



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-427

**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 Board of Education of the Buffalo City School District**

### **Appearances:**

Lippes Mathias, LLP, attorneys for respondent, by Nathaniel J Kuzma, 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) from that portion of the decision which denied her request for compensatory education related to the 2022-23 and 2023-24 school years. The district cross-appeals from that portion of the IHO's decision which, among other things, awarded the parent compensatory education through November 2024. The appeal must be dismissed. The cross-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 appeal on procedural grounds, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, a CSE convened on February 11, 2022 for an annual review and determined that the student continued to be eligible for special education as a student with autism (Dist. Ex. 6 at p. 1). The CSE recommended that from February 2022 to February 2023 the student attend a 6:1+3 special class five times per week for 5-hours and 30-minute and also attend two 30-minute sessions per week adapted physical education (id. at pp. 1, 15-16). In addition, the CSE recommended that the student receive related services of five 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT),

along with supplementary aids and services that included instructional presentation accommodations throughout the school day and access to an augmentative communicator throughout the school day, and supports for school personnel on behalf of the student that included behavior plan progress monitoring meetings for 15-minutes on a bimonthly basis (id. at pp. 15-16). Subsequently, a CSE convened on October 25, 2022 for a review of the student's needs at which time the CSE decided to continue with the student's current program as he would be an August 2023 graduate (Dist. Ex. 7 at pp.1-2). The CSE convened again on April 19, 2023, for an annual review at which time it modified the student's IEP to reduce the recommendation of OT to one 30-minutes session per week (Dist. Ex. 8 at pp. 1, 21). The CSE convened again on May 31, 2023 which resulted in the reduction of the student's recommended speech-language therapy from five 30-minute sessions per week to one 30-minute session per week (Dist. Ex. 9 at p. 1). On October 25, 2023, a CSE convened for a reevaluation of the student's program and removed the 12-month services from its recommendation (Dist. Ex. 10 at pp. 1, 19).

In a due process complaint notice dated May 6, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, 2022-23, and 2023-24 school years.<sup>1</sup> The parent alleged that the student did not "get services, [or] attend school full time" from March of 2020 until October of 2022 as a result of the COVID 19 pandemic, that the student's services were improperly reduced, and that he had regressed and experienced behavioral changes (Dist. Ex. 1 at p. 2-3).

An impartial hearing convened on July 25, 2024 and concluded on August 9, 2024 (Tr. pp. 1-322). The district argued that the IHO did not have subject matter jurisdiction over the instant matter as the student was turning 22 years old in August of 2024 and that he was no longer eligible for special education services (Tr. p. 17-18). The district argued in the alternative, that if the IHO determined the student was eligible for services it would only be under a "gross deprivation of a free and appropriate education" and that even under this theory, the parent would not be successful (Tr. pp. 19-26). Finally, the district argued that the parent's claims with regard to the 2020-21 and 2021-22 school years were time barred (Tr. p. 20). The parent argued that the deprivation of FAPE arose from the hybrid schedule and lack of services her son received during the pandemic (Tr. pp. 27-28). The parent also argued that the district "prematurely issued a diploma" that was post dated despite a pendency order in place (Tr. pp. 28).

In a decision dated August 26, 2024, the IHO summarized the parent's position stating in pertinent part that she was seeking compensatory education for alleged failures by the district resulting in the denial of FAPE during the 2019-2020, 2020-2021, 2021-22, 2022-23, and 2023-24 school years and also requested extended eligibility pursuant to "Senate Bill S3366A" (IHO Decision at pp. 4-6.).<sup>2</sup> The IHO held that the student was not eligible for extended school year services for the 2023-24 school year as he turned 21 prior to the commencement of the normal school year (August 31, 2023) (IHO Decision p. 13). The IHO held that the hearing record supported a finding that the CSE's rationale in reducing the student's services was warranted based

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<sup>1</sup> The parent proceeded pro se.

<sup>2</sup> In his decision, the IHO determined that the parent's claims pertaining to the 2019-2020 and 2020-21 school years were time barred as they arose prior to May 16, 2022, two-years prior to the filing of the parent's due process complaint (IHO Decision p. 5, see also Dist. Ex. 1).

on testimony of the CSE chairperson that the student was not receiving a benefit from the related services. (IHO Decision 14-15). The IHO found that the hearing record reflected that the student experienced regression with respect to his behavioral skills as evidenced in testimony and in the changes the district made to the student's IEP (IHO Decision p. 15-16). Therefore, the IHO found that the district's "failure to address" the student's behavioral issues resulted in a denial of FAPE for part of the 2021-22, 2023-24, (IHO Decision p. 17). For relief, the IHO ordered as compensatory education that the district continue the student's enrollment and related services until November 27, 2024 and that the CSE reconvene to revise the student's FBA and BIP to address his maladaptive behaviors and to develop a transition plan for the student.

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

The parent appeals, alleging that she disagrees with the IHO's decision to continue the student's enrollment and services until November 2024 (Req. for Rev. p. 2). The parent argues that the IHO's reasoning was flawed in that he did not consider the appropriate start of the school year, that the district "blatantly disregard[ed]...the pendency order," and that the IHO's decision with regard to the reduction in the student's OT and speech-language therapy was not supported by the record. The parent also disagrees with several of the IHO's evidentiary determinations. For relief, the parent requests that the IHO's decision be reversed and the student complete the 2024-25 school year in his current placement with the services reflected in his IEP.

The district responds in an answer with cross-appeal. The district argues that the parent's request for review was not timely served and seeks dismissal of the request for review in its entirety. In the alternative, the district disputes the parent's allegations and argues that the student is no longer eligible for an IEP because he has surpassed the age of eligibility and requests that the parent's appeal be denied in its entirety. Moreover, the district cross-appeals on the basis that the IHO did not apply the "gross deprivation standard" and the IHO erred in not considering the compensatory education the district already provided the student during the 2023-24 school year. Finally, the district argues that the IHO was improper in ordering the district to reconvene to modify the BIP/FBA as the student no longer has a right to a FAPE.

#### **V. Discussion**

##### **1. Timeliness of Request for Review**

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's appeal was served untimely. The record reflects that the IHO's decision was issued on August 26, 2024 and the deadline for personal service cannot be extended beyond the 40 days prescribed by Part 279 of the State regulations (see 8 NYCRR 279.4[a]). Therefore, in order for the parent's appeal to be timely it would have had to be served on the district by Monday, October 7, 2024 at the latest. The affidavit of service filed by the parent reflects that the request for review was served on October 8, 2024, one day late, and the request for review itself does not include any explanation for the late filing, let alone one which would constitute good cause (Req. for Rev. at p. 7). Additionally, this office informed the parties by letter, dated October 2, 2024, that the parent's filing was incomplete at that time and there was no active appeal. The letter also informed the parties that the district's Answer with Cross-Appeal (which was filed with this office on September 24, 2024) was also improperly filed and would not be considered.

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]).

Likewise, 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 properly initiate the appeal, and the district's cross-appeal is also untimely, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **November 7, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**