The University of the State of New York

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

No. 24-425

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:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, 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 that respondent (the district) fund the costs of her son's tuition at the International Academy for the Brain (iBrain) for the 2022-23, 2023-24, and 2024-25 school years and denied her request for compensatory education for the 2019-20, 2020-21 and 2021-22 school years. 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

The parties' familiarity with this matter is presumed and given the disposition of this matter on procedural grounds, the detailed facts and procedural history of the case will not be recited here. Briefly, the CSE convened on October 25, 2021 and made the following recommendations: a 12:1+(3+1) special class for core subjects; two 30-minute sessions per week of individual occupational therapy (OT); one hour of group parent counseling and training four times per year; three 30-minute sessions per week of individual physical therapy (PT); one 30-minute session per week of individual speech-language therapy; one 30-minute session per week of group speech-language therapy; daily use of an individual dynamic display speech generating device (SGD); a twelve-month extended school year; special transportation from the closest safe curb location to school; 1:1 paraprofessional for transportation; a wheelchair; and door to door special

transportation (Dist. Ex. 1 at pp. 23-24, 30).[1] In a prior written notice dated November 15, 2021, the district informed the parent of the recommendations made during the October 2021 CSE (see Dist. Ex. 4).

On October 7, 2022, the CSE reconvened for an annual review and recommended similar services (Dist. Ex. 2 at pp. 23-24, 30-31). Via a prior written notice dated November 8, 2022, the district notified the parent of the recommendations made during the October 2022 IEP meeting (see Dist. Ex. 5). In a prior written notice dated November 8, 2022, the district again notified the parents of the recommendations made during the October 2022 CSE (see Dist. Ex. 5). Through a representative from the Brain Injury Rights Group, Ltd., the parent informed the district of the belief that the district failed to provide the student with a FAPE for the 2022-23 extended school year and that she intended to unilaterally place the student at iBrain and sought public funding for the placement unless the district remedied the denial of a FAPE within ten business days (Parent Ex. C at p. 1). On December 16, 2022, the parent executed a contract with iBrain to enroll the student in iBrain for the remainder of the 2022-23 school year starting on January 3, 2022 (see Parent Ex. F).

In a second prior written notice dated June 17, 2023, the district again notified the parents of the recommendations made by the October 2022 CSE, and the district notified the parent of the student's assigned public school site for the 2023-24 school year (see Dist. Exs. 6, 8). In a letter dated June 20, 2023, the parent's representative from Brain Injury Rights Group, Ltd. informed the district that the parent was rejecting the public offer and believed that the district denied the student a FAPE for the 2023-24 extended school year and that the parent would place the student at iBrain and seek public funding for the unilateral placement (see Parent Ex. D). On July 1, 2023, the parent executed a contract with iBrain to enroll the student in iBrain for the 2023-24 extended school year (see Parent Ex. G).

The CSE convened on February 15, 2024 to revise the student's IEP and made the following recommendations: three periods per week of adaptive physical education; 35 periods per week of an 8:1+1 special class for all subjects; four 60-minute sessions per week of individual OT; one 60-minute session per month of "[i]ndividual/group" parent counseling and training; four 60-minute sessions per week of individual PT; one 60-minute session per week of group PT; four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of group speech-language therapy; a full-time daily individual paraprofessional for health, feeding, safety, ambulation; daily access of an individual SGD; daily access to individual eye gaze; daily access to an individual wheelchair mount; a 12-month extended school year; special transportation from the closest safe curb location to school; 1:1 paraprofessional for transportation; a wheelchair; and door to door special transportation (Dist. Ex. 3 at pp. 39-41, 45-46).[2] In a prior written notice dated March 5, 2024, the district notified the parent of the recommendations made by the February 2024 CSE (see Dist. Ex. 7). The district created a school location letter, also dated March 5, 2024,

[1] The parent's first due process complaint requests compensatory education for the district's alleged failure to provide the student with a FAPE for the 2019-20, 2020-21, and 2021-22 school years, but the hearing record does not contain any IEPs prior to October 25, 2021 (Parent Ex. A at pp. 9-15, 24).

[2] The student had attended iBrain for some time and the February 2024 IEP was significantly, but not entirely, modeled after the recommendations contained in the "iBrain Report and Education Plan" dated February 12, 2024 (compare Dist. Ex. 3, with Parent Ex. J).

notifying the parent of the assigned public school site to which the student would be assigned pursuant to the recommendations made by the February 2024 IEP (see Dist. Ex. 9). The district created a second prior written notice, this one dated April 29, 2024, again notifying the parent of the recommendations made by the February 2024 CSE and provided an updated school location letter (see Dist. Exs. 14; 15). In a letter dated June 14, 2024, the Liberty and Freedom Legal Group, Ltd.,[3] on behalf of the parent, notified the district that the parent rejected the February 2024 IEP, that the parent would continue to place the student at iBrain and that the parent would seek reimbursement or direct funding for the student's unilateral placement (see Parent Ex. E). On June 25, 2024, the parent executed a contract with iBrain to enroll the student in iBrain for the extended 2024-25 school year (see Parent Ex. H).

A. Due Process Complaint Notice

Through her attorney, the parent filed a due process complaint notice dated June 18, 2024 alleging that the district failed to provide the student with a FAPE for the 2021-22, 2022-23, 2023-24 school years, that iBrain was an appropriate unilateral placement for the student and that the equities favored ordering the district to directly fund the student's tuition at iBrain for the years in question along with transportation costs (see Parent Ex. A). The parent further asserted that the district failed to provide the student with a FAPE for the 2019-20, 2020-21 and 2021-22 school years based on multiple procedural and substantive violations and sought a bank of compensatory education for those school years (id. at pp. 4-5, 9-15, 24). The parent requested that the district be ordered to fund independent educational evaluations (IEEs) and provide extended eligibility to the student until the age of 25 (id. at p. 23). The parent requested an interim order of pendency directing that the student's placement at iBrain was retroactive to the 2022-23 school year (id. at p. 22). In an amended due process complaint notice dated July 8, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school years and requested that the two due process complaints be consolidated (Parent Ex. B at pp. 1, 2). The parent requested an order directing the district to pay the funding for iBrain tuition and for special transportation for the 2024-25 school year (id. at pp. 9-10).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 13, 2024 (Tr. pp. 42-179).[4] In a final decision dated August 23, 2024, the IHO found that the district met its burden of proving that it had provided the student with a FAPE for the 2022-23, 2023-24 and 2024-25 school years (IHO Decision at pp. 11, 13, 14). Having determined that the district provided the student with a FAPE for the school years at issue, the IHO did not reach the issue of whether the parent established that iBrain was an appropriate unilateral placement or whom the equitable considerations favored (see IHO Decision). The IHO determined that limited weight be afforded to iBrain's deputy director of education and that no weight be given to the student's iBrain attendance records (id. at p. 10).

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[3] Liberty & Freedom Law Group, Ltd, was formerly known as Brain Injury Rights Group, Ltd. and the organization has been renamed (Application of a Student with a Disability, Appeal No. 24-257).

[4] A status conference was held July 9, 2024 and a pre-hearing conference was held July 24, 2024 (Tr. pp. 1-41).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district established that it provided the student with a FAPE for the 2022-23, 2023-24 and 2024-25 school years and argues that the IHO failed to address the procedural and substantive FAPE violations argued by the parent in her due process complaint notices. The parent asserts that the IHO prevented the parent from testifying at the impartial hearing and that the IHO improperly limited the parent's attorney's cross-examination of a district witness. The parent appeals the IHO's adverse findings against the parent's witness and evidence. The parent asserts that the IHO erred in failing to issue determinations regarding the appropriateness of iBrain as a unilateral placement and failing to render a decision on the equities and requests that the Office of State Review rule in the parent's favor for both issues. The parent further argued that the IHO should have ruled on the parent's compensatory education claims for the 2019-20, 2020-21 and 2021-22 school years.

In its answer, the district alleges, among other things, that the parent failed to timely serve the request for review.

The parent submitted a reply, conceding that the appeal was emailed on the following day because of transmission delays caused by the parent's attorney's office's internet connection.

V. Discussion - Timeliness of Appeal

As a threshold matter, it must be determined whether or not the parent's 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]). 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 parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO issued her decision on August 23, 2024, thus the parent had until October 2, 2024 to personally serve the district with a verified request for review (see IHO Decision; 8 NYCRR 279.4[a]; 279.11[b]).

The parent's attorney filed what was described as an "Affirmation of Service," stating that that he had served the request for review upon the district on October 2, 2024 by emailing the district's representative (Parent Aff. of Serv.); however, the district asserts that the parent did not serve the pleading until October 3, 2024 (Answer ¶¶ 19-24). Both parties submitted additional evidence consisting of the emails by which the parent purports to have effectuated service (Answer Ex. Proposed SRO Ex. 1; Reply Ex. Proposed SRO Ex. 1).[5] The district submitted an email from the parent's attorney dated "Thursday, October 3, 2024 12:48 AM" with attachments and the following statement: "[a]ttached please find the Parent's Notice of RFR, RFR, and Affidavit of Verification" (SRO Ex. 1). The parent submitted an email dated September 23, 2024 documenting the parent's attorney confirming with the district that it was his understanding that the district consented to accept service by email (SRO Ex. 2).

[5] As both were marked "Proposed "SRO Ex. 1," for the purposes of clarity, the district's Proposed SRO Ex. 1 shall be referenced in this decision as "SRO Ex. 1" and the parent's Proposed SRO Ex. 1 shall be referenced as "SRO Ex. 2" because that is the order in which they were served and filed.

In the reply, the parent's attorney indicated that:

> [T]he undersigned served [district] counsel, via email, with the Parent's RFR and Affidavit of Verification in a single email. The email and attachments were sent at approximately 12:48 am. Service was delayed due to the undersigned's office internet connection, which delays were solely out of the undersigned's or Petitioner's control.

(Reply ¶ 7). Thus, it is clear that service was in fact made on October 3, 2024 at 12:48 AM, which is the day after the October 2, 2024 deadline. Based on the explanation in the reply, the parent essentially concedes that the appeal documents, consisting of the notice of request for review, request for review, and affidavit of verification were not in fact timely served on October 2, 2024. Thus the "Affirmation of Service" filed with the Office of State Review was, at best, inaccurate to say the least because it indicated the date of service was October 2, 2023 when in fact it was not. Furthermore, the proof of service filed with the request for review does not including language conforming to the requirements of an affirmation, which must be subscribed and affirmed by a person to be true under the penalties of perjury which may include a fine or imprisonment (see CPLR 2106), thus the document was both inaccurate and noncompliant.

The belated explanation set forth in the reply for the late service focuses on the parent's attorney's trouble with his office's email connection; however, the parent's attorney proffers no explanation why he waited until the last moments of the last day or thereafter to attempt to email service of the documents. In this digital age, it is entirely foreseeable that internet connections, power outages, password lockouts, and other similar technical glitches have become increasingly commonplace and, if choosing to work near a deadline, backup arrangements should be in place. 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, the parent's attorney established through the September 23, 2024 email that it was his understanding that the district consented to service by email (SRO Ex. 2). 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 parent's attorney took a gamble in waiting until past 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. Additionally, the parent's explanation relating to office internet difficulties does not contain sufficient good cause. As described above, good cause would be an event that the party does not have control over (Grenon, 2006 WL 3751450, at *5; T.W., 891 F. Supp. 2d at 441).

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]).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 20, 2024

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JUSTYN P. BATES
STATE REVIEW OFFICER