The University of the State of New York

The State Education Department

State Review Officer

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No. 24-646

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 Thomas W. MacLeod, 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 daughter's private services unilaterally obtained from Higher Level Education Resources, LLC (HLER) for the 2023-24 school year. 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

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 November 10, 2020, and made the following recommendations for the student: five periods per week of group special education teacher support services (SETSS);

and two 30-minute sessions per week of group speech-language therapy (Parent Ex. B at pp. 1, 8). The projected implementation date on the student's IESP was November 25, 2020 (id. at p. 1).

On April 27, 2023, the parent sent a letter to the district, indicating that she would be placing the student at a nonpublic school at her own expense for the 2023-24 school year and requesting that the district provide the special education services recommended for the student (Parent Ex. E). On August 23, 2023, the parent, through a lay advocate, sent the district a ten-day notice, informing the district that it had failed to assign a provider for the student's recommended services for the 2023-24 school year and notifying the district of the parent's intent to obtain private services for the student "at an enhanced market rate" (Parent Ex. D). The parent entered into a contract with HLER for the provision of special education services "at listed in the last agreed upon IEP/IESP/FOFD" (Parent Ex. C).[1, 2] HLER provided the student with five hours per week of SETSS and one hour per week of speech-language therapy for the 2023-24 school year (see Parent Exs. F ¶ 2; G-I).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent, through a lay advocate, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years by failing to develop or provide an appropriate program of services (see Parent Ex. A). In particular, the parent asserted that the district failed to supply providers to deliver the services recommended in the student's IESP for the 2023-24 school year (id. at p. 2). The parent alleged that she was unable to procure a provider for the 2023-24 school year at the district rate and had to retain the services of an agency to provide the services at an enhanced rate set by the provider (id.). The parent also alleged that the district failed to convene the CSE to engage in educational planning for the student in advance of the 2023-24 or 2024-25 extended school years (id.). The parent requested an order awarding the student five periods per week of SETTS and two 30-minute sessions per week of speech-language therapy and a bank of compensatory education, all at enhanced rates set by the providers (id. at p. 3).

The district filed a response to the due process complaint notice dated September 11, 2024, asserting several defenses and attached a prior written notice that referred to a CSE meeting that took place on May 8, 2024 and describes that an IESP was created (see Dist. Response to Due Process Compl. Not.).[3]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 7, 2024, and concluded on November 20, 2024, after two days of proceedings

[1] The contract between the parent and HLER is not dated (see Parent Ex. C).

[2] HLER is an LLC and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The hearing record does not include an IESP arising from a May 2024 CSE meeting.

(Oct. 7, 2024 Tr. pp. 1-27; Nov. 20, 2024 Tr. pp. 1-32).[4] In a decision dated November 20, 2024, the IHO found that the district did not dispute that the student was entitled to special education services and failed to provide those services to the student for the 2023-24 school year, thereby denying the student a FAPE (IHO Decision at p. 5). However, the IHO found that the parent had failed to meet her burden of proving the appropriateness of the unilateral placement because the evidence that was provided by the parent lacked specificity and detail regarding whether the student's needs were being met by the private provider and whether the student made progress (id. at p. 6). The IHO dismissed the parent's claim and denied her relief (id.).

IV. Appeal for State-Level Review

The parent appeals, through a lay advocate from Prime Advocacy, LLC, alleging that the IHO erred in finding that the parent failed to meet her burden of proving the appropriateness of the unilaterally-obtained services. Additionally, the parent argues that the IHO erred in finding that an administrator from HLER was an inadequate witness to testify regarding the student's progress.

In its answer, the district alleges, among other things, that the parent failed to timely serve the request for review.[5, 6]

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

[4] The district submitted a motion to dismiss the parent's due process complaint notice alleging that the IHO lacked subject matter jurisdiction and that the parent's claims relating to the 2024-25 school year were not ripe (Dist. Mot. to Dismiss). During the impartial hearing, the IHO found that she had subject matter jurisdiction to hear the parent's claims but dismissed the parent's claim for the 2024-25 school year because the claim was not ripe for review (Oct. 7, 2024 Tr. pp. 11-12; Nov. 20, 2024 Tr. p. 8; IHO Decision at p. 3). Regarding the 2023-24 school year, the parent's advocate indicated that compensatory education for missed services was "not an issue" (Nov. 20, 2024 Tr. p. 9).

[5] The district submits with its answer two proposed exhibits and requests that they both be considered. The proposed exhibits consist of emails between the parties regarding electronic service and shows when the district received the parent's complete request for review (SRO Exs. 1-2). The exhibits will be considered as they are necessary in order to render a decision regarding the timeliness of the parent's appeal (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]).

[6] The parent's lay advocate submitted a request for an extension to serve an answer to a cross-appeal; however, the district had not interposed a cross-appeal challenging determinations of the IHO (see 8 NYCRR 279.5[b] [allowing a petitioner five business days to serve an answer to a cross-appeal]; accordingly, that request was denied. The lay advocate did not request an extension of time to serve a reply and did not file a reply in this matter to respond to procedural defenses raised by the district in its answer (see 8 NYCRR 279.6[a] [allowing a petitioner three calendar days to serve a reply]).

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 parent failed to initiate the appeal in accordance with the timeline prescribed in Part 279 of the State regulations. The IHO issued her decision on November 20, 2024 (see IHO Decision). Therefore, the parent had until December 30, 2024, 40 days after the date of the IHO decision, to serve the district with a verified request for review (see IHO Decision; see also 8 NYCRR 279.4[a]; 279.11[b]). However, the verified request for review was not served until December 31, 2024 (see Parent Verification; SRO Ex. 1). Although the parent's lay advocate purportedly served an unverified request for review on December 30, 2024 (see Parent Aff. of Serv.; SRO Exs. 1-2), 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). Additionally, the parent has failed to assert good cause—or any reason whatsoever—in the request for review for the failure to timely serve the verified request for review. Accordingly, there is no basis on which to excuse the parent's failure to timely appeal the IHO's decision (see 8 NYCRR 279.13; see also B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011] [noting that "[i]nadvertence, mistake or neglect does not constitute good cause"]).

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]).

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. 6). 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.[7]

VI. Conclusion

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

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 30, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] 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.