



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-239

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 Board of Education of the Liberty Central School District

Appearances:

Whiteman, Osterman & Hanna LLP, attorneys for respondent, by Beth A. Bourassa, 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 the costs of the student's home instruction for the 2022-23 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 disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary.

Briefly, according to the parent, the student was the subject of abuse and bullying by various district staff which resulted in the parent keeping the student at home for a portion of the 2021-22 and 2022-23 school years (see generally Parent Exs. C at pp. 2-3; Dist. Ex. 31).

On March 3, 2022, an incident occurred which reportedly placed the student and staff in danger of physical injury and resulted in staff placing the student in a "Handle with Care Therapeutic Hold" (Parent Ex. B2; see Dist. Ex. 12). In response, on March 4, 2022, the parent filed a complaint alleging that district staff placed the student in a hold, which they did not have permission from her to do, after the staff declined the student's request to go to the bathroom (Dist.

Ex. 2 at p. 1). The parent also alleged that one of the aide's hit the student in the head while he was in the hold (id.). On March 9, 2022, the district's Dignity for All Students Act (DASA) coordinator sent the parent a letter informing her that the parent's March 4, 2022 complaint was investigated and determined to be unfounded (Dist. Ex. 11). The letter also indicated the CSE would convene to discuss the student's educational needs on March 10, 2022 (id.).

The CSE met with the parent on March 10, 2022 and the district agreed to move certain staff from the student's classroom with the change effective as of March 15, 2022 (Dist. Exs. 15; 16; 20). The CSE convened again for the student's annual review on April 6, 2022 (Dist. Ex. 21).

The parent submitted subsequent DASA complaints on April 7, 2022 and April 26, 2022 which, after being investigated, were determined by the district's DASA coordinator to be unfounded (Dist. Exs. 5-10). The CSE then convened on May 4, 2022 to discuss the parent's concerns regarding the student's safety at school (Dist. Ex. 23).

After incidents taking place between May 9, 2022 and May 11, 2022, the school principal determined that the student engaged in conduct that warranted a suspension of five days from May 11, 2022 through May 17, 2022 (Dist. Ex. 27).

On May 23, 2022, by agreement, the student's educational programming was changed to remote instruction (Dist. Ex. 24). The CSE met again on June 1, 2022, changing the student's counseling services from group to individual for the remainder of the time the student was to receive remote instruction (Dist. Ex. 25).

The CSE convened on September 1, 2022 for a requested review of the student's then-current IEP and behavioral intervention plan (BIP) for the 2022-23 school year (Dist. Ex. 26 at p. 1). The CSE recommended placement of the student in a 15:1 special class with related services consisting of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute session per week of individual speech-language therapy and one 30-minute session of small group "[p]sychological [c]ounseling [s]ervices" (id. at p. 9).¹ The CSE also recommended that the student be provided with the support of a 1:1 aide who would monitor his behavior; offer him redirection, visuals, and breaks; and use physical interventions to ensure the safety of the student and others (id.).

On September 22, 2022, the parent notified the district of her intent to homeschool the student and purchased homeschool materials from the Keystone School (Parent Ex. H; Dist. Ex. 31 at pp. 12-13). The parent then homeschooled the student during the 2022-23 school year (see generally Dist. Ex. 31).

In a due process complaint notice, dated December 21, 2022 the parent alleged that since March 3, 2022, the student had been "abused by various district staff," specifically referencing the incident that occurred on March 3, 2022 (see generally Dist. Ex. 1). The parent alleged that student could not attend the district school without being abused and requested reimbursement for the costs

¹ The program recommendations were consistent throughout the IEPs included in the hearing record, with the changes to remote instruction for the second half of the 2021-22 school year being the only differences (Dist. Exs. 21; 22; 25; 26).

she incurred in homeschooling the student (*id.*).² The parent also requested that the student be provided missed special education services, noting OT, physical therapy (PT), and speech-language therapy (*id.*).

An impartial hearing convened on March 28, 2023 and concluded on June 28, 2023 after five days of proceedings (Tr. pp. 1-761).³

In the midst of the hearing, on April 25, 2023, the parent filed a second due process complaint notice and the IHO consolidated the subsequent due process complaint notice with this matter on May 1, 2023 (*see* IHO Exs. III; IV). The parent alleged in the April 25, 2023 due process complaint notice that on May 9, 2022, district staff retaliated against the student after finding an audio recording device in the student's pocket, which resulted in the student being unjustly restrained and abused by district staff (IHO Ex. IV). As relief, the parent requested "some type of disciplinary action" and "a public apology" to her family (*id.*).

In a decision dated September 21, 2023, the IHO determined that the allegations of abuse and bullying made by the parent were not supported by the evidence in the hearing record and denied her requested relief (*see generally* IHO Decision).

At the outset of the decision, the IHO acknowledged that he only had the authority to address whether the district offered the student a free appropriate public education (FAPE) during the period of time indicated by the parent in her due process complaint notices (IHO Decision at p. 3). The IHO further acknowledged that he did not have authority to discipline public school personnel (*id.*). The IHO clarified that the main issue before him was whether the district denied the student a FAPE due to alleged abuse and bullying of the student by district staff (*id.*). The IHO also indicated that it was the district's burden to prove the educational program offered to the student was appropriate; however, the IHO further clarified that because the parent only raised issues related to abuse and bullying, for this matter, the district only needed to prove that the alleged abuse and bullying, if it occurred, did not have a "deleterious effect" to the point of making the educational program offered inappropriate (*id.*).

The IHO then went on to explain the legal standard to prove the facts in contention was by preponderance of the evidence and further determined that the allegations raised by the parent were not supported by the evidence in the hearing record (IHO Decision at p. 8). To make such a finding, the IHO individually addressed each allegation of abuse and bullying raised by the parent against the district and found that each allegation was unfounded or "credibly denied" by direct testimony of district personnel at the impartial hearing (*id.* at pp. 8-9). The IHO made a witness credibility finding stating that he found the testimony of the school personnel credible and that

² The parent did not raise any allegations as to the sufficiency of the student's programming recommended in the September 2022 IEP (*see* Dist. Ex. 1).

³ The parties also convened for a prehearing conference on February 21, 2023 (Feb. 21, 2023 Tr. pp. 1-105). The transcripts for the prehearing date and the hearings dates were not paginated consecutively. However, because the transcripts for the five impartial hearings beginning on March 28, 2023 are consecutively paginated, the transcript cites for those dates will not be preceded by the hearing date in this decision (Tr. pp. 1-761). If Citation to the February 21, 2023 prehearing conference, will be preceded by the hearing date (Feb. 21, 2023 Tr. pp. 1-105).

there was no evidence or testimony presented during the impartial hearings that would have made him doubt the testimony of the district witnesses (*id.* at p. 8). Regarding the parent's allegation that the student was inappropriately restrained in school, the IHO summarized the events surrounding the incident and determined that there was no evidence that the district personnel acted or behaved inappropriately (*id.* at p. 9).

The IHO also addressed the appropriateness of the parent's homeschool program and found that she failed to meet her burden of proving that the program she provided the student once she removed the student from the district school was appropriate (IHO Decision at p. 10). The IHO found that the parent presented no evidence that the homeschool program was a special education program or that it addressed the student's special education needs (*id.*). As a result of the above findings, the IHO denied the parent's request for reimbursement of the costs associated with the homeschool program (*id.*).

Regarding the parent's request for compensatory education in the form of OT, PT, and speech-language therapy, the IHO determined that such relief was not warranted given that the district offered services to the student, but the parent chose to homeschool the student and thereby declined to utilize the services that were available (IHO Decision at pp. 10-11).⁴

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review is also presumed and, therefore, the allegations and arguments will not be recited in detail. However, it must be noted that the parent's request for review in this matter is a letter dated October 2, 2023. In that letter, the parent asserted that the IHO overlooked the audio evidence she presented during the hearing and only listened to the district witnesses as to what happened to the student at school. Accordingly, the crux of the parent's appeal is that the IHO erred in finding that the district offered the student a FAPE for the period of time at issue. In an answer, the district responds to the parent's material allegations and argues that the IHO's decision be upheld in its entirety. Additionally, the district argues that the parent's appeal should be dismissed on the basis that the parent failed to timely initiate the appeal.

V. Discussion

A. Timeliness of Appeal

As a threshold matter, it must be determined whether or not the parent'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]). A request for review must be personally served within 40 days after the date of the

⁴ The IHO further noted that the requested relief of compensatory education was further complicated by the fact that the student no longer lived in the school district or New York State and thus it was no longer the district's responsibility going forward to address the student's special education needs (IHO Decision at p. 11).

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]).

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 parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO issued his decision on September 21, 2023, thus the

parent had until October 31, 2023, 40 days after the date of the IHO's decision, to personally serve the district with a verified request for review (see IHO Decision; 8 NYCRR 279.4[a]).

On November 2, 2023, the parent filed with the Office of State Review: a notice of intention to seek review dated October 13, 2023, an affidavit of personal service notarized October 16, 2023, a notice of request for review dated October 13, 2023, and a three-page handwritten letter dated October 2, 2023.⁵ According to the October 16, 2023 affidavit of personal service, the parent served a copy of the notice of intention to seek review and case information statement on the district on October 13, 2023.

In a letter to the parties dated November 2, 2023, the undersigned indicated that the parent's handwritten letter dated October 2, 2023 was deemed to be the parent's request for review, which at that time lacked proper verification.

As set forth in a letter dated November 3, 2023, the district asserts that, on October 13, the parent personally served the district with a notice of intention to seek review, a case information statement, and notice of request for review, but the parent did not serve a request for review.⁶

On November 6, 2023, in accordance with the undersigned's request in the November 2, 2023 letter to the parties, the parent filed with the Office of State Review: an affidavit of verification notarized November 3, 2023, an affidavit of personal service notarized November 3, 2023, and a typed document that identified the reasons the parent disagreed with the decision of the IHO. The parent did not submit verification for her request for review as required by State regulation (see 8 NYCRR 279.7[b]). According to the November 3, 2023 affidavit of personal service, the parent served a copy of the "Request for Review Evidence" on the district secretary on November 3, 2023, three days after the time to file an appeal had passed (see Nov. 3, 2023 Aff. of Service).

⁵ Prior to this, the parent filed through the Office of State Review's electronic filing system a partial copy of a notice of intention to seek review on October 16, 2023. Then on October 17, 2023, by mail, the Office of State Review received a complete copy of the notice of intention to seek review and a notice of request for review. Both filings did not include a request for review. On November 1, 2023, the parent telephoned the Office of State Review to inquire about the status of her appeal. The parent was notified by the Office of State Review that no appeal was then-currently pending. The Office of State Review memorialized the phone conversation with the parent in a letter to both parties dated November 1, 2023, which also informed that parent to explain in her request for review why she failed to personally serve the request for review on the district within the 40-day time limit. The same day, the Office of State Review received handwritten correspondence dated November 1, 2023, requesting an extension of time to submit additional evidence; the parent's handwritten letter dated October 2, 2023 was also included, which identified the reasons the parent disagreed with the decision of the IHO along with copies of the notice of intention to seek review with proof of service and the notice of request for review.

⁶ In response to the letter from the undersigned dated November 2, 2023, the district's attorney sent a letter indicating that the district objected to the ex parte communication from the parent to the Office of State Review, and further, that the district objected to the undersigned's decision to deem the parent's October 2, 2023 handwritten letter to be the request for review in this matter. The district attorney also set forth claims related to the parent's noncompliance with State regulations governing appeals before the Office of State Review.

The typed letter briefly indicates that the parent "wasn't aware these documents also had to be served"; however, it is unclear what documents she is referencing. Additionally, the sole reason provided for any delay was the distance from the parent's out-of-State home to the district.⁷

Based on the parent's affidavit of service, the parent did not personally serve the district within the timelines set forth in State regulation. Additionally, although the parent was directed to provide an explanation as to why the request for review was not timely served, the document submitted did not contain sufficient good cause as the distance between the parent's home and the district is not good cause for delaying service. As described above, good cause would be an event that the party does not have control over (Grenon, 2006 WL 3751450, at *5; T.W., 891 F. Supp. 2d at 441).

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is not sufficient good cause asserted in the request for review or subsequent filings, 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]).

B. Alternative Findings

Even if the parent's appeal had not been dismissed on procedural grounds for failure to properly initiate the appeal, the allegations contained in the parent's request for review would have been dismissed on the merits. The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). Here, the IHO correctly determined that the student was provided a FAPE for the portion of the school years at issue, beginning March 3, 2022 for the 2021-22 school year through the 2022-23 school year and that the student's homeschool program was not appropriate to meet his special education needs. The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered and provided the student a FAPE for the challenged time period, and applied that standard to the facts at hand (IHO Decision at pp. 2-11). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence

⁷ The parent did not receive permission from the Office of State Review to amend her request for review but did receive permission to submit additional evidence to be considered on appeal that was not already a part of the hearing record by November 14, 2023. As such, the typed document submitted by the parent on November 3, 2023 will not be further considered by the undersigned in this matter.

and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]).

This matter was a fact specific inquiry into the alleged abuse and bullying by district staff against the student; or as the IHO stated in his decision, "whether the alleged abuse or bullying, if it occurred, had a deleterious effect to the point of making the educational program offered inappropriate" (IHO Decision at p. 3). As indicated above, the IHO determined that the testimony of the school staff did not correspond with the version of events believed by the parent, as told to her by the student (id. at p. 8). The IHO did not credit the parent's statements and instead credited the testimony of the district staff (id.). In his decision the IHO stated multiple examples of the inconsistencies to highlight why he credited the testimony of the district staff over the parent (id. at pp. 8-9). On appeal, the parent predominantly argues that the IHO erred in overlooking the recordings submitted as part of the hearing record; however, review of this evidence does not controvert the IHO's findings (Parent Exs. F1-F12; K1-K7). Based on the extensive fact and credibility findings of the IHO, there is not a sufficient argument presented or evidence in the hearing record to overturn the IHO's determination and, as such, the conclusions of the IHO are hereby adopted with regard to the district's provision of a FAPE and with regard to the parent's home schooling of the student not being an appropriate special education program for the student.

VII. Conclusion

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 21, 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**