The University of the State of New York

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

No. 20-029

Application of a STUDENT WITH A DISABILITY, by his 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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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 dismissed her due process complaint notice with prejudice. 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 state of the hearing record in the present matter, a recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the limited nature of the appeal and dismissal of this matter on procedural grounds. Briefly, according to the parent's due process complaint notice, the student attended a nonpublic school and a CSE developed an individualized education services plan (IESP) for the student for the 2019-20 school year (Due Process Compl. Notice at pp. 1, 2).

A. Due Process Complaint Notice

In a due process complaint notice dated September 17, 2019, the parent raised issues pertaining to the district's offer of a free appropriate public education (FAPE) to the student on an equitable basis for the 2018-19 and 2019-20 school years (Due Process Compl. Notice at p. 2). First, the parent alleged that the student "missed sessions" of mandated services during the 2018-19 school year (id.). For the 2019-20 school year, the parent alleged that the CSE developed an IESP for the student without meaningful participation from the parent and that the IESP did not properly note the parent's input (id.). The parent also challenged the sufficiency of the evaluations conducted by the district and the amount of special education teacher support services (SETSS) recommended by the CSE (id.). The parent further alleged that, due to the student's needs related to "a dyslexic profile," a SETSS provider that specialized in "such issues" had to be located (id.).

For relief, the parent sought compensatory educational services to remedy the services that the student missed during the 2018-19 school year "plus additional sessions to compensate for the lack of services" (Due Process Compl. Notice at p. 2). The parent requested that the SETSS provider be paid an enhanced rate (id.). The parent also sought an increase in the SETSS services on the student's IESP for the 2019-20 school year (id.). Finally, the parent requested an interim order for an independent neuropsychological evaluation of the student at the district's expense (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was scheduled for December 2, 2019 (see Tr. pp. 1-11). On that date, the district representative appeared before the IHO, but neither the parent nor her advocate was in attendance (see Tr. p. 1). According to the IHO, the matter was scheduled for 11:00 a.m. that day and the advocate emailed the IHO at 1:19 p.m. indicating that, "[a]fter a two-hour wait, and several people taken in prior to [them]" the parent and the advocate "had to leave" but were "available by phone" that day for the impartial hearing (Tr. pp. 3-4). The matter came on for hearing at 1:36 p.m. (Tr. p. 1).

The district representative shared with the IHO the status of the issues from the district's perspective in light of a "lengthy discussion" that had taken place that morning between the district representative and the parent's advocate (Tr. pp. 4-5). The district representative indicated that there were "three issues in question" (Tr. p. 4). The first issue related to enhanced rate, which the district representative stated had been resolved based on the parent's advocate's provision of "all the necessary documents" (id.).[1] The district representative identified the two remaining issues as the parent's requests for the independent neuropsychological evaluation and "compensatory services to cover months of September 2018 through February of 2019" (Tr. p. 5). With respect to the former request, the district stated its position that the student was not entitled to the requested independent neuropsychological evaluation since the district had recently evaluated the student and the parent did not provide notice that she disagreed with the district's evaluation (Tr. pp. 7-8). With respect to the latter request, the district stated its position that the student was not entitled to compensatory education for the requested timeframe because the 2018-19 school year had been the subject of a prior due process complaint notice (Tr. p. 5). The district offered into evidence a

[1] The district representative indicated that this agreement had just been achieved but that she could forward the IHO a copy of a written agreement as soon as it was completed (Tr. p. 7).

due process complaint notice, dated January 1, 2019, filed by the parent related to the 2018-19 school year, as well as a resolution agreement related thereto, dated February 15, 2019, in which the district agreed to fund the student's services at the enhanced rate sought by the parent for the period from January 1, 2019 through the end of the 2018-19 school year (see Tr. pp. 8-9; Dist. Ex. 1 at p. 1; 2 at pp. 1-2).

In a decision dated December 12, 2019, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at p. 7).[2] The IHO indicated that the parent "did not appear at the impartial hearing despite instructions known to the advocate from other proceedings that the Parent's personal appearance was required" (id. at p. 4). The IHO noted the time that the matter was scheduled to begin, the email sent by the parent's advocate as noted above, as well as the affirmations by the district representative as to the issues to be resolved at the impartial hearing (id.). The IHO recited that "the parties to an impartial hearing are obligated to comply with the reasonable directives of the [IHO] regarding the conduct of the impartial hearing" and set forth various provisions of State regulations relating to the manner in which the impartial hearing may be conducted (id. at pp. 4-5). The IHO further indicated that an IHO "may require the parties to be present at the impartial hearing" and further articulated some rationales for his requirement that all parties attend and all witnesses appear at impartial hearings in person, including the "deteriorat[ion]" of the adjudication of claims under the IDEA due, in part, to the over-reliance on telephonic testimony, and the fact that "parties hav[e] a greater stake in the litigation" when the parties and their witnesses are required to appear in person (id. at pp. 5-6). The IHO noted that the requirement for personal appearance was "subject only to 'exigent' circumstances'" (id. at pp. 6-7). Based on the foregoing, the IHO dismissed the parent's due process complaint notice "for want of prosecution in a timely manner, with prejudice as the parties ha[d] executed a Resolution Agreement" (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in dismissing the due process complaint notice with prejudice. As an initial matter, in a footnote, the parent indicates that, although the IHO's decision was dated December 12, 2019, it was not "issued" until January 8, 2020.

The parent argues that the IHO denied her the opportunity to be heard, as the parent and the advocate waited for over two hours for the IHO to call the hearing and the IHO ignored the parent's advocate's request that the parent and advocate be permitted to attend the impartial hearing by telephone in light of the lengthy delay. Moreover, the parent argues that the IHO's requirement that the parent appear at the impartial hearing in person was contrary to State regulation and broadly based on "his own procedural requirements," rather than on the "particular facts of the case." More specifically, the parent alleges that the State regulation relied upon by the IHO to support the proposition that the IHO could require the parties to be present relates, instead, to limitations on the time for each party to present a case. The parent also alleges that the IHO's requirement that the parent and the advocate attend the impartial hearing in person was not communicated to the parent and that, as there was no indication that the parent's testimony was

[2] The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO decision will reflect pages numbered "1" through "8," with the cover page identified as page "1.

sought or required, there was no basis for evaluating whether the directive was reasonable. Instead, the parent argues that the requirement for personal appearance was based on "the IHO's own invented policy that he rigorously and wrongfully applies in every case without rhyme or reason." The parent also asserts that the IHO's refusal to hear telephonic testimony is counter to State regulations, which allow for the same. The parent argues that the IHO's refusal to allow the parent to attend by phone or on another date, after the parent waited more than two hours, violated State regulation, which requires that the impartial hearing be held at a time and place which is reasonably convenient to the parent and the student.

With regard to the IHO's dismissal of the matter with prejudice, the parent alleges that this was contrary to the representations made at the impartial hearing that the IHO was granting the district's request for an extension of the compliance date so that the IHO could receive the transcript and "other facts on this matter." The parent also alleges that the IHO's rationale was error since no resolution agreement was executed or offered into evidence and, in any event, the purported agreement only addressed one of the items of relief requested by the parent.

Based on the foregoing, the parent requests that the IHO's decision be reversed and that the matter be permitted to proceed with the parent being allowed to appear by and through her attorney or advocate "at hearings" and testify via telephone "absent a fact-specific finding as to why telephonic testimony would be improper."

In an answer, the district responds to the parent's allegations. In addition, the district asserts that the parent's request for review should be dismissed because it was served more than 40 days after the date of the IHO's decision. The district points out that the timeline for serving the request for review runs from the date of the decision, not from the date that a party receives the decision. The district asserts that the parent does not set forth good cause for the delay in the request for review and, instead, only indirectly references the timeline in a footnote. According to the district, the footnote includes an unsupported assertion that the IHO's decision was issued on a particular date. Moreover, the district points out that, even assuming the IHO's decision was not issued until January 8, 2020, the parent still had time to serve the request for review before the timeline expired—i.e., 40 days from the December 12, 2019 decision date—which the district argues was particularly feasible since there was no evidence or testimony received during the impartial hearing and, therefore, no record for the parent to review in preparing the request for review.

In the alternative, the district seeks dismissal of the parent's request for the costs of SETSS services for the 2018-19 and 2019-20 school years as moot and remand to the IHO for review of the parent's request for an independent neuropsychological evaluation at district expense. The district argues that the parent's request for the costs of SETSS services as compensatory education related to the 2018-19 school year should be dismissed as moot since the 2018-19 school year was the subject of a prior due process complaint notice and resolution agreement. Further, the district asserts that the parent's request for the costs of SETSS services at the enhanced rate for the 2019-20 school year should be dismissed as moot since the district agreed to fund the student's receipt of five hours per week of SETSS at the hourly rate of $100.00 for the 2019-20 school year.[3] The

[3] As additional evidence, the district offers a copy of an agreement between the parties dated December 3, 2019 and an email exchange between the parties regarding the agreement (SRO Exs. 1-2). Given the dismissal of the parent's appeal on procedural grounds, the proffered evidence is unnecessary in order to render a decision in this

district argues that, although the parent, "has refused to sign the resolution agreement," it is disingenuous for the parent to deny that the resolution agreement exists.

The parent did not submit a reply to the district's answer.

V. Discussion—Timeliness of the Appeal

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 e.g., 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]). 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]).

The parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated December 12, 2019 (IHO Decision at p. 7). The parent was, therefore, required to personally serve the request for review upon the district no later than January 21, 2020, 40 days from the date of the IHO decision (see 8 NYCRR 279.4). However, the parent's affidavit of service indicates that the parent served the district by personal service on February 14, 2020 (Parent Aff. of Service), which renders the request for review untimely.[4]

Additionally, the parent has failed to assert good cause—or any reason whatsoever—in her request for review for the failure to timely initiate the appeal from the IHO's decision. Instead, in a footnote, the parent indicates that, although the IHO's decision was dated December 12, 2019, it was not issued until January 8, 2020 "as evidenced by the email issuance of the Decision."[5]

matter and, therefore, the district's request that it be considered is denied (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

[4] The request for review was dated and was verified by the parent on February 6, 2020 but was not served for another eight days thereafter.

[5] The parent does not include a copy of the email or affirmatively allege that the decision was not transmitted to the parties by other means.

However, 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 the dismissal of an SRO 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. 19-043; 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). Moreover, the regulation specifies the time period within which an appeal must be timely served upon a respondent, but in no way guarantees a minimum time period that a party has for preparation of an appeal (see 8 NYCRR 279.4[a]). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely. Accordingly, there is no basis on which to excuse the parent's failure to timely appeal the IHO's decision (see 8 NYCRR 279.13).

Upon receipt of a decision, there may be circumstances that are outside a party's control in which the 40-day time period has either: 1) already expired; or 2) is much closer to expiring and there is no reasonable way in which a party could prepare and serve an appeal within the remaining time frame. This case presents neither circumstance, especially given that the hearing record consisted of only 11 pages of transcript and two exhibits and the request for review consisted of a narrow allegation of IHO error. Moreover, while I might well have entertained a short delay in filing a late request for review by the parent in light of the allegation that the IHO decision was received much later than would be expected, it is unclear why it took the parent approximately 37 more days after receiving the IHO's decision to serve the request for review on the district (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]).[6]

[6] With regard to the alleged delay in the issuance of the IHO's decision, on the notice of intention to seek review, the parent references that the decision was issued by the district's impartial hearing office. Notwithstanding that the IDEA does not preclude a school district from taking on ministerial actions to assist IHOs in issuing decisions (i.e. formatting, copying, postage), State regulation provides that the IHO "shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). To the extent the impartial hearing office is holding IHO decisions for a period of time before delivering them to the parties, in addition to affecting the parent's time to prepare an appeal as discussed herein, this practice has the potential to violate federal and State regulations governing the timelines for IHOs to render decisions and impede the due process protections afforded to students with disabilities and their parents (see 34 CFR 300.510[b][2]; [c]; 300.515[a]; 8 NYCRR 200.5[j][5]; see also "Requirements Related to Special Education Impartial Hearings," at pp. 3-5, Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf). Allegations of such practice are not clearly stated in the current matter and, even if they were, for the reasons stated in the body of this decision, the alleged delay in transmittal of the IHO decision would still not amount to good cause for the parent's late service of the request for review. Nevertheless, the district is warned that such practice could, if the circumstances warranted, support a finding that the district denied a student a FAPE.

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no cause, let alone good cause, asserted in the request for review as to why late service of a request for review should be excused, in an exercise of my discretion, the appeal is dismissed (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 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 [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

VI. Conclusion

In view of the forgoing discussion finding that the appeal was not timely filed and good cause for accepting a late request for review was not proffered, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 19, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER