The University of the State of New York

The State Education Department
State Review Officer
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No. 24-640

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 Ezra Zonana, 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 dismissed her request that respondent (the district) fund the costs of her son's private services delivered by Alpha Student Support (Alpha) for the 2023-24 and 2024-25 school years. The district cross-appeals. 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

The parties' familiarity with this matter is presumed and, given the disposition of this matter on procedural grounds, a detailed recitation of the student's educational history is not necessary. briefly, a CSE convened on September 23, 2020 and developed an IESP for the student with a projected date of implementation of October 8, 2020 (see Dist. Ex. 2). The September 2020 CSE recommended that the student receive five periods per week of group special education teacher

support services (SETSS) and four 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 6-7).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated July 16, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (see IHO Ex. VIII). The parent argued that the district failed to convene a CSE to create an updated IESP for the student for the 2023-24 and 2024-25 school years and failed to supply providers to deliver special education services to the student during the 2023-24 school year (id. at p. 2). The parent asserted that the district should be ordered to reimburse the parent for private special education and related services that the parent had to secure at enhanced rates (id.). As relief, the parent requested a pendency hearing and the issuance of a pendency order; a declaration that the student was denied a FAPE for the 2023-24 and 2024-25 school years; an order directing the district to fund the student's privately obtained SETSS and speech-language services at the contracted enhanced rate; and a bank of compensatory education at an enhanced rate for any missed SETSS or speech-language services (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 15, 2024 (Tr. pp. 1-13).[2] At the beginning of the impartial hearing, the district objected to the admittance of the parent's documentary evidence because the district's attorney did not receive a disclosure thereof before the hearing despite having notified the parent's advocate that he had not received the parent's disclosure eight days before the hearing (Tr. pp. 4-5; IHO Exs. VI at p. 1; VII at p. 3). The IHO gave the parent's advocate the opportunity to explain why the parent's evidence should be entered into the hearing record but did not accept the advocate's explanation that her office had emailed the CSE and that the CSE should have forwarded the documentation to the district's attorney (Tr. pp. 5-6; see IHO Ex. V). The IHO found that the parent's advocate failed to properly disclose the parent's documents to the district's representative and therefore precluded the admittance of all the parent's exhibits from the hearing record (Tr. p. 6). The IHO did not allow the parent's advocate to withdraw the case without prejudice, so the parent's advocate elected to proceed with the hearing (Tr. pp. 7-8).

In a decision dated November 15, 2024, the IHO reiterated his findings regarding the parent's failure to timely disclose documentary evidence to the district and regarding the parent's request to withdraw the due process complaint notice without prejudice to re-file (IHO Decision at pp. 2-5). The IHO found that the district failed to refute the parent's allegations that the district did not provide the student with a FAPE for the 2023-24 and 2024-25 school years (id. at p. 5). However, the IHO held that, because the parent's evidence was precluded from the hearing record and there was no evidence in the hearing record from the parent or the provider establishing that

[1] The September 2020 IESP noted that "[n]o new evaluations were available" but that, "[u]pon completion of this annual, there will be a request for new evaluation however delays are expected due to covid 19 restrictions (Dist. Ex. 2 at p. 1).

[2] The district submitted a motion to dismiss for lack of subject matter jurisdiction and ripeness (see IHO Ex. II). The parent responded to the district's motion to dismiss (see IHO Ex. III).

the provider's services were tailored to meet the student's unique educational needs, the parent failed to meet her burden to prove that the services delivered to the student were appropriate (id. at pp. 6, 9). The IHO ruled that, given the lack of evidence from the parent, the parent did not establish that equities favored an award of funding for the unilaterally obtained services (id.). Further, the IHO further found that, because the parent's evidence was not entered into the hearing record, the parent could not demonstrate compliance with the June 1 notification, which was another basis for denying the parent equitable relief (id. at p. 7). The IHO denied the district's motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction and ripeness (id. at pp. 8-9). Based on all of the foregoing, the IHO denied the parent's requested relief and dismissed the matter with prejudice (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by excluding her documentary evidence from the hearing record based on the five business day rule. The parent asserts that the evidence was only minimally late and that the parent should have been given the opportunity to present her case. The parent argues that the IHO should not have dismissed the case with prejudice.

In an answer, the district asserts that the parent's appeal should be dismissed for late service because the verification for the parent's appeal was late without good cause shown.[3, 4] The district further argues that the IHO's decision to exclude the parent's evidence for failing to comply with the five-business day rule should be upheld.

In a reply, the parent cites to Application of a Student with a Disability, Appeal No. 24-421, which declined to dismiss a case because of an unsigned verification, and argues that the parent's appeal should not be dismissed.

[3] Although the district identifies its pleading as a "Verified Answer and Cross-Appeal," the district did not interpose a cross-appeal in that it did not seek reversal or modification of the IHO's decision. The district's notice of intention to cross-appeal reflected an intent to cross-appeal the IHO's denial of the district's motion to dismiss for subject matter jurisdiction; however, the district did not advance that cross-appeal in its pleading. The district's argument regarding late service of the appeal constitutes a defense, not a "cross-appeal."

[4] The district submits with its answer two proposed exhibits and requests that they both be considered on appeal. Generally, documentary evidence not presented at an impartial hearing is 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]; 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]). The proposed exhibits consist of emails between the parties regarding electronic service and show when the district received the parent's complete request for review (SRO Exs. 1-2). The documentation submitted by the district as additional evidence post-dates the issuance of the IHO's November 2024 decision and was therefore not available to the parties during the impartial hearing. Furthermore, the additional evidence submitted by the district is relevant to complete the hearing record regarding the issue of timely service. Therefore, I accept the district's additional evidence into the hearing record.

V. Discussion—Timeliness of Appeal

As a threshold matter, it must be determined whether 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]).

Here, the parent failed to initiate the appeal in accordance with the timeline prescribed in Part 279 of the regulations. The IHO issued his decision on November 15, 2024 (see IHO Decision). Therefore, the parent had until December 26, 2024 to serve the district with a verified request for review (see 8 NYCRR 279.4[a]; 279.11[b]).[5] However, the verified request for review was not served until December 27, 2024 (Parent Aff. of Verif.; see also SRO Ex. 2). Although the parent's lay advocate purportedly served the district with an unverified request for review on December 26, 2024 (see Parent Aff. of Serv.; SRO Ex. 1), this service was defective as it did not include an affidavit of verification (see SRO Ex. 2; see also Appeal of Acosta, 54 Ed Dep't Rep., Decision No. 16,782 [2015] [dismissing a petition where the verification was not included with papers served on respondent], available at https://www.counsel.nysed.gov/Decisions/volume54/d16782).

An SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline specified for good cause shown (8 NYCRR 279.13). State regulation requires that 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] [finding that "attorney error or computer difficulties do not comprise good cause"]).

Here, the parent does not state good cause in the request for review. In the parent's lay advocate's email, by which she served the district with the unverified request for review, the lay advocate noted that "[t]he parent [wa]s having issues finding a notary" and requested the lay advocate " send [the appeal] and . . . follow with form D" (SRO Ex. 1 at p. 1). Even if this reason was set forth in the request for review, it does not detail the circumstances surrounding the

[5] Day 40 fell on a holiday, meaning that Thursday, December 26, 2024, was the final day for timely service (8 NYCRR 279.11[b]).

difficulties finding a notary, explain why the parent only identified the issue finding a notary on the day the pleading was due to be served, or amount to "an event that the filing party had no control over" (see Application of a Student with a Disability, Appeal No. 18-021 ["Generally, courts are unwilling to accept law office failure as a reasonable excuse absent a '"detailed and credible explanation of the default at issue'"], citing Scholem v. Acadia Realty Ltd. Partnership, 144 A.D.3d 1012, 1013 [2d Dep't 2016]; see also Application of a Student with a Disability, Appeal No. 24-425 [finding that parent's explanation relating to office internet difficulties did not constitute sufficient good cause]).

In the reply, the parent also asserts that the district was not prejudiced by the delay (Reply ¶ 3). However, lack of prejudice to the district is not a reason why the verified request for review was not timely served (see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 367 [S.D.N.Y. 2013] [indicating that, while an SRO might in his or her discretion "consider whether a party has suffered prejudice, the regulations require a showing of good cause to excuse untimeliness"]).

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 parent's 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., 971 F. Supp. 2d at 365-67; 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]).

In addition to being untimely, the parent's request for review suffers from further defects. State regulation requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). Here, the parent's request for review is signed by the parent's lay advocate, who is not an attorney (Req. for Rev. at p. 4). In addition, as it appears that the parent's advocate served the district by email with consent (see SRO Exs. 1-2), the affidavit of service filed in this matter with the parent's appeal is inaccurate in that it states that the lay advocate served the district by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or to consent to service by an alternate delivery method, the method of service used must be accurately set forth in the affidavit of service. It appears that the lay advocate did not understand how to properly draft the affidavit of service and it is defective.[6]

[6] I have stated in previous decisions that lay advocates, while not attorneys, must have an understanding of the appeals process, particularly as it relates to compliance with the practice regulations for filing appeals (see Application of a Student with a Disability, Appeal No. 18-108; Application of a Student with a Disability, Appeal No. 17-103). In addition, the parent's lay advocate in this matter has been repeatedly warned about her failures to comply with the practice regulations governing appeals before the Office of State Review.

VI. Conclusion

Having exercised my discretion to dismiss the request for review because the parent failed to timely initiate the appeal pursuant to State regulations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 12, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER