The University of the State of New York

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

No. 21-061

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Irvington Union Free School District

Appearances:
Littman Krooks, LLP, attorney for petitioners, by Kevin Pendergast, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, 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 the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at The Windward School (Windward) for the 2018-19 and 2019-20 school years, as well as their request to be reimbursed for private tutoring services during the 2017-18 school year. The parents further request that the IHO's order for a neuropsychological evaluation be affirmed. 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

This appeal arises from an IHO's decision issued after the matter had been remanded by an SRO to determine whether the district offered the student a FAPE for the 2017-18, 2018-19, 2019-20 school years based on the issues raised in the parents' amended due process complaint notice and what relief, if any, the parents were entitled to (see Application of a Student with a Disability, Appeal No. 20-154). Accordingly, the parties' familiarity with the facts and procedural history of

this case—as well as the student's educational history—is presumed and will not be repeated herein.

Briefly, upon remand the original IHO apparently "either declined or was not available to determine the matter" and therefore it was assigned to another IHO (IHO Decision at p. 2; SRO Ex. A).[1] The second IHO held a pre-hearing conference on December 7, 2020, the substance of which was memorialized in a letter to the parties dated December 8, 2020 (IHO Decision at p. 2; SRO Ex. A). Subsequent emails sought to clarify the SRO's order as well as the role of the IHO on remand (SRO Exs. B; C). The second IHO did not take any additional evidence or testimony (see IHO Decision at pp. 1-7).[2]

A. Due Process Complaint Notice

In an amended due process complaint notice dated September 3, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years and that Windward was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years (Dist. Ex. 1 at pp. 17-21).[3] The parents first set forth a lengthy recitation of the student's "[b]ackground and [e]arly [e]ducation" summarizing events leading up to the challenged school years (id. at pp. 2-12), as well as events that occurred during the 2017-18 through 2019-20 school years (id. at pp. 12-16).

Next, the parents specified the bases for their assertion that the district denied the student a FAPE (Dist. Ex. 1 at pp. 17-18). The parents asserted that, for the 2017-18 school year, the district failed to provide the student "with any necessary special education services and supports" (id. at p. 17). In addition, the parents alleged that, for all three school years, the CSEs failed to recommend "an appropriately ambitious special education program" for the student (id.). The parents further stated that the CSEs developed "inappropriate and insufficient" annual goals for the student and "just 'rolled' unachieved goals over" from year to year (id.). The parents alleged that the student's lack of progress in the speech-language realm warranted an increase in speech-language therapy services (id.). The parents argued that the CSEs failed to address the student's "documented diagnoses of ADHD and Central Auditory Processing Disorder" in the IEPs (id. at p. 18).

[1] By letter dated March 2, 2021, the Office of State Review directed the district to complete the hearing record in this matter by providing a missing pre-hearing conference letter (see 8 NYCRR 279.9[a] [requiring the district to file, among other things, "copies of prehearing conference summaries or transcripts"]), as well as missing emails from the parents' counsel to the IHO dated December 23, 2020 requesting clarification of what was to be considered upon remand, and the IHO's response dated December 23, 2020 (see 8 NYCRR 279.9[a]). The district responded by providing the following documents which, for ease of reference, will be cited as SRO exhibits A through C: letter dated December 8, 2020 from the IHO (SRO Ex. A); parents' email of December 23, 2020 (SRO Ex. B); and IHO email response of December 23, 2020 (SRO Ex. C).

[2] For the remainder of this decision the second IHO will be referred to simply as the IHO.

[3] The original due process complaint notice was dated May 6, 2019 (see Due Process Compl. Notice).

The parents described the student's program at Windward and the progress she had made there during the 2018-19 and 2019-20 school years (Dist. Ex. 1 at pp. 18-21) and set forth equitable considerations, which they asserted supported their requests for relief (id. at p. 22). The parents sought "200 hours of compensatory tutoring or reimbursement for tutoring" as relief for the district's failure to provide the student a FAPE for the 2017-18 school year (id. at p. 23). Further, the parents requested that the district be required to reimburse them for the costs of the student's attendance at Windward for summer 2017 and the 2018-19 and 2019-20 school years (id.). Finally, the parents requested that the district be required to conduct "appropriate evaluations" of the student, including "a full Neuropsychological Evaluation" (id.).

B. Impartial Hearing Officer Decision

In a decision dated January 2, 2021, upon remand, the IHO based his findings and decision on a review of the parents' amended due process complaint notice, the district's answer and "the entire extensive record of the [h]earing before the prior IHO" (IHO Decision at pp. 2-3).[4] The IHO noted that as all of the relevant findings of fact in the case were set forth by the SRO in Application of a Student with a Disability, Appeal No. 20-154, there were no relevant findings of fact for him to determine; rather, the issue to be decided was, based on the facts in the record, whether the district offered the student a FAPE (id. at p. 3). The IHO found that the district met "its obligation to offer the child a [f]ree [a]nd [a]ppropriate [e]ducation for the three years in question in this case" and that "[a]ccordingly, there [wa]s no need to reach the issue of whether the child was appropriately placed at the Windward School, or whether equitable considerations support[ed] an award of reimbursement for services obtained by the parents" (id. at p. 7). However, the IHO determined that the student had not received a neuropsychological evaluation in four years and directed the district to obtain a current neuropsychological evaluation of the student (id.)

IV. Appeal for State-Level Review

On appeal, the parents argue that the IHO disregarded the SRO's order to consider the parents' allegations raised in their amended due process complaint notice and "erred in his [d]ecision's lack of thoroughness." The parents' assert that despite acknowledging the SRO's decision required him to address all of the issues raised in the parents' amended due process complaint notice, the IHO's decision did not "truly consider a single allegation raised in that [c]omplaint." The parents assert that "after almost six pages of summary procedural and factual history" the IHO "devot[ed] a total of a half-page" to analysis of the parties claims. They further assert that "with extreme brevity bordering on dismissiveness" the IHO "applie[d] the first and second of the three prongs in a tuition-reimbursement case" brought under the IDEA. According to the parents, in his "half-page (302 word[])" analysis, the IHO included his explanation of what the "Prong I" standard meant and why he did not need to address "Prong II." However, the IHO did not "take up or execute the order of the SRO" that he consider the parents' allegations raised in their amended due process complaint notice.

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

The parents assert that at the December 7, 2020 prehearing conference, counsel for both parties had "offered to participate in new hearing dates, new oral arguments, and/or new filings to help [the IHO] follow [the] SRO directive on additional evidence."[5] The parents further assert that both attorneys made themselves available to the IHO during his deliberations, however, the IHO made no requests and "issued his [d]ecision on January 4th," [2021].

The parents contend that the IHO based his decision that the district offered a FAPE to the student for the 2017-18, 2018-19 and 2019-20 school years on two factors: that the district made its IEP recommendations based on tests, observations and standardized evaluations, and that the parents did not offer a qualified witness on the issues of a FAPE, IEPs, and student progress. With respect to the first factor, the parents assert that they never alleged that the district did not use tests, observations and evaluations in making IEP recommendations. With respect to the second factor, the parents assert that it is unclear whether the IHO found that the parents offered no testimony or whether he found that their witness was unqualified. In response to the IHO's finding, they assert that their witness held a master's degree in teaching, a license in teaching from the State; training certificates for "Multisensory Reading, Preventing Academic Failure and Classroom Language Dynamics"; and a "JD." The parents further assert that their witness had educational credentials that "match[ed] or excel[ed]" those of the district's witnesses, with the possible exception of the school psychologist. The parents contend that if the IHO believed that he needed to hear from more witnesses, the "SRO had already empowered him" to do so in her ruling.

The parents further argue that the IHO "simply ignored the SRO's order to 'consider' the [parents'] allegations on remand, a directive that formed the entire basis for the SRO's decision to send the case [] back to an IHO." The parents contend that "[a]t no point in the entirety of his [d]ecision d[id the IHO] actually discuss a single parent allegation beyond the broad acknowledgement that the [p]arents claimed a denial of FAPE for three school years." They note, for example, that the IHO did not address the parents' allegations that the goals were inappropriate and insufficient, that the IEPs did not address the student's diagnoses, that the district failed to issue the 2019-20 IEP in a timely manner, that the district "took an argumentative approach" to the CSE discussion instead of focusing on reviewing the student's progress and preparing a new IEP, and that testing data indicated the student's lack of progress while attending the district's school. The parents argue that in addition to not addressing their allegations, the IHO did not mention "the legal argument buttressing those allegations" found in their post-hearing brief and memorandum of law, and that their legal analysis and application of extensive case law to the facts of the case "go unmentioned" in the IHO's decision, "even if only to refute it all." The parents contend that given the SRO's "detailed guidance," she "obviously intended for the IHO to engage in a more thoughtful analysis."

The parents assert that the IHO made minimal reference to the hearing record in his decision, and it was therefore difficult to see how the overall record "played any role in the IHO's

[5] The SRO had directed that "[i]t is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parents' claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record" (see Application of a Student with a Disability, Appeal No. 20-154).

deliberations." The parents argue that due to its lack of thoroughness, the SRO should not give deference to the IHO's decision.

Lastly, the parents assert that the IHO failed to apply the correct standard in reaching his Prong I conclusion, as he applied the Rowley standard as opposed to the updated Endrew F. standard, and the parents had specifically alleged in their amended due process complaint notice that the district had failed to provide the "appropriately ambitious" program demanded by Endrew F.[6]

For relief, the parents request that the SRO reverse the IHO's determination "as to the three Burlington prongs and tuition reimbursement for the 2018-19 and 2019-20 school years as well as the tutoring fee reimbursement for the 2017-18 school year."[7] The parents further request that the SRO affirm the IHO's order for a neuropsychological evaluation.

In its answer, the district denies the parents' allegations that the IHO erred by not applying the SRO's order and by issuing a decision that lacked thoroughness. The district further denies that the IHO used the incorrect legal standard when determining that it offered the student a FAPE. The district asserts as an affirmative defense that the parents' request for review is untimely. The district attaches an exhibit to its answer referenced as "Exhibit A", consisting of an email exchange between the IHO and the parties regarding the date of the IHO's decision.[8] The district's answer also asserts that the parents improperly asserted issues in their memorandum of law not raised in their request for review, the parents were precluded from raising issues that were not raised in their due process complaint notice, the IHO correctly determined that the district offered the student a FAPE for the school years at issue, and that equitable considerations favor the district. The district requests that the IHO's decision be upheld.

In a reply, the parents assert that their request for review is timely based upon a "corrected date of decision" letter emailed to the parties by the IHO. The parents attach three exhibits to the reply referenced as parents' exhibits 1 through 3, consisting of a letter and emails between the IHO and the parties regarding the IHO's decision date.[9]

V. Discussion

A. Timeliness of 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

[6] See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982); Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 (2017).

[7] See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985).

[8] For ease of reference, the district's answer exhibit A will be cited as SRO exhibit D.

[9] For ease of reference, the parents' reply exhibits 1 through 3 will be cited as SRO exhibits E through G, respectively.

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 parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated January 2, 2021 (IHO Decision at p. 7). The parents were, therefore, required to personally serve the request for review upon the district no later than February 11, 2021, 40 days from the date of the IHO's decision (see 8 NYCRR 279.4). However, the parents' affidavit of service indicates that they served the district by an authorized service method on February 16, 2021 (Parent Aff. of Service), which renders the request for review untimely.[10, 11]

Additionally, the parents have failed to assert good cause—or any reason whatsoever—in their request for review for the failure to timely initiate the appeal from the IHO's decision.[12]

[10] In their cover letter for filing the request for review and accompanying documents with the Office of State Review dated February 17, 2021, the parents reported that there were two versions of their request for review, one dated February 16, 2021 and a second, corrected version dated February 17, 2021. The parents explained that the original request for review "concluded with an inadvertent switch of the [p]arty names and requests of the SRO," an error that was corrected in the second request for review. The parents indicated that counsel for the district "accepted electronic service of the Notice of Request for Review and the Verified Request for Review, along with the supporting documentation, on behalf of the [d]istrict, on February 16, 2021."

[11] Due to the COVID-19 pandemic, between March 2020 and March 2021, the Chief State Review Officer issued a number of General Orders permitting alternate forms of service of pleadings. The Fourteenth Revised General Order provides for continuing the suspension of the requirement of personal service of a request for review and permits alternate service through April 30, 2021 by sending the request for review and any supporting papers to the respondent's last known address by certified mail, return receipt requested, except that this form of alternate service may be waived provided that the parties agree in writing to an alternate method of service (e.g., email or facsimile) (see "Fourteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 3, Office of State Rev. [Mar. 5, 2021], available at https://www.sro.nysed.gov/common/sro/files/14th-revised-general-order-3.5.21.pdf).

[12] As noted above, the parents' initial request for review was dated February 16, 2021. In their cover letter for filing the request for review with the Office of State Review dated February 17, 2021, the parents also state that the corrected version of the request for review was sent to the district on February 17, 2021.

Instead, the parents assert, in their reply only, that the IHO changed the date of his decision from January 2, 2021 to January 4, 2021 and therefore their request for review, served on February 16, 2021 was timely (see Parents' Reply). The hearing record does not support the parents' assertion. Rather, it shows that by email dated January 4, 2021, counsel for the district advised the IHO that the compliance date to issue his decision had expired and on behalf of the district requested an extension of time to enable the IHO to review the transcript and render a decision (SRO Ex. E). In response, the IHO emailed his decision to the parties that same day, indicating that he had tried to send it to them earlier that day but "apparently it did not go through" (SRO Ex. F). However, the IHO's decision was dated January 2, 2021 (IHO Decision at p. 7). Further, in their January 27, 2021 notice of intent to seek review, the parents acknowledged that the date of the IHO decision was January 2, 2021 (Notice of Intent to Seek Review).

With respect to correspondence between the parties and the IHO concerning the IHO decision, in a January 28, 2021 email to the IHO and district's attorney, counsel for the parents indicated that the notice at the end of the IHO's decision set a 30-day deadline for appealing to the SRO and asked "Am I right that the period is 40 days?" (SRO Ex. D). The IHO responded that same day that he would correct his notice (id.). In a subsequent email, dated February 11, 2021, counsel for the parents thanked the IHO for correcting his notice and inquired if it would also be possible for the IHO to correct the date as it appeared on his decision (id.). The parents' attorney noted that the decision date was January 2, 2021 but that the IHO mailed it to the parties on January 4, 2021 (id.). He further noted that "[a]lthough your notice directs us to count from the date of receipt in filing an appeal, the regulation counts from 'the decision date'" (id.). The IHO responded by email/letter dated February 11, 2021 confirming that his decision, dated January 2, 2021 was sent to the parties via email on January 4, 2021 "and, therefore 'issued' on that date" (SRO Exs. G; IHO letter dated February 11, 2021). The IHO did not change the date of his decision, as the parents suggest, rather merely reiterated what was already known to the parties, namely that although the decision was dated January 2, 2021, the IHO did not send the decision to the parties until January 4, 2021.

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, as in this case, the date the IHO transmitted the decision by email—for purposes of calculating the timelines for serving a request for review (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 appeal to the SRO 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). 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 request for review is timely. The hearing record makes clear that the parents were aware of the date of the IHO's decision, as well as their need to appeal the decision to the IHO within 40 days. Accordingly, there is no basis on which to excuse the parents' failure to timely

appeal the IHO's decision (see 8 NYCRR 279.13). Thus, the district's assertion that the appeal was untimely is correct.

Because the parents 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]).[13]

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**
April 5, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER

[13] Although parents' counsel avers to circumstances concerning an unexpected death in the family, and without making any determinations as to whether such an event might support a finding of good cause in this or any other matter, I note that, as discussed elsewhere herein, no excuse for the late filing was proffered in the request for review. Moreover, the gravamen of the parents' reply relates primarily to the parents' alleged reliance on the IHO's revision of the IHO decision date – which did not occur – rather than on any other attendant circumstances that took place between the date of the IHO's decision and the filing of the request for review.