



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-086

**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:**

Milena Hanukov, Esq., attorney for petitioner

Liz Vladeck, General Counsel, attorneys for respondent, by Frank J. Lamonica, 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 for district funding of her daughter's special education teacher support services (SETSS) and related services for the 2023-24 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the 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 § 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, the CSE convened on January 24, 2023, to formulate the student's IESP to be implemented starting on January 31, 2023 (see Parent Ex. C). The CSE recommended four periods

of direct group SETSS per week and two 40-minute sessions of group speech-language therapy per week (id. at pp. 5-6).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated August 20, 2023, the parent asserted that "[t]he parents and the school ha[d] not found a SETSS provider and related speech provider at the standard rate," indicating that the parties had "reached out to many providers to service the [student]" but such attempts were unsuccessful (Parent Ex. A at p. 2). The parent's requested relief was that the district be ordered to "assign the student enhanced rate SETSS" and speech-language services (id.). The parent indicated that she had found "qualified providers" to implement the student's IESP mandates at an enhanced rate (id.).

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

An impartial hearing convened on October 17, 2023 and concluded on December 20, 2023 after four days of proceedings (see Tr. pp. 1-90). In a decision dated January 27, 2024, the IHO determined that the district did not demonstrate that the parent failed to comply with the June 1 deadline for notice to the district that she sought special education services for a dually enrolled student (IHO Decision at pp. 15-16). Further, the IHO held that the district failed to demonstrate that it delivered the mandated services from the student's January 2023 IESP (id. at p. 17). However, the IHO found that the parent failed to prove that the unilaterally-obtained SETSS were appropriate for the student and that there was no evidence the parent submitted a required 10-day notice of her intent to unilaterally obtain services (id. at p. 18). As such, the IHO denied the parent's requested relief (id. at p. 19).

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

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer, and the parent's reply is presumed and, therefore, the specific allegations and arguments will not be recited here. The gravamen of the parent's claim on appeal is that the IHO erred by denying her request for funding of the unilaterally-obtained SETSS and speech-language services. The district asserts that the IHO correctly determined that the parent is not entitled to relief and further asserts that the parent's appeal should be dismissed for untimely and improper service of the request for review.

#### **V. Discussion—Timeliness of Appeal**

Initially, it is necessary to determine whether the parent's appeal should be dismissed as untimely.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and 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 Bd. 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 State regulations. The IHO's decision was dated January 27, 2024; thus, the parent had until March 7, 2024—a Thursday, 40 days after the date of the IHO Decision—to personally serve the district with a verified request for review (*see* IHO Decision at p. 1, 19; *see* 8 NYCRR 279.4[a]; 279.11[b]). However, the affirmation of service filed with the parent's appeal indicates that the parent served the district via email on March 11, 2024 at 9:23 p.m., with the notice of request for review, the request for review, and verification, which renders the request for review untimely.<sup>1</sup>

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 parents' 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"]).

In a reply to the district's answer, the parent set forth an explanation regarding the timing of her service of the request for review. Even if this allegation had been made in the request for review, as required by State regulation (*see* 8 NYCRR 279.13), it does not rise to the level of an event over which the filing party had no control (*Grenon*, 2006 WL 3751450, at \*5; *T.W.*, 891 F. Supp. 2d at 441). Specifically, the parent's attorney argues that the IHO decision was emailed to the parties on January 27, 2024, a Saturday and the sabbath (Reply at p. 1). Therefore, the parent's attorney argues that she did not receive the decision until January 29, 2024, and the 40-timeline should have commenced from the date when she received the decision (*id.*). Notably, the parent's attorney did not dispute that the IHO's decision dated January 27, 2024 was emailed to the parties on that date (*see* Reply at p. 1; *see also* Req. for Rev. at p. 1).

Despite any contention to the contrary, 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

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<sup>1</sup> The affirmation of services notes that the district agreed to accept service via email as opposed to personal service.

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.

Because the parents 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., 971 F. Supp. 2d at 365-67; 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 properly initiate the appeal, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
April 29, 2024

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**