



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-060

**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 Board of Education of the Rye City School District**

### **Appearances:**

The Law Offices of Gerry McMahon, LLC, attorneys for petitioners, by Gerry McMahon, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of privately-obtained evaluations and services, as well as the costs of their daughter's tuition at the Gateway School (Gateway) for the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to provide the student with an appropriate educational program from April 4, 2016, through May 2, 2016. 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**

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, the evidence in the hearing record reflects that the student has received a diagnosis of Trisomy X, also known as triple X Syndrome, and received speech-language therapy, occupational therapy (OT), and physical therapy (PT) through the Early Intervention Program, and OT and PT through the Committee on Preschool Special Education (CPSE), until the CPSE

declassified the student in March 2013, effective June 2013 (Parent Exs. 1 at pp. 1, 8; 5 at pp. 4, 11; 41 at pp. 1-2; 51 at pp. 10, 13, 16, 24; 75 at p. 1; Dist. Ex. 3 at pp. 1-3).<sup>1</sup>

On October 30, 2014, the student was referred to a child study team by her first-grade teacher due to concerns relating to reading, writing, language, and social/emotional skills, sensory and behavioral needs, and decreased food intake at school (Dist. Exs. 23; 24).<sup>2</sup> Subsequently, the student's teacher referred the student for a "follow-up" child study team meeting, which took place on April 29, 2015, to address the student's challenges with unstructured free time (Dist. Ex. 25 at p. 1).

Between September and December of the student's 2015-16 school year, the student's mother communicated with the school psychologist and the student's teacher about the student's social and sensory-related needs, her progress in the area of reading, and her transition into the second grade, as well as about plans to have the student evaluated (see Tr. pp. 155-57, 436-37, 1923-28; Parent Ex. 74 at pp. 161-75; Dist. Ex. 29).

The parents referred the student to the CSE on January 19, 2016, due to their concerns regarding the student's emerging signs of anxiety and language processing deficits (Dist. Ex. 6 at p. 1). The district conducted a number of evaluations of the student and, on March 31, 2016, the CSE convened and found the student eligible for special education as a student with a speech or language impairment (Dist. Ex. 16 at p. 1, 5; see Parent Exs. 61; 67; Dist. Exs. 8-14).<sup>3,4</sup> The March 2016 CSE recommended that the student attend a general education classroom for the remainder of the 2015-16 school year and receive related services of OT twice weekly in a small group, speech-language therapy once weekly in a small group, and speech-language therapy once weekly on an individual basis, as well as a number of classroom accommodations (Dist. Ex. 16 at pp. 1, 12-13). The March 2016 IEP indicated that the recommended program would be implemented for the remainder of the 2015-16 school year, and then would "roll over to the 2016-2017 school year with some minor changes," including additional annual goals, four sessions of resource room per week, and one OT consult per month in place of one of the OT sessions (id. at pp. 1, 3).

The March 2016 CSE meeting also resulted in an IEP with an implementation date of September 7, 2016 (Dist. Ex. 21). The IEP for the 2016-17 school year reflected the March 2016

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<sup>1</sup> In addition, a team convened on the same day the student was declassified from special education and determined that the student did not meet the criteria to receive accommodations under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (Parent Ex. 16; see Dist. Ex. 3 at p. 1).

<sup>2</sup> The hearing record indicates that a child study team consisted of school personnel who met on a weekly basis to discuss teacher concerns about specific students, including the principal or assistant principal, a special education teacher, academic intervention support teachers, a speech-language pathologist, a school psychologist, the general education teacher, and possibly other staff who knew the student being discussed. (Tr. pp. 49-50).

<sup>3</sup> The parents also obtained private evaluations of the student, including a September 2015 sensory OT evaluation and a January 2016 speech-language evaluation (Dist. Exs. 13; 14).

<sup>4</sup> The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

CSE's recommendations for four sessions of resource room services per week and one OT consultation per month, reduced the recommendation for OT services to one session per week, and removed a speech-language annual goal (compare Dist. Ex 16, with Dist. Ex. 21).<sup>5</sup>

On May 16, 2016, the parents signed an enrollment contract with Gateway for the student's attendance during the 2016-17 school year (Parent Ex. 82).<sup>6</sup>

By letter dated August 19, 2016, the parents informed the district that the student's IEP for the 2015-16 school year "was not implemented on a consistent basis" and that the student's social/emotional functioning "deteriorate[d] substantially as a result" (Parent Ex. 36 at p. 1). The parents also indicated that they did not agree with the program recommended for the student for the 2016-17 school year and, as a result, were unilaterally placing the student at Gateway and intended to seek reimbursement from the district for the costs of the student's tuition and related expenses (id.).

### **A. Due Process Complaint Notice**

By due process complaint notice dated September 9, 2016, the parents alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2014-15, 2015-16, and 2016-17 school years (Dist. Ex. 1).

The parents alleged that the district violated its child find obligation during the 2014-15 school year, and for "the bulk of" the 2015-16 school year (Dist. Ex. 1 at p. 26). Regarding both school years, the parents alleged that the student demonstrated reading, social/emotional/behavioral, and sensory needs, which were not addressed by the district (id. at pp. 6-15).

Turning to the March 2016 CSE meeting and resulting IEPs, the parents alleged that the district failed to provide them with all the evaluations prior to the CSE meeting and that the CSE predetermined the student's services for the 2016-17 school year (Dist. Ex. 1 at pp. 22-24). The parents also asserted that the CSE meeting summary inaccurately indicated that the student's teachers had not raised academic concerns (id. at p. 24). The parents further alleged that the district denied the student with a FAPE for the 2015-16 and 2016-17 school years because the March 2016 IEPs failed to provide for an appropriate program (id. at p. 27). Finally, the parents asserted that the district failed to consistently implement the March 2016 IEP during the 2015-16 school year, and that the district failed to address the student's continued deterioration in social/emotional functioning after the IEP went into effect (id. at pp. 24-25).

As a remedy, the parents requested the district reimburse them for the cost of private speech-language therapy and OT evaluations and privately-obtained speech-language therapy

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<sup>5</sup> Despite the indication in the IEP developed for the remainder of the 2015-16 school year, the IEP developed for the 2016-17 school year did not include additional annual goals (compare Dist. Ex. 16 at pp. 3, 11-12, with Dist. Ex. 21 at pp. 11-12).

<sup>6</sup> Gateway has 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).

sessions, pragmatic language and social skills instruction, and weekly OT sessions (Dist. Ex. 1 at p. 27). The parents further requested that the district reimburse them for the costs of the student's attendance at Gateway for the 2016-17 school year (id.).

## **B. Impartial Hearing Officer Decision**

After a prehearing conference held on October 17, 2016, the parties proceeded to an impartial hearing on November 18, 2016, which concluded on March 17, 2017, after ten days of proceedings (see Tr. pp. 1-2012; IHO Ex. I). As a preliminary matter, the IHO found that, to the extent the parents' claims arose prior to September 2014, they were outside of the limitations period and that there was no basis to apply an exception to the statute of limitations, barring any child find claim that the parents may have had for the 2013-14 school year (id. at pp. 33-35).

With respect to the district's child find obligations, the IHO viewed the 2014-15 and 2015-16 school years together, and concluded that the district did not fail to meet those obligations (IHO Decision at pp. 35-44). The IHO next found that the March 2016 CSE reviewed the available evaluative information during the CSE meeting (id. at p. 26). Turning to the student's IEP for the remainder of the 2015-16 school year, the IHO found that the annual goals and program modifications recommended by the CSE were appropriate and offered the student a FAPE (id. at pp. 20, 22-25). The IHO also concluded that the student's IEP for the 2016-17 school year offered the student a FAPE (id. at pp. 29-33). The IHO found that the IEP thoroughly described the student's needs and recommended appropriate goals and accommodations (id. at pp. 30-31). The IHO found that the failure of the IEP to include academic goals as agreed upon at the CSE meeting constituted a procedural violation; however, the IHO went on to find that the IEP provided sufficient detail on the student's academic needs (id. at pp. 31-33). The IHO further concluded that the addition of resource room services to address the student's needs for the 2016-17 school year made the IEP appropriate (id. at p. 32).

Next, the IHO determined that the district failed to implement the student's IEP for the first month it was in effect during the 2015-16 school year (IHO Decision at pp. 27-28). Specifically, the IHO found that the district failed to provide the student with individual speech-language therapy and failed to provide make-up services (id. at p. 27). Accordingly, the IHO found that this constituted a procedural violation that denied the student a FAPE, and awarded the parents reimbursement for four sessions of privately-obtained individual speech-language therapy services as compensatory education (id. at pp. 28, 45).

The IHO denied the parent's request for tuition reimbursement and other remaining requests for relief (IHO Decision at pp. 44-46).<sup>7</sup>

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<sup>7</sup> With respect to the parents' request for reimbursement of the privately-obtained speech-language evaluation, the IHO found that the parents were not entitled to this relief because the district offered to conduct a speech-language evaluation for the student and that the parents declined this offer and instead obtained a private evaluation without informing the district that they wanted it to pay for the evaluation (IHO Decision at pp. 44-45).

#### **IV. Appeal for State-Level Review**

The parents appeal and allege that the IHO misinterpreted the parents' claim that the district predetermined the student's ineligibility for special education as a section 504 claim. The parents assert that the district denied the student a FAPE by predetermining that the student was ineligible for special education. The parents next allege that the IHO improperly failed to analyze the parents' claims arising prior to September 2014, in that the IHO should have applied an exception to the statute of limitations because the district withheld information and made misrepresentations to the parents.

Turning to their child find claims, the parents allege that the IHO erred when she found that the district did not violate its child find obligations for any of the years at issue. The parents argue that the IHO improperly relied on the student's grades to determine that she did not require an IEP. The parents next assert that the IHO erred in finding that the district was not required to conduct a functional behavioral assessment and ruled that the student's social deficits did not interfere with her learning or the learning of the other children in the classroom. The parents also allege that the IHO ignored evidence indicating that the district's child find policies violated federal and State law.

The parents allege that the district failed to provide the student with a FAPE for the 2015-16 school year, and specifically assert that the goals on the March 2016 IEP for the remainder of the 2015-16 school year were not appropriate. The parents also assert that the district failed to implement the March 2016 IEP during the 2015-16 school year.

Regarding the creation of the student's IEP for the 2016-17 school year, the parents allege that they were not allowed to meaningfully participate in the development of the student's educational program and the district did not provide the IEP to them until after the beginning of the 2016-17 school year. The parents assert that the IHO found that the district committed multiple procedural violations, including the failure to include academic goals or testing accommodations on the 2016-17 IEP, which cumulatively resulted in a denial of a FAPE. The parents go on to allege that the district failed to offer an appropriate program for the 2016-17 school year. The parents argue that the 2016-17 IEP inappropriately carried over the goals from the 2015-16 school year, and "failed to offer active critical instruction, active carryover, and activities that take place in real time."

As relief, the parents request reimbursement for the costs of the student's tuition at Gateway for the 2016-17 school year and privately-obtained speech-language services.

In an answer and cross-appeal, the district responds to the request for review by generally denying the parents' allegations. The district also alleges that the parents raise multiple issues for the first time in their request for relief, which were not raised in the parents' due process complaint notice. In a cross-appeal, the district asserts that the IHO erred in finding that it denied the student a FAPE for failing to implement the student's IEP during the 2015-16 school year. The district alleges that it substantially implemented the student's March 2016 IEP, and that the four-week delay in providing individual speech-language therapy constituted a de minimis delay.

In an answer to the cross-appeal, the parents assert that the district's cross-appeal should be dismissed because the district failed to provide notice of its intention to cross-appeal in accordance with State regulations.

## **V. Discussion—Timeliness of the Request for Review**

Upon review, 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 request for review and other supporting documents 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 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 a Student with a Disability*, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service 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 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 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 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 upon the district]). 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]).

In this case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated June 10, 2017 (IHO Decision at p. 46). The parents were, therefore, required to personally serve the request for review upon the district no later than July 20, 2017 (8 NYCRR 279.4[a]). However, the request for review was first served upon counsel for the district by email on July 24, 2017, and by certified mail on July 25, 2017 (*see* Parent Aff. of Service). Furthermore, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown, the reasons for the failure must be set forth in the request for review (*see* 8 NYCRR 279.13). In

this case, the parents failed to assert good cause—or any cause whatsoever—in their request for review for the failure to timely initiate the appeal.<sup>8, 9</sup>

Accordingly, no good cause has been asserted or found to excuse the untimely service of the request for review on 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]; 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 [Feb. 28, 2006]). Consequently, the parents failed to comply with State regulations regarding service of a request for review, and the request for review is therefore dismissed (8 NYCRR 279.4[a]; 279.13).

Generally, a cross-appeal is considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]). The district's cross-appeal is, accordingly, also dismissed (Application of a Child with a Disability, Appeal No. 05-078).

## VII. Conclusion

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
September 14, 2017

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**

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<sup>8</sup> In a request for an extension of time to file the request for review, dated July 14, 2017, the parents mistakenly referenced the date of the IHO's decision as June 12, 2017, and the deadline for filing the request for review as July 24, 2017. No explanation for this mistake is provided in the record.

<sup>9</sup> In addition, while not relied on as a basis for dismissal, the request for review was verified by counsel for the parents; the practice regulations provide that "[t]he request for review shall be verified by the oath of at least one of the petitioners," and do not contain a provision permitting verification by counsel for the parents (8 NYCRR 279.7[b]). Counsel is cautioned to ensure that future submissions are verified in accordance with State regulation.