The University of the State of New York

The State Education Department
State Review Officer
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No. 16-029

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 New York City Department of Education

Appearances:
Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their claims for the 2012-13 school year based on the IDEA's statute of limitations and denied their request to be reimbursed for their daughter's tuition costs at the at the Jewish Center for Special Education (JCSE) for the 2013-14 school years. The appeal must be dismissed. The cross-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

Although I have reviewed the entire hearing record, given the disposition of this appeal, a recitation of the student's educational history in this decision is unnecessary.

Relevant to this case, the CSE developed IEPs for the student in May 2012 and April 2013 (Dist. Exs. 2; 10). In a due process complaint notice dated August 28, 2015, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (Parent Ex. A at pp. 1-4). In particular, the parents asserted that the May 2012 CSE failed to conduct a new psychoeducational evaluation for the student and improperly relied on a classroom observation and "updated reports" to change the student's educational

classification from "mentally retarded" to a speech or language impairment (id. at p. 2).[1, 2] Furthermore, the parents argued that the CSE "declassified" and removed the student from bilingual Yiddish and English instruction without conducting "up to date testing" (id.).[3] Next, the parents argued that the CSE denied the parents meaningful participation by ignoring their concerns regarding the recommended 12:1+1 special class placement and failing to consider other placement options, thereby denying them the opportunity to participate in the development of the student's IEP (id. at pp. 2-3). With respect to the 2012 IEP, the parents contended that it did not address the student's sensory delays, activities of daily living (ADL) skills, visual perception, and visual motor skills (id. at p. 2). Next, the parents contended that the IEP's annual goals were not reasonably calculated to offer the student an opportunity to make academic, social or emotional progress (id.). The parents specifically contended that the student's speech-language goals were insufficient to address the student's needs (id.). In addition, the parents argued that there were no annual goals to address the student's articulation, pragmatic language, or frustration tolerance (id.). Next, the parents contended that the CSE failed to consider counseling for the student (id.). The parents also argued that the IEP lacked a behavior intervention plan (BIP) or strategies to address deficits in the student's focusing and attending skills (id.). Regarding the particular public school site to which the district assigned the student, the parents alleged that it was not appropriate for the student based upon information that they obtained during a visit to the school (id. at p. 3).

With respect to the 2013-14 school year, the parents argued that the April 2013 CSE failed to conduct new testing and, instead, improperly relied upon progress reports and a classroom observation in order to develop the student's April 2013 IEP (Parent Ex. A at p. 3). The parents further argued that the CSE improperly reduced the student's level of speech-language therapy

[1] While the parents use the older term "mentally retarded," State regulations were amended in October 2011 to replace the term "mental retardation" with the term "intellectual disability" while retaining the same definition (compare 8 NYCRR 200.1[zz][7], with 34 CFR 300.8[c][6]).

[2] I note that the parent may request an independent educational evaluation (IEE) from the district based on a disagreement with a district evaluation, at which point the district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district's criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

[3] The declassification terminology used in the context of bilingual verses monolingual instruction is distinguishable from and should not be confused with term classification as it relates to the parents' concerns over the student's disability category and resulting eligibility for special education and related services. There has been significant Federal guidance and State regulatory activity regarding English language learners and exiting students from bilingual instruction over the past several years (see "Questions and Answers Regarding Inclusion of English Learners with Disabilities" [OSEP 2014], available at http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf; "Addendum to Questions and Answers Regarding Inclusion of English Learners with Disabilities" [OSEP 2015], available at http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/addendum-q-and-a-on-elp-swd.pdf; "Commissioner's Regulations Part 154" Office of Bilingual Education and World Languages, available at http://www.p12.nysed.gov/biling/bilinged/CRPart154.html. According to State guidance, "Part 154 of the Regulations of the Commissioner of Education establishes that for a student to be declassified from Limited English Proficient (LEP)/English Language Learners (ELLs) status and therefore no longer be eligible to receive mandated bilingual education or free standing English as a Second Language (ESL) programs, the student must score proficient" on the New York State English as a Second Language Achievement Test (NYSESLAT), "Bilingual and ESL Services for LEP/ELLs who are Students with Disabilities" Office of Special Education Memorandum [Mar. 2011], available at http://www.p12.nysed.gov/specialed/publications/ bilingualservices-311.pdf.

(id.). Next, the parents argued that the CSE failed to conduct a functional behavioral assessment (FBA) or develop a BIP for the student (id. at pp. 3-4). Additionally, the parents argued that the IEP's annual goals were insufficient to address the student's math, reading, and ADL skills (id. at p. 4). The parents also maintained that the CSE failed to consider counseling for the student (id.). The parents further argued that the particular assigned school site was not appropriate for the student (id.).

As relief, the parents requested prospective funding or reimbursement for the costs of the student's education at JCSE for the 2012-13 and 2013-14 school years, including tuition, related services, and transportation (id.).

On August 31, 2015 an IHO was appointed to hear the matter (IHO Decision at p. 2), and on October 27, 2015 the district submitted a motion to dismiss the parents' due process complaint notice arguing that the parents' claims were barred by the statute of limitations and the equitable doctrine of laches (Dist. Ex. 1 at pp. 1-2). On November 10, 2015, the IHO orally granted the district's motion to dismiss the parents' claims related to the 2012-13 school year on the basis that they fell beyond the 2-year statute of limitations, but denied the motion with respect to claims involving the 2013-14 school year (Tr. pp. 1, 25-26; see IHO Decision at pp. 2-3).

The impartial hearing continued and concluded on February 4, 2016 after five days of proceedings (Tr. pp. 1-685).[4] In a decision dated March 11, 2016, the IHO found that the parents failed to demonstrate by a "preponderance of evidence" that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at p. 7).[5] More specifically, the IHO found that the parents failed to submit evidence demonstrating that the student was found eligible for special education as a student with an intellectual disability for any school year prior to the 2013-14 school year (id.). Additionally, the IHO noted that the parents provided evidence that the student's related services were provided in English, supporting the district's contention that the student was not treated as a bilingual student at JCSE (id.). The IHO also found that the April 2013 CSE was aware of the student's needs and performance at JCSE and "accurately fashioned" an IEP designed to provide the student with a FAPE (id. at p. 8). The IHO also found that the parents' decision to place the student at JCSE prior to visiting the assigned public school site indicated a "prior intent to reject" the assigned school (id. at p. 8). Lastly, the IHO noted that the

[4] In a January 2016 interim decision, the IHO denied the parents' motion to consolidate a subsequently-filed due process hearing involving claims related to the 2015-16 school year with the instant case (January 26, 2016 IHO Interim Decision at pp. 1-2). The IHO addressed several of the regulatory factors relevant to consolidation (see 8 NYCRR 200.5[j][3][ii][a][4]), but also indicated that, due to hearing the 2012-13 and 2013-14 issues, he had already formed an opinion in the case at bar and that accepting the new case "could work to deprive a party of an unbiased opinion regarding this new year." (January 26, 2016 IHO Interim Decision at p. 1). The IHO then recused himself from the 2015-16 proceeding. While I appreciate the IHO's candor, if objectivity is a controlling factor in an IHO's consolidation decision, recusal was likely required in both matters, not just the latter case. In this case, I do not believe that objectivity was the controlling factor governing this decision because there were other predominate factors (i.e. late stage of the proceeding, different parent representatives; undue clouding of the hearing record); however; I remind the IHO that in these types of circumstances, State regulations expressly contemplate that when multiple complaints involving the same student have been filed, the same IHOs is expected to preside over the subsequently-filed complaints and objectively hear all of the issues, unless the IHO is unavailable, a factor not discussed by the IHO in this instance (see 8 NYCRR 200.5[j][3][ii][a][1]).

[5] While the IHO's statement was unquestionably inconsistent with New York's burden of proof statute applicable to impartial hearings (Educ. Law § 4404[l][c]), he also accurately recited the district's burden at another point in his decision (IHO Decision at p. 7).

student had never attended a public school, and that parents are free to choose a private school placement at their discretion (id.).

IV. Appeal for State-Level Review

The parents appeal,[6] and initially assert that the IHO erred in finding that the parents' claims related to the student's 2012-13 school year were time-barred. The parents also assert that during the impartial hearing, the IHO refused to allow "testimony and evidence" related to the 2012-13 school year which was relevant to their claims regarding the 2013-14 school year. Additionally, the parents assert that the IHO erred in finding that they failed to submit evidence denoting the student's classification as a student with an intellectual disability for any school year prior to the 2013-14 school year.

With respect to the 2013-14 school year, the parents argue that the IHO misapplied the burden of proof in determining that the district offered the student a FAPE for the 2013-14 school year. The parents further argue that even if the IHO had properly applied the burden of proof, the district failed to establish that it offered the student a FAPE because of several errors in the CSE process. More specifically, the parents argue that the April 2013 CSE was improperly composed because the April 2013 CSE meeting did not have the required members and the CSE did not consider appropriate or sufficient evaluative material, other than a July 2011 psychoeducational evaluation report and classroom observation. Next, the parents assert that the IHO did not make a finding regarding the appropriateness of the assigned public school site and contend that the district did not meet its burden in this respect.

As to the parents' unilateral placement of the student at JCSE, the parents argue that the evidence in the hearing record supports the conclusion that JCSE was an appropriate placement for the student. With respect to equitable considerations, the parents argue that although the IHO did not make a specific finding on this issue, the IHO's finding that the parents exhibited a prior intent to reject the public placement is against the weight of the evidence. More specifically, the parents contend that they cooperated with the April 2013 CSE and there is no evidence in the hearing record that would preclude or limit reimbursement to the parents on equitable grounds.

As relief, the parents request remand of the case for a hearing on the parents' claims regarding the 2012-13 school as well as prospective funding/reimbursement for the costs of the student's tuition and related services at JCSE for the 2013-14 school year.

In an answer and cross-appeal, the district responds to the parents' petition by admitting and denying the parents' assertions and arguing that the IHO properly dismissed the parents' claims with respect to the 2012-13 school year as time-barred by the statute of limitations. In its cross-appeal, the district argues that the IHO erred in failing to dismiss the parents' claims with respect to the 2013-14 school year as time-barred. However, the district also argues in the alternative that the IHO properly found that the district offered a FAPE for the 2013-14 school year. The district further argues that the absence of a general education teacher during the April 2013 CSE meeting did not rise to a level of a denial of FAPE and that the April 2013 CSE had sufficient evaluative information to develop the student's April 2013 IEP. Additionally, the district argues that the IHO

[6] The parents were represented by an educational advocate when they filed their August 28, 2015 due process complaint notice and during the impartial hearing in this matter (see Parent Ex. A at p. 5; Tr. pp. 1-685).

correctly found that the CSE appropriately classified the student with a speech or language impairment. The district further argues that although not addressed by the IHO, any claims with respect to the assigned school are speculative.[7]

In an answer to the district's cross-appeal, the parents argue that the district's cross-appeal should be dismissed because their due process complaint notice was filed within the appropriate time period for statute of limitations purposes. The parents further argue that the IHO correctly determined that the parents' claims with respect to the 2013-14 school year were not time-barred.

V. Discussion

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 timely personal service of a verified petition and other supporting documents upon the respondent (8 NYCRR 279.2[b], [c]).[8] 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 to timely serve the petition (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.).

The time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a petition (see 8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004).[9] Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date upon which either of parties receives the IHO's decision is not relevant to the calculus in determining whether a petition for review is timely.

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 was

[7] The district submitted additional evidence with its answer and cross-appeal. Generally, documentary evidence not presented at an impartial hearing may be 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; 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 additional evidence submitted by the district was both available at the time of the hearing and is unnecessary to render a determination. Accordingly, I decline to accept this evidence.

[8] 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."

[9] The method of transmittal is relevant only for the purpose of determining whether the exclusion for mailing provision applies.

clearly dated March 11, 2016 (IHO Decision at p. 8). Assuming that the IHO's decision was transmitted to the parties by mail, the parents were required to personally serve the petition upon the district by no later than April 20, 2016 (see 8 NYCRR 279.2[b]). However, the petition was served 20 days late upon the district on May 10, 2016 (see Parent Aff. of Service). Accordingly, the service of the petition upon the district was untimely.

Additionally, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review, 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 reason whatsoever—in their petition as to why they could not timely initiate the appeal, indicating briefly in a footnote only that the IHO's decision was mailed to them on March 30, 2016 (Pet. p. 1 n.1).[10] As noted above, the dates of mailing or receipt are not relevant for calculating the timeline in which a petition appealing the IHO's decision is required to be served. But assuming for the sake of argument that the date of mailing is the operative date triggering the timeline for serving an appeal, the parents' petition would nevertheless be untimely even when factoring in the mailing exception to the timeline. Therefore, because the parents failed to properly initiate the appeal by effectuating timely service upon the district, and good cause for accepting a late appeal has not been presented, the appeal must be dismissed (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]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist. Bd. of Educ., 891 F. Supp. 2d 439, 440-41 [W.D.N.Y. 2012] [informing counsel for the parents that "an examination of pertinent SRO decisions would have informed her that delays due to scheduling difficulties or lack of availability on the part of parties or counsel are not typically found to be 'good cause' for untimely petitions"]; 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 [Feb. 28, 2006]).

VI. Conclusion

In summary, the parents failed to timely initiate the appeal and it must be dismissed. Furthermore, the district prevailed below on the 2013-14 school year claims, and it has become unnecessary to reach the alternative statute of limitations argument in its cross-appeal. Accordingly, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 4, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] Other than the parents' footnote assertion, is no evidence as to when the IHO's decision was mailed to the parents.