



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 21-112

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

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 the decision of an impartial hearing officer (IHO) which she asserts denied, in part, her request for compensatory education for the student. 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

As an initial matter, I note that no hearing record was filed with the Office of State Review in this matter. On May 19, 2021, the Office of State Review received from the parent a notice of intention to seek review, dated May 1, 2021, a notice of request for review, dated May 1, 2021, and a request for review dated and verified May 11, 2021. The parent did not file any affidavits of service with the Office of State Review showing service of either the notice of intention to seek review, the notice of request for review, or the request for review upon the district. The district did not file the hearing record, an answer, or seek an extension of time to answer in this matter and there is otherwise no indication that the district was served with any documents. Accordingly, the information in this proceeding consists solely of the aforementioned documents filed with the Office of State Review by the parent, who has appeared pro se.

IV. Appeal for State-Level Review

The only description of the impartial hearing officer's decision appealed from is in the parent's request for review. The parent states that she disagrees with "Order #1 on page 6 of the

Finding of Fact and Decision document" and had "asked for compensatory SETSS hours from the date we filed for Impartial Hearing until the date of the order." The parent further asserts that "the [district] agreed to reimburse us for what we paid out of pocket, but we did not pay out of pocket."

Specifically, the parent argues that she was "conservatively using 52 of compensatory hours f[ro]m 2019-20" and was "afraid to pay out of pocket" because she did not know "what the ruling would be."¹ The parent requests "compensatory hours from September through March" to be used at her convenience. The parent states that she received "compensatory literacy hours for the same reason" and "has used 45 hours as of April 2021." In sum, the parent requests that she be awarded approximately 83 compensatory SETSS hours comprised of 128 hours (representing a 4 hour a week mandate for a period of 32 weeks minus 45 hours previously used from "last year"). The parent also notes that if the district "is agreeing to reimburse me for 96 hours (Order #1) that I did not use, I would think we could have a bank of hours to use for the future." In support, the parent cites to "page 13, lines 2-6, of the 2/10/21 hearing transcript, that says 'If, in fact, I find in favor of the Parent for request of enhanced rate, that that becomes retroactive, or I would write it to the date of the hearing request...'" In support of her request for review, the parent submits numerous e-mails between her and school district personnel that post-date the impartial hearing for my consideration, which she claims demonstrate "that I started questioning this ruling on March 24, and did not receive a clear answer until May 6, which is why I am just appealing the decision now."

As noted above, the district has not appeared in this matter.

V. Discussion

Based on the facts as alleged in the request for review before me, I am constrained to dismiss the parent's appeal because there is no evidence that it has been served upon the district and it is untimely. Accordingly, the appeal must be dismissed.

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

¹ The parent's statements suggest that there was a previous award of compensatory education from a prior administrative proceeding involving the 2019-20 school year that were being employed during the 2020-21 school year, but the precise details are not clear.

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 within the timelines prescribed in Part 279 of the State regulations. The parent's notice of intention to seek review indicates that the IHO's decision was dated March 20, 2021, which is consistent with her representations that she began questioning whether the decision was proper by March 24, 2021. The parent was, therefore, required to personally serve the notice of request for review and request for review upon the district no later than 40 days from the date of the IHO's decision (see 8 NYCRR 279.4) which would have been April 29, 2021.

As a further complication, the parent failed to file an affidavit of service with her notice of intention to seek review, notice of request for review, and request for review, and the district has not appeared at all in this proceeding, which strongly suggests that the parent failed to serve notice upon the district. It is far too late correct such a defect at this juncture. An appealing party has the obligation to provide notice to the opposing party in the manner prescribed by Part 279 of his or her challenges to the impartial hearing officer's decision and of that party's right to respond to those challenges—that is a critical function of the notice of request for review which accompanies a request for review (8 NYCRR 279.3). Consequently, in the absence of evidence that she provided notice to the district in the manner described in Part 279, the appeal must be dismissed for failure to serve the district (8 NYCRR 279.4[b],[d]-[e]).²

Alternatively, even if the appeal was served in accordance with Part 279 and the parent failed to file proof of such, the appeal is nevertheless untimely. The request for review was verified by the parent on May 11, 2021, in any event, her completed papers would not have been available for service on the district until at least that date, at which time the request for review was already 12 days late.

In addition, the parent does not assert any good cause in her request for review as to why the untimeliness of her request for review should be excused. As an initial matter, the parent does not acknowledge that the request for review is untimely. Moreover, to the extent the parent claims that she "started questioning this ruling on March 24, and did not receive a clear answer until May 6, which is why I am just appealing the decision now," such assertion does not support a finding that the parent has demonstrated the requisite good cause. While it is understandable that the parent would reach out to the district with questions concerning implementation of the IHO's order, the emails submitted by the parent demonstrate that, as stated, she disagreed with

² In light of the COVID-19 pandemic, alternate service has been authorized through a series of general orders issued by the undersigned throughout the pandemic; however, the parent has not demonstrated compliance with the affidavit of service requirements for alternate service either (see "Fifteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 3, Office of State Rev. [May 3, 2021] available at https://www.sro.nysed.gov/common/sro/files/15th-revised-general-order-5.3.21_0.pdf).

the substance of the IHO's order from the time she received it and merely kept repeating her disagreement to the district in a series of emails that commenced on March 24, 2021 and ended on May 5, 2021. Notably, the parent's primary claim on appeal – that she disagreed with "Order #1 on page 6 of the Finding of Fact and Decision document" because the IHO failed to award the parent "compensatory hours [of SETTS] from September through March" to be used at her convenience – is reiterated by the parent in emails to the district dated March 24, April 29 and May 5, 2021 as well as in an email to the IHO dated May 5, 2021. Although the district kept in communication with the parent concerning implementation of the IHO's order and attempted to answer the parent's questions related thereto, the district did not represent to the parent at any time that it agreed with her that the IHO's order was incorrect or that it had the ability to modify the IHO's order. Rather, in its emails to the parent, the district repeatedly cited to portions of the IHO's order and asserted that it was bound by the IHO's specific award of relief while providing her with information regarding the type of documentation she needed to provide to the implementation office in order to receive the relief awarded by the IHO. Accordingly, even if I were inclined to liberally construe the parent's attachment of the emails between herself and the district, and her brief reference thereto in the request for review, as an attempt to excuse the late request for review, the emails do not support a finding of good cause but instead demonstrate that although the parent knew that she disagreed with the IHO's order as soon as or very shortly after she received it. However, she delayed serving or filing an appeal while she pursued a good faith, but ultimately fruitless, attempt to gain relief from the district outside of the parameters of the IHO's order. As a result, because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no 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]).³

Although dismissing this proceeding, I note that there are statements from the district personnel in the e-mails to the parent that could be interpreted as stating that the district lacks the authority to act further because the IHO did not order a specific action such as "[o]ur office can only fund/provide services pursuant to an Impartial Hearing Order. Since the Final Order does

³ Although I need not reach the substance of the parent's appeal, I note that, based upon the limited facts presented in the request for review, I am generally disinclined to award the type of compensatory education award with an open-ended time line that she seeks. While I understand that the parent was of the viewpoint that the compensatory education services should be stretched out in the event that she did not prevail in this proceeding, in most circumstances I am of the viewpoint that compensatory education services should be delivered as soon as they can be reasonably accommodated in the student's schedule because my experience, after presiding over a large number of complex compensatory education cases, is that delaying educational instruction usually does not serve a student's long term interests.

not order the provision of compensatory SETSS services, we are unable to grant that request." But outside of a due process administrative proceeding, districts remain free to make up missing services called for by a CSE or to request that the CSE provide other supportive services needed by a student who is eligible for special education, provided they do not conflict with an order issued in a due process proceeding. To be fair, the statements of the district staff—the "we"—may have referred solely to the staff in that particular office. If a district is not implementing services called for by the student's IEP or IESP, or the CSE is unwilling to assist the parent, it is possible that some flexibility to pursue those matters remains. To the extent that the parent believes her remaining concerns do not conflict with a decision already issued by an IHO,⁴ the parent may wish to present a State administrative complaint to the Office of Special Education as another, more flexible vehicle for addressing her concerns with the district's willingness to provide the student with appropriate special education programming ([see http://www.p12.nysed.gov/specialed/formsnotices/samplecomplaint.htm](http://www.p12.nysed.gov/specialed/formsnotices/samplecomplaint.htm)).

VI. Conclusion

In view of the foregoing findings that the parent's appeal from the IHO's decision was not served upon the district and, alternatively, that if served, the appeal is untimely and good cause for accepting a late request for review was not proffered, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 17, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁴ An example of a conflict would be if the same issue was previously decided in a due process hearing and the IHO denied the parent particular relief or made factual findings that were adverse to the parent. The State complaint process cannot be used to overturn the decision of an IHO.