



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-208

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Irina Roller, PLLC, attorneys for petitioner, by Irina Roller, Esq. and Benjamin J. Hinerfeld, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 dismissed the parent's due process complaint notice against respondent (the district) regarding the 2020-21 school year. The 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 undeveloped state of the hearing record in this matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the proceeding and the limited nature of the appeal.¹

A. Due Process Complaint Notice

In a due process complaint notice, dated March 11, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year

¹ No evidence has been admitted into the hearing record (IHO Decision at pp. 1-2).

(Due Process Compl. Not.). According to the parent, the student has received diagnoses of an executive functioning and frontal lobe disorder, a developmental speech-language disorder – unspecified, a developmental coordination disorder, and an anxiety disorder (id. ¶ 4). The parent claimed that the CSE last convened to review the student's educational program on May 9, 2017, and, at that time, "classified the student as [l]earning [d]isabled" and developed an IEP for the student for the 2017-18 school year (id. ¶ 6).² For the 2020-21 school year, the parent asserted that the district failed to develop an appropriate IEP, provide the parent with prior written notice, or provide a school location letter (id. ¶¶ 9-13). As relief, the parent sought tuition reimbursement at the Fusion Academy (Fusion) for the 2020-21 school year and funding and/or reimbursement of the costs of transportation to and from Fusion (id. ¶ 28). The parent also invoked pendency at Fusion alleging that the student's program at Fusion was substantially similar to York Prep, a program which was found to be the student's pendency program in a prior proceeding regarding the 2019-20 school year (id. ¶¶ 20, 22).

B. Impartial Hearing Officer Decision

This matter was originally assigned to an IHO (IHO I) with the Office of Administrative Trials and Hearings (OATH), who held fourteen status conferences beginning November 30, 2021 and ending May 1, 2023 (see Tr. pp. 1-69). IHO I granted extensions for the parties to facilitate settlement resolutions (id.; Parent Mem. of Law at p. 2; Answer ¶ 3; May 25, 2021 Order of Extension; July 24, 2021 Order of Extension; Aug. 23, 2023 Order of Extension; Sept. 22, 2021 Order of Extension; Oct. 22, 2021 Order of Extension; Dec. 20, 2021 Order of Extension; Feb. 19, 2022 Order of Extension; Mar. 17, 2022 Order of Extension; Apr. 20, 2022 Order of Extension; June 16, 2022 Order of Extension; July 5, 2022 Order of Extension; July 28, 2022 Order of Extension; Oct. 19, 2022 Order of Extension; Nov. 16, 2022 Order of Extension; Dec. 14, 2022 Order of Extension; Feb. 14, 2023 Order of Extension; Mar. 23, 2023 Order of Extension; Apr. 15, 2023 Order of Extension; May 1, 2023 Order of Extension).³ At the May 1, 2023 status conference, IHO I scheduled another status conference for June 26, 2023 (Tr. p. 67). However, on May 31, 2023, the parties received notice that IHO I rescinded her appointment (see Parent Memo. of Law at p. 3; Answer ¶ 4).

On June 1, 2023, an IHO with OATH (IHO II) was appointed to this matter and IHO II emailed both parties to inform them of his appointment and to schedule a status conference for June 9, 2023; in that email he requested that each party respond by Monday, June 5, 2023 to let IHO II know if the June 9, 2023 date worked (IHO Ex. I; IHO Decision at p. 1). On June 9, 2023 IHO II emailed both parties noting he had not received a response from either party and inquired "if this case [wa]s still being pursued" (IHO Ex. II at p. 1; see IHO Decision at p. 1). IHO II further warned in the June 9, 2023 email that if he did not hear from the parties "in ample time, [he] may be forced to dismiss the case for failure to pursue the claim" (id.). On June 14, 2023, IHO II

² Due to the undeveloped hearing record, it is unclear what special education services the May 2017 CSE recommended for the student.

³ At the December 20, 2021 settlement conference, a representative for the parent did not appear (see Tr. pp. 6-10). At the January 18, 2022, March 17, 2022, March 23, 2023, and May 1, 2023 settlement conferences, a representative from the district did not appear (see Tr. pp. 11-20, 60-69). The parent's attorney indicated at both the March 23, 2023 and May 1, 2023 settlement conferences that the settlement attorney for the district she had been working with was no longer employed by the district (id.).

emailed both parties warning that he would be dismissing the case for failure to pursue the claims asserted if the parties did not respond by "close of business" on June 16, 2023 (IHO Ex. III at p. 1; IHO Decision at p. 1). Thereafter, on June 21, 2023, the IHO issued a two-page decision dismissing the parent's due process complaint notice without prejudice (IHO Decision at pp. 1-2).

IV. Appeal for State-Level Review

The parent appeals from the IHO's June 21, 2023 dismissal of his due process complaint notice. The parent's request for review is on a form completed by the attorney for the parent and states: "Parent seeks reinstatement of his Due Process action. Please see attached Memorandum of Law." In its answer, 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, that the parent failed to comply with the practice regulations, and that IHO II was justified in dismissing the parent's due process complaint notice without prejudice.

V. 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 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 July 31, 2023, 40 days from the date of the June 21, 2023 IHO decision (see 8 NYCRR 279.4[a]). However, the parent's affidavit of service of the request for review indicates that the parent served the district on October 5, 2023, which renders the request for review untimely.

Additionally, the parent failed to assert good cause in his request for review for the failure to timely initiate the appeal from the IHO's decision. In fact, as noted above, the parent's request for review merely references the parent's memorandum of law. As a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of

Educ., Appeal No. 12-131).⁴ Nevertheless, to the extent that the request for review notes that the IHO's decision was received by the parent on September 19, 2023, the impact of this assertion will be addressed below.⁵

The time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a request for review (see 8 NYCRR 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision, not from date of receipt via email or regular mail], aff'd 188 A.D.3d 889 [2d Dep't 2020]; Application of a Student with a Disability, Appeal No. 19-043; Application of a Student with a Disability, Appeal No. 16-029; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely.

If the parent had asserted that he had not received the IHO decision through some act over which he had no control, such an allegation may constitute good cause for a late filing depending on the circumstances. However, even considering the assertions raised in the parent's memorandum of law, they do not present good cause for the delay. In the memorandum of law, counsel for the parent asserts that counsel's office did not receive the email communications from the IHO or the IHO's decisions. However, reviewing the IHO's emails and the earlier information in the hearing record, the failure to receive the IHO's emails appears to have been an act that was entirely within the parent's, or the parent's attorney's, control.

⁴ After an independent review of the parent's request for review and supporting documents, it appears that the parent did not specifically raise any claims in his request for review and instead, relies solely on the memorandum. Accordingly, the parent's use of the memorandum of law is improper. The parent's memorandum of law consists of approximately 10 pages of background facts and procedural history and 8 pages of argument. The parent could have placed the 8-page argument in his request for review and would still have been under the 10-page limitation (see 8 NYCRR 279.8[b]). In addition, the parent's request for review lacked the proper verification (see 8 NYCRR 279.7[b]), which is particularly troubling as it is unclear if the parent is aware of the attorney's actions in this proceeding or the reasons given for the late filing. Given these circumstances, a copy of this decision is being sent to the parent along with parent's counsel. With respect to compliance with the filing requirements regarding the form and verification of pleadings, the parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

⁵ The parent offers additional evidence with the request for review (SRO Exs. A-C); however, due to the limited scope of this decision, only the exhibits regarding the transmittal of the decision will be considered (see SRO Exs. B-C). Proposed SRO exhibit A is an unnotarized affidavit by an employee of Fusion indicating the tuition paid by the parent during the 2020-21 school year and is unnecessary for this decision.

Here, in the parent's March 11, 2021 due process complaint notice, the parent's attorney requested that "all questions" be sent to the attorney's law firm at its physical address or to the two email addresses specified (Due Process Compl. Not. at p. 6). One email address was purported to be for a former attorney with the parent's counsel and the other appears to be an email associated with parent's attorney's law firm (see Parent Memo. of Law at pp. 3-5; Due Process Compl. Not. at p. 6).

The hearing record shows that IHO II addressed all email correspondence to the parties with both of the emails specified in the parent's March 2021 due process complaint notice (see IHO Exs. I-III). There is no evidence presented by the parent's attorneys that indicates they informed the district or OATH that such email addresses were no longer an acceptable form of communication or that the attorney was no longer employed by the law firm.

Moreover, according to the order of extension included in the hearing record, on May 1, 2023, IHO I granted a joint request from the parties made the same day which identified June 14, 2023 as the new date of the IHO's decision (Parent Memo. of Law at p. 3; May 1, 2023 Order of Extension). The parent concedes that his attorneys were aware that IHO I rescinded her appointment on May 31, 2023 (Parent Memo. of Law at p. 3), and accordingly, by the time IHO II was appointed, he was constrained by the timelines to issue a decision by mid-June without another request by the parties for an extension.

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 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]).

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.

**Dated: Albany, New York
November 29, 2023**

**CAROL H. HAUGE
STATE REVIEW OFFICER**