The University of the State of New York

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

No. 12-120

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Jessica C. Darpino, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Maria C. McGinley, Esq., of counsel

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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton) and home-based services for the 2011-12 school year. The parents cross-appeal, and seek modifications to the IHO decision. The appeal must be dismissed. The cross-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 discussed more fully below, the merits of the district's appeal need not be addressed because the district has not properly initiated this appeal. Briefly, however, on May 17, 2011, the CSE met for an annual review and to develop an IEP for the 2011-12 school year (Parent Ex. C at p. 1). The CSE found the student eligible for special education programs and related services as a student with autism and recommended a twelve month extended school year in a 6:1+1 special class in a special school (id.).[1] The CSE recommended the following related services: a full time behavior management paraprofessional; occupational therapy (OT); physical therapy; and speech language therapy (id. at p. 22). The parents were sent two Final Notices of Recommendation (FNRs), both dated June 15, 2011, each identifying a different district public school to which the

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

student was assigned for the 2011-12 school year (Tr. pp. 141-43, 716-17; Parent Exs. F;G). By letter dated June 30, 2011, the parents rejected the assigned public schools at both locations (Parent Ex. E at p. 1; see Tr. pp. 724-25). The student attended McCarton for the 2011-12 school year (Tr. p. 391; see Parent Ex. Q).[2]

A. Due Process Complaint Notice

By amended due process complaint notice dated July 11, 2011, the parents requested an impartial hearing, asserting that the district failed to offer the student a FAPE for the 2011-12 school year on procedural and substantive grounds (Parent Ex. A). The parents' assertions included, among other things, that the CSE failed to follow proper procedures and that the IEP was not appropriate (id. at pp. 2-7). In addition, the parents asserted that the placement, program and interventions provided by the parents for the student were appropriate and that equitable considerations favored the parents (id. at pp. 2-3, 7-8). As relief, the parents sought, among other things, the cost of tuition for the student's attendance at McCarton for the 2011-12 school year, home and community based applied behavior analysis (ABA) and related services, and transportation (id. at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2011, and concluded on March 2, 2012, after five days of proceedings (Tr. pp. 1-852). In a decision dated May 1, 2012, the IHO determined, among other things, that the district recommendation for the student to attend a 6:1+1 special class in a special school with a 1:1 paraprofessional and related services was not appropriate and denied the student a FAPE for the 2011-12 school year (IHO Decision at pp. 20-30). Regarding the parents' unilateral placement, the IHO found that McCarton was appropriate for the student for the 2011-12 school year (id. at pp. 31-33). Regarding equitable considerations, the IHO found no basis to deny or limit payment for tuition reimbursement based on a lack of cooperation or other equitable factors (id. at p. 35). As relief, the IHO granted the parents' request for tuition reimbursement for the student to attend McCarton for the 2011-12 school year (id. at p. 36). The IHO also granted the parents' request for reimbursement for home-based ABA therapy for the 2011-12 school year to the extent of awarding one hour per week on school days and three days per week on weeks that school was not in session (id. at pp. 36-37).

IV. Appeal for State-Level Review

On June 6, 2012, the district served a notice of petition and petition on the parents by personally delivering and leaving the documents with the doorman of the building where the parents resided and by certified and first class mail. The Office of State Review received a verified copy of the notice of petition and petition on June 8, 2012. In the petition, the district seeks an order annulling the May 1, 2012 IHO decision finding that (1) the district did not provide the student with a FAPE; (2) the student was entitled to home-based ABA therapy, and (3) equitable considerations favored the parents.

In an answer, the parents assert that the district's service of the petition was improper and untimely and request that the district's appeal be dismissed. The parents also assert that the IHO properly found that the district failed to offer the student a FAPE for the 2011-12 school year. The

[2] The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

parents ultimately seek to uphold the May 1, 2012 IHO decision, but request eight modifications to the IHO's findings, which they characterize as a "cross-appeal" in their "wherefore" clause of their pleading. In addition, the parents asserted six "additional responses."

In an answer, the district responds to the six additional responses. The district further asserts that the arguments asserted in the "wherefore" clause should be dismissed because the parents did not formally cross-appeal these issues and the parents have failed to clearly identify the reasons for challenging the IHO's decision in conformity with State regulation (see 8 NYCRR 279.4). In a reply, the district asserts that the petition was timely served, and alternatively that the district had good cause for the late service of the petition. In a letter, the parents object to acceptance of the district's reply, and, among other things, specifically request that two exhibits and one paragraph of the district's reply be stricken as irrelevant and prejudicial.

V. Applicable Standards

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student with a Disability, Appeal No. 12-042; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).[3]

A parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less then 10 days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). A notice of intention to seek review is not required when the school district seeks review of an IHO's decision (8 NYCRR 279.2[c]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Additionally, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's

[3] Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or 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). State regulations provide an SRO with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). An SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of the Bd. of Educ., Appeal No. 12-059 [dismissing district's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

VI. Discussion

A. Timeliness of Appeal

In this case, the IHO's decision is dated May 1, 2012, and includes the required statement advising the parties of their right to seek review of the decision by an SRO, and further provides notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which is also underlined (IHO Decision at p. 44; see 8 NYCRR 200.5[j][5][v]). The parents assert that the district's service of the petition was improper and untimely. The parents' assertion is based upon calculation of the time to serve the petition within 35 days of the date of the IHO decision (8 NYCRR 279.2[b], [c]). In this case, the IHO decision dated May 1, 2012, renders the deadline for the district's service of the petition to be June 5, 2012. According to the district's reply, the IHO decision was "distributed to the parties" on May 2, 2012 (Reply ¶ 5). The district does not assert that the May 1, 2012 decision was distributed by mail, but instead asserts that although 8 NYCRR 279.2(c) calculates the time in which to appeal from the "date" of the IHO

decision, the SRO should interpret the regulation to mean the distribution date when a decision is distributed by e-mail because a plain language interpretation would lead to an "absurd" result (Reply ¶ 10). As such, the district asserts that it had until June 6, 2012 to effectuate proper service—the 35th day from the date of distribution of the IHO's decision—to timely serve the petition. Although the district asserts that the petition was served in a timely manner, it further asserts that in the event a determination is made that service of the petition was untimely, the SRO should exercise discretion to excuse the one day delay in service, based upon a finding of good cause for the one day delay and that the parents have not been prejudiced.

According to the district's affidavit of service dated June 7, 2012, the district initially attempted personal service of the petition upon the parents on June 5, 2012, two times, but were unable to accomplish personal service of the petition upon the parents (Dist. Aff. of Service). Thereafter, the district asserts that on June 6, 2012, the district again attempted personal service of the petition upon the parents and were again unable to accomplish personal service of the petition upon the parents, and instead personally delivered and left the petition with the doorman of the building at the place of residence of the parents (id.). The district further asserts that on June 6, 2012, the district effectuated service upon the parents by certified mail and first class mail (id.).

The district asserts that since the IHO's decision dated May 1, 2012 was not transmitted to the district until May 2, 2012, the petition should be deemed timely served because the May 2, 2012 date should be used in the calculation of timeliness. However, State regulations do not rely upon the date of receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of ascertaining the deadline for serving a petition (8 NYCRR 279.2[b], [c]; see Application of the Dep't of Educ., Appeal No. 11-151;[4] 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 was transmitted to the district by e-mail is not relevant to the instant analysis regarding timeliness.

While the district cites Gagliardo v. Arlington Cent. Sch. Dist., 373 F. Supp. 2d 460, 464-65 (S.D.N.Y. 2005) in support of it position that the SRO should exercise its discretion to excuse the late petition for good cause, in Gagliardo, the SRO's dismissal of plaintiffs' appeal based upon untimeliness was vacated because it was based upon an erroneous premise, and Gagliardo does not stand for the proposition that a petition before the SRO should not be dismissed for being one day late, as asserted by the district. In addition, with regard to good cause, the district failed to set forth any cause for the failure to timely serve the petition in their petition, as required by regulation (see 8 NYCRR 279.13; see also R.S. v. Bedford Cent. Sch. Dist., 2012 WL 4955185, at *5 (S.D.N.Y. Oct. 2, 2012). In its reply, the district asserts good cause based upon the district's attempt to effectuate timely service on June 5, 2012, when service was unsuccessful and asserts that the parents' counsel had recently refused to accept service on behalf of his clients in many cases, and that on May 17, 2012 a paralegal informed the district that the law firm did not have authority to accept service on behalf of the parents (Reply ¶¶ 6, 17). The district further asserts that the parents' firm has engaged in "gamesmanship" regarding service and such should not be rewarded by dismissing the district's petition (Reply ¶ 17). In support of its claim that the parents were not prejudiced, the district asserts that the parents' attorney served its answer and cross-appeal on June 15, 2012 (Reply ¶ 18). Upon review, however, I find that asserting a basis for good cause

[4] Application of the Dep't of Educ., Appeal No. 11-151, is currently on appeal to the Southern District of New York, 12 CV 3188.

is not authorized by State regulations in a reply, but that in any event, the assertions by the district do not constitute good cause for untimely service (see 8 NYCRR 279.13). I note that the district had knowledge since May 17, 2012.that the parent's law firm would not accept service (see Reply ¶¶ 6, 17); the district waited until the last minute to attempt personal service on the parents on June 5, 2012; and that difficulties effectuating personal service and the need for substituted service are foreseeable. Accordingly, I find that the district does not set forth good cause for failing to arrange for service to be effectuated in a timely manner.[5]

In view of the foregoing and under the circumstances of this case, I find that the petition was not served upon the parents prior to the expiration of the time to initiate an appeal and that good cause is not present to accept the late petition (8 NYCRR 279.13; see 8 NYCRR 279.2[c]). Additionally, since the petition was untimely, there is no reasonable basis for considering the parents' later cross-appeal and it too must be dismissed (see Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Child with a Disability, Appeal No. 05-048; Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 116 F.3d 53, 58 [2d Cir.1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]).[6] As neither party has timely appealed the May 1, 2012 IHO decision, it is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

VII. Conclusion

Based upon the aforementioned nonconformity with State regulations, including the district's failure to initiate the appeal in a timely manner with proper service, I will exercise my discretion and dismiss the petition, without a determination of the merits of the parties' claims (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; R.S., 2012 WL 4955185, at *4-*5; T.W. v. Spencerport Cent. Sch. Dist., 2012 WL 4074576, at *3-*4 (W.D.N.Y. Sept. 18, 2012; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition that was served one day late]; Application of a Student with a Disability, Appeal No. 12-042; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal

[5] Although the district was granted permission to use substituted service, when the affidavit of service was filed it became clear the district effectuated substituted service after the time for initiating the appeal had already elapsed. Authorization of an alternate method of service does not extend the time for initiating an appeal to an SRO.

[6] Given the ultimate disposition of this case, I need not make a determination regarding the sufficiency of the "cross-appeal" as argued by the district. However, it may under the circumstances of this case, also provide an alternative basis for dismissing the "cross-appeal" (see 8 NYCRR 279.4, 279.8[b]; see also Application of a Student with a Disability, Appeal No. 12-069).

No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an IHO's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct., Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 24, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER