



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-379

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 Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 found that she had not established that the private services obtained for her daughter were appropriate for the 2023-24 school year. Respondent (the district) cross-appeals from a portion of the IHO's decision which awarded compensatory education. 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. 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 March 15, 2024, a CSE convened and found the student eligible for special education as a student with a speech or language impairment (Parent Ex. B at p. 1). The March 2024 CSE developed an IESP for the student, recommending three periods per week of special education teacher support services (SETSS), two 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of occupational therapy (OT) (*id.*). The student was parentally placed in a nonpublic school (*id.*).

In a due process complaint notice dated May 17, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent alleged that the district failed to implement SETSS and related services recommended in the student's March 2024 IESP, and that the parent was unable to locate service providers (*id.* at p. 3). The parent then requested, among other things, that the district be ordered to fund providers the parent located, at the providers' contracted for rate, and that the district be ordered to fund a bank of compensatory periods of SETSS and related services not provided to the student for the 2023-24 school year at the prospective provider's contracted for rate (*id.* at p. 4).

An impartial hearing convened and concluded before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on July 16, 2024 (Tr. pp. 1-32). In a decision dated July 31, 2024, the IHO found that the district denied the student a FAPE for the 2023-24 school year and that the parent failed to establish that the private services were appropriate (IHO Decision at pp. 3, 5-7). The IHO further found that compensatory education was an appropriate form of relief for the district's failure to provide a FAPE to the student and directed the district to fund three hours per week of SETSS, one hour per week of speech-language therapy, and one hour per week of OT for each week that the district failed to provide such services to the student from March 29, 2024 through the end of the 2023-24 school year (*id.* at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by precluding her from entering evidence into the hearing record because it was not timely disclosed.

The district, in an answer and cross-appeal, contends that the parent's appeal should be dismissed because the request for review was not timely served, and the parent did not assert any good cause for the late service in the request for review. As a cross-appeal, the district contends that this matter should be dismissed for lack of subject matter jurisdiction, that the IHO erred by

denying its motion to dismiss for lack of subject matter jurisdiction, and that the award of compensatory education was improper.^{1, 2}

In a reply, the parent alleges that the district's arguments regarding subject matter jurisdiction are not applicable. The parent further contends that the undersigned should excuse the late service of the request for review. Lastly, the parent contends that the IHO did not err in awarding compensatory relief, but requests that the district be ordered to fund the student's private services at the contracted for rates, or, in the alternative, that the matter be remanded.

V. Discussion

As a threshold matter, it must be determined whether the appeal and cross-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

¹ The district submits additional evidence with its verified answer and cross-appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). While the district's exhibit could not have been offered prior to the impartial hearing, it is not necessary to render a decision, and, as such, it will not be considered. Similarly, the parent has offered additional evidence with her reply. The parent's additional evidence is also not necessary to render a decision in this matter and will not be considered.

² Briefly, the district's arguments on appeal with respect to subject matter jurisdiction are without merit. The IHO had subject matter jurisdiction to preside over the parent's claims, just as this SRO has subject matter jurisdiction to decide the appeal (see e.g., Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386 [collectively addressing similar arguments raised by the district and finding that there was subject matter jurisdiction to address claims related to implementation of equitable services under State law]).

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 July 31, 2024 (IHO Decision at p. 9); thus, the parent had until September 9, 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 electronic service, the parent's request for review was served on the district on September 10, 2024 – one day after the timeline for proper service of the request for review (Affidavit of Service). Absent from the parent's request for review is 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 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]).

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

³ Even if I were to consider the parent's reasons set forth in her reply for failure to timely initiate the appeal, I would decline to find that constituted good cause to excuse the untimely service. The parent asserts that she was unable to have her verification of the request for review notarized due to an unspecified "child care emergency" (Reply). However, review of the request for review shows that the attorney for the parent signed it on August 16, 2024 and there is not a sufficient explanation as to why it took until September 10, 2024 for the parent to obtain a notary for her verification, especially considering the document was "[n]otarized online using audio-video communication" (Req. for Rev.).

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, and having found that the cross-appeal is likewise untimely, 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
November 18, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**