The University of the State of New York

The State Education Department
State Review Officer
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No. 24-438

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 unilateral special education services delivered by HLER, LLC (HLER) for the 2023-24 school year. The district cross-appeals arguing that the due process complaint notice should be dismissed for a lack of subject matter jurisdiction. 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 programing 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

Given the disposition of this matter on procedural grounds, a detailed recitation of the facts and procedural history is not necessary. Briefly, on December 22, 2020, a CSE convened, determined the student was eligible for special education as a student with a learning disability,

and developed an IESP with a projected implementation date of January 13, 2021 and projected annual review date of December 22, 2021 (see Parent Ex. B).[1] The December 2020 CSE recommended five periods per week of direct, group special education teacher support services (SETSS), and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 7).[2]

Turning to the 2023-24 school year at issue, the hearing record includes a letter, dated April 27, 2023, with the salutation "Dear Chairperson," bearing the parent's conformed signature (i.e., "/s/") that was emailed from a generic "Parents Submissions" email address to various email addresses with the district's email domain (see Parent Ex. E). The letter indicated that the parent intended to place the student in a nonpublic school for the 2023-24 school year at her own expense and requested that the district provide the "educational services" to which the student was entitled pursuant to an "IEP/IESP" (id. at p. 1).

The hearing record also includes a letter dated August 22, 2023, with the salutation "Dear Chairperson, from Prime Advocacy, LLC (Prime Advocacy), in which Prime Advocacy indicated it was authorized to communicate on the parent's behalf and advised the "Chairperson" that the district failed to make available a provider for the special education services mandated for the student for the 2023-24 school year and that, if the district continued to not assign a provider, the parent would "unilaterally obtain the mandated services through a private agency" (Parent Ex. D).

The parent signed an enrollment agreement with HLER for the 2023-24 school year for the agency to provide services to her son in accordance with the last agreed upon IEP, IESP, or administrative decision (see Parent Ex. C).[3]

For the 2023-24 school year, the student attended a nonpublic school, and received private SETSS from providers with HLER (see Parent Exs. G; H; I).

A. Due Process Complaint Notice

In a due process complaint notice dated June 19, 2024, the parent, through Prime Advocacy, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). The parent alleged that the last program developed by the district was contained in the December 2020 IESP (id. at p. 1). The parent also alleged that, for the 2023-24 school year, the district failed to implement and supply providers for the recommended services contained in the December 2020 IESP (id. at p. 2). As relief, the parent requested a pendency hearing and declaratory finding that the district denied the student equitable services and a FAPE for the 2023-24 school year (id. at p. 3). In addition, the parent requested an

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] HLER of a limited liability company and is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see NYCRR 200.1[d]; 200.7).

order for five periods of SETSS and two 30-minute sessions per week of OT as well as funding for SETSS and OT services at an enhanced rate for the 2023-24 school year (id.). Lastly, the parent sought a bank of compensatory education services for those services not provided by the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 23, 2024 (Tr. pp. 1-49). In a decision dated August 28, 2024, the IHO found that the district failed to meet its burden to prove that it provided the student equitable services for the 2023-24 school year (IHO Decision at pp. 4-5). Next, the IHO discussed whether the parent met her burden of proof with respect to the appropriateness of the unilaterally obtained services (id. at pp. 5-8). The IHO found that the testimony of the educational supervisor was not credible; the information in the progress report was generic, did not identify the student's levels of performance, did not describe what the SETSS providers did with the student or what progress the student made, and included goals but did not specify as to whether the goals were worked on during the 2023-24 school year or recommended for the following school year; and the sessions notes did not indicate what the providers did with the student and, in some instances, reflected that the providers worked on "recycled the goals from a three-year-old IESP" (id. at pp. 6-8). Lastly, the IHO made an alternative finding that, if the parent met her burden to prove the unilaterally obtained services were appropriate, based upon equitable considerations, the relief would be at a reduced rate (id. at pp. 8-10).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that she failed to meet her burden to prove that the unilaterally obtained services were appropriate for the student.[4] The parent also asserts that the IHO incorrectly found that the educational supervisor's testimony was not credible, that the agreement with HLER was invalid, that the provider's rate was unreasonable, and that equitable considerations would have warranted a reduction of the provider's rate.

In its answer and cross-appeal, the district asserts that the parent failed to timely serve the request for review. For its cross-appeal, the district argues that the IHO did not have subject matter jurisdiction over the dispute.

The parent did not submit a reply or answer to the district's cross-appeal.

V. Discussion

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness.

[4] The parent filed an affidavit of service stating that she served a notice of intention to seek review on the district on September 24, 2024; however, the parent failed to file the notice of intention to seek review with the Office of State Review (see 8 NYCRR 279.4[e]; see also 8 NYCRR 279.2). Also, the parent did not serve or file a notice of request for review with her request for review as required by the practice regulations (see 8 NYCRR 279.3; 279.4[a], [e]).

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 August 28, 2024 (IHO Decision at pp. 1, 10); thus, the parent had until Monday, October 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 parent's affidavit of personal service, the request for review was personally served on the district's counsel on October 9, 2024 (Parent Aff. of Serv.). In addition, in an email dated Wednesday, October 9, 2024, the parent's advocate emailed the request for review to the district's counsel based on a mutual agreement to accept electronic service in the matter (SRO Ex. 1).[5] Therefore, the parent did not effectuate service until the 42nd day after the date of the IHO's decision (see SRO Ex. 1). 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.

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

[5] 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]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; 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, proposed SRO Exhibit 1, offered by the district, is an email which evidences the parent's late service of the request for review and was not available at the time of the impartial hearing. In the exercise of my discretion, I find that the district's proposed exhibit is necessary to render a decision in this matter and will be considered.

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 is also dismissed.

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.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 8, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER