The University of the State of New York

The State Education Department
State Review Officer
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No. 16-074

Application of the BOARD OF EDUCATION OF THE MAMARONECK UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Littman Krooks LLP, attorneys for respondents, Marion M. Walsh, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2016-17 school year. The IHO found that the student's pendency placement was at the Reach Academy of Greenburgh-North Castle Union Free School District (Reach Academy). 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 full recitation of the student's educational history is unnecessary. Briefly, however, a CSE convened on May 18, 2016, to conduct the student's annual review and develop an IEP for the 2016-17 school year (Parent Ex. G at p. 1). Finding the student remained eligible for special education and related services as a student with autism, the May 2016 CSE recommended a 12-month program in a 6:1+2 special class placement at a State-approved

nonpublic residential school (id. at pp. 1, 10-11, 13).[1] [2] The May 2016 CSE also recommended one 30-minute session per week of individual counseling (id. at pp. 10-11).

In an email dated July 13, 2016, the district's director of special education sent the parent copies of the student's most recent report card and transcript and asserted that the student had satisfied all State requirements for a Regents diploma (Parent Ex. L at pp. 1-3). The district's director requested a meeting with the parents to "discuss the implications of these reports" (id. at p. 1).

In a letter to the district's director of special education dated July 18, 2016, the student's mother expressed disagreement with the district's "proposal to end [the student's] eligibility for special education" and the district's "position that he may have satisfied all requirements for a Regents diploma" (Parent Ex. M at p. 1). The letter included several specific assertions with respect to the above disagreements and informed the district of the parents' intention to explore unilateral placement of the student at district expense while reserving the right to request pendency at Reach Academy (id. at pp. 1-4).

In a letter to the student's mother dated July 21, 2016, the district's director of special education informed the parent that the district had decided that the student would remain at Reach Academy until August 16, 2016, "during which time he will work towards completion of his remaining PE requirements as well as vocational activities" and that a CSE meeting was to be scheduled thereafter to "review his status" (Parent Ex. P).

A. Due Process Complaint Notice

The parents initiated this proceeding by a due process complaint notice dated August 8, 2016 (see Petition ¶3). However, the district failed to submit a copy of the due process complaint notice with the hearing record submitted to the Office of State Review. However, given the disposition of this matter on procedural grounds, as discussed below, a copy of the due process complaint notice was not required to reach a determination in this matter. Nevertheless, the district is reminded that, whether or not entered into evidence by a party or the IHO, under State regulation, the due process complaint notice is deemed part of the hearing record and must be submitted to the Office of State Review by the district (8 NYCRR 200.5[j][5][vi]).

B. Interim Decision on Pendency

A hearing to determine the student's pendency placement was held on September 7, 2016 (Tr. pp. 1-238). The parents requested an order from the IHO establishing the student's placement for the pendency of this proceeding at Reach Academy pursuant to the May 2016 IEP (Tr. pp. 6-

[1] The student's eligibility for special education as a student with autism through the 2015-16 school year is not in dispute between the parties (see 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]), but ineligibility by reason of graduation became the primary disputed issue between the parties in the 2016-17 school year.

[2] Although the May 2016 IEP recommended placement in a nonpublic school for the 2016-17 school year (Parent Ex. G at p. 13), the student continued to attend Reach Academy, the same school he attended for the 2015-16 school year (Tr. p. 114), which according to the June 2015 IEP was recommended as placement in a special act school district (Parent Ex. B at p. 19).

14). The district asserted that the IHO should not issue a pendency order because the student graduated and was therefore no longer eligible for special education services (Tr. pp. 14-21). The parents disagreed and contested that the student had not met the requirements for graduation and remained eligible for services (Tr. pp. 6-8).

By decision dated September 13, 2016, the IHO issued an interim decision finding that the issue of whether the student had satisfied all the State requirements for a Regents diploma remained in dispute, and ordered the district to allow the student to remain at his "then current educational placement at the Reach Academy" during the pendency of the proceeding (IHO Decision at pp. 4-5).

IV. Appeal for State-Level Review

The district appeals the IHO's interim decision, and asserts that the IHO erred in finding that the evidence produced during the hearing failed to establish that the student had met the requirements for receipt of a Regents diploma prior to the initiation of the impartial hearing and further erred in ordering that the student be placed at Reach Academy for the pendency of the proceeding.

In their answer, the parents assert, among other things, that the IHO properly determined that, given the dispute regarding whether the student graduated, the student must receive procedural protections during the pendency of the proceeding. Additionally, the parents assert that the district's petition must be dismissed as being untimely.

V. Discussion

A. Timeliness of Appeal

Upon review of the timeline of the IHO's interim decision and the proceedings on appeal, the District's 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 a respondent (8 NYCRR 279.2[b], [c]). 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 was 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]). 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). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service of the petition in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of

a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service of the petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service of the petition upon the district]).

Specifically, 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 a party's 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. 16-029).[3] Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date upon which either party receives the IHO's decision is not relevant to the calculus in determining whether a petition for review is timely.

In this case, the district failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's interim decision was dated September 13, 2016 (IHO Decision at p. 5). The district was, therefore, required to personally serve the petition upon the parents no later than October 18, 2016 (8 NYCRR 279.2[b]). However, the petition was first served upon the parents on October 25, 2016 (see Dist. Aff. of Service).[4] Accordingly, the petition for review was not timely served upon the parents in accordance with State regulations and must be dismissed.

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 (8 NYCRR 279.13). Here, the district failed to assert good cause—or any reason whatsoever—in its petition for the failure to timely initiate the appeal (id.).[5] Accordingly, there is no basis on which to excuse the untimely personal service of the petition on the parents (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 438, 440-41 [W.D.N.Y. 2012] [informing counsel for the parents that "an examination

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

[4] Even if the IHO's interim decision was transmitted to the parties by mail, which has not been alleged, the district would have been required to personally serve the petition upon the parents by no later than October 24, 2016 (8 NYCRR 279.2[b]; see 8 NYCRR 279.11), because the last day of service such a scenario would have fallen on a weekend, State regulations would have allowed for service on October 24, 2016, the following Monday. Under this hypothetical situation, the petition would still have been untimely.

[5] The district's petition indicates that the IHO's interim decision was dated September 22, 2016; however, the interim decision submitted to the Office of State Review is clearly dated September 13, 2016 (IHO Decision at p. 5). The parents' attorney explained that the IHO distributed the September 13, 2016 interim decision to counsel for both parties on September 19, 2016 via electronic mail (Nov. 10, 2016 Aff. ¶7) and the district has not submitted a reply to the parents' counsel's representations. Even assuming, for the sake of argument, that the time period in which to commence an appeal was calculated from the date that the interim decision was sent (which it is not as explained above), the district's petition would still be untimely as it would have been required to personally serve the petition upon the parents no later than October 24, 2016.

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]).

As a final note, pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. Accordingly, the district may include an appeal from the IHO's interim decision in an appeal or cross-appeal from a final IHO decision in this proceeding. However, while 8 NYCRR 279.10(d) does not preclude a party from appealing a pendency determination after the conclusion of the impartial hearing, it also does not provide a party with an indefinite extension of the 35-day timeline for filing an appeal from an interim decision that addresses a pendency determination (see Application of a Student with a Disability, Appeal Nos. 13-041 & 14-008 [appeal from interim decision dismissed as being untimely because it was one day late and district did not appeal or cross-appeal from IHO's final determination).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 13, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER