The University of the State of New York

The State Education Department
State Review Officer
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No. 15-108

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Pelham Union Free School District

Appearances:
Law Offices of Neal H. Rosenberg, attorneys for petitioners, Lakshmi Singh Mergeche, Esq., of counsel

Keane & Beane PC, attorneys for respondent, Stephanie M. Roebuck, Esq., of counsel

DECISION

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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the cost of their daughter's tuition at the New Haven Residential Treatment Center (New Haven) for a portion of the 2013-14 and 2014-15 school years as well as their daughter's tuition costs at the Robert Louis Stevenson School (RLS) for a portion of the 2014-15 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 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]; 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 appeal, a recitation of the student's educational history is unnecessary.

By due process complaint notice dated September 12, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, that the parents' unilateral placement of the student at New Haven was an appropriate placement, and that equitable considerations did not diminish or preclude an award of tuition reimbursement (Joint Ex.

1 at pp. 1-13). With respect to the 2013-14 school year, the parents argued that the August 2013 IEP was substantively and procedurally inappropriate (id. at p. 8).[1] The parents further argued that the August 2013 CSE's recommendation of a State-approved residential placement was not appropriate because it did not provide the student with the level of therapeutic support to meet the student's needs (id. at pp. 5-8). Regarding the 2014-15 school year, the parents alleged that the district failed to make a timely placement recommendation for the student prior to the beginning of the school year (id. at p. 9). The parents further alleged that the June 2014 CSE was improperly constituted, relied upon outdated evaluative information, and failed to adequately discuss or address the student's behavioral needs (id. at pp. 9-10). Additionally, the parents argued that the August 2014 IEP failed to "adequately identify" the student's needs and contained inappropriate annual goals (id.). Next, the parents argued that New Haven constituted an appropriate unilateral placement for the student and that equitable considerations supported their request for relief (id. at pp. 11-12). As relief, the parents requested an award of "payment/reimbursement" for the cost of the student's tuition and related expenses at New Haven for the 2013-14 and 2014-15 school years (id. at p. 12). The district responded by letter dated September 22, 2014 (Joint Ex. 2).

The parents filed a second due process complaint notice dated March 19, 2015, in which the parents alleged that the district failed to offer the student a FAPE for the 2014-15 school year (Joint Ex. 3). The parents argued that the December 2014 IEP was substantively and procedurally inappropriate (id. at p. 6). The parents stated that they enrolled the student at RLS in January of 2015 and asserted that RLS was an appropriate unilateral placement for the student (id. at p. 9). The parents further contended that equitable considerations supported their request for relief (id. at p. 9). As relief, the parents requested an award of "payment/reimbursement" for the cost of the student's tuition and related expenses at RLS for a portion of the 2014-15 school year (id.). The district responded by letter dated April 15, 2015 (Joint Ex. 4).

By "Order Granting Consolidation" dated May 10, 2015, the IHO consolidated the two due process complaint notices (IHO Ex. I at pp. 1-3; see 8 NYCRR 200.5[j][3][ii]).

On October 27, 2014, the IHO conducted a prehearing conference, and on December 5, 2014, the parties proceeded to an impartial hearing, which concluded on July 13, 2015, after seven days of proceedings (see Tr. pp. 1-1216; IHO Ex. II). In a decision dated September 25, 2015, the IHO determined that the district failed to offer the student a FAPE for portions of the 2013-14 and 2014-15 school years (IHO Decision at pp. 32-48).

With respect to the 2013-14 school year, the IHO found that the district offered the student a FAPE as of July 1, 2013 but failed to offer the student a FAPE from August 19, 2013 until the end of the 2013-14 school year (IHO Decision at p. 33-36).[2] More specifically, the IHO found that the June 2013 CSE's recommendation of a State-approved residential placement was appropriate for the student (id. at p. 35). The IHO found that because the student was enrolled at the CSE's recommended State-approved residential placement at the start of the 12-month 2013-

[1] With respect to the August 2013 IEP, the parents attempted to incorporate specific allegations that they raised regarding the March 2013 IEP (see Joint Ex. 1 at p. 8 [August 2013 IEP inappropriate "[f]or the reasons stated above regarding the March 2013 IEP"]).

[2] In New York, the school year begins on July 1 (Educ. Law § 2[15]).

14 school year, the district offered the student a FAPE as of July 1, 2013 (id.). However, the IHO found that the August 2013 CSE's continued recommendation of the State-approved residential placement was not appropriate as the student was no longer enrolled in the State-approved residential placement as of July 12, 2013 (id.). Thus, the IHO found that the district failed to offer the student a FAPE from August 19, 2013 until the end of the 2013-14 school year (id.).

Regarding the 2014-15 school year, the IHO found that the district failed to offer the student a FAPE as of July 1, 2014, but offered the student a FAPE as of August 28, 2014 (IHO Decision at p. 36). The IHO found that the district's failure to locate an appropriate placement for the student as of July 1, 1014, constituted a denial of a FAPE (id.). However, the IHO found that the August 2014 CSE's recommendation of home instruction pending acceptance of the student to a residential placement was appropriate for the student and that the residential placement ultimately located by the district would have been appropriate for the student (id. at pp. 37-38). Accordingly, the IHO found that the district offered the student a FAPE for the 2014-15 school year as of August 28, 2014 (id. at p. 38). The IHO further found that the district continued to offer the student a FAPE after her discharge from New Haven in December 2014 (id.). The IHO determined that the December 2014 CSE's recommendation of home instruction was appropriate until the district could locate an appropriate day treatment program (id. at pp. 38-39). However, the IHO found that the district failed to offer the student a FAPE from March 1, 2015 until the end of the 2014-15 school year because the district failed to secure an appropriate day treatment program for the student as recommended by the December 2014 CSE (id. at p. 39).

Turning to the parents' placements of the student for the 2013-14 and 2014-15 school years, the IHO found that New Haven was appropriate because the New Haven program constituted a "therapeutic and academic placement" that addressed the student's needs (IHO Decision at pp. 40-42). However, the IHO found that the parents did not meet their burden of establishing the appropriateness of RLS (id. at pp. 42-44). Specifically, the IHO found that RLS was not appropriate for the student because it "did not provide the structured therapeutic environment and psychological counseling" that the student needed (id. at p. 44).

Lastly, with respect to equitable considerations, the IHO denied the parents' request for relief "*in toto*" (IHO Decision at p. 44). With respect to the 2013-14 school year, the IHO found that equitable considerations did not favor an award of tuition reimbursement because the parents provided the district with untimely and inadequate notice of their intent to unilaterally place the student at New Haven and failed to demonstrate a contractual obligation with respect to the cost of the student's tuition at New Haven (id. at pp. 44-46). The IHO further found that the parents did not offer the district "an opportunity to secure an appropriate residential placement" for the student and "fail[ed] to communicate with the district about their plans for [the student]" (id. at p. 45). Similarly, regarding the 2014-15 school year, the IHO found that equitable considerations did not favor an award for tuition reimbursement because the parents provided the district with untimely and inadequate notice of their intent to unilaterally place the student at RLS and the parents never intended to place the student in a public school (id. at pp. 46-48). Accordingly, the IHO denied the parents' request for funding/reimbursement of the cost of the student's tuition at New Haven for the 2013-14 and 2014-15 school years and at RLS for the 2014-15 school year (id. at p. 48).

IV. Appeal for State-Level Review

The parents appeal, and initially assert that the IHO failed to address crucial issues of law and fact. The parents further contend that the IHO "erroneously and incongruently" found that the district failed to offer the student a FAPE for portions of the 2013-14 and 2014-15 school years while finding that the district offered the student a FAPE for other portions of the 2013-14 and 2014-15 school years. Next, the parents allege that the IHO erred in finding that RLS was not an appropriate placement. The parents contend that RLS addressed the student's needs and that the student made progress. Lastly, the parents argue that the IHO erred in finding that equitable considerations barred their requested relief. The parents argue that, contrary to the IHO's findings, they fully cooperated with the district and would have considered any recommended program within the district, so long as it met the student's needs. As relief, the parents seek "payment/reimbursement" of the cost of the student's tuition at New Haven for portions of the 2013-14 and 2014-15 school years and at RLS for a portion of the 2014-15 school year.

In an answer, the district responds to the parents' allegations with admissions and denials, and generally argues to uphold the IHO decision in its entirety.

VI. Discussion—Timeliness of Appeal

Based on the reasons set forth below, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by personal service of a verified petition and other supporting documents upon the respondent (8 NYCRR 279.2[b], [c]).[3] A petition for review must be personally served within 35 days from the date of the IHO's decision to be reviewed, except that if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto are excluded in computing the period within which the petition may be served (8 NYCRR 279.2[b], [c]). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause set forth in the petition (id.).

In this case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The findings of fact and decision of the IHO is dated September 25, 2015 and was transmitted to the parties by mail (IHO Decision at p. 48).[4] The date of mailing and the four days subsequent thereto are excluded in calculating the 35-day period for service of the petition; therefore, the parents were required to personally serve the petition upon the district no later than November 4, 2015 (see 8 NYCRR 279.2[b]). However, the petition was not served upon the district until November 9, 2015 (see Parent Aff. of Service).[5] Accordingly, the service of the petition upon the district was untimely.

[3] 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."

[4] In a letter to the Office of State Review dated December 2, 2015, the parents' attorney indicated that the IHO Decision was mailed to the parents and that the parents received it on September 30, 2015.

[5] In a letter to the Office of State Review dated December 2, 2015, the parents' attorneys clarified that the

Furthermore, while an SRO may, in his or her sole discretion, excuse a failure to timely serve or file a petition for review for good cause, the reasons for the failure must be set forth in the petition (see 8 NYCRR 279.13). Here, the parents failed to assert good cause—or any explanation—in their petition for the failure to timely initiate the appeal. Additionally, by letter dated November 25, 2015, the Office of State Review directed the parents to submit a written explanation as to the untimeliness of the petition. In a letter to the Office of State Review dated December 2, 2015, the parents' attorneys indicated that they "had no notice of any discrepancy that needed to be addressed in the petition" and that the filing of the petition on November 9, 2015 was based upon a "misinterpretation of the regulations." In a letter to the Office of State Review dated December 7, 2015, the district's attorneys responded and argued that the parents' petition should be dismissed because the parents failed to set forth the reason for failing to timely serve the petition in the petition as required by State regulations.

In view of the foregoing, the petition was not served upon the district prior to the expiration of the time to initiate an appeal and the parents have not provided this office with sufficient good cause to accept the late petition. As set forth in the letter of December 2, 2015, the parents' attorneys admittedly "misinterpret[ed] the regulations" and miscalculated the date upon which to timely serve the petition. In this instance, the parents have not raised sufficient good cause to excuse the failure to timely serve the petition upon the district (8 NYCRR 279.13; see 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 and noting that it was foreseeable that difficulties might arise when attempting to effectuate service on the day service was due]). Even if the admitted "misinterpretation of the regulations" had been stated in the petition, I am not persuaded that the reasons for the delay constituted good cause shown to excuse the untimely service of the petition. Therefore, based upon the parents' failure to properly initiate the appeal and the absence of good cause for untimeliness, I exercise my discretion and dismiss the petition as untimely.

VII. Conclusion

Having found that the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 23, 2015

STEVEN KROLAK
STATE REVIEW OFFICER

"November 10, 2015" date on the petition was a typographical error since the petition was served on the district on November 9, 2015.