The University of the State of New York

The State Education Department
State Review Officer
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No. 24-259

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 directed respondent (the district) to provide special education teacher support services (SETSS) and speech-language therapy to the student for the 2022-23 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

Given the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary. Briefly, the evidence in the hearing record indicates that a CSE convened on January 11, 2017 to develop an IESP for the student, with a projected implementation date of January 23, 2017 (Parent Ex. B at p. 1). The CSE found the student eligible for special education services as a student with a speech and language impairment

and recommended that he receive four periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 6-7).

A. Due Process Complaint Notice

In a due process complaint notice dated December 13, 2022, the parent, through a lay advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). The parent indicated that the last program the district developed for the student was the January 23, 2017 IESP (id.). According to the parent, the student required the same special education and related services for the 2022-23 school year as those that were set forth in the January 2017 IESP and the district failed to provide them (id.). The parent also alleged that the district had not convened a CSE meeting for the student since January 11, 2017 and therefore the district had failed to comply with State regulations regarding annual reviews by the CSE and reevaluations (id. at p. 2). In addition, the parent alleged that she had to privately locate, secure, and hire SETSS and speech-language providers for the student and the parent sought payment from the district for the privately-obtained SETSS provider at an enhanced rate (id. at p. 3).

B. Impartial Hearing Officer Decision

After two initial appearances, the parties proceeded to an impartial hearing on June 1, 2023 before the IHO (Tr. p. 11). The parent entered two exhibits into evidence: the due process complaint notice and the January 23, 2017 IESP (Tr. pp. 11-12; see Parent Exs. A; B). At the impartial hearing, the parent's representative clarified that the parent sought payment from the district for the services listed in the January 2017 IESP (Tr. p. 12). The district agreed that the services in the January 2017 IESP were recommended for the student and requested that "the IHO issue a final order mandating [those] services" (Tr. pp. 12-13). Both parties represented that there were no further issues to be resolved by the IHO (Tr. p. 13).

By email dated June 28, 2023, the IHO sent the parties a draft decision for review and provided the parties an opportunity to propose changes prior to issuance of the final decision (SRO Ex. A at pp. 1-2).[1] On that same day, June 28, 2023, both parties responded to the IHO's email

[1] Both parties submitted additional evidence for consideration by a State Review Officer. 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, many of the attachments to the parent's request for review are either 1) found elsewhere in the hearing record, and/or 2) could have been offered at the time of the impartial hearing. These will not be accepted as additional evidence; however, the parent submitted as additional evidence a document that depicts emails spanning from June 2023 and May 2024 among the IHO and the parties that will be considered and referred to as SRO Exhibit A. The district submitted with its answer, an email chain from March 2024 through May 2024 with an attached decision; and an email chain from June 2024. These could not have been offered at the time of the impartial hearing and are necessary in order to render a decision. They will be referred to as SRO Exhibits B and C, respectively.

(id. at pp. 1-3). The parent's representative requested that the words "market rate" be added to the decision and a representative for the district did not object to that language being added (id.).

Several extension orders were then issued (July 27, 2023 Extension Order; August 26, 2023 Extension Order; September 25, 2023 Extension Order; October 25, 2023 Extension Order; November 24, 2023 Extension Order; December 24, 2023 Extension Order; January 23, 2024 Extension Order; February 22, 2024 Extension Order). The specific circumstances that led to these extensions are unclear, but each order states that the extensions were based upon settlement negotiations (see id.).

By decision dated March 11, 2024, the IHO found that the district failed to implement its own "IEP [sic]" (IHO Decision at p. 4). The IHO then briefly discussed compensatory education and found that "the student must be awarded services for the time frame outlined in the [due process complaint]" (id.). The IHO ordered the district to provide four periods per week of group SETSS and two 30-minute sessions per week of individual speech-language therapy (id.).

After the IHO submitted her decision via email on March 11, 2024 to the district's impartial hearing office, a representative from the hearing office noted that the case number on the decision's cover page was incorrect and asked the IHO to correct the decision and resubmit it with the corrected case number (SRO Ex. B at pp. 1, 4-5). The IHO did not do so until May 10, 2024, in an email to the hearing office representative with the corrected decision attached (id. at p. 1). The parent's representative was copied on the IHO's May 10, 2024 email that transmitted the corrected decision, as well as other emails (id. at pp. 1-3). By email dated May 13, 2024, the hearing office sent the parent's representative a copy of the IHO decision (SRO Ex. A at pp. 2-3; see SRO Ex. B at p. 1).

On May 17, 2024, the parent's representative sent an email to the district stating the following: "See this Decision. This was a case that had a hearing last June but Decision was only submitted in March and received by us this week. Obviously the appeal deadline has come and gone" (SRO Ex. A at p. 1). The parent's representative then noted the parent's concerns with how the case had proceeded, and the representative alleged that the words "market rate" were not included in the decision, as previously agreed, because the "IHO likely missed that email [discussing this] due to the delay in rendering her Decision" (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. Among other things, the parent argues that the IHO erred by omitting the words "market rate" from the decision, that the district did not make any substantive opposition in the proceedings below, and claims that the district is refusing to submit payment for privately obtained services. The parent also asserts that the appeal is timely

due to the extreme delay in receipt of the IHO decision, that the delay prejudiced the student, and that the record close date is incorrect and deprives the parent the right to appeal.[2]

In an answer, the district disputes the parent's material allegations and argues that the parent's appeal was untimely served and therefore should be dismissed.

V. Discussion -- Timeliness of 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]). 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]).

Here, 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 April 22, 2024, the first business day after 40 days from the date of the March 11, 2024 IHO decision (see 8 NYCRR 279.4 [a]). While the affidavit of service for the request for review has not been provided by the parent, I note that, by any measure, even if the dates were calculated in a manner most favorable to the parent, the parent's service of the request for review

[2] Briefly, I am not persuaded by the parent's contention that the record close date cannot precede the date of the IHO decision, and the record close date's alleged effect on the parent's ability to appeal. According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at https://www.nysed.gov/memo/special-education/requirements-related-special-education-impartial-hearings; see 8 NYCRR 200.5[j][5][iii]). Therefore, a record close date can precede the date of the IHO decision, which must be rendered and sent to the parties no later than 14 days from the record close date. To the extent the parent's contentions with respect to the record close date, and by relation, the date of the IHO decision, are that the dates should be changed to reflect the date of receipt of the decision, this is without merit, as discussed later in this decision.

is certainly well beyond the April 22, 2024 date.[3] The request for review is dated June 20, 2024, and the parent's verification is dated June 21, 2024. Therefore, the earliest the parent could have served this document upon the district is June 21, 2024. I also note that the district has alleged, in its answer, that the request for review was served on June 21, 2024 (see also SRO Ex. C at p. 1).

The parent has failed to assert good cause in her request for review for the failure to timely initiate the appeal from the IHO's decision. In the request for review, the parent contends that, although the IHO decision was dated March 11, 2024, the decision was not received by the parent's representative until "some point between May 10, 2024 and May 17, 2024" (see SRO Ex. A at p. 1). The parent contends that the appeal is timely because it was served within forty days from the date the parent's representative received the IHO decision. This is not, however, the correct standard for timely initiating an appeal.

The time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a request for review (see 8 NYCRR 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as 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.

To the extent that the parent asserts that a delay in the transmittal of the IHO's decision contributed to any lateness in the service of the request for review, there may be circumstances that are outside a party's control where such a delay 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).

As summarized above, the parent's representative received the IHO decision via email from the IHO on May 10, 2024, and then once again from the Impartial Hearing Office on May 13, 2024, after the expiration of the 40-day time period on April 22, 2024 (SRO Exs. A at pp. 2-3; B. at p. 1). I also note that the IHO sent the parties a copy of a draft decision over 10 months prior to this, on June 28, 2023 (SRO Ex. A at p. 3). Additionally, the parent's representative had further notice of a potential delay of the release of the decision when she was copied onto the email chain on April 12, 2024 regarding the discrepancy of the case number in the original decision that was

[3] I note that the petitioner is required, by regulation, to file proof of service with this Office (8 NYCRR 279.4[e]).

sent to the hearing office on March 11, 2024 (see SRO Ex. B at p. 3). While I might well have entertained a short delay in filing a late request for review by the parent in light of the fact that the IHO decision was received much later than would be expected, and given that the 40-day time period had already expired by the time the finalized decision was actually received, it is unclear why it took the parent approximately 39 to 42 more days after receiving the IHO's decision to serve the request for review on the district, especially given that the parent's representative had notice of an impending decision, as discussed above (see Application of the Bd. of Educ., Appeal No. 20-030 [noting that it was unclear why it took the parent approximately 38 more days after receiving the IHO's decision to serve the request for review]; Application of the Bd. of Educ., Appeal No. 20-029 [noting that it was unclear why it took the parent approximately 37 more days after receiving the IHO's decision to serve the request for review]; Application of the Bd. of Educ., Appeal No. 12-059 [noting that a delay of nine days in serving a request for review was too long in circumstances in which a shorter delay in service might have been countenanced]).

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 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 timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 12, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER