



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-578

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 Kashif Forbes, 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 granted respondent's (the district's) motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction. 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 programming 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 procedural posture of the matter—namely that it was dismissed with prejudice prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts and educational history of the student in this matter is limited to the procedural history

including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

In a due process complaint notice dated July 12, 2024, the parent, through a lay advocate, alleged that the district failed to properly develop and implement an IESP for the student for the 2023-24 school year, denied the student equitable services, and failed to provide the student with a free appropriate public education (FAPE) for the 2023-24 school year (Due Process Comp. at pp. 1, 2). The parent invoked the student's right to pendency and asserted that the last agreed upon program was a November 13, 2023 IESP (*id.* at pp. 1, 3). The parent further asserted that she was unable to locate providers at the district's rates, but was able to secure providers who were willing to deliver the student's services at enhanced rates (*id.* at p. 2). Among other relief, the parent requested direct funding for five hours per week of special education teacher support services (SETSS), one 60-minute session per week of individual speech-language therapy, one 60-minute session per week of individual counseling, and one 60-minute session per week of individual OT, with each service to be delivered by a provider of the parent's choosing at enhanced rates (*id.* at p. 3).

This matter was assigned to an omnibus docket, according to an undated Omnibus Standing Order issued by an IHO with the Office of Administrative Trials and Hearings (OATH). On August 27, 2024, the district filed a written motion to dismiss the parent's due process complaint notice on the grounds that the IHO lacked subject matter jurisdiction and the parent's claims were not ripe (Dist. Mot. to Dismiss). The parties convened before the IHO in this matter on September 9, 2024, to discuss the district's motion to dismiss (Tr. pp. 1, 8, 14-15). At the September 9, 2024 hearing, the parent's advocate presented oral arguments objecting to the district's motion to dismiss (Tr. pp. 17-20).

In a decision dated October 17, 2024, the IHO granted the district's motion to dismiss on the ground that she lacked subject matter jurisdiction over implementation or enhanced rate claims (IHO Decision at pp. 1, 3, 5). The IHO determined that the parent's claims in her July 12, 2024 due process complaint notice were "implementation/enhanced rate claims," which did not relate to the identification, evaluation, educational placement of the student, the provision of a FAPE, a manifestation determination or discipline of a student with a disability, and thus the IHO did not have subject matter jurisdiction (*id.* at p. 3). The IHO further found that there was no actual dispute related to the "CSE's recommendation that an IHO need[ed] to preside over" and that it had always been her belief that IHO's "had no jurisdiction or powers pertaining to implementation and that an impartial hearing [wa]s not necessary in instances, where there [wa]s no dispute or disagreement with the CSE's recommendation" (*id.* at pp. 3-4). The IHO then noted an emergency regulation adopted by the State Education Department and the district's creation of an Enhanced Rate Equitable Service (ERES) unit to specifically address implementation/enhanced rate claims (*id.* at p. 4). The IHO stated that her decision did

not hinge on the emergency regulation to part 200.5, but rather hinge[d] on the creation of the ERES unit, where [the] parent can seek the enhanced rate, and if not successful there they can make a complaint to the State Education Department and from there can proceed to [S]tate court, which [wa]s the same end point [the] parent would reach through the process of appearing before an IHO. It

[wa]s for th[o]se reasons that the motion to dismiss [wa]s granted, irrespective of the emergency regulation

(IHO Decision at p. 4).

The IHO also stated that she lacked "an essential element to having subject matter jurisdiction" in that she was not empowered to provide the parent's requested relief (IHO Decision at p. 4). The IHO further explained that although she could order the parent's requested relief, an IHO could not "force the implementation unit to do anything" (id. at pp. 4-5). Accordingly, the IHO dismissed the parent's due process complaint notice with prejudice (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals through a lay advocate and asserts that the IHO erred in dismissing her due process complaint notice for lack of subject matter jurisdiction. As relief, the parent requests that the IHO's decision be reversed and remanded to the IHO for a hearing and determination on the merits.

In an answer, the district alleges that the parent's appeal must be dismissed because the request for review was not timely served. The district further argues that the request for review fails to assert any good cause for the parent's delay in serving the request for review. In the alternative, the district asserts that the IHO's decision should be affirmed in its entirety.¹

V. Discussion

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

¹ Briefly, the district's arguments with respect to subject matter jurisdiction have been addressed in a number of recent decisions at the State level review (see, e.g., Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-499; Application of a Student with a Disability, Appeal No. 24-498; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-404; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386 [collectively addressing similar arguments raised by the district and finding that there was subject matter jurisdiction to address claims related to implementation of equitable services under State law]).

[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 district is correct that the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO decision is dated October 17, 2024, thus the parent had until November 26, 2024 to personally serve the district with a verified request for review (see IHO Decision at p. 8; 8 NYCRR 279.4[a]; 279.11[b]). As reflected in the parent's "affidavit of personal service," the request for review was served on the district's counsel on November 27, 2024 (Parent Aff. of Service).² Therefore, the parent did not effectuate service

² Attached to the district's answer is an email that reflects that the parent's advocate served the request for review by email to district's counsel on November 27, 2024 at 3:12 a.m. (Answer Ex. 1 at p. 1). While State regulations

until the 41st day after the date of the IHO's decision, one day after the deadline, which renders the request for review untimely.

In the request for review, the parent acknowledged that the notice of intention to seek review was not timely filed and requests that such lateness be excused; however, the parent's request for review did not provide any reason for the failure to seek review within the 40-day timeline. Accordingly, good cause for the late service of the request for review is not at issue.

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no 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]; Mt. Vernon City Sch. Dist., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision, not from date of receipt via email or regular mail], aff'd, 188 A.D.3d 889 [2d Dep't 2020]).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 26, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**

do not preclude a school district and a parent from agreeing to waive personal service and consent to service by an alternate delivery method, the parent's advocate swore under the penalty of perjury that she served the district by personal service when the district's evidence shows that it was served by email (compare Parent Aff. of Service, with Answer Ex. 1). I strongly caution the parent's advocate about submitting inaccurate affidavits of service in the future.