SEIT program denied the student a FAPE; a finding that the district failed to recommend an appropriate placement for the student, which denied the student a FAPE; an order directing the continuation of services mandated in the student's November 2016 IEP for the 2022-23 school year, "absent an up-to-date program"; and for the district to fund a bank of compensatory educational services for any missed services the student should have received under pendency if the parent was "unable to locate services providers" (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

On August 10, 2022, the parties proceeded to an impartial hearing, and the IHO conducted a prehearing conference (see Tr. pp. 1-12). The impartial hearing resumed on August 17, 2022, with the IHO conducting a second prehearing conference (see Tr. pp. 13-18). The parties informed the IHO that they reached an agreement on the student's pendency services, both parties had

executed a pendency form, and the parent's attorney withdrew the request for an impartial hearing on pendency (see Tr. pp. 14-15). Thereafter, on September 16, 2022, the parties returned to the impartial hearing and, at that time, the parent's attorney indicated an intention to submit an amended due process complaint notice based on the district's disclosure of a June 2021 IESP, which post-dated the June 2019 IESP complained of in the July 2022 due process complaint notice (see Tr. pp. 19-21).

On October 7, 2022, the parties resumed the impartial hearing with the IHO conducting another prehearing conference as a follow-up to the parent's amended due process complaint notice (see Tr. pp. 28-34). On December 7, 2022, the impartial hearing continued, but without the district's attorney being present (see Tr. pp. 35-42). When the impartial hearing resumed on January 18, 2023, with all parties present, the district's attorney explained that although he had intended to present two witnesses, neither witness was available to testify on that date (see Tr. pp. 43-50). After hearing from both parties, the IHO stated her intention to proceed with the impartial hearing, and both parties submitted evidence into the hearing record (see Tr. pp. 50-57; Parent Exs. A-G; Dist. Exs. 1-7). The impartial hearing continued on that day with the parent presenting witnesses, and on March 1, 2023, the impartial hearing concluded after eight total days of proceedings (see Tr. pp. 62-126; Parent Exs. H-I).

In a decision dated April 5, 2023, the IHO determined that the district failed to offer the student a FAPE because it "did not offer any testimony to defend its outdated IESP for [the student] and/or otherwise demonstrate that the services set forth in that document met [the student's] educational needs" (IHO Decision at p. 13). Having noted that the district entered documents into the hearing record as evidence that explained the student's "history of special education needs," the IHO found, however, that the documents "did not explain how the [district] planned to meet [the student's] special education needs during the 2022-2023 school year" (id.). The IHO also found that the hearing record contained "undisputed evidence" that the district "did not implement special education or services" for the student during the 2022-23 school year (id.).

Next, the IHO examined whether the parent sustained her burden to establish the appropriateness of the SETSS and speech-language therapy services secured for the student (see IHO Decision at pp. 13-15). Overall, the IHO concluded that the evidence in the hearing record did not "explain what Yes I Can's providers did to specifically address" the student's needs and "how the services provided by these educators and therapists specifically benefitted" the student, other than offering the "limited, generic statements that SETSS and speech therapy [we]re provided in school and at home, respectively, and [we]re somehow 'individualized'" (id. at p. 14). As a result, the IHO found that the parent did not sustain her burden under the "Second Circuit's 'totality of circumstances'/instruction 'specially designed to meet the [child's] unique needs' standards by the preponderance of the evidence" (id.). The IHO noted that the evidence presented was "not useful evidentiary material and d[id] not explain how the Yes I Can providers [we]re meeting [the student's] special education needs"; in addition, the IHO noted that the evidence presented did not "assist [her] in understanding [the student] as a learner and how Yes I Can providers [we]re meeting her needs as a learner" (id.). The IHO afforded "little to no weight" to evidence regarding the student's alleged progress, which the IHO characterized as consisting of "generic, conclusory, unsupported and unsubstantiated statements" (id. at pp. 14-15). The IHO also noted the "absence of the progress report referenced in [the] Yes I Can's supervisor's affidavit" and explained in the footnote that although the hearing record included progress reports from the

2020-21 and 2021-22 school years, the hearing record did not include any progress reports for the school year in question, namely, the 2022-23 school year (id. at pp. 14-15 n.4). In light of the foregoing, the IHO determined that the parent failed to sustain her burden of proof with respect to the unilaterally obtained services, SETSS and speech-language therapy, for the student for the 2022-23 school year (id. at p. 15).

Next, the IHO turned to the question of equitable considerations, and more specifically, whether the parent had a "legal obligation" to pay for the SETSS and speech-language therapy services she privately secured for the student (IHO Decision at pp. 15-16). Here, the IHO found that although the parent cooperated with the district and provided the requisite statutory notice (i.e., 10-day notice), the contract she entered into with Yes I Can was "poorly worded and [wa]s missing important terms (such as the cost of the services, the services to be provided, and the number of hours of services)" (id.). In addition, the IHO pointed to the parent's own testimony indicating that she was not obligated to pay Yes I Can for the SETSS and speech-language therapy services (id. at p. 16). As a result, the IHO was "constrained to find" that the parent was not obligated to pay for these services (id.).[1]

Next, the IHO found that, based on the evidence in the hearing record, the student did not require a 12-month school year program, and moreover, the hearing record did not include evidence to establish that the student had received any summer services during summer 2022 (see IHO Decision at p. 16).

Finally, with respect to compensatory educational services, the IHO found that the parent appeared to seek such relief "either for services not provided under pendency or services mandated by the most recent IESP, and not provided by [the district]" (IHO Decision at p. 16). The IHO indicated that if the parent sought compensatory educational services for missed pendency services, then she "should refer to, and if appropriate, seek enforcement of, the pendency agreement between the parties" (id.). To the extent that the parent sought compensatory educational services "pursuant to the IESP," the IHO concluded that the student was not entitled to such relief for OT and counseling, as neither was mandated in the student's IESP (id. at pp. 16-17).

In summary, the IHO denied the parent's request for reimbursement or direct funding of the costs of the student's privately obtained SETSS and speech-language therapy for the 2022-23 school year; and the IHO similarly denied the parent's requests for 12-month school year programming and compensatory educational services (see IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO misunderstood the parent's burden of proof and ignored evidence that supported a finding that the privately obtained SETSS were appropriate. The parent contends that the district's failure to present any evidence to defend its reduction in the

[1] The IHO also found that, based on a recent decision issued by the Federal District Court in the Southern District of New York, that "proof [of an] inability to pay [wa]s not necessary," and therefore, the IHO need not reach a finding on this point (IHO Decision at p. 16, citing Ferreira v. New York City Dep't of Educ., 22 Civ. 4993 [S.D.N.Y. Mar. 14, 2023]).

amount of the SETSS relieved her of any burden to defend the student's need for 10 periods per week of SETSS on a 12-month school year basis. The parent also argues that the IHO erred by finding that no valid contract existed between the agency providing the student's services and the parent. As relief, the parent seeks funding for the student's program outlined in the November 2016 IEP, "at a reasonable market rate," for the 2022-23 school year, as well as an award of compensatory educational services consisting of 46 hours of OT and 34.5 hours of counseling to be used over the next two years.[2]

In an answer, the district responds to the parent's allegations and asserts that the parent failed to timely initiate the appeal. In addition, the district argues that the request for review fails to comply with practice regulations, which the parent's attorney has been cautioned about in previous appeals. The district generally argues to uphold the IHO's findings that the parent's unilaterally obtained services were not appropriate and that the contract for those services was not valid. As a cross-appeal, the district argues that the parent failed to establish a lack of financial resources for an award of direct funding. As relief, the district seeks to uphold the IHO's decision, to dismiss the parent's request for review, and to sustain its cross-appeal.

By letter dated June 2, 2023, counsel for the parent requested a specific extension of time to serve a reply and answer to the district's cross-appeal from June 5, 2023 to June 19, 2023 which was granted by letter dated June 5, 2023. However, as of this date of this decision, the Office of State Review has not received a reply in this matter or a further request for an extension of time. The two-day timeline after service for filing the pleading with the Office of State Review has elapsed (8 NYCRR 279.5[c]; 279.6[b]).

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 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

[2] To be clear, the parent did not challenge the IHO's determination that denied her request to be reimbursed for the costs of the student's privately obtained speech-language therapy services (compare IHO Decision at pp. 13-15, 17, with Req. for Rev.). Consequently, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

(Educ. Law § 3602-c[2]).[3] "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]). 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 [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.).[4]

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., 694 F.3d at 184-85).

VI. Discussion—Timeliness of Appeal

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]). 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 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

[3] 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]).

[4] 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 p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). 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.).

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 parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The parent was required to serve the request for review upon the district no later than May 15, 2023, 40 days from the date of the April 5, 2023 IHO decision (see 8 NYCRR 279.4[a]). However, the parent's affidavit of service indicates that the parent served the district via electronic service on May 16, 2023 (Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parent has failed to assert good cause in the request for review for the failure to timely initiate the appeal from the IHO's decision, as required by State regulation (see 8 NYCRR 279.13; see generally Req. for Rev.). In the request for review, the parent acknowledges that the IHO's decision was dated April 5, 2023 (see Req. for Rev. at pp. 1, 9). Thus, because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no good cause asserted in the request for review, in an exercise of my discretion, the appeal is dismissed (8 NYCRR 279.13; see 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]).

VII. Conclusion

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 23, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER