



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-140

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

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter Albert, Esq.

Judy Nathan, Interim Acting General 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. 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 matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary.¹

¹ This student has been the subject of prior administrative proceedings, through which the parent sought and obtained district funding of the student's unilateral placement of the student at the International Academy of Hope (iHope) for the 2017-18 school year and at iBrain for the 2018-19 school year (see Parent Ex. B; C). This matter, concerning the 2019-20 school year, was the subject of a prior State-level administrative appeal involving the student's stay-put placement during the pendency of the present proceedings (see Application of a Student with a Disability, Appeal No. 20-069).

After several correspondence between the parent and the district in regard to planning a CSE meeting to review the student's programming for the 2019-20 school year and attempts by the district to schedule such a CSE meeting, a CSE convened on June 10, 2019 and developed an IEP for the student for the 2019-20 school year (see Parent Ex. X; see also Dist. Exs. 7; 10-12; 15-16; 18-19; Parent Exs. L; M; P; Q; X).² The parent did not attend the June 2019 CSE meeting (see Dist. Ex. 13 at p. 28). In a letter dated June 21, 2019, the parent indicated that the district had not "properly responded" to her request for a "Full Committee Meeting" to develop the student's IEP and that, "to date, the [district] ha[d] not offered [the student] a program or placement that c[ould] appropriately address his educational needs" (Parent Ex. N). The parent notified the district of her intent to unilaterally place the student at iBrain (id.). In a prior written notice and school location letter dated June 28, 2019, the district summarized the recommendations of the June 2019 CSE and notified the parent of the particular public school to which the district assigned the student to attend for the 2019-20 school year (Dist. Ex. 14)

In a due process complaint notice, dated July 8, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year and, for relief, sought district funding of the student's tuition at iBrain (see Parent Ex. A).

An impartial hearing convened on January 16, 2020 and concluded on March 12, 2021, after 13 days of proceedings (see Tr. pp. 1-430). In a decision dated May 9, 2021, the IHO held that the district offered the student a FAPE for the 2019-20 school year (see IHO Decision at pp. 7-9). The IHO found it unnecessary to determine whether iBrain was an appropriate unilateral placement or whether equitable considerations weighed in favor of an award of tuition reimbursement for the 2019-20 school year and denied the parent's requested relief (id. at p. 9).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised in the parent's request for review, the district's answer thereto, and the parent's reply is presumed and will not be recited here in detail other than as discussed below as applicable to the timeliness of the appeal. Generally, the central issue raised by the parent on appeal is whether the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year and denying the parent's request for district funding of the costs of the student's attendance at iBrain for the 2019-20 school year. However, the parent's request for review must be dismissed as untimely for the reasons set forth below.

V. Discussion—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 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

² The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are similar or identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

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]).

Here, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The parent was required to serve the request for review upon the district no later than June 18, 2021, 40 days from the date of the May 9, 2021 IHO decision (see 8 NYCRR 279.4[a]). However, the affirmation of service filed with the parent's appeal indicates that the parent served the district on June 25, 2021 (June 25, 2021 Parent Aff. of Service), which renders the request for review untimely.³

Additionally, the parent has failed to assert good cause in her request for review for the failure to timely initiate the appeal from the IHO's decision. In her request for review, the parent notes only that, although the IHO decision was dated May 9, 2021, this was a Sunday, and the decision was not "received from [the district] until May 13, 2021" (Req. for Rev. ¶ 10). However, the time period for appealing from an IHO decision begins to run based on the date of the IHO's decision and State regulations regarding timeliness do not rely on 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 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 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], aff'd 188 A.D.3d 889 [2d Dep't 2020]; 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 either of the parties receives the IHO's decision is not relevant to the calculus in

³ The parent's service of the notice of intention to seek review on the district was also untimely (see 8 NYCRR 279.2[b]). However, as the parent's appeal is dismissed based on the untimely service of the request for review, it is unnecessary to discuss the import of the untimely service of the notice of intention to seek review in this instance. In a reply, the parent makes a confusing argument that she timely filed a notice of intention to cross-appeal and that, therefore, her answer and cross-appeal should not be dismissed; however, the parent is the petitioner in this matter and served no answer or cross-appeal. Accordingly, the parent's argument is not applicable.

determining whether a request for review is timely. Moreover, even if the May 13, 2021 date could be relied on to calculate the timelines, the parent's appeal would still be untimely.

Further, to the extent that the parent asserts a delay in receipt of the IHO's decision contributed to any lateness in the service of the request for review, there may be circumstances that are outside a party's control identifying such instances as those in which the IHO decision is not received until 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 (see Application of a Student with a Disability, Appeal No. 20-030; Application of a Student with a Disability, Appeal No. 20-029). However, this case presents neither circumstance. The parent had ample time (36 days) to timely serve the request for review upon purported receipt of the IHO decision on May 13, 2021. Accordingly, there is insufficient basis to exercise my discretion and excuse the parent's failure to timely appeal from the IHO's decision (see 8 NYCRR 279.13).

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, 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

Having found that the request for review must be dismissed because the parent failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 20, 2021**

**STEVEN KROLAK
STATE REVIEW OFFICER**