The University of the State of New York

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

No. 24-576

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:
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 his request that respondent (the district) fund the costs of his daughter's private services delivered by Education Optimized (EdOpt) for the 2023-24 and 2024-25 school years. The 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 relating to the student's educational history is not necessary. Briefly, the CSE convened on April 5, 2022, found the student eligible for special education services as a student with a speech or language impairment and created an IESP (see Parent Ex. B). The CSE recommended that the student receive four periods per week of direct group special education teacher support services

(SETSS), two 30-minute sessions per week of individual and one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 9).

In a letter to the district dated April 17, 2023, the parent indicated that he was placing the student in a nonpublic religious school and requesting equitable services for the 2023-24 school year (Parent Ex. K at p. 2).

The parent signed a contract with EdOpt dated August 28, 2023 which indicated that EdOpt would provide 10-month services "[a]s per the last agreed upon IEP/IESP/FOFD" and an attached schedule A listed group and individual rates for services for 2023-24 school year, which included but was not limited to "Special Education Services" and "Speech" (Parent Ex. C at pp. 2-3). The contract did not specify a particular IESP or other document (id. at pp. 1-3).

On September 4, 2023, the parent's advocate, Prime Advocacy, LLC, sent an unsigned 10-day notice of unilateral placement to the district which indicated that the district failed to provide services for the 2023-24 school year and requested the district fulfill the mandate (Parent Ex. D). The advocate asserted that should the district fail to assign a provider; the parent would be compelled to unilaterally obtain the mandated services at an enhanced market rate (id.).

The CSE convened on March 3, 2024 to conduct an annual review, and the CSE found the student continued to eligible as student with a speech or language impairment and developed an IESP (see Dist. Ex. 3). The CSE recommended four periods of direct group SETSS per week with two 30-minute sessions per week of individual and one 30-minute session per week of group speech-language therapy, and two 30-minute sessions per week of individual OT (id. at p. 9).

The district sent the parent a prior written notice dated March 4, 2024 which indicated that the student would be parentally placed in non-public school and that the parent was special education services (id. at p. 1). The notice indicated that the CSE reviewed a February 2024 teacher report (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent contended that the district denied the student a FAPE by not supplying providers for the services recommended (id.). The parent asserted that for the 2023-24 school year she was unable to find a provider at the district rates and privately retained the services of an agency at enhanced rates (id.).

For relief, the parent requested, among other things, a pendency hearing and order, direct funding/reimbursement for SETSS, OT and speech-language therapy, as well as the other related services recommended in the May 13, 2013 IESP at an enhanced rate and a bank of compensatory education services for any services that were not provided to the student due to the district's failure to implement services during the 2023-24 school year (id. at p. 3). The district filed a Due Process response dated August 7, 2023 asserting several defenses.

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 1, 2024 (see Tr. pp. 1-41).[1] In a decision dated October 18, 2024, the IHO found that the district failed to demonstrate that it provided the student with a FAPE for the 2023-24 and 2024-25 school years (IHO Decision at pp. 1, 4, 9, 11-12).

The IHO addressed a defense raised by the district that the parent had failed to timely request dual enrollment services under Education Law 3602-c and rejected the argument for the 2023-24 school year based upon evidence in the hearing record (IHO decision at p. 7). The IHO also determined that the parent's request for dual enrollment services was untimely and that it was grounds for dismissal of any claims by the parent for the 2024-25 school year (id. at p. 9).[2] Turning to the district's motion to dismiss, the IHO denied the motion (id. at pp. 7-8). The IHO held that the district's contention that parentally placed students are not entitled to due process hearings was without merit and noted that any potential changes to State regulations were not applicable because the due process complaint in this case was commenced before the enactment date of those regulatory changes (id.).

With regard to the 2023-24 school year, the IHO held that the district failed to demonstrate it delivered services to the student with services in accordance with either the 2022 or 2024 IESPs and that the district inability to provide special education services was improper (IHO Decision at p. 4). The IHO concluded that the district could not shift the responsibility to the parent to locate providers (id.). Next, the IHO determined that the parent failed to demonstrate that the unilaterally obtained services from EdOpt were appropriate as the evidence did not show that agency provided the student with educational instruction specially designed to meet his unique needs (id. at pp. 4-5). The IHO noted that the hearing record lacked any testimony from the student's providers, the parent's witness lacked any personal knowledge of the student and that the attendance sheets lacked information as to what was covered in the sessions (id. at p. 5). The IHO also held that the information in the progress report was unpersuasive as it contained "virtually no information regarding Student's academic levels at the start or end of the year" (id.). Based on these findings, the IHO held that evidence did not lead to the conclusion that EdOpt provided the student with specially designed instruction (id.). Regarding equitable considerations for the 2023-24 school year, the IHO made alternative findings and held that they would not favor the parent (id. at pp. 5-7). The IHO held that the parent did not demonstrate the requested rate was reasonable and appropriate as the documentary evidence did not establish the student's providers certifications and there was no evidence that the parent attempted to find providers able to offer services at the district's approved rates (id. at p. 6). The IHO found that the parent did not act in good faith to

[1] Prior to the impartial hearing, the district filed a motion to dismiss dated September 4, 2024 (Tr. p. 13; see IHO Ex. III).

[2] The IHO noted that the district did not offer evidence that it made any efforts to deliver services (IHO Decision at p. 9).

locate a provider at the district's approved rates (id.). Lastly, the IHO held that the hearing record failed to demonstrate that the services provided the student with educational benefit (id.).[3]

The IHO then made alternative findings that the hearing record did not show that the parent met her burden that the unilaterally obtained services from EdOpt were appropriate for the 2024-25 school year (IHO Decision at p. 10). The IHO found that there was no evidence of the providers' qualifications or experience, no time sheets, no session notes, and no assessments or evaluations (id.). Lastly, the IHO held that equitable considerations did not favor the parent for the 2024-25 school year because the hearing record lacked a contract or other evidence for the 2024-25 school year showing that the parent was liable for or had a financial obligation for the services (id.). The IHO also determined that the hearing record failed to demonstrate that the parent gave the district timely notice of her intent to unilaterally obtain private services for the student and that denial of the parent's claim on that basis was warranted (id. at p. 11).

As a result of his findings, IHO denied the parents request for funding/reimbursement for SETSS and speech-language therapy services provided by EdOpt during the 2023-24 and 2024-25 school years (IHO Decision at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO held the parent to an unreasonable standard of appropriateness. Among other things, the parent contends that the documentary evidence in the record was sufficient to find the program appropriate. As to equitable considerations, the parent assets that IHO improperly shifted the burden to the parent to find a provider at the district's rate.

Additionally, the parent asserts that the IHO incorrectly overlooked the June 1 notification and erred by finding that the equities do not favor the parent. The parent argues that the IHO incorrectly found that the claim for the "2023-2024 school year" was barred due to the June 1 deadline. The parent asserts that the June 1 letter was dated April 17, 2023 and there is no bar to the parent's claims for the "2023-2024 school year."[4]

---

[3] The parent has misread aspects of the IHO's decision which held that parent's claims regarding the 2023-24 school year were not barred by Educ. Law § 3602-c as the hearing record showed that the parent provided the district with sufficient notice to comply with the laws requirements (id. at p. 7). The IHO found that a complete dismissal of the action would be "inequitable" and that Educ. Law § 3602-c does not bar the 2023-24 claims (id.).

[4] I note that the parent has not appealed from the IHO's denial of services for the 2024-25 school year (see IHO Decision at pp. 9-12). The IHO found that the parent failed to send a June 1 letter for the 2024-25 school year (id. at p. 9). The parent's request for review appeals the IHO decision relating to the June 1 letter regarding the "2023-2024 school year" (Req. for Rev. at p. 9). Although the parent did not raise the 2024-25 school year in the due process complaint notice or at the impartial hearing (see generally Tr. pp. 1-41; Parent Ex. A), and it is unclear why the IHO reached this issue, it does not alter the fact that the IHO made findings regarding the 2024-25 school year in his decision that have gone unchallenged (IHO Decision at pp. 9-12). The parent was required to appeal those findings. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The parent notes that there was an issue with service of the notice of intention to seek review. The parent indicates that the notice was filed six days late due to the fact that the IHO decision was submitted to the advocate's office during a religious holiday, while the office was closed. The advocate's office was backlogged following the holiday, which caused the delay in filing the notice. The advocate asserts that the parent should not lose her entitlement to claim reimbursement by a "mere technicality of a delay of [six] days." Further, the parent acknowledged that the verification was slightly delayed because the parent was unable to have it notarized in a timely timely. It is asserted that the request for review was served timely and the district was not prejudiced in anyway. The parent requests the SRO order funding for SETSS and speech-language therapy at the contracted rate of $195 and a bank of compensatory services for missed mandated sessions.

In an answer, the district argues that the undersigned should dismiss the parent's appeal because the verified request for review was not timely served. The district contends that the initial request for review served on November 27, 2024 did not include an affidavit signed and notarized from the parent. The excuse of not having access to a notary does not constitute a good cause. The parent verification was not served until November 29, 2024, which makes the request for review untimely.[5] In addition to the request for review being untimely, the district asserts that the notice of intention to seek review was untimely, without a good cause basis for its delay and notes that the holiday asserted by the advocate occurred from October 16th to 23rd 2024, while the notice was not due until November 12, 2024. Moreover, district asserts that the request for review was not paginated and the statement of facts referred to the wrong student. On these bases, the district argues that the request for review should be dismissed. Should the undersigned decline to dismiss the matter on procedural grounds, the district also asserts arguments explaining why the IHO properly dismissed the parent's claims for both the 2023-24 and 2024-25 school years.

V. Discussion

In this case, the parent has not properly initiated this appeal. First, 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

[5] The district noted that it attached a copy of the email chain from the parent's advocate as SRO Ex. 1.

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 timeline prescribed in Part 279 of the State regulations. The IHO's decision was dated October 18, 2024 (IHO Decision at p. 12). Therefore, the parent had until Wednesday, November 27, 2024, 40 days after the date of the IHO decision, to serve a verified request for review upon the district (id.; see also 8 NYCRR 279.4[a]; 8 NYCRR 279.11[b]). However, the verified request for review was not served until November 29, 2024 (see Parent Verification; Req. for Rev. at pp. 8-9; see also Dist. Answer at ¶ 5; SRO Ex. 1).[6] Although, the parent's lay advocate served partially completed papers on November 27, 2024, this service defective as it did not include verified pleadings (see 8 NYCRR 279.7[b]). Furthermore, a notice of request for review was nether served nor filed which is required under Part 279.3.[7] Timely service of a verified request for review that is accompanied by a notice of request for review as is required. The parent has failed to provide a good cause basis was to why the verified request for review and notice of request for review were not timely served. The advocate's statement that the parent was not able access a notary does not constitute good cause for the delay.

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]).

The parent's papers, even if they had been timely, suffer from further defects. The untimely request for review did not comply with the Part 279.8(a) which governs the form of pleadings.[8] Specifically, Part 279.8(a)(4) states "all pleadings shall be signed by an attorney, or by a party if

[6] Also, the advocate acknowledges that the notice of intention to seek review was not timely filed (Req. for Rev. at pp. 7-8).

[7] The district submitted a copy of the email exchange after the IHO decision with the parent's advocate.

[8] The district notes in its answer that the request for review referred to the incorrect student in the statement of facts. This is true. The request for review referred to the incorrect student a due process complaint notice dated on October 1, 2024 (Req. for Rev. at p. 2). The due process complaint notice in this case was dated July 15, 2024 (see Parent Ex. A).

the party is not represented by an attorney." The request for review was neither signed by an attorney nor the parent as required by State regulations, and I decline to accept them.[9]

Lastly, the lay advocate submitted an affidavit of personal service that she personally served the request for review upon an attorney for the district who was present at the address of the offices of the lay advocate, Prime Advocacy. In the answer, the district explained that the request for review was served by e-mail. Thus, it appears that the lay advocate did not understand how to properly draft the affidavit of service and it is defective.

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.

Dated: **Albany, New York**
January 24, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] The request for review also failed to comply with the requirements of Part 279, which govern how the pleadings should be formatted. The request for review is not paginated in this instance (8 NYCRR 279.8[a][3]).