



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-360

**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:**

Law Office of Deborah A. Ezbitski, attorneys for petitioner, by Deborah A. Ezbitski, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Grove School and related transportation costs 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 the facts and procedural history is not necessary. Briefly, the student has a history of hearing loss, and has received diagnoses of attention deficit hyperactivity disorder, generalized anxiety disorder, and major depressive disorder (Parent Ex. J at pp. 2, 15-16). For the 2022-23 school year (seventh grade), the student was attending a nonpublic school in the district at the parent's expense and the parent requested equitable services from the district (see Dist. Exs. 1 at pp. 2, 13; 2). A CSE convened on January 16, 2023, determined the student was eligible for special education as a student with a hearing impairment, and developed an individualized education services program (IESP) (see Dist. Ex. 1). The CSE recommended that the student receive one 30-minute individual session per week of hearing education services and one 30-minute individual session per week of counseling services (id. at p.11).

In a letter dated May 19, 2023, the parent requested that the district develop an IEP for the student (Parent Ex. B). Thereafter, by letter dated August 15, 2023, the parent indicated that the district failed to respond to her request for an IEP and instead provided a form for the parent to complete to request equitable services (Parent Ex. C at p. 1; see Dist. Ex. 3). The parent outlined the student's needs as they had evolved and indicated the student needed a more supportive placement to address her "learning, hearing, and behavioral" needs (Parent Ex. C at p. 2). Because the district had not developed an IEP for the student, the parent stated her intent to unilaterally place the student at the Grove School, an out-of-State therapeutic residential nonpublic school, for the 2023-24 school year and seek tuition reimbursement from the district (id.; see Parent Ex. I).<sup>1</sup>

The student attended the Grove School for the 2023-24 school year (see Parent Ex. G; Dist. Ex. 10).

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

In a due process complaint notice dated November 9, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 2). The parent asserted that, since January 2023, the student experienced "a significant worsening" of medical health symptoms and had been in and out of psychiatric hospitals and treatment programs (id.). The parent alleged that the district failed to hold a CSE to develop an IEP for the student after the parent requested it do so in her May 2023 letter to the CSE (id. at p. 3).

As relief, the parent sought an order requiring the district to reimburse the parent for tuition costs owed to the Grove School, together with related transportation expenses for the student and her parents, for the 2023-24 school year (Parent Ex. A at p. 4).

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

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on December 11, 2023 and concluded on March 28, 2024, after six days of proceedings inclusive of prehearing and status conferences (Tr. pp. 1-557). In a decision dated June 28, 2024, the IHO concluded that the district did not provide the student with a FAPE; however, the IHO denied the parent's claim for reimbursement for tuition and related transportation costs for the 2023-24 school year because the parent failed to meet her burden of proof to show that the unilateral placement was appropriate (IHO Decision at pp. 21-22).

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

The parent appeals, alleging that the IHO incorrectly held that the parent failed to demonstrate that the unilateral placement of the student was appropriate. The parent further seeks

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<sup>1</sup> The Grove School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

a determination that there were no equitable barriers to an order granting tuition reimbursement and transportation expenses for the 2023-24 school year.

In its answer, as relevant here, the district asserts that the parent failed to timely serve the request for review.

## 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 June 28, 2024 (IHO Decision at pp. 1, 22); thus, the parent had until Wednesday, August 7, 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 the district's email confirming receipt and proof of service on the district, the parent's request for review was served on the district on Friday, August 9, 2024, 42 days after the date of the IHO's decision.<sup>2</sup> Absent from the parent's request for review was any reason for the failure to seek review within the 40-day timeline. Accordingly, good cause for the late service is not at issue.

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<sup>2</sup> State regulations require a petitioner to file proof of service of the request for review with the Office of State Review (8 NYCRR 279.4[e]). Here, the parent did not file an affidavit of service; rather the parent filed the district's email dated August 9, 2024 to constitute proof of service (see Req. for Review at p. 9). The parent did not file a reply to respond to the district's assertion in its answer that the appeal was untimely served or that the request for review was served on some date other than August 9, 2024 (see 8 NYCRR 279.6). Indeed, the notice of request for review, the request for review, and affidavit of verification are all dated August 9, 2024.

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 the practice regulations governing appeals before the Office of State Review. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determination above.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 30, 2024**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**