



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-116

**Application of a STUDENT SUSPECTED OF HAVING 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:

The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Big N Little: Ziv Hatorah Program (Ziv Hatorah) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it violated its obligation to initially evaluate the student to determine his eligibility for special education after December 2022. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary. On August 22, 2022, the parent executed a contract with Ziv Hatorah for the student's attendance during the 2022-23 school year (sixth grade) (Tr. p. 63; Parent Ex. D). In a letter dated September 19, 2022, the parent requested that the district evaluate the student and "place him in a full-time special education classroom for the 2022-2023 school year" (Parent Ex. B at p. 2; see Parent Ex. J). The parent also stated her

intent to unilaterally place the student and seek tuition funding or reimbursement for the costs thereof "if these issues [we]re not timely addressed" (Parent Ex. B at p. 2).

In a prior written notice dated September 20, 2022, the district indicated that it had "received a written referral from [the parent] requesting an evaluation to determine if [the student] has an educational disability and may require special education services" and was proposing to conduct an initial evaluation of the student to determine his eligibility for special education (Dist. Ex. 1). In October and November 2022, the district sent communications to the parent, which provided information and forms for the evaluation process, scheduled and re-scheduled appointments for the district to conduct the social history and psychoeducational evaluation, and requested that the parent sign and return the forms providing consent for the district to evaluate the student (Dist. Exs. 2; 5; 7; 10 at pp. 2-3; see Dist. Exs. 3; 4; 6; 7).¹ The parent did not appear to appointments for the social history and psychoeducational evaluation (Dist. Ex. 10 at pp. 1-2); however, the parent denies having been aware of the appointments (Tr. pp. 102-03, 105). According to the district's Special Education Student Information System (SEIS) events log, the district called the parent to notify her that, due to the missed appointments, the case would be closed "and she would have to start over," which the parent responded "would be fine" (Dist. Ex. 10 at p. 1). In an email and letter, dated November 29, 2022, the district reiterated that it was closing the case and would not evaluate the student at that time (Dist. Exs. 8; 9; 10 at p. 1).

In a letter to the district dated December 2, 2022, the parent indicated that, despite requesting an evaluation in September 2022, the district had failed to evaluate the student or offer him a placement, that the parent had obtained a private evaluation, and that the parent intended to continue the student's unilateral placement at Ziv Hatorah for the 2022-23 school year and seek public funding for the costs of the student's tuition and the private evaluation (Parent Ex. C; see Parent Ex. K).

In a due process complaint notice, dated December 20, 2022, the parent alleged that, despite her request for an evaluation, the district had not evaluated the student or offered him a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent requested an award of funding for the student's tuition at Ziv Hatorah for the 2022-23 school year (id. at p. 2).

After prehearing conferences on February 21, 2023 and March 1, 2023, the parties proceeded to the impartial hearing before the Office of Administrative Trials and Hearings (OATH) on April 19, 2023 (Tr. pp. 1-129; IHO Exs. I-II). In a decision dated May 10, 2023, the IHO determined that the district did not fail to provide the student a FAPE following the September 2022 initial referral of the student because the parent did not consent to the district's evaluation of the student or appear at appointments for evaluations (IHO Decision at pp. 1, 6-8). However, the IHO found that the parent's December 2022 letter re-triggered the district's obligation to evaluate the student, that there was no evidence in the hearing record that the district took steps to evaluate the student at that point, and that, therefore, the district denied the student a FAPE following the December 2022 letter (id. at pp. 8, 12). The IHO declined to make a decision regarding the

¹ There is indication in the hearing record that the district sent some communications to the email address of the parent's other child, which the parent used (see Tr. pp. 104-05; Dist. Exs. 2; 5; 8).

appropriateness of Ziv Hatorah to meet the student's special education needs absent a determination of his eligibility for special education but found that the hearing record showed that the school addressed the student's behavioral needs and allowed the student to make academic progress (*id.* at pp. 8-9). However, the IHO found that equitable considerations did not support an award of tuition reimbursement (*id.* at pp. 1, 6, 10-11). Therefore, the IHO denied the parent's request for tuition reimbursement for the costs of the student's attendance at Ziv Hatorah for the 2022-23 school year (*id.* at pp. 6, 12).

IV. Appeal for State-Level Review

The parent appeals arguing that the IHO erred in finding that the district did not fail to provide the student a FAPE after the parent's September 2022 referral of the student and that equitable considerations did not support the parent's request for relief.² The parent requests that the district be required to fund the costs of the student's tuition at Ziv Hatorah for the 2022-23 school year.

In an answer and cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly found that the district did not violate its obligation to evaluate the student after the September 2022 referral and that equitable considerations did not support the parents' requested relief. In addition, the district asserts that the parent's request for review should be dismissed on the basis that the parent failed to timely initiate the appeal. As for a cross-appeal, the district asserts that the IHO erred in finding that the district violated its obligation to initially evaluate the student after the parent's December 2022 letter and that Ziv Hatorah met the student's needs.³

V. Discussion—Initiation 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*

² The parent also challenges the IHO's determination not to enter an exhibit offered by the parent into evidence.

³ The parent did not submit a reply or answer to the district's answer and cross-appeal.

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 June 20, 2023, 40 days after the date of the May 10, 2023 IHO decision (see 8 NYCRR 279.4[a]).⁴ However, the affirmation of service filed with the parent's appeal indicates that the parent served the district on June 22, 2023, which renders the request for review untimely.

Additionally, the parent has failed to assert good cause—or any reason whatsoever—in her request for review for the failure to timely initiate the appeal from the IHO's decision. Accordingly, there is no basis on which to excuse the parent's failure to timely appeal the IHO's decision (see 8 NYCRR 279.13; see also B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011] [noting that "[i]nadvertence, mistake or neglect does not constitute good cause"]).

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 as to why late service of a request for review should be excused, 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]).

Generally, a cross-appeal is considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[a], [f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]; Application of the Bd. of Educ., Appeal No. 12-059). The district's cross-appeal is, accordingly, also dismissed.

⁴ The 40th day elapsed on June 19, 2023; however, service was not required on that day under 8 NYCRR 279.11(b) because it was a legal holiday.

VI. 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
July 14, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**