



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-326

**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:**

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

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 denied her request that respondent (the district) reimburse her for the cost of her son's attendance at Reach for the Stars Learning Center (RFTS-LC) 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 disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary. Briefly, according to a prior written notice submitted by the district in response to the parent's due process complaint notice, on June 16, 2023, the district summarized the recommendations of the January 9, 2023 CSE (June 16, 2023 Prior Written Notice). The January 9, 2023 CSE found the student eligible for special education and related services as a student with autism and recommended a 6:1+1 special class in a specialized school with the related services of individual occupational therapy (OT), parent

counseling and training, individual speech-language therapy, group paraprofessional services, and a speech generating device with associated software and accessories (id. at p. 1).<sup>1</sup>

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

In a due process complaint notice dated February 22, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 3-4, 5). The parent asserted that the district committed multiple procedural and substantive violations of the IDEA, which resulted in a denial of a FAPE to the student (id. at pp. 3-4). As relief, the parent requested direct funding and reimbursement for the student's unilateral placement at RFTS-LC for the 2023-24 school year and for the district to provide transportation (id. at p. 5).

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

A prehearing conference was held before the Office of Administrative Trials and Hearings (OATH) on March 25, 2024 (Tr. pp. 1-11). The parties reconvened on May 2, 2024 for an impartial hearing (Tr. pp. 12-32). In a decision dated June 3, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 19). The IHO then determined that the parent's unilateral placement of the student at RFTS-LC was not appropriate, noting that the private school did not remedy deficiencies in the public-school program particularly finding that the private school did not have sufficient behavioral supports, a needed 1:1 health paraprofessional, or sufficient related services (id. at pp. 19-22). The IHO then further determined that if an award were warranted, equitable considerations would have required a reduction (id. at pp. 22-23). The IHO dismissed the parent's claims with prejudice (id. at p. 23).

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

The parent appeals and asserts that the IHO erred in finding that RFTS-LC was not an appropriate unilateral placement for the student for the 2023-24 school year and in finding that equitable considerations weighed against full funding for the contracted for costs of the student's education at RFTS-LC. As relief, the parent requests full funding for the cost of the student's attendance at RFTS-LC for the 2023-24 school year. The parent's attorney also provided an affidavit, which identifies health issues and medical appointments the attorney had from June 24, 2024 through August 9, 2024.

In an answer, the district initially asserts that the parent's 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 parent's delay in serving the request for review and that the affidavit of the parent's attorney purporting to show good cause was not referenced in the request for review. The district's attorney has also provided a declaration in support of his arguments. In the alternative, the district asserts that the IHO's decision should be affirmed in its entirety.

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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]).

The parent interposed a reply to the district's answer.<sup>2</sup>

## V. Discussion — Timeliness of Request for Review

As a threshold matter, it must be determined whether or not the parent's 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 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

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<sup>2</sup> A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). The parent requested and was granted an extension to serve a reply to the district's answer by September 23, 2024. On October 1, 2024, the parent filed with the Office of State Review a 27-page document entitled "Reply In Further Support Of Request For Review" dated September 23, 2024, a six-page document captioned "Declaration" and also entitled " Reply In Further Support Of Request For Review" and dated September 23, 2023. Lastly, the parent filed an affidavit sworn to on September 30, 2024, wherein the parent's counsel averred that she "served the Verified Reply and Answer to Cross Appeal and Memorandum of Law in Further Support via electronic mail" on September 23, 2024. Notably, the documents listed in the parent's attorney's affidavit of service do not match the documents filed with the Office of State Review. In particular, the district has not interposed a cross-appeal in this matter. State regulations require that the reply, together with proof of service, shall be filed with the Office of State Review within two days after service of the reply is complete (8 NYCRR 279.6[b]). While it is unclear from the affidavit of service whether the documents filed with the Office of State Review on October 1, 2024 were the same documents served on the district on September 23, 2024, they were nonetheless untimely filed with the Office of State Review. In addition, State regulations provide that a memorandum of law in support of a reply shall not exceed 10 pages in length (8 NYCRR 279.8[b]). Here, the parent's attorney has untimely filed a reply with supporting documents that do not comport with the regulations governing practice before the Office of State Review. Documents that do not comply with the form requirements may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]). Under the circumstances described above, I decline to accept the parent's reply and it will not be considered.

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 June 3, 2024, thus the parent had until July 15, 2024, 42 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]).<sup>3</sup>

On August 8, 2024 the parent filed the following documents with the Office of State Review: an undated notice of intention to seek review; a notice of request for review dated July 29, 2024, which was crossed out and replaced with a handwritten date of August 6, 2024; a verified request for review dated July 31, 2024; an affidavit of verification sworn to on August 7, 2024; and an affidavit of the parent's attorney sworn to on August 6, 2024.

In a sworn declaration submitted with the answer, the district's attorney states that the first communication he had with the parent's counsel relative to this matter was on August 7, 2024 at

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<sup>3</sup> Whereas here, when the 40th day after an IHO's decision is rendered falls on a Saturday, service may be made on the following Monday (see 8 NYCRR 279.4[a], 279.11[b]).

5:00 p.m. when the parent's counsel served an appeal packet via the district's electronic filing account (Reimels Declaration ¶ 4). The district's attorney further avers that there were no prior communications from the parent's counsel prior to August 7, 2024 regarding this case (*id.* ¶ 5).

As noted above, the parent's reply was not accepted as it was not in compliance with the practice regulations; accordingly, the parent has offered no rebuttal of the district's defenses of untimely service.

Additionally, the parent's request for review did not acknowledge that the request for review was not timely served and did not specify any cause for the late filing as required by State regulation which specifically states that the reason for a late filing "shall be set forth in the request for review" (8 NYCRR 279.13). According to the affidavit of the parent's attorney attached to the request for review, 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" (Aug 6, 2024 Aff. ¶ 2). The parent's 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 parent's 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 parent's 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 parent's 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).

While I am not unsympathetic to the parent's attorney's health struggles, review of the submissions from the parties reflects that the parent's attorney has not accounted for the time period between June 3, 2024, when the IHO issued her decision and her June 24, 2024 doctor's visit, wherein the parent's attorney was not experiencing any symptoms as indicated by her own affidavit. Further, although the parent's attorney's affidavit notes issues regarding her health during the period from June 24, 2024 through an appointment scheduled for August 9, 2024, the parent's attorney did not specify how her illness impacted on her ability to file a request for review in this proceeding as the affidavit only generally indicates that her health issues resulted in her missing deadlines for "numerous submissions" (Aug 6, 2024 Aff.). Additionally, there is no evidence that the parent's attorney reached out to the district prior to the service of the request for review on August 6, 2024 or ever sought an extension of time to file the request for review with the Office of State Review. Therefore, I must find that the parent has not offered good cause for her delay in initiating the appeal.

Based on the foregoing, 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 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 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, 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**  
                         **October 31, 2024**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**