The University of the State of New York

The State Education Department
State Review Officer
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No. 24-245

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 found that respondent (the district) offered her son an appropriate educational program 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

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 here in detail. The student has received diagnoses of attention deficit hyperactivity disorder (ADHD), predominantly inattentive presentation; a language disorder; and specific learning disorder with impairments in reading, written expression, and mathematics (Parent Ex. C at pp. 15-16). The student was initially found eligible for special education as a student with a learning disability on March 18, 2020 (Parent Ex. O ¶ 8). On July 26, 2022, a CSE convened to develop the student's IEP for the 2022-23 school year (see generally Parent Ex. B). The July 2022 CSE recommended a 12-month program for the student of integrated coteaching (ICT) services in English language arts (ELA), math, social studies, and science, together with three periods per week of direct group special education teacher support services (SETSS) in math and three periods per week of direct group SETSS in ELA

(Parent Ex. B at pp. 10-11).[1] In addition, the July 2022 CSE recommended two 40-minute sessions per week of group speech-language therapy (id.).

The student underwent a neuropsychological and educational evaluation in November and December 2022 (see Parent Ex. C).[2] A CSE convened on May 19, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Dist. Ex. 1). The May 2023 CSE recommended a 12-month program of ICT services in math, ELA, social studies, and science; three periods per week of direct group SETSS in math; three periods per week of direct group SETSS in ELA; one 30-minute session per week of group occupational therapy (OT) in a separate location; one 30-minute session per week of group OT in the classroom; and two 30-minute sessions per week of group speech-language therapy in a separate location (Dist. Ex. 1 at pp. 21-23).

A. Due Process Complaint Notice

In a due process complaint notice, dated October 20, 2023 and later corrected on March 14, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. A; see IHO Decision at p. 2).[3] In connection with the three school years at issue, the parent alleged that the district failed to evaluate the student in all areas of suspected disability and committed other procedural violations and that the IEPs developed for the student did not offer special education and related services tailored to meet the student's unique needs and allow him to make meaningful progress (Parent Ex. A at pp. 2-3). With respect to the May 2023 IEP, the parent also alleged that the CSE failed to take into consideration the findings of the neuropsychological evaluation or her concerns expressed at the meeting (id. at pp. 8, 13).

As relief, the parent requested that the district be required "to fund" 10 hours per week of SETSS, two 30-minute sessions per week of OT, and three 30-minute sessions per week of speech-language therapy and to convene a CSE to develop an IEP to include such services (Parent Ex. A at p. 14). Additionally, the parent requested compensatory OT for the period of time beginning on January 21, 2022 when the student was initially denied OT services until the district recommended OT, and compensatory SETSS for the four extra hours recommended by the neuropsychologist from the period of September 8, 2022 to June 30, 2023 (id. at pp. 14-15). Lastly, the parent requested extended school year services for the student (id. at p. 15).

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[2] The hearing record contains duplicate copies of the neuropsychological and educational evaluation report (compare Parent Ex. C, with Dist. Ex. 3). For purposes of this decision, only the parent's exhibit will be cited. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The parent requested pendency based upon the May 2023 IEP (Parent Ex. A at p. 11).

B. Impartial Hearing Decision

On November 29, 2023, an IHO from the Office of Administrative Trials and Hearings (OATH) held an "Omnibus Settlement Conference" (IHO Decision at p. 2). An impartial hearing convened on January 30, 2024 and concluded on March 21, 2024 after three days of proceedings (Tr. pp. 1-47). In a decision dated May 2, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years but offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 5-8). Regarding the 2021-22 and 2022-23 school years, the IHO found that the district "failed to properly and fully evaluate Student, failed to recommend appropriate OT services to address Student's needs, and failed to timely reconvene to consider the new information in the updated evaluations" (id. at p. 6). For the 2023-24 school year, the IHO found that the IEP "largely comport[ed] with the recommendation of the Neuropsychologist" and that the frequency of SETSS and speech-language therapy recommended by the May 2023 CSE was sufficient given the student's progress receiving a similar level of services and cautions in the neuropsychological evaluation about more intensive services possibly being detrimental to the student (id. at pp. 6-7). As relief, the IHO ordered a bank of 68 hours of OT services by a qualified provider of the parent's choice at a reasonable market rate determined by the district's implementation unit (id. at p. 8). The IHO denied the parent's remining requests for relief as without merit or as insufficiently supported (id.).

IV. Appeal for State-Level Review

The parent appeals through a lay advocate. 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 discussed below as applicable to the initiation of the appeal. Generally, the parent alleges that the IHO erred in finding that the district met its burden to prove that it offered the student a FAPE for the 2023-24 school year and in finding that six periods of SETSS per week was appropriate for the student.

In its answer, the district asserts that the parent's request for review should be dismissed on the basis that the parent failed to properly serve the district. In the alternative, the district asserts that the IHO properly concluded that the district offered the student a FAPE for the 2023-24 school year.

The parent did not file a reply to the district's answer.

V. Discussion

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for failure to timely and properly serve the request for 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]-[c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]).

A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (8 NYCRR 279.4[a]). 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]).

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]).

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]).

Here, the IHO's decision was dated May 2, 2024, thus the parent had until June 11, 2024, 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 June 17, 2024, the parent filed the following documents with the Office of State Review: a notice of intention to seek review dated May 24, 2024; a request for review dated June 10, 2024, with attachments; an affidavit of verification sworn to on June 11, 2024; and two affidavits of service.[4] The first affidavit of service states that on May 24, 2024 at 4:58 p.m., the notice of intention to seek review was personally served on "CSE1" at what appears to be the address of a local CSE office within the district upon a named individual with the title "Community Coordinator." The second affidavit of service states that on June 12, 2024 at 2:14 p.m., the notice of intention to seek review was again served upon "CSE1" at the same address and upon the same individual named in the first affidavit of service. The parent did not file an affidavit of service that referred to the request for review as the document served.

The parent also submitted with her appeal an email that the parent's advocate sent to the district's attorney on Tuesday, June 11, 2024 at 11:39 pm with a subject line referencing the student's name and the IHO case number and a message in the body stating "Please see Request for Appeal and associated documents in respect of the above student." Thereafter, the parent's advocate sent another email on June 12, 2024 at 12:41 am stating that the affidavit of service had previously been omitted but was "attached now as combined (last page)."[5]

In a sworn declaration submitted with the answer, the district's attorney states that the parent's advocate did not request and he did not agree to waive personal service or to accept service on the district's behalf via email (Reimels Declaration ¶ 5). The district's attorney further avers that the parent did not serve the request for review upon the district by any other means and that, to the extent the parent served the individual named in the affidavits of service for the notice of intention to seek review, that person "ha[d] not been designated by the [district] to accept service of appeal documents on behalf of the [district]" (id. ¶ 7).

As noted above, the parent did not file a reply to the district's answer and, therefore, has offered no rebuttal of the district's defense of improper service.

Thus, based on the parent's affidavits of service, the declaration from the district's attorney, and the emails submitted by both parties, I find that the parent failed to properly initiate the appeal by service upon the district as required by State regulation (see 8 NYCRR 279.4[b]; Application of a Student with a Disability, Appeal No. 20-020; Application of a Student with a Disability, Appeal No. 12-077; see also Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service under similar regulatory provisions upon unidentified receptionist found

[4] A notice of request for review was not filed by the parent as required by State regulations (see 8 NYCRR 279.3; 279.4[e]).

[5] With its answer, the district's attorney filed a declaration under penalties of perjury with two attachments consisting of the same emails submitted by the parent except that the time stamps on the district's versions show the times the emails were received by the district (June 11, 2024 at 11:41 pm and June 12, 2024 at 12:42 am, respectively) (see Reimels Declaration Exs. A-B).

improper]; Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696 [service upon the executive secretary to the superintendent found under similar regulatory provisions improper]). The attempt to serve the district's attorney via email after 11:00 pm on the last day to complete service was defective because, while State regulations do not preclude a school district and a parent from agreeing to "waive" the personal service method and agree to service by an alternate delivery method, the district's attorney avers that the district never agreed to waive personal service and he did not agree to accept service via email on the district's behalf (Reimels Declaration ¶ 5). Further, even if the June 13, 2024 affidavit of service filed by the parent mistakenly referenced the notice of intention to seek review instead of the request for review, at that point, on June 12, 2024, service of the request for review was untimely, and, in any event, a "Community Coordinator" is not among the individuals specified in State regulation upon whom service may be made and the district's attorney avers that the district did not designate that individual to accept service on the district's behalf (8 NYCRR 279.4[b]; see Reimels Declaration ¶ 7). Accordingly, the appeal must be dismissed for all of the reasons described above.

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER