The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-398

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:
Kule-Korgood & Associates, P.C., attorneys for petitioners, by Michele Kule-Korgood, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, Emily A. McNamara, 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 that respondent (the district) fund their son's tuition costs at the Cooke School and Institute (Cooke) during the 2022-23 school year. The district cross-appeals, seeking in pertinent part, the dismissal of the appeal due to the parents' untimely service of a request for review. The appeal must be dismissed. The cross-appeal must be sustained in part.

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

The student has received diagnoses of autism spectrum disorder, seizure disorder, and anxiety disorder (Parent Ex. H at p. 4). A CSE convened on December 14, 2021, determined the student was eligible for special education as a student with autism, and developed the student's IEP to be implemented beginning December 28, 2021 (see generally Dist. Ex. 1).[1] The December

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1];

2021 CSE recommended 12-month programming consisting of a full time 12:1+1 special class placement in a specialized school; one 45-minute session per week of individual counseling services; one 45-minute session per week of group counseling services; one 45-minue session per week of individual occupational therapy (OT); one 45-minute session per week of group OT; one 60-minute session per month of group parent counseling and training; one 45-minute session per week of individual physical therapy (PT); two 45-minute sessions per week of individual speech-language therapy; one 45-minute session per week of group speech-language therapy; three periods per week of adapted physical education; and full time, daily, individual paraprofessional services for health and epilepsy monitoring, safety and supervision (id. at pp. 11-12, 15).

Via prior written notice and a school location letter both dated June 28, 2022, the district notified the parents of the December 2021 CSE's recommendations and of the public school site the district assigned the student to attend for the 2022-23 school year (see Dist. Exs. 2; 3). In letters to the district dated February 24, 2022 and August 26, 2022, the parents expressed their disagreement with the recommendations contained in the student's December 2021 IEP, as well as with the particular assigned public school for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at Cooke (see Parent Exs. D; E). The student attended Cooke during the 2022-23 school year (see Parent Exs. Q-T).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated November 20, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parents asserted that the recommendation for a 12:1+1 special class was not appropriate to meet the student's needs and that the assigned public school would not have been able to implement the student's December 2021 IEP recommendations even if they had been appropriate (id. at pp. 3, 4-6). In addition, the parents argued that the district failed to properly evaluate the student prior to the CSE meeting and that the parents were denied the opportunity to fully participate in the CSE process due to the lack of proper evaluative material (id. at pp. 2, 3).

B. Impartial Hearing Officer Decision

A prehearing conference was held on February 15, 2024 (Tr. pp. 1-11). An impartial hearing convened on April 3, 2024 and concluded on July 23, 2024, after three days of hearings (Tr. pp. 12-497). In a decision dated August 8, 2024, the IHO found that the district's December 2021 IEP was "reasonably calculated to give the student an educational benefit" and that the district did not deny the student a FAPE for the 2022-23 school year (IHO Decision at p. 13). Having determined that the district offered the student a FAPE for the 2022-23 school year, the IHO declined to rule on whether the parents established that Cooke was an appropriate unilateral placement or whether equitable considerations favored the parents (id.).

8 NYCRR 200.1[zz][1]).

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO used the wrong legal standard to find that the district offered the student a FAPE and that the IHO failed to meaningfully address whether the district's recommended program was appropriate for the student. The parents assert that the IHO's conduct during the hearing deprived them of their due process rights and that the IHO improperly based his decision on retrospective testimony. The parents argue that the CSE failed to properly evaluate the student before the December 2021 CSE meeting, thereby denying the student a FAPE and denying the parents their opportunity to effectively participate in the CSE process. The parents assert that the IHO failed to address multiple claims contained in their due process complaint and argue that the IHO erred in finding that the December 2021 IEP addressed the student's transition needs. Next, the parents assert that they met their burden of proving that Cooke was an appropriate unilateral placement for the student and that equitable considerations favor the parents. The parents allege that the IHO should have struck the testimony of the first district witness because the parents' attorney was denied the opportunity to finish cross-examining that witness. The parents argue that the IHO failed to address the parents' claim that the district was unable to implement the student's December 2021 IEP in July 2022 at the start of the extended school year.

The district cross-appeals, asserting that the parents' appeal should be dismissed for untimely service because the district did not receive the parents' appeal within 40 days of the date of the IHO's decision (Answer and Cross-Appeal ¶¶ 5-6). To support this argument, the district attached "SRO Proposed Exhibit 1" to its answer, which is an email reflecting that the district did not receive the parents' appeal until 12:00 a.m. on Wednesday, September 18, 2024 (id. ¶ 6; SRO Ex. 1). In the alternative, the district argues that the evidence in the hearing record establishes that the district offered the student a FAPE for 2022-23 school year. The district alleges that the parents failed to meet their burden of proving that Cooke was an appropriate unilateral placement for the student. The district further asserts that equitable considerations favor the district.

The parents submitted an answer to cross-appeal and reply, arguing that the parents' appeal was timely served and that the appeal was transmitted via alternative service, which is complete when the person serving the documents has taken all actions within their control.

V. Discussion – Timeliness of Appeal

As a threshold matter, it must be determined whether the parents' appeal should be dismissed for failure 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]). 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]). Service of a request for review "shall be complete upon delivery to the party being served" (8 NYCRR 279.4[d]).

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 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. 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 parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO issued his decision on August 8, 2024, thus the parents had until September 17, 2024, 40 days after the IHO's decision was issued, to personally serve the district with a verified request for review (see IHO Decision; 8 NYCRR 279.4[a]; 279.11[b]).

The parents' attorney submitted an "Affirmation of Service" indicating that she served the request for review on Tuesday September 17, 2024 at 11:59 p.m. by emailing the district's representative subsequent to her receiving consent for electronic service; however, the district asserts that it did not receive the request for review until Wednesday, September 18, 2024 at 12:00 a.m. (Req. for Rev. at p. 15; Answer and Cross-Appeal ¶¶ 5-6). The district submitted additional evidence consisting of the emails submitted by the parents' attorney to the district dated Wednesday, September 18, 2024 (SRO Ex. 1).[3, 4]

Upon review of the September 18, 2024 email, the parents' attorney may have hit "send" on September 17, 2024 at 11:59 p.m. but the email was not received by the recipient's email server until September 18, 2024 at 12:00 a.m. (compare Affidavit of Service, with SRO Ex. 1). Approximately two minutes later the parents' attorney emailed the district a document titled "Memo of Law 22-23 [student name redacted]" with a message reading "Please replace last memorandum of law with this one" (SRO Ex. 1). That email was received by the district on Wednesday, September 18, 2024 at 12:02:18 a.m. (id.).

The parents' attorney argues that service by email equates to alternate service and that alternate service "shall be complete upon performance of all the actions required" (Answer to Cross-Appeal ¶ 4 citing 8 NYCRR 279.4[d]). However, the district's consent to accept service by email is not equivalent to alternative service delineated in paragraphs (c)(1) and (2) of 8 NYCRR 279.4 (see 8 NYCRR 279.4) and it was the parents' responsibility to serve their request for review within 40 days of the date of the IHO's decision. Accordingly, the parents failed to serve the request for review within 40 days after the date of the IHO's decision; moreover, it was entirely foreseeable that the email would not be delivered instantaneously and, instead, at least a few seconds for delivery would be required, thereby causing the documents to be untimely served the next day. Additionally, State regulation requires personal service in order to initiate an appeal, which would generally need to be effectuated on a district during business hours, or at a time when a process server may reasonably expect to find someone authorized to accept service (see 8 NYCRR 279.4[a]-[b]). In this instance, it is undisputed that the district consented to service by

[3] Generally, documentary evidence not presented at an impartial hearing is 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]). Here, the additional evidence submitted with the answer could not have been presented at the impartial hearing and is necessary to consider in order to render a decision about the timeliness of the parents' appeal.

[4] The district's proposed SRO Ex. 1 was described by the district as a "September 18, 2024, email from the [parents] serving the RFR on the [district], and [an] August 26, 2024 email from [the parents] confirming that the parties agreed to service via email" (Answer and Cross-Appeal ¶ 6). However, the document submitted by the district as proposed SRO Ex. 1 only contains two September 18, 2024 emails with the confidentiality notice at the bottom cut off midsentence (see SRO Ex. 1). The parents assert in their answer to cross-appeal and reply that SRO Ex. 1 is a partial document which does not contain the attachments sent with the documents (Answer to Cross-Appeal ¶ 2). The parents are correct in this assertion. However, I find that although SRO Ex. 1 is incomplete, it clearly conveys that the district did not receive the parents' notice of request for review, request for review or memorandum of law until 12:00 a.m. on September 18, 2024. Therefore, I decline to reject SRO Ex. 1.

email (Answer with Cross-Appeal ¶ 6). However, while service by email may afford litigants greater flexibility and convenience, it comes with sacrifices to the formality and assurances that personal service affords. State regulation is clear that "[s]ervice shall be complete upon delivery to the party being served" (8 NYCRR 279.4[d]). Here, the parents' attorney bore the risk of waiting until the last possible moment to serve the request for review and in relying on service by email, which takes time from when a message is sent to when it is delivered; because of this, the parent ultimately failed to timely serve the request for review and accompanying documents on the district.

Based on the foregoing, the parent did not serve the district within the timelines set forth in State regulation. Absent from the parents' request for review is any reason for the failure to seek review within the 40-day timeline. The parents' assertion of an excuse for untimely service in the answer to cross-appeal and reply is not effective under State regulations and will not be considered. (8 NYCRR 279.13; see 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]). Accordingly, the issue of good cause is not properly before me and will not be considered herein.[5]

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is not sufficient good cause asserted 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 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; however, I will sustain in part to the extent the district argues that the request for review must be dismissed for untimeliness.

[5] Even if I were to consider the parents' reasons set forth in the reply for failure to timely initiate the appeal, I would decline to find that the attorney's illness while drafting the pleading and last-minute difficulties formatting the margins of the pleading constitute good cause to excuse the untimely service (see Grenon, 2006 WL 3751450, at *5; T.W., 891 F. Supp. 2d at 441; Application of a Student with a Disability, Appeal No. 24-315).

VI. Conclusion

Having found that the request for review must be dismissed because the parents failed to properly initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT THAT IT SOUGHT DISMISSAL OF THE APPEAL BASED ON UNTIMELINESS.

Dated: **Albany, New York**
November 14, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER