The University of the State of New York

The State Education Department
State Review Officer
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No. 22-106

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 Mineola Union Free School District

Appearances:
Law Office of John J. McGrath, attorneys for petitioners, by John J. McGrath, Esq.

Keane & Beane, PC, attorneys for respondent, by Susan E. Fine, 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 respondent (the district) had met its obligations under the "child find" provisions of the IDEA and dismissed their request for compensatory educational services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the

recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

Due to the disposition of this appeal, a full recitation of the student's educational history is unnecessary.

Briefly, after the student received special education services during preschool including special education itinerant teacher (SEIT) services, physical therapy (PT), and occupational therapy (OT), in March 2019, the Committee on Preschool Special Education (CPSE) of the student's district of residence found the student no longer met the criterion for special education as a preschool student with a disability and declassified the student (Tr. pp. 407-08; Dist. Exs. 16 at p. 1; 17 at p. 9). During the 2019-20 school year, the student was parentally placed for kindergarten in the Schechter School of Long Island (Schechter), a private school located in the district (see Dist. Exs. 11; 19).[1] The student returned to Schechter for first grade during the 2020-21 school year (see Dist. Ex. 20). At some point in February or March 2021, the student was involved in a behavioral incident that resulted in his suspension from Schechter (Tr. pp. 200-02, 321). Shortly thereafter, the parents referred the student to the CSE in the district for an initial evaluation seeking an IESP (Dist. Exs. 21; 23 at pp. 1-2).[2] Evaluations were conducted and there were efforts to convene a CSE meeting for the student; however, the parents withdrew the student from Schechter and placed the student in a public school in the district of residence in April 2021 and the proposed CSE meeting in the district was cancelled (Tr. pp. 111-16; Dist. Exs. 22; 23; 25; see Dist. Ex. 26).

Thereafter the district of residence conducted a CSE meeting in June 2021, at which the CSE found the student eligible for special education as a student with an other health impairment and developed an IEP for the student (Tr. p. 418; Dist. Exs. 29-30).

A. Due Process Complaint Notice

By due process complaint notice dated November 30, 2021 the parents alleged that the district violated its child find responsibilities under the IDEA when it failed to look for, find and evaluate the student during the 2019-20 and 2020-21 school years while the student attended

[1] Schechter is alternatively referred to as the Solomon Schechter school in the record (see, e.g., Dist. Exs. 1 at pp. 1-2; 8).

[2] A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]). However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

Schechter within the geographic location of the district (Dist. Ex. 1 at pp. 1-2, 7-11).[3] The parents also alleged that the district had discriminated against the student and violated the student's rights under section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (id. at pp. 11-12). The parents also asserted claims against Schechter, among other non-district entities (id. at pp. 12-19). For relief, the parents requested compensatory education from the district and "consequential damages" from various parties along with a series of specific findings and orders from the IHO (id. at pp. 19-21).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on March 18, 2022, which concluded on May 18, 2022, after four days of proceedings (see Tr. pp. 1-434). In an interim decision dated February 14, 2022, the IHO dismissed all claims against parties other than the district, the parents' claims raised pursuant to the ADA, and those claims brought pursuant to section 504 that fell outside the IDEA (Interim IHO Decision at pp. 3-4).

In a decision dated July 10, 2022, the IHO found that the district had adequate procedures in place to meet its "child find" obligations under the IDEA, and specifically met those obligations with respect to the student (IHO Decision at pp. 8-18, 20). The IHO further found that the district did not discriminate against the student in violation of section 504, denied all of the parents' requests for relief, and dismissed the due process complaint notice with prejudice (id. at pp. 18-22).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents assert that the IHO erred in dismissing their claims under section 504 and the ADA and erred in dismissing their claims against parties other than the district. They request that the undersigned remand the matter to the IHO to develop a record supporting those claims. The parents object to the IHO's finding that the district had adequate procedures in place to enable it to identify, locate, and evaluate children suspected of having a disability. The parents also object to the IHO's finding that there was no child find violation with respect to the student and assert that the district should have known the student was eligible for special education as of September 2019. The parents request a judgment in their favor and a finding that the district failed to meet its child find obligations.

In its answer, the district contends that the parents' appeal should be dismissed as it was not served within the time period provided for by State regulation. The district further argues that the parents have not asserted good cause, or provided any explanation, for the failure to timely

[3] The school district of location is responsible for child find for students who are parentally placed in nonpublic schools located in their geographic boundaries ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," at p. 2, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf).

serve the request for review. Therefore, the district contends there is no basis to excuse the lateness and accept the appeal.

The district next contends that State regulations require all pleading to be verified, and that the parents' failure to verify their request for review in accordance with those regulations should result in the rejection of their request for review. The district also contends that the request for review does not conform to State regulations that require a request for review to include a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise ruling, failures to rule, or refusal to rule presented for review" (quoting 8 NYCRR 279.8[c][2]).

The district further argues that the IHO correctly dismissed the claims against parties other than the district, dismissed the claims brought pursuant to the ADA, and determined that where there was overlap between the section 504 claims and the IDEA those would be addressed at the impartial hearing. The district also asserts that the IHO correctly determined that the district met child find requirements under the law for students within the public school and nonpublic schools within its boundaries, and properly determined that no evidence indicated that the student should have been referred to the CSE prior to February 2021. The district requests that the IHO's decision be upheld.

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 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 district is correct in its procedural defense and the appeal must be dismissed. The parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO rendered her decision on July 10, 2022 (IHO Decision at p. 22). The parents were therefore required to serve the request for review on the district no later than August 19, 2022, (a Friday) 40 days after the date of the IHO's decision. The parents' affidavit of service

indicates that the parents served the district by personal service on August 22, 2022. Accordingly, the request for review was untimely served.

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.[4] The parent's counsel did not even acknowledge timeliness in the request for review and has provided no excuse for the failure to timely serve the request for review. Accordingly, there is no basis on which to excuse the parents' failure to timely appeal the IHO's decision (see 8 NYCRR 279.13; see also B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011] [noting that "[i]nadvertence, mistake or neglect does not constitute good cause"]).

Because the parents 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]).

VI. Conclusion

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

I have considered the parties' remaining contentions, including the district's other asserted bases for rejection the request for review, and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 23, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

[4] The parents have not submitted a reply to the district's assertion that the request for review is untimely.