The University of the State of New York

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

No. 18-052

Application of the BOARD OF EDUCATION OF THE MOUNT VERNON CITY 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:
Law Offices of Douglas A. Spencer, PLLC, attorneys for petitioner, by Douglas A. Spencer, Esq.

Cuddy Law Firm, PLLC, attorneys for respondent, by Andrew Weisfeld, 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. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the special education and related services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2016-17 and 2017-18 school years was not appropriate and ordered, among other things, the district to provide compensatory education services. 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 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

A full recitation of the student's educational history is unnecessary due to the disposition of this appeal on procedural grounds. Briefly, the hearing record reflects that the student was classified as a student with a speech or language impairment as early as the 2007-08 school year (Parent Exs. B at p. 1; JJ at p.1). Significant aspects of the record are set forth below.

On May 20, 2014, a CSE convened for an annual review and to develop the student's special education programing for the 2014-15 school year (Dist. Ex. 1 at p.1). The May 2014 CSE determined that the student continued to be eligible for special education as a student with a speech or language impairment and recommended a 12:1+2 special class with related services of speech-

language therapy in a 5:1 small group, and individual counseling (id. at p. 1).[1] On September 3, 2014, the student's IEP for the 2014-2015 school year was amended, without a CSE meeting, to recommend a 15:1 special class because the parent disagreed with the May 2014 recommendation for a 12:1+2 special class (Parent Ex. H at 7; Dist. Ex. 2 at p.1).[2]

The CSE convened on January 21, 2015 for a manifestation determination due to accumulated days the student was out of school due to suspensions (Dist. Ex. 3 at p. 1). The CSE chairperson determined that there was "not a nexus between the student's disability and the student's suspensions" (id.). The CSE also reviewed the results of a speech-language and a psychoeducational evaluation completed in September 2014 and recommended that a functional behavioral assessment (FBA) be conducted to identify behaviors to target for a behavioral intervention plan (BIP) (Parent Ex. I at p. 1; Dist. Ex. 3 at pp. 2-3; see Dist. Exs. 17-18). The CSE reconvened on March 19, 2015 to review the results of evaluations, including the district's September 2014 evaluation of the student and private evaluations of the student conducted in January 2015, which showed a "very significant decline" in the student's IQ score, at which time the CSE recommended changing the student's placement to a 15:1 special class with a life skills program (Tr. p. 166; Parent Ex. I at pp. 1, 3-6; see Parent Ex. G at pp. 2-3).[3] However, the life skills program recommendation was not implemented (Tr. pp. 193-94).

On May 8, 2015, a CSE convened for an annual review of the student's program for the 2015-16 school year (Parent Ex. J at p. 1). The May 2015 CSE recommended that the student be placed in a 15:1 special class and receive related services of speech-language therapy in a 3:1 small group, and individual counseling (id. at p. 1).[4] On January 11, 2016, the student's program for the 2015-2016 school year was amended, without a CSE meeting, to change the student's placement to home instruction for "safety reasons" at the request of the parent (Dist. Ex. 6 at p. 1).[5]

On July 13, 2016, a CSE convened for an annual review of the student's programing and to develop an IEP for the 2016-17 school year (Dist. Ex. 10 at p. 1). During the July 2016 CSE meeting the parent indicated interest in pursuing an out-of-district program (id.) The July 2016 CSE recommended placement in a 15:1 special class with the related services of individual speech-language therapy, counseling in a small group, and individual counseling (id.). In September 2016,

[1] The recommended placement was at the student's home public school (Dist. Ex. 1 at p. 11).

[2] The student's related services for the 2014-15 school year remained the same.

[3] There are duplicate exhibits in the hearing record (compare Dist. Exs. 4; 5 with Parent Exs. I; J). The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). The IHO is also reminded of his obligation to exclude from the hearing record any evidence he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Unless otherwise specified, where exhibits are duplicated, the corresponding parent exhibit will be cited.

[4] The CSE noted that the "parent wanted further clarification on the Life Skills program and diploma options" however, "[b]ased on the teacher report, parent discussion, [and] committee discussion, the student has turn[ed] around, he is attending classes and participating in the class discussions" so the CSE determined that the student would remain in a 15:1 special class (id.).

[5] The resultant IEP contained allegations that the student was bullied by members of a gang.

the CSE reconvened at the parent's request, and although the student's resulting IEP suggested that the student would transition from home instruction to a school-based program under a re-entry plan, the student remained on home instruction through June 2017 (Parent Exs. L at pp. 1-2; M at pp. 1-2; Dist. Ex. 12 at pp. 1-2). The CSE amended the student's IEP without a meeting in January 2017 to note the home instruction aspects of the student's programming (Parent Ex. M at p. 1).

On May 16, 2017, a CSE convened for an annual review of the student's programing for the 2017-18 school year (Dist. Ex. 13 at p.1). The May 2017 CSE determined that the student continued to be eligible for special education and recommended a dual program of home instruction for core classes and in-school instruction for electives and vocational training, including consultant teacher services, a 15:1 special class, and related services of individual speech-language therapy, counseling in a small group, and individual counseling (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 9, 2017, the parent requested an impartial hearing alleging that the district procedurally and substantively failed to offer the student a free appropriate public education (FAPE) for the 2014-15, 2015-16, 2016-17, and 2017-18 school years (Parent Ex. A at p. 2). The parent alleged that the CSE failed to conduct timely and comprehensive evaluations, denied her the right to meaningfully participate in the decision making process pertaining to the student's education, and failed to hold timely and compliant annual review meetings (id. at pp. 10-12). The parent also alleged that the IEPs for those years failed to appropriately identify the student's present levels of performance, did not contain academic goals to allow for progress, and failed to appropriately address the student's behavioral needs, including failing to conduct an FBA and develop a BIP and not recommending appropriate counseling (id. at pp. 12-13). The parent further claimed that the district failed to provide an appropriate educational placement, failed to recommend and provide appropriate related services, and failed to include appropriate research-based methodologies in the student's IEPs (id. at pp. 11-12).

As relief, the parent sought an interim order for an independent educational evaluation (IEE) in all areas of need, including neuropsychological, speech-language, assistive technology/augmentative and alternative communication, and occupational therapy (OT) evaluations (Parent Ex. A at pp. 13-14). The parent also requested an FBA and corresponding BIP (id. at 13). In addition, the parent requested an order directing the CSE to reconvene to review the results of the IEE and create an appropriate IEP, as well as an order directing "the District to immediately place the student in an appropriate nonpublic or out-of-district placement in accordance with the recommendations of the independent evaluators" (id. at p. 14). Further, the parent requested compensatory education in areas including academics, OT, speech-language therapy, behavioral, social/emotional, and counseling for at least a three-year period (id. at p. 15). Lastly, the parent sought an order that the district provide attendance records for all related service sessions for the 2014-15, 2015-16, and 2016-17 school years, transportation funding, and district funding of the IEE (id. at pp. 13, 15).

B. Impartial Hearing Officer Decision

An IHO was appointed and a prehearing telephone conference was held on September 19, 2017, during which the parties discussed the student's pendency (Tr. pp. 1-39). The IHO issued

an interim decision regarding the student's pendency (stay put) placement, dated September 22, 2017, finding that the January 2017 IEP was the student's last agreed upon placement, and directed that the educational programing outlined in the January 2017 IEP be implemented at a specific district school (Interim IHO Decision at pp. 7-8).

The impartial hearing continued on October 11, 2017 and concluded on March 5, 2018, after nine days of proceedings (see Tr. pp. 40-1539). In a decision dated March 23, 2018, the IHO found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years (IHO Decision at pp. 25-26).[6] More specifically, the IHO found that after district evaluations "raised a question regarding whether the 2014-2015 testing accurately measured a cognitive skill decline of 30-plus points," the district failed to evaluate the student further (id. at p. 25). The IHO further found that the district "should have then re-evaluated the Student's speech/language deficits to accurately understand his needs to develop appropriate goals in subsequent IEPs" (id. at pp. 25-26). Next, the IHO found that "multiple instances when the District developed IEPs for the Student on the singular ground that the Student had passing grades and passed Regents examinations - while on one-to-one home instruction was flawed because the District did not adequately consider[] the Student's need for a smaller class" namely, "smaller than 15:1 Regents track class" (id. at p. 26). For the 2017-18 school year, the IHO found that the CSE's decision to change the student's goals to 12th grade material without more individual support, was based solely on teacher reports, and consequently the goals were not individualized to the student or supported by adequate evaluation data; noting that goals assigned based on a student's expected grade level are procedurally deficient (id.).

The IHO found no evidence in the record to support the parent's claim that the district failed to conduct timely and complete CSE meetings, noting that the district, at times, held multiple meetings to attempt to address the parent's concerns (IHO Decision at p. 27). With respect to the parent's claim that she was denied the right to meaningfully participate in the decision making process regarding the student's education, the IHO found that although the district's failure to conduct evaluations deprived the parent of information needed to participate in the CSE process, there was no basis to conclude that the district failed to provide educational documents prior to, or during, CSE meetings, or failed to explain evaluation and testing results (id.). The IHO also found that the district was not required to conduct an FBA of the student, noting that the parent declined consent when the CSE considered conducting an FBA in January 2015 (id.). Further, the IHO found that "evidence of non-delivery" of allegedly missed related services "is absent from the record" and further found that he did not have jurisdiction to order production of the related services records requested by the parent (id.). Finally, the IHO dismissed the parent's request for reimbursement for the IEEs (id. at p. 30).

For relief, the IHO ordered the CSE to reconvene within 30 days to review the student's educational programing and the reports from the private neuropsychological, speech-language, and OT evaluations conducted during the hearing, and to further provide an appropriate program in a class of "no more than eight students" (IHO Decision at p. 30). The IHO determined that "the [s]tudent is entitled to compensatory education services for denial of FAPE" and ordered the

[6] The IHO found that the "two-year statute of limitations bars adjudication of the appropriateness of the 2014-15 IEP" under 8 NYCRR 200.5(j)(1)(i) (IHO Decision at p.4). The IHO also found that the parent's claim for relief "for the CSE's May 8, 2015 decision for the [s]tudent's 2015-16 school year" is also "dismissed as barred by the two-year statute of limitations" (id. at p. 29).

district to provide "the full 690 hours" described in the July 2017 Huntington Learning Center report, at a rate of $85.00 per hour at public expense, between the date of the IHO's decision and the student's 21st birthday (IHO Decision at p. 30).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding the student was denied a FAPE for the 2016-17 and 2017-18 school years. The district alleges that the IHO erred in finding that the district failed to properly evaluate the student. The district further asserts that the IHO's finding that the district did not conduct additional testing is also incorrect because, following the 2014 assessment and "discovery of the testing anomaly" the district contracted with BOCES to evaluate the student. The district also states that it sought consent from the parent to reevaluate the student—to conduct psychoeducational, speech-language, and OT evaluations prior to the beginning of the 2017-18 school year—but the parent refused to provide consent. The district asserts that at no point did the CSE rely merely on the student's academic performance.

The district also asserts that the IHO erred in allowing, and relying on, information that was not available to the CSE, specifically the testimony and evaluative reports and recommendations from the parent's private clinicians. The district argues that, as the clinicians did more than "simply seek to clarify or explain the services outlined on the student's IEP," this represented prohibited "retrospective" evidence regarding services not listed in the IEP, which may not be used to challenge the appropriateness of an IEP. Lastly, the district alleges that the IHO erred in awarding compensatory education services as the IHO did not consider the progress the student was making in the district program and that the July 2017 Huntington Learning Center report relied on by the IHO was flawed for several reasons.

The parent has not submitted an answer to the request for review.

V. Applicable Standards

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'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]). 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]).

VI. Discussion

In this proceeding, the district's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review, as the district failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated March 23, 2018 (IHO Decision at p. 30).[7] The district was therefore required to serve the request for review on the parent no later than May 2, 2018, 40 days from the date of the IHO decision (8 NYCRR 279.4[a]). The district's affidavit of service indicates that the district served the parent on May 5, 2018.[8] Accordingly, the request for review is untimely. 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 instance, the district failed to assert good cause—or any cause whatsoever—in its request for review for the failure to timely initiate the appeal of the IHO's decision.

Accordingly, no good cause has been asserted or found to excuse the untimely service of the request for review on the parent (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 district 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).

[7] The request for review acknowledges that the IHO Decision is dated March 23, 2018; however, it also indicates that the IHO Decision was delivered to the parties via electronic mail on March 26, 2018 (Req. for Rev. ¶¶ 1, 2). 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 in this case the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a request for review (see 8 NYCRR 279.4[a]; Application of the Bd. of Educ., Appeal No. 16-074; 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 request for review is timely.

[8] The district served the father, rather than the mother who filed the due process complaint notice in this proceeding.

VII. Conclusion

Having found that the request for review must be dismissed because the district failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
June 4, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER