



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-329

Application of a STUDENT WITH A DISABILITY, by her 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) appeals from that portion of a decision of an impartial hearing officer (IHO) which denied in part her request that respondent (the district) fund her daughter's unilaterally obtained services from EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision that found that the unilateral services from EDopt were appropriate and that equitable considerations favored the parent. The appeal must be dismissed. The cross-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 programming 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

The parties' familiarity with this matter is presumed and given the disposition of this matter on procedural grounds, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, on January 12, 2017, a Committee on Preschool Special Education (CPSE) convened, found the student eligible for special education as a preschool student with a disability, and developed an individualized education program (IEP) for the student (Parent Ex. B). The CPSE recommended that the student receive ten hours per week of individual special education itinerant teacher (SEIT) services, three 45-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of individual counseling, and one 60-minute session of 2:1 counseling per week for a 12 month period (id. at pp. 15-16).

Subsequently, on May 22, 2023, a CSE convened, found the student eligible for special education services as a student with an other health impairment, and developed an IESP (Dist. Ex. 4 at p. 1). The IESP reflected that the student had been attending fourth grade in a nonpublic school, had been evaluated over the course of the 2022-23 school year (id. at pp. 1, 4). According to comments made by the student's parent, the student had been receiving ten periods of special education teacher support services (SETSS) during 2022-23 school year (id. at p. 4).¹ The May 2023 CSE recommended that the student receive five hours per week of group SETSS in a separate location and related services of one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, and two 30-minute sessions per week of group OT (id. at p. 11).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2023, the parent, through an attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent alleged that the student required the services that were mandated in the student's January 12, 2017 preschool IEP (id. at p. 2). The parent asserted that the district failed to "conduct and consider all necessary evaluations of the student," failed to "consider the full continuum of services" for the student, precluded the parent's participation in the creation of the IESP, and failed to provide the parent with prior written notice (id. at p. 1). The parent contended that the student required 12-month services to make progress and avoid regression (id.) The parent also alleged that the district failed to provide "qualified" providers to the student, did not provide any services for the 2023-24 extended school year, and that the district impermissibly shifted the burden of finding providers to the parent (id.).

As relief, the parent sought a finding that the district failed to provide the student with a FAPE, requested a pendency hearing, and requested an order awarding the student SEIT services, OT, and counseling at the frequencies set forth in the January 2017 preschool IEP, as well as a

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.

bank of compensatory education services to make up for any mandated services not provided by the district for the 2023-24 extended school year (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

After a pendency hearing and other prehearing conferences, an impartial hearing was held on May 13, 2024 (Tr. pp. 1-86). In a final decision dated June 25, 2024, the IHO found that the district "conceded" that the May 2023 IESP was "controlling" but that the district failed to provide the student with a FAPE for the 2023-24 school year, that the parties' last agreed program for the student was the May 22, 2023 IESP, and that the district failed to implement the services outlined in the May 22, 2023 IESP for the ten-month, 2023-24 school year (IHO Decision at pp. 10, 15). The IHO did not address the remaining procedural claims or claims that the May 2023 IESP was inadequate. The IHO also found that the parent demonstrated that the unilaterally obtained services delivered by EDopt to the student were appropriate; however, in the same unilateral placement analysis the IHO found that the student was "not entitled to a 12-month program or to an increase in special education support services" (id. at p. 12). The IHO found that that equitable circumstances favored the parent, and that the student was entitled to compensatory services for all of the services mandated in the May 2023 IESP that were not otherwise provided pursuant to pendency (id. at pp. 13, 15). Finally, the IHO concluded that "the May 22, 2023 IESP is the last IESP developed for the [s]tudent. I find that the [d]istrict should have implemented the services outlined in the last IESP for the 10-month 2023/2024 school year" (id. at p. 15). Accordingly, the IHO ordered the district to directly fund the costs of five hours per week of SEIT services that EDopt provided to the student during the ten-month 2023-24 school year at the enhanced rate of \$195, upon proof of invoices, and to fund a bank of 36 hours of individual counseling, 36 hours of group counseling, and 36 hours of individual OT services to be provided by providers chosen by the parent at an enhanced rate to the extent that these services were not provided through pendency (id. at p. 16).

IV. Appeal for State-Level Review

The parent, through a lay advocate, appeals from the IHO's decision, arguing that the IHO erred in finding that the "last agreed upon IEP" was the May 22, 2023 IESP,² which recommended five hours per week of SETSS for the 10 month school year, and not the January 12, 2017 IEP, which recommended ten hours per week of SEIT services and 12 month services. The parent further argues that the IHO erred in ordering the district to fund services based on the May 22, 2023 IESP.

In an answer and cross-appeal, the district seeks dismissal of the parent's request for review. The district argues that the parent failed to meet her burden to prove that the unilateral private SEIT services she obtained for the student from EDopt were appropriate. In the event that the SRO reaches the issue of relief, the district asks the SRO to reduce the provider rate from \$195 to \$145 per hour due to the absence of hearing record evidence as to the reasonableness of the rate.

² It does not appear that the IHO found that the May 2023 IEP was "agreed upon."

The parent filed a reply, denying the allegations set forth in the district's answer and cross-appeal.

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]).

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 State regulations. The IHO rendered her decision on June 25, 2024 (IHO Decision at p. 16). The parent was therefore required to serve the request for review on the district no later than Monday, August 5, 2024, because forty days from the date of the IHO decision fell on Sunday, August 4, 2024. The parent's affidavit of service reflects that the request for review was served on Tuesday, August 6, 2024, which was one day after the timeline for service of a request for review had passed pursuant to 8 NYCRR 279.4[a]. Accordingly, the request for review was untimely served.

Additionally, the parent failed to assert good cause, much less any cause, in her request for review for the failure to timely initiate the appeal from the IHO's decision.

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 Polanco v. Porter, 2023 WL 2751340, at *5 [S.D.N.Y. Mar. 31, 2023]; 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]).

Lastly, a cross-appeal is considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[a], [f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]; Application of the Bd. of Educ., Appeal No. 12-059). Thus, the district's cross-appeal challenging aspects of the IHO's determination is also dismissed.

VI. Conclusion

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

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
October 31, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER