The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 18-008

Application of a STUDENT WITH A DISABILITY, by his 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

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 awarded the parents tuition reimbursement for the cost of their son's tuition at Fusion Academy (Fusion) for the 2017-18 school year and reduced the award by 50 percent based on equitable considerations. 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

Due to the disposition of this appeal on procedural grounds, a full recitation of the student's educational history is unnecessary. Briefly, the limited hearing record in this matter reflects that the student was classified as a student with an orthopedic impairment and found eligible for special education and related services as early as the 2005-06 and 2006-07 school years (see Parent Exs. A at p. 1; B at p. 1).[1]

[1] While the IEPs note the student's classification and eligibility for related services, the hearing record shows that the 2005-06 IEP was created as a result of a CSE review and requested review, and that the CSE modified the student's then existing IEP (Parent Ex. B at p. 2). It is not clear from the record when the student was first found eligible for special education and related services; however, the student was listed as a first-grader on the May 2, 2005 IEP (id. at p. 1). It is also not clear from the record when the district last drafted an IEP for the student. Counsel for the district suggested during the hearing that an IEP may have been created in 2008 and 2009; however, the parents indicated that the last IEP they received was the one for the 2006-07 school year (Tr. pp. 51-53).

The hearing record is not developed as to where the student was educated over the past ten years, the student's need for special education, or the types of services and supports the student received over that time. However, the student's unofficial high school transcript from Fusion indicated that he began taking classes at Fusion during the 2013-14 school year and continued to take classes at Fusion through the 2016-17 school year (Parent Ex. E). In addition, pursuant to a stipulation of agreement, the district agreed to pay for the cost of the student's tuition at Fusion via direct funding for the 2015-16 school year (Parent Ex. D).

In a letter dated April 19, 2017, the parents notified the district of their intent to unilaterally place the student at Fusion for the 2017-18 school year (Dist. Ex. 1). The parents noted that the district had failed to create an IEP for the student for more than six years (id. at p. 2). On April 21, 2017, the district responded to the parents' letter by asserting that the parents' letter was premature because the 2017-18 school year did not start until September 1 for a 10-month student (Dist. Ex. 2). In an exchange of emails in May 2017, the district contacted the parents to schedule an evaluation of the student and the parents indicated that they did not want an evaluation conducted at that time—asserting that the district's attempt to evaluate the student was untimely (Dist. Ex. 4).

A. Due Process Complaint Notice

In a due process complaint notice dated August 8, 2017, the parents requested an impartial hearing, asserting that the district denied the student education and never updated the student's IEP (Parent Ex. H at p. 1). The parents demanded that the district continue to fund the student's education at Fusion as they had done for prior school years so that the student could graduate "without further delay" (id.).

B. Impartial Hearing Officer Decision

In an email dated September 14, 2017, the parents requested that the IHO issue a decision on pendency directing the district to fund the student's placement at Fusion (IHO Ex. I at p. 6). On September 20, 2017, the IHO denied the parents' request during a telephone conference and noted that the issue of pendency would be determined at the impartial hearing (see IHO Decision at p. 8).[2]

An impartial hearing convened and concluded on October 6, 2017 (Tr. pp. 1-298). In a decision dated November 9, 2017, the IHO determined that there was no basis for the issuance of a decision on pendency directing the district to fund the student's education at Fusion during the course of the proceedings, that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that the parents met their burden with respect to the appropriateness of Fusion as a unilateral placement, and that equitable considerations required a 50 percent reduction in the award of tuition reimbursement (IHO Decision at p. 8).

The IHO determined that the district incorrectly treated the parents' April 2017 letter as a request for an initial evaluation, rather than as a 10-day letter "sent on behalf of an IDEA-classified

[2] The IHO is reminded that, as a part of the impartial hearing, a copy of a transcript or written summary of the conference (or prehearing conference) call should have been entered into the hearing record (see 8 NYCRR 200.5 [j][3][v], [xi]).

student" who had not been declassified (IHO Decision at p. 8). The IHO further found that, as no IEP had been developed for the student for the 2017-18 school year, the district failed to offer the student "any educational program" for the school year and therefore did not offer the student a FAPE (id. at p. 9).

With respect to the appropriateness of the educational program at Fusion, the IHO determined that the minimal evidence in the hearing record was sufficient to meet the parent's burden of proof (IHO Decision at p. 9). Specifically, the IHO noted the student's completion of a number of courses, high grades, and Fusion's provision of 1:1 instruction (id.). The IHO further found that the fact that the student only attended Fusion for several weeks during summer 2017 did not make it an inappropriate placement (id.).

With respect to the issue of whether the equities supported an order of reimbursement, the IHO found fault with both parties (IHO Decision at pp. 9-10). The IHO determined that the district's attempt to evaluate the student was inadequate (id. at p. 9). However, the IHO also found that the parents' reaction to the district's "limited offer" to evaluate the student contributed to the lack of an evaluation and development of an IEP (id. at p. 10). Weighing these considerations, the IHO reduced the award of tuition reimbursement by 50 percent (id.).

The IHO also found that the student's mother's testimony was insufficient to show that the parents could not pay the student's tuition at Fusion, and thus declined to award direct funding of the student's tuition at Fusion (IHO Decision at p. 10). The IHO ordered the district to reimburse the parents 50 percent of the student's tuition, up to $40,000, upon presentment of proof of payment (id.).

IV. Appeal for State-Level Review

On December 21, 2017, the parents served, via facsimile, a notice of request for review on the district's CSE (see Req. for Rev.).[3] The affidavit of service was notarized on January 22, 2018.

In their request for review, the parents assert that the IHO erred by not rendering a decision on pendency, and finding that equitable considerations supported a 50 percent reduction in the tuition reimbursement award.

On January 25, 2018, the Office of State Review received the parents' request for review, and in a letter dated January 26, 2018, requested a copy of the hearing record from the district. The hearing record was received from the district on February 5, 2018. The district has not filed an answer.

V. Discussion

A. Timeliness of Appeal

As 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

[3] The notice of intention to seek review and case information statement is dated December 7, 2017; however, there is no proof of service of the notice of intention to seek review.

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's 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 Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; 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]).

The parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO rendered his decision on November 9, 2017 (IHO Decision at p. 10). The parents were therefore required to serve the request for review on the district no later than December 19, 2017, 40 days from the date of the IHO decision. The parents' affidavit of service indicates that the parents served the district by facsimile on December 22, 2017. Accordingly, the request for review was untimely.

In their request for review, the parents acknowledge that the IHO Decision was dated November 9, 2017 and assert that they received it on November 10, 2017 (Req. for Rev. at p. 1).[4] 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 email—for purposes of calculating the timelines for serving a petition (see 8 NYCRR 279.2[b], [c]; Application of the Board of Educ., Appeal No. 17-100; Application of a Student with a Disability, Appeal No. 16-029). 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. Nevertheless, even counting from the date of transmittal, the last date for service of a request for review would have been December 20, 2017, and accordingly, the parents' service of the request for review on December 22, 2017 would still have been untimely.

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 (8 NYCRR 279.13). Circumstances that constitute good cause for late filing could include postal service error, or other events that the filing party had no control over (Grenon

[4] Although the document is a request for review, it is labeled as an affidavit (see Req. for Rev. at p. 1).

v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]). Here, the parents have failed to assert good cause—or any reason whatsoever—in their request for review for the failure to timely initiate the appeal, and in fact acknowledged the correct date of the IHO Decision in their request for review.

In addition, the affidavit of service accompanied with the request for review indicates that the request for review was served on the district via electronic mail. In this instance, there is no indication that the district agreed to accept service via electronic means and the district has not appeared in this matter. Personal service of a request for review on a respondent is required and may only be waived under certain circumstances (8 NYCRR 279.1[a]; see Application of the Bd. of Educ., Appeal No. 12-207; Application of the New York City Dep't of Educ., Appeal No. 12-120). Further, personal service of a request for review upon a school district must be made by delivering a copy of the request for review to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service (8 NYCR 279.4[b]). The parents did not serve the request for review on any of designated recipients of service. Accordingly, even if the request for review were timely served, it does not appear that service was proper and dismissal of the request for review for lack of proper service would be necessary.

Accordingly, because the parents failed to properly initiate the appeal by effectuating timely service upon the district, and there is no basis on which to excuse the untimely personal service of the request for review on the district, the appeal is 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., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; 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 [S.D.N.Y. Feb. 28, 2006]).

VI. 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**
February 23, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER