



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-315

**Application of a STUDENT WITH A DISABILITY, by his parents, 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:**

The Law Office of Laura D. Barbieri, PLLC, attorneys for petitioners, by Laura Dawn Barbieri, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for direct funding of the full cost of their son's attendance at Atidaynu – Our Future School (Atidaynu) for summer 2021, and further found that Reach for the Stars Learning Center (RFTS-LC) was not an appropriate unilateral placement for the student for the 10-month 2021-22 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 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 December 7, 2020 to develop an IEP for the student, with a projected implementation date of December 14, 2020 (Dist. Ex. 3 at pp. 1, 13-14, 19). The December 2020 CSE found the student eligible for special education and related services as a

student with autism (*id.* at p. 1).<sup>1</sup> For the remainder of the 2020-21 school year, the December 2020 CSE recommended 12-month services consisting of placement in a 6:1+1 special class in a specialized school with five periods per week of adapted physical education, and related services consisting of three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy, as well as a recommendation for four 60-minute sessions per year of group parent counseling and training (*id.* at pp. 13-14, 18, 19-20).

### **A. Due Process Complaint Notice**

In an amended due process complaint notice, dated December 15, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. B at p. 1).<sup>2</sup> The parents asserted that the district failed to provide prior written notice, failed to utilize appropriate scientifically based teaching instruction, that the CSE failed to conduct and consider adequate evaluations, and that the CSE failed to fully include the parents in the creation of the student's educational program (*id.*). As relief, the parents requested funding/reimbursement for the student's unilateral placement at Atidaynu for summer 2021 and funding/reimbursement for the student's unilateral placement at RFTS-LC for the 10-month 2021-22 school year (*id.* at p. 5).

### **B. Impartial Hearing Decision**

A prehearing conference was held on September 7, 2022 (Tr. pp. 1-6).<sup>3</sup> The parties reconvened on June 28, 2023 for an impartial hearing, which concluded on October 27, 2023, after four nonconsecutive days of hearings (Tr. pp. 60-341). In a decision dated May 1, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year (IHO Decision at pp. 13, 32-33). The IHO then determined that the parents' unilateral placement of the student at Atidaynu for summer 2021 was appropriate, and that equitable considerations favored reimbursement (*id.* at pp. 15-19). With regard to the amount of reimbursement, the IHO determined that the affidavit submitted by the school's director requested an amount that was not consistent with the enrollment contract (*id.* at p. 16). The IHO awarded funding in the amount of \$15,000, which she calculated based on the cost of a 12-month school year compared to the cost of a 10-month school year as included in the enrollment contract (*id.* at pp. 16, 19, 32). Turning to the 10-month 2021-22 school year, the IHO found that RFTS-LC was not an appropriate unilateral placement for the student (*id.* at pp. 19-27). The IHO then further determined that equitable considerations did not favor any award of funding or reimbursement at RFTS-LC for the 10-month school year (*id.* at pp. 27-32, 33). As relief, the IHO awarded the amount of \$15,000 for the student's education at Atidaynu for summer 2021 (*id.* at p. 32).

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<sup>1</sup> The student's eligibility for special education as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>2</sup> The parents filed an initial due process complaint notice on June 6, 2022 (Parent Ex. A at p. 1).

<sup>3</sup> The district did not appear at the prehearing conference or at subsequent status conferences held on October 19, 2022 and November 4, 2022 (Tr. pp. 1-16). Additional status conferences, at which the district did appear, were held on December 15, 2022, January 17, 2023, March 13, 2023, and May 30, 2023 (Tr. pp. 17-59).

#### **IV. Appeal for State-Level Review**

The parents appeal and assert that the IHO erred in failing to fully fund the cost of the student's unilateral placement for summer 2021, erred in finding that RFTS-LC was not an appropriate unilateral placement for the student for the 10-month 2021-22 school year and in finding that equitable considerations favored denial of any reimbursement. As relief, the parents request full funding for the cost of the student's attendance at Atidaynu for summer 2021 in the amount of \$22,000 and funding in the amount of \$347,862 for the cost of the student's attendance at RFTS-LC for the 10-month 2021-22 school year. The parents' attorney also provided an affidavit, which purports to demonstrate good cause for the parents' delay in serving their request for review.

In an answer, the district initially asserts that the parents request for review must be dismissed as untimely. The district further argues that the request for review fails to assert any good cause for the parents' delay in serving the request for review and that the affidavit of the parents' attorney purporting to show good cause was not referenced in the request for review. The district has also attached two documents to its answer which the district alleges undermines the parents' attorney's purported good cause for the delay.<sup>4</sup> In addition, the district's attorney has provided an affidavit in support of her arguments. In the alternative, the district asserts that the IHO's decision should be affirmed in its entirety.

#### **V. Discussion — Timeliness of Request for Review**

As a threshold matter, it must be determined whether or not the parents' appeal should be dismissed for failing 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]-[c]). 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

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<sup>4</sup> Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ.*, Appeal No. 08-024; *Application of a Student with a Disability*, Appeal No. 08-003; *Application of the Bd. of Educ.*, Appeal No. 06-044; *Application of the Bd. of Educ.*, Appeal No. 06-040; *Application of a Child with a Disability*, Appeal No. 05-080; *Application of a Child with a Disability*, Appeal No. 05-068; *Application of the Bd. of Educ.*, Appeal No. 04-068). The district's proposed SRO exhibit 1 contains email correspondence exchanged between the parents' attorney and the district's legal staff and attorneys from May 24, 2024 through June 11, 2024. The district's proposed SRO exhibit 2 is an affidavit from the attorney representing the district in this appeal, wherein she affirms under penalty of perjury her personal knowledge of the circumstances of her receipt of an email dated June 11, 2024. The emails and attorney affidavit sought to be introduced as additional evidence were not required to be submitted as part of the hearing record (*see* 8 NYCRR 200.5[j][5][vi]). Due to their relevance to the parents' asserted good cause for delay, these documents are necessary to render a decision in this matter and, as such, I will exercise my discretion and accept the district's proposed SRO exhibits 1 and 2 as additional evidence (*see* SRO Exs. 1-2).

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 IHO's decision was dated May 1, 2024, thus the parent had until June 10, 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]).

By email dated May 24, 2024, the parents' attorney wrote to the district's legal service general mailbox, a district attorney, and a staff member asking if she could serve a notice of intention to seek review by email (SRO Ex. 1 at p. 9). The district staff member replied on May 24, 2024 that the district would accept service by email and requested that the impartial hearing case number be entered on the notice, because the parents' attorney had listed the name of the IHO instead of the case number (id. at p. 8). In a reply dated May 24, 2024, the parents' attorney stated that she would update the notice (id. at p. 7). In an email dated May 29, 2024, the district attorney included on the original correspondence wrote to the parents' attorney stating, "[c]an you at least confirm what case you're talking about here? We don't have an IHO number" (id. at p. 6). The district attorney also asked in a separate email sent on the same date if the parents' attorney would accept service by email for any district "papers" (id.). The parents' attorney replied to the district's attorney approximately 20 minutes later on May 29, 2024, wherein she apologized and agreed to "fix the document after [she] look[ed] up the number" (id. at p. 5). The parents' attorney also agreed to accept service by email from the district and indicated that she was "behind in [her] to do list" (id.). On May 30, 2024, the parents' attorney provided a corrected notice of intention to seek review to the district (id. at p. 4).

By email dated June 11, 2024, the parents' attorney wrote to the district's attorney and staff member requesting the name of the district's attorney who would be handling this matter and to also request consent "for a two-week extension in the submission of the [request for review], and supporting memo" (SRO Ex. 1 at p. 3). On June 11, 2024, the district's attorney replied with the name of the district's attorney handling this matter and copied the attorney in his response to the parents' attorney (id.). On June 11, 2024, the district's attorney for this matter replied that she took no position on the parents' attorney's request (id. at p. 1).<sup>5</sup> The parents' attorney replied approximately one hour later thanking the district's attorney for letting her know (id.).

On July 30, 2024, the parents filed the following documents with the Office of State Review: a notice of intention to seek review dated May 24, 2024; a notice of request for review dated July 29, 2024; a verified request for review dated July 27, 2024; an affidavit of verification sworn to on July 29, 2024; an affidavit of the parents' attorney sworn to on July 29, 2024; and a memorandum of law dated July 28, 2024. Along with the notice of intention to seek review was a copy of the email exchange wherein the district agreed to accept electronic service. However, the parents' attorney did not provide affidavits of service for the notice of intention to seek review or for the request for review.<sup>6</sup>

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<sup>5</sup> The affidavit of the district's attorney representing the district in this matter avers that she received the parents' attorney's June 11, 2024 email as a courtesy copy from her supervisor, that she replied approximately four minutes later to the parents' attorney and did not receive any further communications from the parents' attorney between June 11, 2024 and July 30, 2024, when she was served with the parents' request for review and "appeal documents" (SRO Ex. 2 at ¶¶ 4-5).

<sup>6</sup> I note that the petitioner is required, by regulation, to file proof of service with the Office of State Review (8 NYCRR 279.4[e]).

According to the affidavit of the parents' attorney, following her being retained to appeal the IHO's decision in this matter, she became seriously ill with what "was likely COVID-19, although [she] initially tested negative at the end of June 2024" (July 29, 2024 Aff. ¶ 2). The parents' attorney further described her symptoms, noted two doctors' visits on June 24, 2024 and June 26, 2024, and cited an exhibit that was not included with the appeal (id. ¶¶ 3-4). The parents' attorney also stated that she tested positive for COVID-19 on July 15, 2024, which indicated that she "was continually sick with COVID earlier, with a false negative initial test result" (id. ¶ 6). The parents' attorney then indicated that due to her health issues, she "was completely deficient in attending to [her] work responsibilities and the deadlines for numerous submissions were completely missed" (id. ¶ 8). The parents' attorney further described the steps she had taken to prevent such lapses in the future, she asserted that the district did not suffer any prejudice, and that "these extraordinary and unique circumstances warrant[ed] consideration" and that her late submissions should be accepted (id. at ¶¶ 9-10, 12). However, missing from the parent's affidavit was an account of anything that occurred around the time the parents' appeal was due to be served in this matter—as of June 10, 2024. All of the information contained in the affidavit relates to later events, beginning at the end of June 2024 and running through July 2024.

While I am not unsympathetic to the parents' attorney's health struggles, review of the submissions from the parties reflects that the parents' attorney has not accounted for the time period between May 1, 2024, when the IHO issued her decision and June 10, 2024, which was the last day to timely serve a request for review. When the parents' attorney contacted the district on June 11, 2024, seeking their consent to a request for an extension, the request for review was already untimely (SRO Ex. 1 at p. 3). Further, there is no evidence that the parents' attorney ever did seek an extension to file the request for review with the Office of State Review. The district's attorney also averred that there was no further communication between the parties until she was served with the request for review on July 30, 2024 (SRO Ex. 2 at ¶ 5). Therefore, I must find that the parents have not offered good cause for their delay in initiating the appeal.

Based on the foregoing, I find that the parents 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 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]).

Because the parents 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, 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 parents failed to timely initiate the appeal, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                      **August 29, 2024**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**