The University of the State of New York

The State Education Department
State Review Officer
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No. 19-043

Application of a STUDENT WITH A DISABILITY, by her parent, 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:
Cuddy Law Firm PLLC, attorneys for petitioner, by Mark Gutman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which ordered that the student be placed in a day treatment program beginning in the 2019-20 school year. The district cross-appeals from that portion of the IHO's decision which ordered the district to provide the student with assistive technology and training. 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, parent, 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 parent 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 parent 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. Procedural History

A. Due Process Complaint Notice

The parent initiated the instant administrative due process proceeding by filing a due process complaint notice dated February 12, 2018 (Parent Ex. A at p. 1). The parent raised concerns about the adequacy of the CSE process and the substantive appropriateness of student's March 2016, July 2016, and June 2017 IEPs and asserted that the district failed to provide the

student with a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see id. at pp. 8-12).[1] As relevant here, the parent claimed that the district should fund an appropriate placement to address the student's "serious behavioral and emotional needs, such as a residential placement" that would provide the student with individualized instruction and address her needs on a 24-hour basis (see id. at p. 13).

B. Impartial Hearing and Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing on March 16, 2018 and concluded on January 10, 2019, after eight days of proceedings (see Tr. pp. 1-1298).

In an interim order dated May 3, 2018, the IHO ordered that the following evaluations be completed: a neuropsychological evaluation, a speech-language evaluation, an assistive technology (AT) evaluation, an OT evaluation, a functional behavior assessment (FBA), and a vocational assessment (May 3, 2018 Interim IHO Decision at pp. 2-3). The IHO also ordered that, upon receipt of the evaluations, the CSE should convene and conduct an IEP meeting within two weeks of the parent's submission of the last completed evaluation (id. at p. 3).

With respect to the student's educational history, the resulting evidentiary record developed by the parties and IHO showed that the student had been born prematurely and as an infant exhibited global neurodevelopmental delays (Parent Exs. L at pp. 1; NN at p. 3). She received speech-language, occupational and physical therapies through the Early Intervention Program and attended a special education preschool (Parent Ex. LL). The student has received special education services continuously since that time (Parent Exs. L at p. 1; LL at p. 2; NN at p. 3).[2]

The hearing record in this proceeding shows that the parent previously filed another due process complaint notice in January 2016 seeking a residential placement for the student due to her aggressive behaviors (Tr. pp. 1221, 1224; Parent Ex. DD at p. 2). As a result of the parent's January 2016 due process complaint notice, an impartial hearing took place in May 2016 (Parent Ex. EE). By interim decision dated May 26, 2016 the IHO noted a dichotomy in the parties' perception of the student's behavior and ordered that a "Board Certified Neutral Evaluator visit the child in the home and school to determine if there [wa]s a significant difference in both venues, the causes . . . of the difference, possible remedies and finally . . . whether th[e] child require[d]

[1] The parent generally raised claims with respect to the following: the district failed to evaluate the student in all areas of suspected disability and failed to respond to the parent's request for IEEs, and the district did not allow the parent to meaningfully participate at the CSE meetings; with respect to the March 2016, July 2016 and June 2017 IEPs, the district failed to include appropriate present levels of educational performance, the district did not develop meaningful and appropriate goals, the district failed to consider whether the student required an extended school day to progress, the district failed to recommend appropriate related services, the district failed to address the student's behavioral needs, and the district failed to recommend an appropriate placement (see Parent Ex. A at pp. 8-12).

[2] The student has received diagnoses of cerebral palsy, attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), pervasive developmental disorder (PDD), autism spectrum disorder with accompanying intellectual and language impairment; intermittent explosive disorder (IED),unspecified impulse control disorder and bipolar disorder (Parent Exs. F at p. 3; G at p. 3; L at pp. 1, 3; M at p. 1; X at p. 1; NN at p. 19).

placement in a residential program" (id. at p. 2). For the purposes of the assessment, a board-certified behavior analyst (BCBA) observed the student at home and in school June 21-26, 2016 (Parent Ex. K). Based on her observations, the BCBA concluded that the majority of the student's problem behaviors occurred during periods where structure was limited and the student was not receiving direct adult attention or when the student did not have the prerequisite skills to engage in appropriate interactions (id.at p. 5). The BCBA noted that the student was more noncompliant at home than at school (id. at p. 6). At school the staff members were firm and placed direct demands on the student and classroom behavior charts and reward schedules helped to keep the student motivated (id. at p. 5). At home family members scolded the student when she engaged in problem behaviors, which served as reinforcement in the form of attention (id.at p. 6).

After the conclusion of the 2015-16 school year, the IHO who presided over the 2016 due process proceeding issued a final determination consistent with the recommendations of the board certified behavioral analyst (BCBA) (who testified during the hearing) that the student receive 15 hours per week of applied behavior analysis (ABA) services in the home by a BCBA and a transportation paraprofessional to accompany her on the bus to and from school "in lieu of a residential placement" for the 2016-2017 school year (see Parent Ex. FF at pp. 3-4). According to the IHO who presided over the 2016 due process proceeding, the BCBA who conducted the evaluation believed that a residential placement "might be detrimental" at that time (id. at p. 3).

For the 2016-17 and 2017-18 school years the student continued to attend school in the district and was placed in a 12:1+1 special class and received related services of speech-language therapy, occupational therapy, and counseling (Parent Exs. F at p. 10; G at p. 10; H at pp. 8-9). In and around this time she exhibited moderately delayed (impaired) intellectual skills and functioned below grade level in all subject areas (kindergarten instructional level) (Parents Exs. E at p. 2; F at pp. 2, 12; G at pp. 2, 13; H at pp. 2, 11; Q; R). The student also presented with "severe" delays in behavior/emotional development (Parent Ex. F at p. 2; G at p. 2; see Parent Ex. H at pp. 3-4). In school the student had difficulty following directions, was easily distracted, impulsive, interfered in peers' business, interrupted conversations, was verbally aggressive and grabbed peers' hair and objects (Parent Exs. H at p. 3-4; K at pp. 2, 6; M at p. 2; O at p. 1; GG at p. 1; LL at pp. 6-9, 15, 19, 21; NN at pp. 4-6, 11-12, 14-15). She was involved in several verbal and/or physical altercations on the bus and in school (Parent Exs. J at pp. 1, 3; M at p. 2; V; W; Y; Z; PP; QQ; RR). The student required frequent prompting but was easily redirected and motivated by behavioral rewards (Parent Exs. F at p. 3; H at p. 3;O at p. 1; NN at p. 14). At home the student was non-compliant, defiant, violent, physically aggressive toward family members, and destroyed property (F at pp. 2-3; G at pp. 2-3; H at p. 4; J at pp. 1, 3; K 3-5; L at p. 3; M at p. 1; X; KK at p. 1; LL at pp. 9-11, 15-16; 18-19; NN at pp. 4, 12, 14). The student was hospitalized on several occasions due to her aggressive behavior in the home (Parent Exs. F at p. 3; L at p. 1; M at p. 1; NN at p. 4, 16). There was general acknowledgement by the parent and professionals who worked with or evaluated the student of a discrepancy between the way the student behaved at school and the way she behaved at home, with the student engaging in more violent, destructive behavior in the home (Parent Exs. H at p. 4; K at p. 6; LL at pp. 19; NN at pp.16, 18).

In March 2018 the student participated in a diagnostic learning ability evaluation conducted by a Lindamood-Bell center (Parent Ex. R).[3] In addition, in light of the IHO's directive to conduct evaluations, the following IEE's were conducted in spring 2018: an April 4, 2018 OT evaluation, an April 5, 2018 speech-language evaluation, an April 5, 2018 assistive technology (AT) evaluation, an April 23, 2018 functional behavior assessment (FBA), an April 24, 2018 vocational assessment and a May 4, 2018 neuropsychological evaluation, (Parent Exs. II, JJ, KK, LL, MM, NN).

In a second interim decision dated July 23, 2018, the IHO stated that the parent had presented multiple witnesses whose collective opinions were based on recently conducted evaluations and each witness opined that their assessment indicated that the student was capable of learning and significantly improving ADL skills necessary for life functioning (July 23, 2018 Interim IHO Decision at p. 4). The IHO further stated that the district was not in opposition to an interim decision of services to determine if results could be achieved "sufficient to rethink its proscriptions of educational resources" (id.). The IHO ordered that the student attend Lindamood Bell tutoring for three hours a day, five days per week commencing on July 30, 2018 through "the first day of school September 2018," after which the student was to attend 10 hours per week of tutoring concluding on September 30, 2018 (id.). Further, the IHO ordered that the facility "administer the same entrance examination to the student…as was given upon initial evaluation" and that the "result[s] must be available to the [p]arties prior" to the next hearing date (id.). The IHO also ordered that speech-language therapy be provided to the student six hours per week commencing July 30, 2018 and concluding on September 30, 2018 "with a re-evaluation using the same initial exam as previously employed by the [p]arent's selected independent provider" (id.). Additionally, the IHO ordered the district to fund an independent BCBA 20 hours per week in the home between July 30, 2018 and September 30, 2018 to "address the student's multiple noncompliant issues with particular focus to the student's ADL skills" (id. at pp. 4-5). Finally, the district was ordered to fund a MetroCard for the parent and student in order to receive the identified services (id. at p. 5).[4]

In a final decision dated March 8, 2019,[5] the IHO found that the district denied the student a FAPE for the 2016-17 and 2017-18 school years by failing to address "all the student's known

[3] The student's performance on selected subtests of various standardized tests showed that she was performing primarily at or below the first percentile on measures of academic ability (Parent Ex. R at pp. 1-3). The executive center director recommended that the student receive Lindamood-Bell instruction four hours per day, five days per week for 70-80 weeks to develop her language and literacy skills (Parent Ex. R at p. 4).

[4] In a third interim decision dated October 12, 2018 the IHO noted that it became apparent at the hearing that the July 23, 2018 interim decision which directed the speech-language provider "to re-test the student upon a certain date with the exact same instruments previously used in April 2018" was not followed; specifically, the speech provider failed to conduct the same evaluation (i.e., the entrance examination) of the student so that a comparison of raw scores could be made, and as a result the IHO ordered the district to conduct a speech-language evaluation using the "Oral and Written Language Scales-Second Edition (OWLS-II) and the Word Identification and Spelling Test (WIST) assessment tools, and provide data including scale scores and composite scores" (October 12, 2018 Interim IHO Decision at p. 3; Tr. pp. 927-954).

[5] It is noted that parent exhibits X through AA as referenced in the IHO's exhibit list differ from the parent's exhibits as marked and received by the Office of State Review, and as referenced in the hearing transcript

challenges and handicapping circumstances to enable the student to make progress" and failing to create an FBA in light of the student's "manifestations of aggression" that were known to the district (IHO Decision at p. 14). Additionally, the IHO determined that the district failed to conduct a vocational assessment and an AT evaluation (id.). Moreover, the IHO found that the district was aware of the student's lack of progress and aggressive behaviors, was cognizant that the parent had complained numerous times regarding the "lack of appropriate skills acquisition and dangerous and self-injurious conduct in the home" and failed to provide appropriate services and supports (id. at pp. 14-15).

For relief, the IHO ordered that the student be placed in a day treatment program, noting that the district was "willing to consider" such a placement at the hearing (IHO Decision at p. 15). The IHO ordered the placement to commence July 2019 for a minimum of one year (id.). The IHO also ordered the district to provide the student with 12 hours of ABA therapy per week, with additional ABA supervisory/coordination services of four hours per month, for the period of April 1, 2019 through June 2020 (id.). The IHO further ordered that ABA therapy be provided across various environments such as during school, travel, and home deportment (id.). The IHO also ordered the district to provide three hours per week of extended day (after school) speech-language therapy and two hours per week of extended day OT, in addition to those services already provided through the student's IEP (id. at p. 16). The IHO ordered the district to fund tutoring services at Lindamood Bell for four hours per week for the period of April 1, 2019 through June 2020 (id.). The IHO further ordered the district to provide the student with an AT "instrument" and training for 25 hours "according to the type of instrument" determined by the evaluator for the student's use, and three "[p]arent training sessions per month commencing April 1, 2019 [through] October 2019 provided by [a] BCBA provider" (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in failing to offer a residential placement given the recommendations of the experts and the needs of the student, including evidence that demonstrated severe behavioral issues. The parent further contends that the IHO "misunderstood and misapplied the law" with respect to residential placements and relied on statements made by the district representative about the appropriateness of a residential program rather than on witness testimony. The parent also alleges that the IHO unfairly allowed the district representative to ask several impermissibly leading questions of a witness. The parent requests that the SRO reverse the IHO's decision to place the student in a day treatment program and find that a residential placement is appropriate for the student.

Additionally, the parent makes several procedural assertions with regard to this appeal. While the IHO decision is dated March 8, 2019, the parent contends that she was not given access to the decision until April 16, 2019. The parent's request for review was subsequently served upon the district on May 22, 2019. The parent asserts that the request for review should be considered timely, however if the SRO finds the request is not timely, the SRO should find that good cause was shown to file this appeal over any objections of untimeliness given the circumstances

(compare Parent Exs. X-AA, and IHO Decision at pp. 18-21, with Tr. pp. 3, 22, 24). Any references to these exhibits herein are consistent with the parent's exhibits as marked and as referenced in the hearing transcript.

including late receipt of the IHO decision and in consideration of the "scope of the materials in this matter."

In an answer with cross appeal, the district responds to the parent's allegations with admissions and denials and argues to uphold the IHO's decision to place the student in a day treatment program. The district also agrees that the IHO decision "was sent to the [p]arties on April 16, 2019 . . . and avers that the [p]arent's [request for review] is timely based on the date on which they received the decision." The district cross appeals the IHO's order that the district provide the student with an iPad and training in AT. The district contends that the AT award should be modified "to allow for an assessment over a trial period at school" before the AT device and training is ordered.

In an answer to the district's cross appeal, the parent responds to the district's claim concerning AT and argues that the IHO's determination to grant AT services and training is supported by the record and should be affirmed.

V. Discussion

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 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.). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 18-027 [dismissing a parent' appeal for failure to timely effectuate personal service upon the district]; 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]).

In this proceeding, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO decision was dated March 8, 2019, and the

parent was thus required to serve the request for review on the district no later than April 17, 2019, 40 days from the date of the decision (8 NYCRR 279.4[a]; IHO Decision at p. 17). The affidavit of service filed with the request for review reflects that the request for review along with the notice of request for review, memorandum of law, and affidavit of verification were served on May 22, 2019.

On appeal, the parent maintains that she was "not given access to the [IHO] decision until April 16, 2019 when [she] received it from the New York City Impartial Hearing Office" (Req. for Rev. at ¶ 29).[6] Following receipt of the IHO decision, the parent asserts that she "sought clarification of the date of [the] decision" on April 19, 2019 from the Office of State Review (id. at ¶ 30). In the April 19, 2019 letter, the parent requested that "for the purposes of deadlines" for the request for review and subsequent submissions, "the 'date of decision' be deemed April 16, 2019 when counsel for the [p]arent received a copy of the IHO's decision." The district also maintains in the answer and cross-appeal that it agrees that the IHO decision was sent to the parties on April 16, 2019, and the parent's request for review "[was] timely based on the date on which they received the decision" (Answer at ¶ 20). As to the issue of timeliness, both parties misread the applicable regulation. I remind both parties that 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 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding SRO decision to dismiss appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision not from date of receipt via email or regular mail]; Application of a Student with a Disability, Appeal No. 16-029; 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;).[7] Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date upon which either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a petition for review is timely. By arguing the issue timeliness based upon receipt, both parties are essentially arguing that a party should have a 40-day period in which to prepare and serve an appeal after the date the IHO decision was received, the regulations plainly state that a request for review must be served within 40 days after the date of the IHO decision, and it is within the SRO's sole discretion whether to excuse a failure to timely seek review for good cause shown (8 NYCRR 279.4[a]; 8 NYCRR 279.13). Thus, despite their agreement, neither party has the authority to make such a determination.

[6] In the request for review the parent "seek[s] to introduce SRO Exhibit 1, the [e]mail notification of receipt of the IHO decision" (Req. for Rev. at ¶ 29). While there is no email appended to the request for review, an email dated April 16, 2019, attached to the notice of intention to seek review from the New York City Department of Education Impartial Hearing Office, states "[a]ttached please find the hearing officer's decision in the referenced matter."

[7] On January 1, 2017, 8 NYCRR Part 279 was amended, thus citing references in appeals prior to that time may have changed.

It is also notable that on April 23, 2019 the Office of State Review responded to the parent's April 19, 2019 letter request that the date of the decision be "deemed" April 16, 2019; that request was not granted by an SRO.[8] At my direction, the parent was informed by OSR staff at that time that, among other things, she must file a request for review, and if the request filed is untimely, the parent should identify good cause for her failure to timely serve and file the request for review (see Req. for Rev at ¶¶ 30-31). On appeal, the parent maintains that the "scope of the materials in this matter along with the late receipt of the final order" provides sufficient good cause (id. at ¶¶ 33-34).

While I might well have entertained a short delay in filing a late petition for review by the parent in light of the fact that the IHO decision was received much later than would be expected, it is unclear why it took the parent approximately 36 more days after receiving the IHO's decision and nearly one month after receiving the April 23, 2019 letter of the Office of State Review to serve the request for review on the district to assert the claim on appeal that the IHO's decision to place the student in a day treatment program should be reversed and it should be determined that a residential placement is appropriate for the student [Application of the Bd. of Educ., Appeal No. 12-059 [noting that a delay of nine days in serving a request for review was too long in circumstances in which a shorter delay in service might have been countenanced]. Moreover, with respect to the parent's argument concerning the size of the record, the parent has maintained the same counsel since the time of the impartial hearing.[9] As parent's counsel should already have been very familiar with this case, I find it puzzling that the size of the record presented a problem so significant that counsel required over a month to draft and serve the request for review upon the district, especially after the IHO largely ruled in favor of the parent and the only major substantive issue to identify was the IHO's decision favoring a nonpublic therapeutic day program over a residential setting.

As a result, I find that no good cause has been asserted that excuses a 36-day delay in initiating the proceeding by serving 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.,

[8] While State regulations contemplate specific extensions of the timelines to answer or reply at the request of a party (8 NYCRR 279.10[e]), the regulations work differently with respect to timeline deviations when serving a request for review, which also happens to be the key step that initiates a proceeding before an SRO and a procedural event which requires the school district to continue the student's then-current educational placement under the stay-put rule. Instead, the explicit policy set forth in State regulation involves a discretionary determination as to whether to accept an appeal that was served late for good cause shown, which provides the SRO with the opportunity to examine the request for review, the reasons for the delay in initiating the proceeding, and whatever circumstances are supported by evidence in the hearing record or additional evidence submitted by a party in support of or opposition to the request (8 NYCRR 279.13). Thus, while the opportunity to be heard continues, by design, there is no provision for an extension of the timelines for a request for review in Part 279, which is the essence of what the parent was seeking in the April 19, 2019 letter.

[9] Counsel has actually remained the same since the time that the due process complaint was filed more than one year ago (see Parent Ex. A at p. 1).

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 parent 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). Finally, to the extent the district cross-appeals the parent's request for review, I find that the cross-appeal is also untimely. While cross-appeals must be served within five days of service of the request for review, any party aggrieved by an IHO decision has 40 days from the date of that decision to appeal, and a cross-appeal that is filed following an untimely request for review is also untimely (see 8 NYCRR 279.4[a], [f]; 8 NYCRR 279.5; Application of the Bd. of Educ., Appeal No. 12-059).

As a final note, I sympathize with the parent's struggle with managing her daughter's behavior in the home environment and her viewpoint that residential placement is either the best option, or perhaps only option for the student; however, not one, but two IHO's have opined on this issue after lengthy evaluative inquires, and the need for a residential placement over a therapeutic day placement is a problematic decision to reach under IDEA in circumstances such as these. Where, as here, the student is attending school with a lesser degree of interfering behaviors and some have the viewpoint the student's educational needs can be met in a day treatment program, it is very difficult to reach a decision to resort to a more restrictive residential setting when the student's most serious behavior difficulties manifest almost exclusively at home in interactions with the student's family.[10] Simply removing the student from the home environment relieves the stress temporarily, but does little to rectify the issue.

While I am sympathetic,[11] that is not a basis to depart from my determination that the parent's appeal is untimely. Both sides in this case were provided a reasonable opportunity to be heard and the IHO took steps to develop an appropriate record upon which to base a decision, and the proceeding comported with the requirements for due process. The IHO's recommendation of a day treatment program as relief appears to be supported by evidence in the record; notably, the neuropsychologist conducting the May 2018 evaluation stated in the recommendations section of the report that the student "require[d] a small, specialized, highly structured day program" (Parent Ex. NN at p. 19). The neuropsychologist additionally noted that if a day program could not be found then a "residential placement should be considered" (id.).[12] During the hearing, the parent's

[10] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed App'x 126, 128 [2d Cir. Oct. 7, 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. Law § 4402[2][b][2]; 34 CFR 300.104; 8 NYCRR 200.6[j][1][iii][d]). In general, the Second Circuit has required objective evidence that a student cannot obtain an educational benefit in a less restrictive setting before finding that a residential placement is required by the IDEA (see M.H., 296 Fed. App'x at 128; Walczak, 142 F.3d at pp. 131-32).

[11] I believe the parents need some respite as much as the student needs a day treatment program, but that is not an IDEA issue, it is more likely a Medicaid services coordination issue.

[12] I note, however, that the IHO's basis for ordering a day treatment program in this case appeared to result more from the district's willingness "to consider a day treatment program," than any recommendations actually made for the student (IHO Decision at p. 15).

attorney also noted that the parent sought "a highly structured day program that will provide ABA instruction throughout the day;" however, if that program was not successful then the student should be placed in a residential program which could provide her with a "higher level of structure throughout the day" (Tr. p. 968). To that extent, the IHO's order of 12 hours of ABA therapy per week in addition to the student's placement in a day treatment program is consistent with the parent's request (IHO Decision at pp. 15-16). Furthermore, the IHO ordered several additional extended day services in the form of additional OT and speech-language therapy and continued tutoring services through Lindamood Bell (id. at p. 16). As a result, the relief ordered by the IHO was not only consistent with the record, but the amount of services being provided to the student is substantial. I also remind the parent that if she believes that the student is not making progress in her new day treatment program, the parent is within her rights to request a CSE meeting and/or an impartial hearing to address such concerns in the future.

As a final point, there is some indication that the provision of ABA services previously ordered may not have been effectuated. Notably, the neuropsychologist who completed the May 2018 neuropsychological evaluation testified that it was her "understanding that a couple of agencies have been involved with the family in an attempt to provide home-based ABA, and either it was not provided or the agency decided that it wasn't working and left," and so "it wasn't consistently provided, or provided for a long enough time" (Tr. pp. 815, 845; see Parent Ex. NN at pp. 16-17). She further opined that a consistent ABA program would be effective in limiting the student's "aggressive responses to frustration" (Tr. p. 815). To the extent that the neuropsychologist is referring to the services ordered as part of the previously issued July 2016 IHO decision, while SROs do not have the authority to enforce the terms of an IHO decision,[13] there are other avenues available to the parent to obtain such relief in the event the district has failed to comply with the terms of an IHO decision.

VI. Conclusion

Having found that the parent 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**
June 27, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] An SROs jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]).