The University of the State of New York

The State Education Department
State Review Officer
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No. 24-191

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, 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, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2023-24 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 limited scope of this appeal and the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary.

In a due process complaint notice dated March 1, 2024, the parent alleged that the district procedurally and substantively denied the student a free appropriate public education (FAPE) for the 2023-24 extended school year and, among other relief, sought an order of pendency maintaining the student's placement at the International Academy for the Brain (iBrain) and an

order directing the district to fund the costs of the student's program at iBrain for the 2023-24 extended school year (Parent Ex. A).

The parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH). On April 3, 2024, a prehearing conference was held where the parties discussed the issue of the student's pendency and the parent requested a hearing on pendency (Tr. pp. 1, 26-39, 46-73). At the April 4, 2024 pendency hearing, both parties submitted exhibits into evidence and had the opportunity to argue their respective positions (see Parent Ex. A; Dist. Exs. 1-3; Tr. pp. 46-73). The parties agreed that a prior, unappealed IHO decision dated October 6, 2023 formed the basis for the student's pendency program, but disagreed whether the student's pendency program included music therapy and regarding the date when the student's pendency started (Tr. pp. 54-67).

In an interim decision dated April 4, 2024, the IHO found that pendency was based on the prior, unappealed IHO decision dated October 6, 2023 which specifically excluded music therapy because the student did not receive such services during the school years then at issue (Interim IHO Decision; see Dist. Ex. 1). According to the IHO, in determining the student's pendency program, she lacked "the authority to alter, modify, or enlarge the relief" that was previously ordered (Interim IHO Decision at p. 1). Therefore, the IHO's pendency order tracked the same language that was in the prior October 6, 2023 IHO decision, and included the district funding the student's base tuition and supplemental tuition costs (except for the costs of music therapy) at iBrain for the extended school year at specified amounts, as well as the district funding the costs for 1:1 nursing services and private transportation at specified rates "upon the receipt of appropriate invoices" (id.). Finally, the IHO determined that the student's pendency program was to be retroactive to the date of the filing of the due process complaint notice and would continue until the conclusion of the matter, unless modified by a subsequent order or agreement (id. at p. 2).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in using "outdated figures" from the October 6, 2023 IHO decision for the specific dollar amounts awarded as pendency instead of awarding the contractual costs that the parent was obligated to pay for the 2023-24 school year. The parent also argues the IHO erred in excluding music therapy the pendency order. Additionally, the parent contends that the IHO erred by requiring payment only "upon receipt of appropriate invoices" and by ordering pendency retroactive to the date the parent filed the due process complaint notice rather than to the start of the school year. The parent requests that the IHO's interim order of pendency be modified to award the parent the full costs of the student's enrollment, transportation, and nursing contracts retroactive from the first day of school.

In an answer, the district responds to the parent's material allegations and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues that the parent's appeal was untimely served and did not comply with State regulations governing appeals before the Office of State Review.

V. Discussion --Timeliness of Request for Review

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for failure 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 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 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 New York City Dep't of Educ. v. S.H., 2014 WL 572583, *5-7 [S.D.N.Y. Jan. 22, 2014] [affirming an SRO's dismissal of a district's appeal that was served one day late]; 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. 23-294 [dismissing a parent's appeal for failure to effectuate timely service when the appeal papers were sent by email that was received by the district seven seconds past the deadline for timely service]; 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 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 rendered her decision on April 4, 2024 (Interim IHO Decision at p. 2). The parent was therefore required to serve the request for review on the district no later than Tuesday, May 14, 2024, 40 days after the date of the IHO's decision (see 8 NYCRR 279.4). An attorney from the parent's law firm filed an "affirmation of service by email" stating that on May 14, 2024, she served the request for review by email to the district's attorneys at "the email addresses consented to and designated" by the district's attorneys for service. However, the district asserts that the parent did not actually serve the pleading until Wednesday, May 15, 2024.

With its answer, the district filed an attorney declaration made under the "penalties of perjury" by a district attorney who manages the appeals division of the district's special education unit (declarant) and additional evidence consisting of emails between the parties' counsel regarding the service of documents in this matter (see Decl.; SRO Exs. 1-4).[1] The declarant states that he responded to the parent's counsel by email timestamped April 11, 2024 at 3:44 PM to consent on behalf of the district to service by electronic mail and advise the parent's attorney that the Word document that she had earlier attached to an email timestamped at 3:28 PM was blank (Decl. ¶¶ 4, 5; SRO Ex. 1). By email timestamped April 11, 2024 at 4:06 PM, the parent's attorney indicated that her "scanner was acting up" and attached the notice of intention to seek review as a PDF, which the district could access (Decl. ¶ 6; SRO Ex. 1). Thereafter, on May 14, 2024 at 5:58 PM, the parent's attorney emailed the declarant and others with a subject line containing the student's name and the body of the email containing only "scans" that were not hyperlinked and could not be opened by the district (Decl. ¶¶ 7, 9; SRO Ex. 2). On May 14, 2024 at 6:23 PM, the parent's attorney sent a second, separate email to the declarant and others, with the student's name in the subject line, and hyperlinks in the body of the email that could not be opened by the district (Decl. ¶ 8; SRO Ex. 3). By email timestamped May 14, 2024 at 6:24 PM, the declarant responded to the

[1] 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 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. For purposes of identification and clarity of the documents referenced in this decision, the document labeled "Email Service of NOI" has been designated SRO Ex. 1, the document labeled "Email 1" has been designated SRO Ex. 2, the document labeled "Email 2" has been designated SRO Ex. 3, and the document labeled "Email Service of RFR" has been designated SRO Ex. 4.

parent's first email that it was unclear who the intended recipient was and that the district could not open the attachments (Decl. ¶ 9; SRO Ex. 2). Also by email timestamped May 14, 2024 at 6:24 PM, the declarant separately responded to the parent's second email that it was unclear who the intended recipient was and that the district could not open the attachments (Decl. ¶ 10; SRO Ex. 3). The next day by email timestamped May 15, 2024 at 9:12 AM, the attorney for the parent responded just to declarant: "I am able to open it. When my paralegal gets in, we will try to reformat it so you can open it. It is our [request for review]" (Decl. ¶ 11; SRO Ex. 3). On May 15, 2024 at 10:56 AM, a different attorney from the parent's law firm sent a separate email to the district's attorneys identified in the May 14, 2024 affirmation of service, with attachments in PDF format that included the request for review (Decl. ¶ 12; SRO Ex. 4).[2] The declarant responded confirming receipt by email timestamped May 15, 2024 at 11:40 AM (id.).

The parent did not file a reply to respond to the district's assertion that the appeal is untimely. Based upon my review of the district's unrefuted additional evidence, the parent did not serve the district within the timelines set forth in State regulation. State regulation requires personal service in order to initiate an appeal and makes clear that "[s]ervice shall be complete upon delivery to the party being served" (8 NYCRR 279.4[a], [b], [d]). Here, although the district consented to service by email, the district could not access the request to review and other documents until May 15, 2024, and therefore, as explained more fully below, the parent's attempt to serve the district on May 14, 2024 was defective and incomplete (see Decl. ¶ 12; SRO Ex. 4). While New York courts and the Office of State Review have increasingly permitted service of process by email as an alternative form of service and the Office of State Review has not interjected when the parties mutually agree to service by email instead of personal service as required by State regulations, in order to be effectuated, service by email must comport with due process and appraise a party of the action (see e.g., Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 140-43 [1st Dep't 2010] [noting that alternative service by email or fax is generally proper unless there is a showing that the defendant did not receive the transmitted information]; In re J.T., 53 Misc. 3d 888, 893 [N.Y. Fam. Ct. 2016] [holding that service of process was reasonably calculated to apprise the respondent of the proceeding]).

In this case, the parent's attorney acknowledged her difficulty scanning documents and transmitting attachments to the district as evidenced by her email to the district on April 11, 2024 when she had to resend the notice of intention to seek review due to her failure to successfully send the document on her first attempt (SRO Ex. 1). Thereafter, despite her past technical difficulties and that problems with scanners, computers, and emails could foreseeably arise, the parent's attorney waited until the evening of the last day to timely serve the district, attempting to email the district the request for review at 5:58 PM and 6:23 PM (SRO Exs. 2; 3). Nonetheless, the parent's attorney still had a couple hours to timely correct the defective and incomplete service on May 14, 2024 as the declarant promptly responded to both of the parent's attorney's emails at 6:24 PM (one minute after the parent's second email) that he could not access the information purportedly transmitted within the emails and that he was unclear who the emails were intended

[2] The district attorneys identified in the parent's affirmation of service by email and sent the email timestamped May 15, 2024 at 10:56 AM included the declarant (see Parent Aff. of Serv.; SRO Ex. 4).

for (id.).[3] While service by email may afford litigants greater flexibility and convenience, it comes with sacrifices to the formality and assurances that personal service affords. Here, the parent's attorney took a gamble in waiting until the last evening to serve the request for review and in relying on service by email. The parent's attorney's emails dated May 14, 2024 at 5:58 PM and 6:23 PM with just the student's name in the subject line, no explanatory text in the body of the email, no attachments, inaccessible hyperlinks, and addressed to different district recipients than those identified in her affirmation of service were not reasonably calculated to apprise the district of the parent's appeal and did not comport with due process (see SRO Exs. 2; 3). In addition, these incomplete emails cannot be interpreted to extend the timeline set forth in State regulation for initiating an appeal. Thus, the parent's May 14, 2024 attempt of service was defective and incomplete. Ultimately, on May 15, 2024, a different attorney at the parent's law firm emailed the request for review and related documents to the district attorneys identified in the affirmation of service, but such service was one day late.

Moreover, 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"]). As stated, the parent did not file a reply and regardless, technical difficulties and waiting until the last evening to attempt service do not constitute good cause to excuse untimely service.

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]).

[3] The district recipients of both of the parent's attorney's emails dated May 14, 2024 did not match the names the parent's attorney identified in her affirmation of service by email (compare Parent Aff. of Serv., with SRO Ex. 2 and SRO Ex. 3).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 8, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER