



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-042

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 Board of Education of the [REDACTED]

Appearances:

Sussman & Watkins, attorneys for petitioner, Michael H. Sussman, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Garrett L. Silveira, Esq., of counsel

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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Kildonan School (Kildonan) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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, 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As discussed more fully below, the merits of the parent's appeal need not be addressed because the parent has not properly initiated this appeal. Briefly, however, on April 5, 2011, the CSE met to review the student's continued eligibility for a special education program and to create his IEP (Dist. Ex. 15). The student's eligibility for a special education program and related services as a student with a learning disability is not in dispute in this appeal (Tr. p. 26; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

A. Due Process Complaint Notice

By due process complaint notice dated June 27, 2011, the parent requested an impartial hearing, asserting that the district had failed to offer the student an appropriate program that sufficiently addressed his needs for the 2011-12 school year (IHO Ex. I at p. 2). The parent also notified the district that she had signed a contract with Kildonan for the student's attendance at Kildonan for the 2011-12 school year, and that if the district could not develop an appropriate program for the student, the parent would send the student to Kildonan and seek tuition reimbursement (*id.*).¹

The district responded to the due process complaint notice by letter dated June 30, 2011, asserting that it had offered the student an educational program and related services that were reasonably calculated to address the student's needs (IHO Ex. II at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 22, 2011, and concluded on December 12, 2011, after five days of hearing (Tr. pp. 1, 291, 575, 744, 894). In a decision dated January 19, 2012, the IHO determined that the district had offered the student a free appropriate public education (FAPE) for the 2011-12 school year, and denied the parent's request for tuition reimbursement (IHO Decision at p. 18).

IV. Appeal for State-Level Review

On February 22, 2012, the parent served a Notice of Petition, a Verified Petition, and a Memorandum of Law in Support of Petition on the district (Answer ¶ 65). The Office of State Review received these documents on February 23, 2012, and by facsimile and letter also dated February 23, 2012, the Office of State Review notified counsel for both the parent and district that the petition had been rejected, would not be considered, and had been returned to the parent's counsel on the ground that it failed to comport with the requirements of 8 NYCRR 279.8(a)(5) because the petition exceeded 20 pages in length (Answer Ex. A). The letter further advised the parent's counsel that "should a revised Petition be untimely served, the reasons for failure to timely serve the petition for review within the time specified must be set forth in the petition" (*id.*).

Subsequently, the parent filed a second petition with the Office of State Review that was received on February 28, 2012. The parent alleges that the IHO erred by not awarding tuition reimbursement to the parent for the student's attendance at Kildonan for the 2011-12 school year. The parent further alleges that the petition was reformatted to comply with the page limitations set forth in State regulations. The petition is dated February 21, 2012.

In an answer, the district asserts: (1) that the parent failed to file a notice of intention to seek review in accordance with 8 NYCRR 279.2; (2) that the second petition was not served

¹ The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

upon the district and therefore should be dismissed for improper service; (3) that the second petition does not comply with the form requirements set forth in State regulations; and (4) that the IHO properly found that the district offered the student a FAPE for the 2011-12 school year.

V. Applicable Standards

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).²

A parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than 10 days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). A notice of intention to seek review is not required when the school district seeks review of an IHO's decision (8 NYCRR 279.2[c]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Additionally, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]).³ The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of

² Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

³ As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065).

service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or 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). State regulations provide an SRO with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). An SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., 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. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; 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 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]).

VI. Discussion

In the present case, personal service of the second petition upon the district did not occur, nor did service occur pursuant to any of the above enumerated exceptions to the personal service requirement. The parent's February 27, 2012 cover letter to her second petition reflects that a copy of the petition and accompanying papers were sent by overnight mail to the district's counsel. No affidavit of service was filed as required by State regulations to show that the second petition was personally served on the district, and the district alleges in its answer that it was never served with the petition (Answer ¶ 67).⁴ In the petition, the parent did not offer any explanation for her failure to personally serve the petition. Given that the original petition was rejected by the Office of State Review, and in the absence of any showing that the parent personally served the district with the second petition, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than personal service, the parent did not effectuate proper service (8 NYCRR 279.2[b]; see Application of a

⁴ The affidavit of personal service filed with the second petition appears to have been removed from the rejected petition and affixed to the second petition. Whether an inadvertent oversight or intentional it is nevertheless improper.

Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 09-075; Application of the Dep't of Educ., Appeal No. 09-062).

Moreover, the appeal has not been initiated in a timely manner with proper service, and the cause alleged in the petition is not sufficient to excuse the untimeliness of the parent's appeal. Here, the IHO's decision was dated January 19, 2012, and included the required statement advising the parties of their rights to seek review of the decision by a State Review Office, and further provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text (IHO Decision at p. 18; see 8 NYCRR 200.5[j][5][v], [k]). Although the petition does not indicate how the IHO delivered his decision, for purposes of this decision I assume that it was sent by mail. As such, the date of mailing and the four days subsequent thereto are excluded in calculating the 35-day period within which the petition would have been timely served, and the petition was required to be personally served on the district no later than February 28, 2012 (8 NYCRR 279.2[b]). The parent did not set forth any reasons in the petition to explain why she could not personally serve the petition within the time period set forth in State regulation (8 NYCRR 279.13) and she has not filed a reply to the procedural defenses interposed by the district in its answer (8 NYCRR 279.6). The parent is represented by experienced counsel who has previously appeared before the Office of State Review (see, e.g., Application of the Bd. of Educ., Appeal No. 11-149; Application of the Bd. of Educ., Appeal No. 11-078; Application of the Bd. of Educ., Appeal No. 10-079 [warning the parties to adhere to the practice regulations before the Office of State Review in future appeals]; Application of the Bd. of Educ., Appeal No. 08-055; Application of a Child with a Disability, Appeal No. 06-024; Application of a Child with a Disability, Appeal No. 03-107; Application of a Child with a Disability, Appeal No. 96-19; Application of a Child with a Disability, Appeal No. 95-74; Application of a Child with a Handicapping Condition, Appeal No. 92-36). Under the circumstances of this case, I find that the petition was not properly served upon the district prior to the expiration of the parent's time to initiate an appeal (8 NYCRR 279.13; see 8 NYCRR 279.2[b]).

In addition, I note that at no time did the parent personally serve a notice of intention to seek review upon the district, which resulted in the delay of the hearing record being submitted to the Office of State Review (8 NYCRR 279.2[a], [b]). By letter to the district's counsel dated February 29, 2012, having not yet received the hearing record for review, the Office of State Review requested that the district file a certified record with the Office of State Review. In response, the district notified the Office of State Review by letter dated March 1, 2012 that it not been served with a notice of intention to seek review from the parent and therefore requested an extension of time to file the hearing record. Upon review of the filings, I also note that the parent's memorandum of law in support of the petition fails to comport with State regulations as it does not include a table of contents (8 NYCRR 279.8[a][6]). Finally, State regulations require that a petition be verified (8 NYCRR 279.7). Like the issue with the affidavit of personal service described above, the verification submitted to the Office of State Review appears to be a xerox copy of the original verification from the rejected petition which has been affixed to the second petition. Therefore, I cannot conclude that the second petition is a verified petition.

VI. Conclusion

Based upon the aforementioned nonconformities with State regulations, including the parent's failure to initiate the appeal in a timely manner with proper service, I will exercise my discretion and dismiss the petition, without a determination of the merits of the parent's claims (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an IHO's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct., Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
April 11, 2012



JUSTYN P. BATES
STATE REVIEW OFFICER