The University of the State of New York

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

No. 13-227

Application of a STUDENT WITH A DISABILITY, by his 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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander Fong, 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 parent) appeals from a determination of an impartial hearing officer (IHO) which found that respondent (the district) offered the student an appropriate program during the 2013-14 school year and denied her request to be reimbursed for the cost of her son's tuition at Seton Foundation for Learning (Seton).[1] 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.

[1] The Commissioner of Education has approved Seton as a school with which school districts may contract to instruct preschool students with disabilities (Tr. p. 5; see 8 NYCRR 200.1[d], 200.7).

§§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As more fully discussed below, the merits of the parent's appeal need not be addressed, because the parent did not properly initiate this appeal. Briefly, however, on March 13, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Dist. Ex. 3 at p. 18). The March 2013 CSE determined that the student was eligible for special education and related services

as a student with autism (id. at pp. 1, 19).[2] For the 2013-14 school year, the March 2013 CSE proposed a 12-month placement for the student in a 6:1+1 special class housed in a specialized school, in conjunction with related services comprised of four 30-minute sessions of 1:1 occupational therapy (OT) per week, one 30-minute session of OT in group per week, two weekly 30-minute sessions of 1:1 physical therapy (PT) per week, three 30-minute sessions of 1:1 speech-language therapy per week, and twice weekly 30-minute sessions of speech-language therapy in a group of three (id. at pp. 14-15). The March 2013 CSE further proposed that the student participate in adapted physical education (id. at p. 14). The March 2013 CSE also recommended the provision of 1:1 health paraprofessional services for the student on a full-time basis to address feeding concerns (id. at p. 15). In addition, the March 2013 IEP called for the provision of a weighted vest as an assistive technology device on an as-needed basis (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 12, 2013, the parent requested an impartial hearing (Parent Ex. D).[3] She advised the district that she planned to enroll the student in Seton for the upcoming school year (id.). The parent indicated that upon visiting the public school site to which the student had been assigned, she determined that it constituted an inappropriate educational setting for the student, because she found the public school site to be "very busy and loud," and she further noted that the students in the proposed classroom were not functionally grouped (id.). The parent maintained that the student had "a lot of age appropriate skills" and that the student should be "in a group of children that he [could] model from" (id.). She further argued that the student progress would be impeded if placed with lower functioning students, and that the student would imitate the behaviors of those lower functioning students (id.). The parent also invoked the student's right to pendency (id.).

B. Impartial Hearing Officer Decision

On July 19, 2013, an impartial hearing convened and it was concluded on the following hearing date of September 11, 2013, (Tr. pp. 1-95). On September 3, 2013, the IHO issued an Interim Order on Pendency (September 3, 2013 Interim IHO Decision at p. 4). Subsequently, on September 13, 2013, pursuant an agreement of the parties the IHO modified her determination with respect to the student's pendency placement, and directed that the student would remain in the school-age program housed in Seton, and that he would receive his related services comprised of speech-language therapy, OT, PT and full-time paraprofessional services at the frequency and duration set forth in the March 2013 IEP (September 13, 2013 Interim IHO Decision at pp. 2-3).

With respect to the merits of the case, in a decision dated October 23, 2013, the IHO concluded that the March 2013 IEP was appropriate and offered the student a free appropriate public education (FAPE) (IHO Decision at pp. 6-7). She further found that the assigned public

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] Although it is not clear from the due process complaint notice that the parent was seeking tuition reimbursement from Seton as a remedy, during the impartial hearing, she clarified that she was requesting an award of payment of the student's tuition at Seton to be provided at public expense (Tr. p. 17).

school site would have addressed the student's special education needs (id. at p. 6). Accordingly, the IHO dismissed the parent's claims and denied the parent's request for relief (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals, seeking reversal of the IHO's decision and requesting findings that the district did not offer the student a FAPE during the 2013-14 school year and that Seton was appropriate to meet his educational needs.[4] More specifically, she argues that that proposed 6:1+1 special classroom with the assigned public school site constituted an overly restrictive setting for the student.[5] She maintains that the lack of appropriate models for the student in the proposed classroom further rendered it inappropriate for the student's educational needs. Additionally, given the student's distractibility, the parent asserts that the public school site constitutes a loud and overwhelming environment for him, which would not be appropriate. With respect to the appropriateness of Seton, the parent argues that the student is doing well there and interacting with typically developing peers. She further maintains that Seton offers the student an appropriate curriculum that is designed for students with autism, which the parent asserts gives the student "a better chance at succeeding," while the district's "placement [would] hold him to the same [standard]" as general education children."

In addition, the parent contends that a personal relationship of the IHO with the district tainted the IHO's decision in the instant case. As a remedy, the parent seeks an award of tuition reimbursement for Seton for the 2013-14 school year.

The district submitted an answer in which it generally denies the allegations contained in the petition. The district requests findings that it provided the student with a FAPE during the 2013-14 school year and that the equities preclude an award of relief in this instance. Initially, the district notes that the parent did not draft the petition in accordance with State regulation, because she failed to number the paragraphs. Next, the district contends that a dismissal of the petition is warranted in this matter, because the parent failed to serve it within the 35-day time period prescribed by State regulation. Regardless of whether the parent served the petition in a timely manner, the district maintains that the parent cannot prevail on the merits in this instance. Preliminarily, the district asserts that the parent's claim should be limited to whether the assigned public school site could implement the March 2013 IEP in the least restrictive environment (LRE). Next, while the district submits that the parent failed to raise a claim in the due process complaint notice alleging that the assigned public school site could not implement the March 2013 IEP, the district maintains that the hearing record supports a contrary conclusion. Rather, although the parent's claims surrounding the assigned public school site are speculative in nature, the district contends that the student would have been suitably grouped for instruction had he enrolled in the assigned public school site. Next, the district submits that the evidence in the hearing record fails to support the parent's claims that the assigned public school site is a loud and distracting environment. Lastly, the district argues that the hearing record fails to support the parent's claims that the assigned public school site constituted an overly restrictive setting for the student. Rather,

[4] With respect to the provision of a FAPE to the student, the parent requests a finding that the placement offered by the district was "not in the best interest of the child."

[5] The parent notes that there is not a seat available for the student within the proposed 6:1+1 special class.

the district maintains that neither party disputes that the student could not be educated in the general education environment and when developing the student's IEP, the March 2013 considered, but opted against less restrictive placements on the continuum for the student. Furthermore, the district submits that it was anticipated that students enrolled in the assigned public school site who demonstrated progress could then move to a less restrictive program, and that the assigned public school site also offered mainstreaming opportunities. With respect to equitable considerations, the district alleges that the parent's claim for relief is barred in this particular instance, because, the parent had no intention of enrolling the student in a public school. Finally, the district contends that should the parent prevail on her claim of tuition reimbursement, there is no showing in the hearing record that she lacks the financial ability to pay the student's tuition at Seton, which would entitle her to an award of payment of the student's tuition to be provided at public expense.

V. Discussion

A. Timeliness of Appeal

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]; 279.7). When the respondent is a district, personal service is effected by personal delivery to the district clerk, a district trustee or member of the district's board of education, the district superintendent, or to a person in the superintendent's office who has been designated by the board of education to accept service (8 NYCRR 275.8[a]). 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; (2) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]); or (3) the parties may agree to waive personal service (see Application of the Dep't of Educ., Appeal No. 07-037).

Further, 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 than ten 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 OSR (Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Additionally, the 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 provide that, if the IHO's decision was 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 OSR 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 an untimely petition (8 NYCRR 279.13). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown (id.). 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 B.C. v. Pine Plains Cent. Sch. Dist., 2013 WL 4779012, at *7 [S.D.N.Y. Sept. 6, 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review 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 for review that was served one day late]; see also, e.g., Application of the Dep't of Educ., Appeal No. 12-120; Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student with a Disability, Appeal No. 12-042; 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. 09-099; 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 Bd. of Educ., Appeal No. 07-055; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 05-060; Application of a Child with a Disability, Appeal No. 05-045; Application of the Dep't of Educ., Appeal No. 01-048).

In this case, the parent's appeal was not initiated in accordance with the procedures and timelines prescribed in Part 279 of State regulations.[6] The IHO's decision was dated October 23, 2013, and included the required statement advising the parties of their rights to seek review of the decision by an SRO, and further provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text (IHO Decision at p. 7; see 8 NYCRR 200.5[j][5][v], [k]). Although the the parties do not indicate in this instance how the IHO delivered her decision, out of an abundance of caution for the parent, who is proceeding pro se, I will pressume that it was sent by mail, and therefore that the date of mailing and the four days subsequent thereto are excluded in calculating the 35-day period within which the petition would have been timely served, and the petition was required to be personally served on the district no later than December 2, 2013 (8 NYCRR 279.2[b]). The petition was served upon the district December 6, 2013, and is therefore untimely. Additionally the parent did not set forth any reasons in the petition that would allow me to find good cause as to why she could not personally serve the petition within the time period set forth in State regulation (8 NYCRR 279.13).

[6] Upon review, the district also correctly submits that the parent failed to set forth the allegations in the petition in numbered paragraphs (8 NYCRR 279.8[a][3]), however, were that the only defect, I would not have dismissed the appeal.

Moreover, the parent has not filed a reply to the procedural defense of untimeliness asserted by the district in its answer (8 NYCRR 279.6). Under the circumstances of this case, I must find that the petition was not properly served upon the district prior to the expiration of the parent's time to initiate an appeal (8 NYCRR 279.13; see 8 NYCRR 279.2[b]).

Assuming, however, that the instant matter was not dismissed for want of timeliness, with regard to the parent's claim raised on appeal that the IHO's "personal relationship with the district tainted her decision in this matter," I have reviewed the hearing record, and find no evidence to support a claim of bias or that the IHO acted in an inappropriate manner during the course of the impartial hearing. Rather, an independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see e.g., Tr. pp. 78-89, 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). Moreover, in this instance, although I am constrained to dismiss the parent's petition based on grounds of untimeliness, I am sympathetic to the parent's wish to secure an educational placement for the student that she deems to be in his best interest. Regardless, a school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

VI. Conclusion

Based upon the parent'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; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006] [upholding dismissal of an untimely petition for review 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 for review 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]; 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.

Dated: **Albany, New York**
December 27, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER