The University of the State of New York

The State Education Department
State Review Officer
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No. 24-122

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 Thomas W. MacLeod, 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 privately-obtained special education services delivered by Future Minds, Inc. (Future Minds) for the 2023-24 school year. Respondent (the district) cross-appeals to the extent the IHO issued a corrected decision. The appeal must be dismissed. The cross-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, 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail here. Briefly, the CSE convened on October 4, 2022 to develop an IESP for the student and found the student eligible for special education services as a student with a speech or language impairment (see generally Parent Ex. C).[1] With an IESP implementation date of October 11, 2022, the CSE recommended that the

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute

student receive special education teacher support services (SETSS), speech-language therapy, and occupational therapy (OT) (Parent Ex. C at p. 10).[2]

The student was parentally placed at a nonpublic school for the 2023-24 school year (Parent Ex. A at p. 2). On May 14, 2023, the parent submitted a district form to request dual enrollment services from the district pursuant to an IESP for the student for the 2023-24 school year (Parent Ex. D). On September 1, 2023, the parent signed a contract with Future Minds to provide the student's SETSS "in accordance with the [IESP] developed by the [district]" (Parent Ex. E at p. 2).[3]

On September 15, 2023, the parent, through her attorney, submitted a due process complaint notice to the district that was dated August 17, 2023 in which the parent alleged she and "the school" had not found a provider at the "standard SETSS rate" to deliver services to the student; that she reached out to many providers to deliver services to the student but was unsuccessful; and that according to the student's IESP, the student needed SETSS from a qualified provider in order to make progress in her academics and meet her learning goals (Parent Ex. A at p. 2).[4] For relief, the parent proposed the district "assign the student enhanced rate SETSS" (id.). The district submitted a due process response dated October 23, 2023 which indicated the CSE held a review on October 4, 2022, found the student eligible for special education services as a student with a speech or language impairment, and recommended SETSS with related services (Parent Ex. B).[5]

A. Impartial Hearing Officer Decision

An impartial hearing convened on October 31, 2023 and concluded on January 31, 2024 after seven days of proceedings inclusive of a pre-hearing conference and two status conferences (Tr. pp. 1-34).[6] At the onset of the impartial hearing, the district rested its case without placing any documents into evidence or calling any witnesses (Tr. p. 26). The parent introduced five exhibits

(see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The parent's exhibits A through E are paginated consecutively as if it was one exhibit; for example: parent exhibit A begins with a page labeled "PARENT 2" and parent exhibit B begins with a page labeled "PARENT 4" (see Parent Ex. A-E). For purposes of this decision, the pagination of each exhibit shall be referred to separately from the other exhibits, with the pages cited consecutively beginning with page 1 for each exhibit.

[3] Future Minds 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).

[4] The parent did not identify the school year at issue in her due process complaint notice (see Parent Ex. A).

[5] The district's October 2023 due process response indicated the parent's due process complaint notice was filed on September 15, 2023 (Parent Ex. B at p. 1).

[6] A representative from the district did not appear at the conferences or hearing dates held on October 31, 2023, November 2, 2023, December 5, 2023, or January 31, 2024 (Tr. pp. 1-9, 15-19, 31-34). The parent's attorney did not appear for the December 28, 2023 hearing date (Tr. pp. 20-22). According to the hearing record, the hearings held on November 2, 2023 and December 28, 2023 were scheduled by mistake (see Tr. pp. 7-9, 20-22). The January 31, 2024 hearing was scheduled for parties to file written closing briefs (see Tr. pp. 28-34).

and presented written opening and closing statements and a written closing brief (see Tr. pp. 27-28; Parent Ex. A-E; Parent Opening & Closing Statement; Parent Post-Hr'g Br.).[7]

In a final decision dated February 4, 2024, the IHO found that the student was entitled to SETSS as indicated in the October 2022 IESP; however, the IHO further found that there was no evidence showing what, if any, privately obtained services were provided by Future Minds to the student or a basis to award the requested enhance rate for SETSS (Feb. 4, 2024 IHO Decision at p. 7).[8] The IHO also determined there was no testimony or evidence that the student missed any services during the 2023-24 school year (id.). Therefore, IHO dismissed the matter, denying the parent's requested relief (id. at p. 8).

B. Events Post-Dating the IHO's Decision

The parent through her attorney emailed the IHO on February 9, 2024 to "confirm [her] understanding" of the IHO's decision and alleged several "discrepancies" within the decision (SRO Ex. A at p. 1).[9] The parent alleged the date of appearance was January 4, 2024, not April 26, 2022 as identified in the decision and that the IHO referred to the student by the wrong age and misidentified the student's private school (id.). The parents also identified what she believed were discrepancies in the IHO's analysis section of the decision which included arguments regarding the IHO's evidence determinations (id. at pp. 1-2).

The IHO signed a "corrected" decision in this matter on February 9, 2024, which fixed the typographical errors regarding the student's age and her private school placement (compare Feb. 9, 2024 IHO Decision at p. 2, with Feb. 4, 2024 IHO Decision at p. 2). The IHO did not make any further modifications (compare Feb. 9, 2024 IHO Decision, with Feb. 4, 2024 IHO Decision). The IHO emailed the corrected version of the decision to the parties and the decision processor with the impartial hearing office on February 9, 2024; however, according to an email from the decision processor dated February 12, 2024, the IHO did not attach the corrected decision to the email (SRO Ex. A at p. 4). The parent through her attorney also emailed the IHO on February 26, 2024

[7] The IHO failed to mark or identify some of the items that are part of the administrative hearing record, however, upon submitting the hearing record to the Office of State Review, the district duly adhered to State regulation that require the submission of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" which are deemed part of the hearing record (8 NYCRR 200.5[j][5][vi][b]).

[8] The IHO signed a "corrected" decision in this matter on February 9, 2024; therefore, for purposes of this decision, the cites to the decisions will be preceded by the date each decision was signed.

[9] The parent submits additional evidence to be consider on appeal consisting of an email exchange dated February 4, 2024 to February 27, 2024 between parties and the IHO regarding the February 4, 2024 decision (SRO Ex. A). 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 concerns the IHO's transmittal of the decision in this matter to the parties and, therefore, could not have been offered at the time of the impartial hearing and is necessary for addressing the parties' arguments about the timeliness of the parent's appeal. Accordingly, the document has been considered.

indicating that the corrected decision was not attached to the prior February 9, 2024 email (id. at p. 5). On February 26, 2024, the IHO emailed the parties with the corrected decision attached (id. at pp. 6-7). The parent also received a copy of the corrected decision from the impartial hearing office on February 27, 2024 (id. at p. 8).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail other than as applicable to the timeliness of the appeal. Generally, the issue raised by the parent on appeal is whether the IHO erred in dismissing her due process complaint notice and not awarding her requested relief of funding for the student's unilaterally obtained SETSS for the 2023-24 school year. In its answer, the district asserts that the parent's appeal should be dismissed because it is untimely. The district further asserts in a cross-appeal that the IHO lacked authority to issue a "corrected" decision and thus the IHO's "corrected" decision dated February 9, 2024 should be vacated. The parent prepared and served a reply and answer to the district's cross-appeal. The district prepared and served a verified reply to the parent's answer to the district's cross-appeal.[10]

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

[10] In the reply to the answer to the cross-appeal, the district argues that the parent's reply and answer to the cross-appeal should not be considered because it was not properly verified by the parent. Although the parent prepared and serviced a "SUR-REPLY" to the district's reply to explain why the parent's reply and answer to the cross-appeal was not properly verified by the parent, State regulations do not authorize such a pleading and it will not be considered (see 8 NYCRR 279.6[a] [a reply to answer may only be accepted if it is filed in response to claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, a procedural defense interposed in an answer, answer with cross-appeal, or answer to a cross-appeal, or additional documentary evidence served with the answer or answer with cross-appeal]). With respect to the argument set forth in the district's reply to the answer to the cross-appeal, State regulations provide that all pleadings shall be verified by a party (8 NYCRR 279.7[b]). The district is correct that the attorney's verification of the parent's reply and answer to the cross-appeal is not in compliance with State regulations. Nevertheless, as a matter within my discretion, I decline to reject the parent's reply and answer to the cross-appeal on this ground in this instance given this is the first time the parent's attorney has appeared in this forum and the parent properly verified her request for review. However, counsel for the parent is now cautioned that the parent must verify pleadings in appeals to the Office of State Review (8 NYCRR 279.7[b]).

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]).

The district argues that the parent's request for review fails to comply with the practice requirements of Part 279 because the parent failed to timely serve the request for review within 40 days after the date of the IHO's decision. The district alleges that the IHO improperly issued a corrected decision on February 9, 2024, and therefore such date cannot be used for calculating the date on which the parent should have initiated this appeal. The district argues that IHO's final decision date for purposes of calculating the date on which the parent needed to initiate this appeal was February 4, 2024, and thus the parent needed to serve the district with her request for review by March 15, 2024.

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 parent was required to serve the request for review upon the district no later than March 15, 2024—40 days from the date of the February 4, 2024 IHO decision (see 8 NYCRR 279.4[a]). However, according to the district and Affirmation of Service filed by the parent's attorney of service, the parent served the district on April 8, 2024 (see Answer with Cr.-Appeal ¶ 12; Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parent does not assert good cause in her request for review for the failure to timely initiate the appeal from the IHO's February 4, 2024 decision, but indicates that she was appealing from the IHO's decision "that was issued on February 26, 2024" (see Req. for Rev. at p. 1 & ¶ 6). However, the timeline to initiate an appeal is not computed on the basis of the latest transmittal date or a parties' receipt of an IHO's decision; instead it is computed using the date of the IHO's decision (see Khanimova v. Banks, 2024 WL 2093470, at *3 [S.D.N.Y. May 9, 2024]; Polanco v. Porter, 2023 WL 2751340, at *5 [S.D.N.Y. Mar. 31, 2023]). The timeline is computed based upon the date of the IHO's decision, and in this case the parent was aggrieved by the IHO's February 4, 2024 decision, which was the final decision for purposes of appeal (8 NYCRR 279.4[a]). IHOs are precluded from reopening a due process proceeding and altering the substantive findings of a final decision, and the regulations do not provide that an IHO's correction of typographical errors operate as a stay of the appeal timeline. [11]

[11] An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see, e.g., Application of a Student with a Disability, Appeal No. 17-021; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., Hawaii, 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of

As summarized above, the IHO sent an email on February 4, 2024, which the parent's attorney responded to on February 9, 2024, with concerns regarding the decision (SRO Ex. A at pp. 1-3). The parent's attorney indicated there were discrepancies in the decision that she wanted clarified, and, in addition, the parent's attorney also included allegations about the IHO's substantive determinations, arguing that such were not supported by the evidence in the hearing record (id. at pp. 1-2). The IHO responded on February 9, 2024, and stated "[p]lease see corrected [decision] for typos" (id. at p. 4). On February 12, 2024, a decision processor with the impartial hearing office emailed the parties and IHO indicating that no decision was attached to the IHO's February 9, 2024 email (id. at p. 4). Then, on February 26, 2024, the parent's attorney emailed the IHO requesting the corrected decision, and the IHO sent the corrected decision on the same day (id. at p. 5). On February 27, 2024, the IHO sent the corrected decision to the parent's attorney (id. at pp. 6-7).

The parent in her answer to the cross-appeal argues that an IHO must sign and date a decision the same day the decision is distributed and argues that the corrected decision was transmitted on February 26, 2024 and thus that is the date that must be used for calculating the time period to appeal (see Answer to Cross-Appeal). However, as noted above, 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., 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. On the other hand, there may be circumstances that are outside a party's control where delay in receipt of an IHO's decision might contribute to lateness in the service of the request for review, such as where the 40-day time period has either: 1) already expired; or 2) is much closer to expiring and there is no reasonable way in which a party could prepare and serve an appeal within the remaining time frame (see Application of a Student with a Disability, Appeal No. 20-030; Application of a Student with a Disability, Appeal No. 20-029). However, this case presents neither circumstance.

Taking the above-mentioned events into consideration, I find that the parent's request for review was untimely served. State regulation provides that the IHO "shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision

Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, reissuing a decision with an altered decision date can result in grave consequences because school districts and IHO's lack the authority to alter material provisions of a final decision (see Application of a Student with a Disability, Appeal No. 19-018 at n.6).

to the parents" (8 NYCRR 200.5[j][5]). In this instance, the IHO's February 4, 2024 decision was delivered to the parties on the date of issuance and there was no delay in the parent's receipt of the decision and the parent does not deny receiving the decision (compare IHO Decision at p. 8, with SRO Ex. A at pp. 1-3; see Req. for Rev.). The parent does not allege she did not receive the decision dated February 4, 2024 (see Req. for Rev.; Answer to Cr.-Appeal). The February 4, 2024 decision bore the signature of the IHO and was transmitted to the parties (Feb. 4, 2024 IHO Decision at p. 8; SRO Ex. A at p. 3).[12] The statement in the February 4, 2024 notice right to appeal contained the IHO's decision explicitly stated that the parent had 40 days from the date of the IHO's decision to, among other things, personally serve the request for review (IHO Decision at p. 9).

Moreover, I am not convinced that the parent could not have initiated this appeal on or prior to March 15, 2024, as the parent's attorney raised very similar, if not the same arguments, in her request for review as she did in her February 9, 2023 email to the IHO regarding the decision (compare Req. for Rev. ¶¶ 8-27, with SRO. Ex. A at pp. 1-2). Additionally, the parent in her answer to the district's cross-appeal further confirms that she knew on February 4, 2024 that she had "objections to the issues and mistakes" made by the IHO in her decision and would need to initiate an appeal (Answer to Cr.-Appeal ¶ 1). The parent notes in her answer to the cross-appeal that the "[a]nalysis section seemed inapplicable based on the [c]onclusions of [l]aw section of the [February 4, 2024 decision]" (id.).

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]).

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

[12] Although the IHO went on to issue a "corrected" decision, it was only for the purposes of addressing the parent's concerns as it related to the typos in the decision (SRO Ex. A at pp. 1-6;). To be sure, the IHO should not have changed the date of the decision to February 9, 2024; which, as reflected in this appeal, created much confusion. However, the parent acknowledges in her answer to the cross-appeal, as she must, that "[the IHO] did not make any substantive changes to her [decision], and did not change any decision or order" (Answer to Cr.-Appeal ¶ 12). If the second decision had made substantive changes rather than just correcting typographical errors or ministerial clarifications, such a decision would have to be vacated on appeal due to violation of the finality requirements for IHO decisions.

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.

VII. 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**
May 10, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER