The University of the State of New York

The State Education Department
State Review Officer
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No. 24-109

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:
Shehebar Law PC, attorneys for petitioner, by Y. Allan Shehebar, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her daughter's special education services delivered by Grow with Us, LLC (Grow with Us) 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 programing for students with disabilities under the 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, 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 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

A CSE convened on March 11, 2018, found the student eligible for special education, and developed an IESP with a projected implementation date of September 6, 2018 (Dist. Ex. 3).[1] The CSE recommended that the student receive five periods per week of group special education teacher support services (SETSS) along with two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 5-6). The IESP reflects that for the 2018-19 school year the student was "Parentally Placed in a Non-Public School" (id. at p. 8).

There is no evidence in the hearing record regarding the student's educational history between the March 2018 CSE meeting and the 2022-23 school year. Turning to the 2023-24 (fourth grade) school year at issue, on May 2, 2023, the parent completed and signed a form notifying the district that the student would be parentally placed at a nonpublic school for the 2023-24 school year and requesting that the district continue to provide special education services to the student (Dist. Ex. 1).

In a due process complaint notice dated September 14, 2023, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) and failed to provide appropriate equitable services to the student for the 2023-24 school year (Parent Ex. A). In particular, the parent contended that the district "failed to implement the special education services recommend on the" March 2018 IESP for the 2023-24 school year (id. at p. 2). The parent indicated she had found providers to deliver the services but "at an enhanced rate" (id.). For relief, the parent requested that the district directly fund the costs of SETSS and related services delivered by private providers (id. at p. 3). The parent also "reserve[d] the right to seek any compensatory educational for services that should have been provided or for services that were mandated to the Student but not provided due to the [district's] denial of a FAPE" (id. at p. 2).

The evidence in the hearing record includes a services agreement Grow with Us, executed on October 26, 2023, for the company to deliver five periods per week of SETSS to the student at a specified rate for the 2023-24 school year (Parent Ex. C).[2, 3]

A CSE convened on December 5, 2023, found the student continue to be eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of December 19, 2023 (Dist. Ex. 5). The IESP reflects that, at that time, the student was parentally placed at "a private religious school for girls" (id. at p. 1, 7). The CSE recommended that the student receive five periods per week of group SETSS (id. at p. 5).

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][11]).

[2] Grow with Us is an LLC and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Whether the parent executed the services agreement with Grow with Us is a material issue in dispute in this matter.

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on January 19, 2024 (Tr. pp. 1-89).[4] In a decision dated February 22, 2024, the IHO found that the district conceded that it "did not implement the services mandated" in the student's March 2018 IESP and that the district's failure in this regard denied the student a FAPE (IHO Decision at p. 4). With regard to the unilaterally obtained services from Grow with Us, the IHO found that a provider with "valid certifications" was providing the student with five hours of individual SETSS, which addressed the student's needs, and that the student made progress (id. at p. 5). However, the IHO found that, given issues with the parent's name listed and the signature, the services agreement with Grow with Us was not "reliable, valid, or credible," and, therefore, parent failed to demonstrate a financial obligation to pay for the unilaterally obtained SETSS (id. at p. 6). On this ground, the IHO denied the parent's request that the district fund the SETSS delivered by Grow with Us (id.). Turning to the parent's request for compensatory education, the IHO ordered the district to fund a bank of 14 hours of OT and 14 hours of speech-language therapy to be delivered "by a qualified provider of Parent's choosing at the rate paid for the same or similar services within the past 12 months by the DOE implementation unit" (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's request for district funding of unilaterally obtained SETSS delivered by Grow with Us on the ground that the parent did not have a financial obligation to pay for the services.

In an answer, the district argues that the IHO decision should be upheld. The district also asserts that the parent's request for review should be dismissed because it was not timely served. The parent responds to the district's answer in a reply.

V. Discussion

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness.

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 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

[4] On January 18, 2024, the district executed a pendency agreement, which provided that the student's stay-put placement arose from the March 2018 IESP (Pendency Implementation Form).

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 district is correct that the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated February 22, 2024 (see IHO Decision at p. 8); thus, the parent had until April 2, 2024—a Tuesday, 40 days after the date of the IHO decision—to serve the district with a verified request for review (see IHO Decision at pp. 1, 10; see also 8 NYCRR 279.4[a]).

The parent's attorney filed an "Attorney Affirmation of Service" stating that the attorney "affirm[ed] . . . under the penalty of perjury" that she served the request for review by electronic mail on the district on April 2, 2024 (Parent Aff. of Serv.).[5, 6] The district agreed to service by electronic mail (Reply Ex. A).[7] However, the district asserts that the parent did not actually serve the pleading until April 3, 2024. As additional evidence, the district submits a copy of the email by which the parent's attorney effectuated service (Answer Ex. 1). The email from parent's counsel to district's counsel attaching the request for review is timestamped April 3, 2024 at 7:53 AM (id.).

In the reply, the parent's attorney does not deny that the request for review was untimely served on April 3, 2024 as the district alleges. Instead, the parent's attorney argues that, because the parent requested and was granted leave to amend the request for review, the original pleading was "not officially filed" and the timeliness of the amended pleading controls. The parent's attorney contends that the amended request for review was timely served on April 17, 2024, which was the deadline set forth in the letter from the Office of State Review granting leave to amend the pleading. The parent's attorney's position is misguided. If the parent attorney's interpretation was adopted, any litigant could simply avoid the specific appeal timelines by concealing the fact that the appeal is untimely and then requesting leave to amend the untimely pleading, a process is not contemplated by State regulations, which require a petitioner to set for the reasons for the failure to timely serve a request for review in the pleading itself (8 NYCRR 279.13). Moreover, the parent's attorney in this case requested leave to amend the pleadings under false pretenses that the original request for review was timely served by filing an attorney affirmation under penalty of perjury that that she served the request for review a day earlier, an affirmation the undersigned relied on when granting leave to amend. The parent's attorney is warned that representations made

[5] The "Affirmation" included a conformed signature ("/s/") (Parent Aff. of Serv.).

[6] The attorney also filled out the form for electronic filing with the Office of State Review, indicating that the district had been served on April 2, 2024.

[7] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the additional evidence submitted with the answer and the reply could not have been presented at the impartial hearing and is necessary to consider in order to render a decision about the timeliness of the parent's appeal (Answer Ex. 1; Reply Ex. A).

in this forum are required to be both accurate and truthful. The undersigned did not excuse late service of the original request for review when granting leave to amend, thus it certainly did not toll the timeline set forth in State regulation for initiating an appeal.

Thus, 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 (see 8 NYCRR 279.13). 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 not sufficient 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 properly initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER