The University of the State of New York

The State Education Department
State Review Officer
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No. 24-309

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 Lindsay R. VanFleet, 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), through a lay advocate, appeals from a decision of an impartial hearing officer (IHO) which, as relevant here, reduced the contracted hourly rate for her son's (student's) unilaterally-obtained special education teacher support services (SETSS)[1] delivered by EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals seeking, in pertinent part, the dismissal of the appeal due to petitioner's untimely service of a request for review. The appeal must be dismissed. The cross-appeal must be sustained in part.

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

[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.

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

The CSE convened on May 16, 2018 and developed an IESP which recommended that the student receive five periods of group SETSS per week in English; together with related services including two 30-minute sessions per week of individual and one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of group physical therapy (PT), and two 30-minute sessions per week of individual and one 30-minute session per week of group occupational therapy (OT) (Parent Ex. B at pp. 1, 10-11).

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) by failing to develop and implement an appropriate program for the 2023-24 school year (Parent Ex. A). The parent provided notice that she would take unilateral action to implement the necessary services for the student and that the parent would request funding from the district for such services obtained (id. at p. 2). According to the parent, she was unable to procure a provider at the district's rates and consequently, the parent had no choice but to retain the services of a provider at enhanced rates (id.).

As relief, the parent sought an order, in pertinent part, declaring that the district failed to provide the student with a FAPE, directing the district to fund the "current education placement" under pendency, and directing the district to fund the costs of provider services at an enhanced rate for the 2023-24 school year (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on March 27, 2024 before an IHO appointed by the Office of Administrative Trials and Hearings (OATH). In a decision dated April 24, 2024, the IHO concluded that the parent's service on the district of a ten-day notice (Parent Ex. C), coupled with a letter dated May 11, 2023 (Parent Ex. D), put the district on notice that a new IESP needed to be generated (IHO Decision at pp. 6, 12). The IHO found that the district failed to convene a CSE to create a program for the student for the 2023-24 school year and the IHO deemed the IESP dated May 16, 2018, to be the last agreed upon program that the district should have implemented (id.). The IHO found that the district denied the student a FAPE by failing to implement the IESP for the 2023-24 school year (id.). Having not been provided with SETSS by the district, the parent contracted with an agency on August 29, 2023 (Parent Ex. E). The IHO found that while the district did not contest its failure to implement the mandated program, it asserted that the contracted rate for the SETSS provider was excessive (IHO Decision at pp. 5, 12). The IHO found, in pertinent part, that there was no clear evidence that the SETSS were provided on a one-to-one basis as opposed to in a group (id. at p. 12). Therefore, the IHO reduced the contracted hourly rate from $195 to a rate not to exceed $125 (id.).[2] Among other relief, the IHO ordered the district to

[2] The parent did not pursue her claim for the funding of related services (Tr. p .3; IHO Decision at p. 3).

directly fund the SETSS at a rate not to exceed $125 per hour for the 2023-24 school year (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals, alleging, as relevant here, that the IHO arbitrarily reduced the contracted rate for SETSS without sufficient evidence. The district cross-appeals, in pertinent part, seeking the dismissal of the parent's request for review because it was untimely served on the district. In a reply, the parent, through her lay advocate, does not contest that the request for review was untimely, but instead, as relevant here, asserts that there is good cause to excuse the untimely service because a technical error caused the due date for the service of the request for review to be mis-calendared.

V. Discussion

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

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

Here, the district is correct that the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated April 24, 2024 (IHO Decision at pp. 1, 14); thus, the parent had until Monday, June 3, 2024—40 days after the date of the IHO decision—to serve the district with a verified request for review (id.; see also 8 NYCRR 279.4[a]; 8 NYCRR 279.11[b]). However, as reflected in an affidavit of personal service, the parent's request for review was served on the district on June 18, 2024 – 55 days after the date of the IHO decision (Req. for Rev. at p. 9). Absent from the parent's request for review was any reason for the failure to seek review within the 40-day timeline. The parent's assertion of an excuse for untimely service in the reply to the district's answer and cross-appeal, by her lay advocate, is not effective under State regulations and will not be considered. (Application of the

Dep't of Educ., Appeal No. 12-120 [finding that asserting a basis of good cause in a reply is not authorized by State regulations]).[3] Accordingly, the issue of good cause is not properly before me and will not be considered herein.

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there was no good cause asserted for its untimeliness in the request for review, in an exercise of my discretion, the appeal is dismissed (8 NYCRR 279.13; see Avaras v. Clarkstown Cent. Sch. Dist., 2019 WL 4600870, at *11 [S.D.N.Y. Sept. 21, 2019] [upholding SRO's decision to dismiss request for review as untimely for being served nine hours late notwithstanding proffered reason of process server's error]; New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-CV-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

VI. Conclusion

In summary, the appeal must be dismissed due to the parent's failure to timely initiate the appeal pursuant to practice regulations. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determination above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT THAT IT SOUGHT DISMISSAL OF THE APPEAL BASED ON UNTIMELINESS.

Dated: **Albany, New York**
September 9, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

[3] Even if I were to consider the parent's reason set forth in her reply for the failure to timely initiate the appeal, I am not persuaded that a technical error inputting a date into an office calendar constitutes good cause to excuse the untimely service (see 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"]).