The University of the State of New York

The State Education Department
State Review Officer
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No. 19-087

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 Board of Education of the North Babylon Union Free School District

Appearances:
Mitch Kessler, Esq., attorney for petitioners

Guercio & Guercio, LLP, attorneys for respondent, by Gary L. Steffanetta, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Preschool Special Education (CPSE) had recommended for their son for a portion of the 2017-18 and 2018-19 school years was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the disposition of this appeal, a full recitation of the student's educational history is not warranted. Briefly, however, the student attended a part-time 12:1+2 integrated classroom at a particular preschool location and received related services for the 2016-17 school year and the beginning of the 2017-18 school year (see Dist. Exs. 23 at pp. 1, 9-10; 32 at p. 1; 38 at p. 1).

The CPSE convened on February 12, 2018 to recommend a program and "location" change following "allegations . . . made by the parents towards the school" (Dist. Ex. 16 at pp. 1-2). The February 2018 CPSE recommended an 18:2+1 special class in an integrated setting (for 5 hours per day) at a new location with the related services of two 30-minute sessions per week each of individual speech-language therapy, occupational therapy (OT), and physical therapy (PT), as well

as one 30-minute session per week of group speech-language therapy (id. at pp. 1, 10-11). The February 2018 CPSE also continued the recommendation that the student receive one 30-minute session per week each of individual OT and speech-language therapy to be delivered by a separate agency at its facility (compare Dist. Ex. 16 at p. 11, with Dist. Ex. 23 at p. 9). The February 2018 IEP was to be implemented from March 19, 2018 through June 22, 2018 (Dist. Ex. 16 at pp. 1, 11).[1] The parents did not agree with the proposed change in location and requested home-based services "in the interim" (id. at p. 2). According to the evidence in the hearing record, the student did not attend a preschool program pursuant to the February 2018 IEP (see Tr. p. 305).[2]

On April 27, 2018, the CPSE convened to develop the student's IEP for 12-month services (Dist. Ex. 11 at p. 1). For July and August 2018, the April 2018 CPSE recommended an 18:2+1 special class in an integrated setting at the same location recommended in the February 2018 IEP with the following related services: two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, one 30-minute session per week of small group speech-language therapy, and one 30-minute session per week of individual "[s]peech [f]eeding [t]herapy" (id. at pp. 1, 11; see Dist. Ex. 16 at p. 11).[3] The parents continued to "refuse[]" the proposed location for the preschool program and "disagree[d] with the recommendations of the CPSE" (Dist. Ex. 11 at p. 1).

On June 15, 2018, the Committee on Special Education (CSE) convened to develop a program for the student's transition into kindergarten (Dist. Ex. 6 at p. 1). The CSE found the student eligible for special education as a student with an other health-impairment and recommended a special class and related services to be delivered at an out-of-district program, which the district would endeavor to locate by sending out application packets (id. at pp. 1-2, 9, 11).[4]

The student attended a private summer camp program at the parent's expense during summer 2018 (see Tr. pp. 191, 279, 282-83).[5]

On August 28, 2018, the CSE convened and recommended an 8:1+1 special class at a particular Board of Cooperative Educational Services (BOCES) program, along with the services

[1] According to the CPSE chairperson, leading up to the March 19, 2018 implementation date, the student's spot in his previous preschool classroom remained open (see Tr. pp. 157-58).

[2] It appears that, during this timeframe, the district made some efforts to locate a provider to deliver services to the student in the home or in a provider's office (see Dist. Exs. 55-62).

[3] The April 2018 IEP did not specify that any of the related services would be delivered by a separate agency; according to the IEP, all related services were recommended to be delivered in a "[t]herapy [r]oom" (Dist. Ex. 11 at p. 10).

[4] There is some evidence in the hearing record regarding the parent's attempt to send the student to a district "Academic Intervention Elementary Program" (see Tr. pp. 60-61, 280-82, 335-37, 406-08, 454-55; Dist. Ex. 67); it does not appear that this program was recommended in an IEP (see Tr. pp. 454-55; Dist. Ex. 11).

[5] Additionally, the student received some related services from the separate agency, as he had throughout the 2017-18 school year (see Dist. Exs. 63 at pp. 24-28; 64 at pp. 13-14).

of a 1:1 aide, and the following related services: two 30-minute sessions per week each of individual speech-language therapy and individual OT, one 30-minute session per week of individual PT, and one 30-minute session of small group speech-language therapy (Dist. Ex. 2A at pp. 28-29, 35-36, 38).[6]

A. Due Process Complaint Notice

In a due process complaint notice dated August 28, 2018, the parents alleged that the student was denied a free appropriate public education (FAPE) when the district's CPSE recommended a change in program and placement, including the location of the preschool, after the parents had complained about the student's then-current classroom teacher (Dist. Ex. 1 at p. 2). The parents also set forth allegations relating to the district's "kindergarten readiness program" to which they had attempted to bring the student to attend for summer 2018 (id.). As for the August 2018 CSE, the parents asserted that the CSE refused to consider placements proposed by the parents, failed to recommend "one-to-one assistance" for the student, and recommended a program and a location that created a "logistical nightmare" for the parents (id. at pp. 2-3).[7] The parents also alleged violations of the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act of 1973 (section 504), and the United States Constitution, as well as a general claim of retaliation (id. at p. 3).

For relief, the parents asserted that the "district should be required to revert to the earlier IEP and either find an appropriate placement, provide in-home instruction or reimburse the parents for the cost of securing special education and related services in a private school" (Dist. Ex. 1 at p. 4). The parents also requested compensatory educational services for the time the student had been without special education services, and for reimbursement of the cost of the student's attendance at a summer camp (id.).[8]

B. Impartial Hearing Officer Decision

A prehearing conference was held on September 26, 2018 (Pre-Hr'g Conf. Tr. pp. 1-48).[9] On October 3, 2018, the district submitted a motion to dismiss the parents' due process complaint notice and the parents submitted their response on October 30, 2018 (Dist. Exs. 2A, 2B). On February 14, 2018, the IHO conducted a hearing on the district's motion to dismiss (Tr. pp. 1-96). By interim decision dated February 26, 2019, the IHO dismissed the parents' Constitutional claims, retaliation claim, and claims under the ADA based on the IHO's lack of jurisdiction, and all claims related to the 10-month portion of the 2018-19 school year based on mootness due to the student's

[6] The district's motion to dismiss is included in the hearing record as district exhibit 2A and is paginated inclusive of the two accompanying affidavits and exhibits attached thereto; it is cited pursuant to the pagination assigned to the exhibit as a whole.

[7] Although the due process complaint notice refers to a CSE meeting on "August 28, 2017," it is presumed that this is a typographical error (see Dist. Ex. 1 at p. 2).

[8] According to the evidence in the hearing record, the student moved to another school district in or around the end of August 2018 (see Dist. Exs. 77; 78; 81; 82; IHO Ex. 2a).

[9] The prehearing conference transcript is not numbered consecutively with the transcript for the remainder of the impartial hearing.

change in residence (IHO Ex. 4 at pp. 15-28). The parties proceeded to an impartial hearing on the parents' remaining claims on March 21, 2019 and concluded on May 1, 2019 (Tr. pp. 97-474).

In a final decision dated June 25, 2019, the IHO found that the student was not expelled from the preschool program he attended for the beginning of the 2017-18 school year (IHO Decision at pp. 20-21). Further, the IHO determined that the district's CPSE followed appropriate procedures during the February 2018 and April 2018 meetings (id. at p. 21). The IHO next found that the February 2018 CPSE's recommendation of a full day 18:2+1 special class in an integrated setting was appropriate for the student for the period of February 12, 2018 through summer 2018 (id. at p. 23). The IHO then determined that the April 2018 IEP also offered the student a FAPE (id. at pp. 23-24). Regarding the parents' objection to the specific school site recommended by the CPSE, the IHO found that the school site was an approved preschool that had an available seat for the student and was capable of implementing the February and April 2018 IEPs (id. at p. 24). The IHO further found that the CPSE did not require the parents' consent to make the recommendation of a school site (id. at pp. 24-26). Next, the IHO noted that the parents raised the issue of pendency for the first time in their closing brief (id. at p. 26). The IHO determined that pendency did not apply because the student was moving out of the district at the time the parents filed the due process complaint notice on August 28, 2018 (id. at p. 27).

Turning to the parents' request for reimbursement of summer camp, although the IHO found that the district had met its burden of establishing that the student had been offered a FAPE for summer 2018, she went on to address the appropriateness of the parents' unilateral placement and equitable considerations (IHO Decision at pp. 27-30). The IHO determined that the parents did not meet their burden to establish the appropriateness of the unilateral placement and that equitable considerations did not weigh in favor of the parents' request for relief (id. at pp. 28-30). Concerning compensatory educational services, the IHO found that the student was not entitled to an award of services as there had been no denial of a FAPE and she further attributed the student's having been without services to the parents' refusal to send the student to the program recommended by the CPSE (id. at p. 31). Lastly, the IHO determined that the district did not violate section 504 (id. at pp. 31-32).

IV. Appeal for State-Level Review

The parent filed a request for review dated July 18, 2019 with the Office of State Review ("July 2019 request for review").[10] The Office of State Review received the July 2019 request for review and opened a file designated Application of a Student with a Disability, Appeal No. 19-064. In a letter from the Office of State Review, dated July 22, 2019, the parent was informed that her request for review was being returned to her and would not be considered because portions of the request for review and accompanying documents were "not legible, thereby impairing the district's ability to answer and a State Review Officer's ability to review [the parent's] claims." Nevertheless, the parent was also informed that she could prepare an amended request for review

[10] The student's mother was individually identified as the petitioner on the student's behalf in the caption on the July 2019 request for review. The notice of intention to seek review, notice of request for review, request for review, affidavit of verification, and affidavit of service were all signed by the student's mother.

which had to "be verified and served upon the district no later than August 5, 2019."[11] In the same letter, the parent was informed that no further action would be taken and the matter would be closed if an amended request for review was not served upon the district by the deadline and thereafter filed with the Office of State Review.[12] On August 13, 2018, eight days after the deadline set forth in the July 22, 2019 letter for serving an amended request for review had elapsed, the SRO assigned to the matter sent a letter notifying the parent that "in the absence of an amended request for review," the file, Application of a Student with a Disability, Appeal No. 19-064, had been marked closed.

In a letter to the SRO, dated August 16, 2019, the attorney who had represented the parents during the impartial hearing indicated that he was representing the parents in their appeal and should have been notified by the Office of State Review that the July 2019 request for review had been rejected and notified of the August 5, 2019 deadline to file an amended request for review.[13] The attorney further wrote that he "had the new documents ready to be signed" by the parent but that she had been hospitalized in the days leading up to and including August 5, 2019. The attorney also asserted that, had he known of the August 5, 2019 deadline, he "would have taken the necessary steps to preserve [his] clients' appeal rights." For those reasons, the attorney requested that the appeal be restored to the docket and that a new deadline be set for the parents to file an amended request for review.

The SRO responded to the attorney by letter copied to all parties dated August 20, 2019. Initially, the SRO noted that the attorney had not appeared as an attorney of record representing the parent in the appeal and, accordingly, was not included on correspondence regarding the parent's appeal. The SRO also acknowledged the attorney's request that the Office of State Review not close the file in Application of a Student with a Disability, Appeal No. 19-064. The SRO declined that request but informed the attorney that the parent could file a new request for review. The attorney was informed that, in the event the parent (or the attorney acting on her behalf) served another request for review and filed it with the Office of State Review, the Office of State Review would open a new appeal number upon receipt of such a filing. In the letter, the SRO further reminded the attorney that, if the parent elected to serve a new request for review, "State regulation permits a State Review Officer, in his or her sole discretion to excuse a failure to timely serve or

[11] As discussed below, State regulation requires that a parent may initiate an appeal from the decision of an IHO by serving a verified request for review upon the district no later than 40 days after the date of the IHO's decision (8 NYCRR 279.4[a]). The parent's July 2019 request for review was served and filed with time remaining before the expiration of the 40-day timeline. Once the July 2019 request for review was rejected, the parent was given leave by the SRO assigned to the matter to prepare and serve an amended request for review by August 5, 2019, which was a Monday and 41 days after the date of the IHO's decision, thereby aligning with the regulatory timelines for initiating an appeal from an IHO's decision.

[12] The July 22, 2019 letter acknowledged that the notice of intention to seek review suffered "from similar deficiencies in legibility," but indicated that an SRO had "determined that the text [wa]s sufficiently clear to put the district on notice of its obligation to prepare and submit a hearing record in accordance with State regulation (8 NYCRR 279.9)."

[13] Although the attorney referenced the "appellants" plural, as noted above, the student's mother was included as the sole petitioner on the student's behalf in the July 2019 request for review.

file a request for review 'for good cause shown,'" which must be set forth in the request for review (citing 8 NYCRR 279.13).[14]

Approximately four weeks later, on September 19, 2019, the parents served a request for review and memorandum of law on the district, which was received by the Office of State Review on September 20, 2019 ("September 2019 request for review").[15] The current appeal file, Application of a Student with a Disability, Appeal No. 19-087, was duly opened by the Office of State Review.[16]

In the appeal, the parents' attorney includes a "Statement Pursuant To 22 NYCRR § 279.13" to explain the late filing of the September 2019 request for review.[17, 18] Initially, the attorney sets forth the circumstances that led to the rejection of the July 2019 request for review, which was timely, and the parents' failure to amend that request for review by the deadline assigned. In particular, the attorney asserts that, due to the distance between his office and the homes of the parents, he mailed the documents to the student's mother with instructions for her to scan and email the completed documents back to him. The attorney notes that the scanned copy was of poor quality. Further, the attorney states that, because of his oversight in not providing his name, address, and telephone number as counsel for the parents, the Office of State Review sent correspondence requiring the filing of a legible copy of the request for review to the parent instead of to him. The attorney attributes his lack of awareness of the pleading requirements to this matter being his first special education case. Next the parents' attorney states that the student's mother received notice of the insufficiency of the July 2019 request for review before being hospitalized for several days due to potentially life-threatening conditions. Lastly, the attorney asserts that he

[14] In a letter dated August 21, 2019, received after the SRO assigned to the matter responded to the parents' attorney, the district formally objected to the request to reopen Application of a Student with a Disability, Appeal No. 19-064. The district's attorney also reported that he was contacted by the parents' attorney via email on July 23, 2019, wherein the parents' attorney stated that he was preparing a revised request for review and a supporting brief and requested that the district's attorney accept service on the district's behalf. According to the district's attorney, he promptly responded on the same day with an email that acknowledged that the parent had been given time to amend the request for review but that he was not authorized to accept service on behalf of the district. The district included a copy of the email exchange with its letter. Based on that exchange, the district's attorney argued that the parents' attorney appeared to be aware of the August 5, 2019 deadline to amend the request for review or at least that the parent was given time to amend. The district's attorney also asserted that the parents' attorney's claims related to the student's mother's hospitalization were vague and unsubstantiated and did not explain the attorney's failure to contact the district's counsel or the Office of State Review for information on a deadline. In conclusion, the district's attorney alleged that there was no legitimate excuse for the original filing of an illegible request for review and further that it belied logic that the parent would have informed her attorney that the Office of State Review had rejected her appeal papers and not informed her attorney of the deadline to refile.

[15] The parents are jointly named as petitioners on the student's behalf in the September 2019 request for review.

[16] Although the September 2019 request for review is titled "Amended Request for Review" and refers to appeal number 19-064, since the matter in Application of a Student with a Disability, Appeal No. 19-064 was closed—and as explained in the SRO's August 20, 2019 letter to the parents' attorney—the request for review has been assigned a new appeal number and is deemed to be an original filing, rather than an "amendment."

[17] Regulations of the Education Department are found in Title 8 of the New York Code of Rules of Regulations.

[18] This section of the request for review is written in first person from the attorney's perspective.

has invested a great deal of time in the underlying impartial hearing and in the appeal proceeding(s) "without renumeration [sic]" and that the student shouldn't suffer for a "simple administrative error complicated by his mother experiencing a severe medical condition." Finally, the attorney asserts that the district was aware of the parents' intention to seek review of the IHO's decision "all along" and that he did not believe that the district could show that it suffered "unfair prejudice" as a result of the late filing.

As to the substance of the parents' appeal of the IHO's decision, the parents argue that the IHO erred in dismissing their ADA, Civil Rights Act, and First Amendment claims for lack of jurisdiction. The parents also allege that the IHO erred in finding that the student was not unlawfully expelled from preschool after the parents complained of possible abuse or neglect of the student. The parents further argue that the IHO erred in rejecting the parents' claim of a pendency violation. Next, the parents contend that the IHO erred by finding that the 18:2+1 integrated class recommended by the February and April 2018 CPSEs offered the student a FAPE for the end of the 2017-18 school year and summer 2018. The parents allege that the student required a 1:1 aide and that the recommended program was not the student's least restrictive environment (LRE). Additionally, the parents argue that the IHO erred by denying their claim that the district's CPSE predetermined the student's recommended program. For summer 2018, the parents allege that the IHO erred by rejecting their claim that the student was unlawfully expelled from a kindergarten preparedness program. The parents further contend that the IHO erred by denying their request "for tuition reimbursement for a summer regression-prevention program." According to the parents, the IHO's sole basis for her determination was their failure to provide the district with the required 10-day notice of their intention to unilaterally place the student in a summer program at district expense. The parents argue that they were not required to provide notice to the district due to the student having been expelled from the district program during summer 2018. The parents further contend that there was no evidence in the hearing record to demonstrate that the district provided the parents with a procedural safeguards notice. The parents also allege that the IHO erred by rejecting their claim that the district violated section 504 when it permitted the student's expulsion from preschool and a summer program and when it violated State regulations by attempting to change the student's educational placement.

As relief, the parents request that their late filing of the September 2019 request for review be accepted, that the IHO's decision be reversed, that the student receive compensatory educational services for the 2017-18 school year, and that the parents receive reimbursement for the costs of the student's attendance at a program for summer 2018.

In an answer the district generally argues that the parents' September 2019 request for review must be dismissed and the IHO's decision should be affirmed in its entirety. Specifically, the district alleges that the parents' notice of intention to seek review was not timely served, the September 2019 request for review was not timely served, the parents have failed to establish good cause for the untimely service of the notice of intention to seek review and the September 2019 request for review, the parents' September 2019 request for review was not accompanied by the required notice of request for review, the September 2019 request for review was not properly verified, and the parents have repeatedly failed to comply with the practice requirements governing

appeals before the Office of State Review.[19] For those reasons, the district alleges that the September 2019 request for review should be dismissed. The district also argues that the parents have raised new allegations in the September 2019 request for review related to pendency, predetermination, and LRE that were not raised in the due process complaint notice and should be dismissed.

In a reply, the parents assert that, because the district has suffered no identifiable prejudice as a result of the alleged procedural irregularities with the parents' appeal, the district's defenses should fail. Additionally, the parents allege that the due process complaint notice adequately placed the district on notice that the parents were raising claims sounding in predetermination and pendency and that the district opened the door to the question of LRE.[20]

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

[19] In accordance with the July 22, 2019 letter from the Office of State Review to the parties, the parent's notice of intention to seek review dated July 18, 2019 was deemed sufficient to put the district on notice of its obligation to prepare and submit a hearing record (8 NYCRR 279.9). The district timely filed a hearing record in Application of a Student with a Disability, Appeal No. 19-064. As such, it was not necessary for the parents to file a second notice of intention to seek review. Accordingly, the district's argument on this point is without merit. As for the lack of a notice of request for review and the attorney's signing of the affidavit of verification, the district is correct that these aspects of the parents' filing were out of conformance with State regulations (8 NYCRR 279.3, 279.7[b]); however, given the disposition of this appeal, it is unnecessary to determine the impact, if any, of these irregularities on review of the parents' filing.

[20] In a letter dated October 7, 2019, the district argues that the parents' reply fails to comply with State regulation governing the form requirements for pleadings and should not be accepted or considered. A reply is restricted by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). To the extent the reply, in part, exceeds the scope of permissible content by improperly reiterating arguments set forth in the September 2019 request for review, those portions of the reply have not been considered.

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 parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review, as the parents principally failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations and there is no good cause to support the acceptance of a late request for review in this case. The IHO's decision was dated June 25, 2019 (IHO Decision at p. 32). The parents were therefore required to serve the request for review on the district no later than August 5, 2019, on the Monday following the Sunday expiration of the 40-day timeline (8 NYCRR 279.4[a]; 279.11[b]). The parents' request for review in this matter was served on September 19, 2019, over six weeks after the regulatory timeline expired.

For good cause to justify the untimely service of the September 2019 request for review, the parents' attorney first focuses on the circumstances surrounding the service and filing of the July 2019 request for review and the parent's failure to meet the August 5, 2019 deadline to file an amended request for review. As noted above, the student's mother originally submitted a timely but illegible request for review to the Office of State Review on July 22, 2019, which was rejected and returned to the parent with a letter from the Office of State Review on July 22, 2019. Although the parent was given an opportunity to file an amended request for review, she did not do so by the August 5, 2019 deadline. Consequently, the file for Application of a Student with a Disability, Appeal No. 19-064, was administratively closed as an unperfected appeal on August 13, 2019.

In the September 2019 request for review, the parents' attorney states that he mailed the documents to initiate the appeal to the student's mother with instructions for her to scan and return the completed documents to him. He further acknowledges that the scanned copy of the documents was of poor quality. These statements do not explain why the original, illegible copy of the request for review was mailed from the parent's home, if as the parents' attorney asserts, the parent was instructed to return the completed copies to him[21] or why, based on his own statement, he believed it was acceptable to file an illegible pleading in an administrative proceeding. This was not an instance where the parents or the parents' attorney found themselves in a frenzy gathering the documents as best they could to meet an impending deadline. At the time that the July 2019 request for review was served, there was still time before the regulatory timeline to appeal an IHO's

[21] The request for review and accompanying documents were sent to the Office of State Review via priority mail from the parent's home address.

decision expired for the parent and/or the parents' attorney to correct the illegibility before serving and filing the documents.

Concerning the lack of any information on the parent's July 2019 request for review and accompanying papers identifying him as the parents' counsel—which, according to the parents' attorney, resulted in his lack of notice about the rejection of the request for review and the deadline to amend—the parents' attorney characterizes it first as an oversight and then further attributes it to his being a novice in the area of special education law. State regulation provides that "[a]ll pleadings and papers submitted to a State Review Officer in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). The parents' attorney's explanations are unavailing given that the parents' attorney is not new to the practice of law generally and the requirement that "pleadings on behalf of a party represented by counsel bear counsel's name, address and telephone number" (Sept. 2019 Req. for Rev. at p. 5) is not unique to State regulations governing appeals to the Office of State Review.[22, 23] Moreover, even assuming that the requirement was specific to appeals to the Office of State Review, ignorance of the regulatory requirements would not be the sort of thing that would contribute to a finding of good cause (see B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011]).

Notwithstanding the original service and filing of the illegible July 2019 request for review, the parent was given ample time—14 days from the date of the Office of State Review's rejection letter on July 22, 2019 to August 5, 2019 when the amended request for review was due to be served—to cure the defects present in the request for review, and the student's mother was clearly informed of this deadline. Even though the parents' attorney was not directly notified by the Office of State Review of the rejection of the request for review and the deadline for amendment, the parents' attorney's assertions that he had no notice of the deadline do not reconcile with email correspondence annexed to the district's August 21, 2019 letter to the Office of State Review, which suggests that, as early as July 23, 2019, the parents' attorney was preparing a "revised" request for review and had learned from the district's attorney that the parent had been given additional time to properly serve an amended request for review.

As for the parents' attorney's allegation that the hospitalization of the student's mother contributed to the failure to meet the August 5, 2019 deadline to amend the request for review,

[22] For example, the Civil Practice Law and Rules provides that: "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper, or if the party does not appear by attorney, with the name, address and telephone number of the party" (CPLR 2101[d]).

[23] Even if the parents' attorney was unfamiliar with the procedures governing appeals to the Office of State Review, there is an entire section dedicated to assisting pro se parents with drafting, serving and filing appeals on the Office of State Review's website (see "Parent Guide to Appealing the Decision of an Impartial Hearing Officer," available at https://www.sro.nysed.gov/book/filing-request-review-section-i). Both the July 2019 and September 2019 requests for review, along with the required supporting documents, were completed on forms found on the Office of State Review website, so it appears that the parents' attorney availed himself of some of the resources available on the website to aid him in preparing an appeal compliant with State regulation, but not others.

even assuming that such a reason was substantiated and sufficient to constitute good cause (but see Application of a Student with a Disability, Appeal No. 13-039 [finding that travel and temporary illness of one of the parents were not sufficient to establish good cause excusing the parents' failure to timely serve the district]; Application of a Student with a Disability, Appeal No. 08-143 [finding that the reason given for the parent's delay in initiating the appeal, the parent's hospitalization abroad, was too vaguely stated to establish good cause]), the parents' attorney fails to address that, in this appeal, the parents appear jointly. Although I am sympathetic that the student's mother has undergone a hospitalization, the parents' attorney does not offer any explanation why the student's father was or was not able to sign and verify an amended request for review.[24, 25]

While the parents' attorney set forth various reasons for the failure to timely file an amended request for review prior to August 5, 2019, the statement of good cause in the September 2019 request for review fails to address, in any meaningful or relevant manner, the remaining period of time before the September 2019 request for review was served. As summarized above, the parents' attorney communicated with the Office of State Review by letter dated August 19, 2019 and indicated that he "had the new documents ready to be signed by [the student's mother]," yet the September 2019 request for review was not served upon the district until September 19, 2019. There is no reason stated in the September 2019 request for review for this additional delay of more than four weeks. It may be that the parents' attorney took the additional time to prepare an "Appeal Brief" to accompany the September 2019 request for review. The parents' attorney does point to the time he invested in the case (citing the appeal brief) within the section of the September 2019 request for review devoted to articulating good cause for the late filing. However, without speaking to the substance of the brief, its content appears to mirror closely the post-hearing brief submitted to the IHO at the close of the impartial hearing (compare Parent Appeal Brief, with IHO Ex. 6),[26] and the parents' attorney cites no reason why the "Appeal Brief" was not completed sooner and/or submitted with the parent's July 2019 request for review. In any event, while an attorney's investment of time on his or her client's behalf is laudable, I can think of no circumstance where such effort would contribute to or form the basis for a finding of good cause for a late filing.

As a final matter, the parents' attorney asserts that, since the district has been aware of the parents' intention to appeal the IHO's decision, the district could not show that the late filing of the September 2019 request for review "would cause any unfair prejudice" (Sept. 2019 Req. for Rev. at p. 5). However, lack of prejudice to the district is not a reason why service of the September 2019 request for review was not made on time (see B.C. v. Pine Plains Cent. Sch. Dist., 971 F.

[24] In the parents' attorney's August 19, 2019 letter to the Office of State Review and again in the parents' memorandum of law in support of their reply in this matter, the parents' attorney notes that the student's mother had "taken on the responsibility of signing and verifying appeal papers due to her availability as a stay-at-home parent" (Reply Mem. of Law p. 2). While this speaks to the mother's availability prior to her hospitalization, it does not speak to the father's unavailability thereafter.

[25] Perplexingly, after making much of the student's mother's unavailability to sign papers, the attorney signed the verification accompanying the September 2019 request for review, instead of a parent as required by State regulation (8 NYCRR 279.7[b])); the student's father signed the verification accompanying the parents' reply.

[26] It is entirely permissible and appropriate to utilize and modify such an existing work product for the purpose of efficiently presenting a party's position to an SRO; however, it tends to undermine any impression that the attorney required several additional weeks to prepare the "Appeal Brief."

Supp. 2d 356, 367 [S.D.N.Y. 2013] [indicating that, while an SRO might in his or her discretion "consider whether a party has suffered prejudice, the regulations require a showing of good cause to excuse untimeliness"]).

In summary, the parents' attorney's argues that the student should not be penalized for an administrative error; however, that was precisely why the parent was given leave to amend the July 2019 request for review. The failure to comply with the practice requirements of Part 279 of the State regulations may either result in the rejection of the submitted documents or the dismissal of a request for review by an SRO, depending on the circumstances of each case (8 NYCRR 279.8[a]-[c]; 279.13; see T.W., 891 F. Supp. 2d at 440-41 [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). The sentiments underlying the decision in J.E. are why the parent was granted the opportunity to cure the defects with her July 2019 filing. The process employed was used to preserve every opportunity for the parent to file an appeal that was reasonably compliant with the practice regulations. In the absence of an amended request for review, the file was administratively closed without a determination. This too was used in an effort to preserve the possibility that the parent might at some later point in time attempt to file a late request for review with a viable assertion of good cause for the delay. Had the parent's appeal been dismissed in a final decision in Application of a Student with a Disability, Appeal No. 19-064, due to noncompliance with the practice regulations, I would have been powerless as an SRO to undo that determination and allow another appeal to proceed. This is because an SRO is precluded from reopening or reconsidering a final determination. As explained by the United States Department of Education, "Once a final decision has been issued, no motion for reconsideration is permissible." (Letter to Weiner, 57 IDELR 79 [OSEP 2010]; see C.C., Jr. v. Beaumont Indep. Sch. Dist., 2015 WL 13648561, at *10-*11 [E.D. Tex. Mar. 23, 2015]). In fact, the parents in this case did avail themselves of the opportunity to file a late request for review; however, examination of the September 2019 request for review shows that no good cause has been asserted or found to excuse the untimely service of the request for review on the school 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., 971 F. Supp. 2d at 365-67; 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 timely service of a request for review, and the request for review is therefore dismissed (8 NYCRR 279.4[a]; 279.13).

VII. Conclusion

Having found that the September 2019 request for review must be dismissed because the parents failed to timely initiate the appeal, the necessary inquiry is at an end and I need not address the parties' remaining arguments.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 18, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER