The University of the State of New York

The State Education Department
State Review Officer
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No. 15-006

Application of a STUDENT WITH A DISABILITY, by his parents, from a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Mamaroneck Union Free School District

Appearances:
Law Offices of Leah L. Murphy, attorneys for petitioner, Leah L. Murphy, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which granted in part and denied in part the parents' request to withdraw certain issues raised in the due process complaint notice without prejudice. 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 appeal, a full recitation of the student's educational history is not warranted. Briefly, however, a subcommittee of the CSE convened on April 22, 2013 to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 3 at pp. 1-2, 7-10).[1] On May 7, 2014, CSE subcommittees convened for a requested review (see Dist. Ex. 5 at pp. 1-2; see generally Dist. Exs. 29; 34-38; 52-53). Approximately one month

[1] The student's eligibility for special education and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[ ]; 8 NYCRR 200.1[zz][ ]). In addition, on September 25, 2013, the district modified the student's IEP, which resulted in the student attending a regular education science class rather than a special class (see Dist. Ex. 4 at pp. 1-2).

after the May 2014 CSE subcommittee meeting, the student was involved in a disciplinary matter at the district public school, which resulted in the student receiving a five-day suspension (see Dist. Exs. 47; 51; see also Dist. Exs. 39 at p. 1; 40 at p. 1; see generally IHO Exs. 5A-5B). By letter dated June 5, 2014, the district scheduled a manifestation determination review (MDR) meeting to proceed on June 10, 2014, in addition to the student's disciplinary hearing (see Dist. Exs. 39 at pp. 1-2; 40 at pp. 1-2).[2] After unsuccessfully attempting to settle the matter on June 10, 2014, the MDR meeting was adjourned until June 16, 2014 (see IHO Exs. 5D at pp. 1-1-3; 5G at pp. 1-2; 5H at pp. 1-3; 5I at pp. 1-2; see also Tr. pp. 10-14, 22-27; Dist. Ex. 43 at p. 1).[3] In an e-mail dated June 11, 2014, the parents advised the district that they did not intend to "waive their rights" and requested information regarding the "identify of the hearing officer appointed for the 201.8 hearing" (IHO Ex. 5I at pp. 1-2).

In a letter dated June 16, 2014 and hand-delivered to the district, the parents indicated that due to the district's failure to hold the MDR meeting and "threatening" to hold a hearing pursuant to 8 NYCRR 201.8, the parents placed the student at the Second Arc Life program and would seek reimbursement for the costs of the student's program for the remainder of the 2013-14 school year and for summer 2014 (Dist. Ex. 43 at p. 1).[4]

A. Due Process Complaint Notice

By due process complaint notice dated June 27, 2014, the parents requested an "expedited due process hearing" alleging that the district committed "gross violations of [the student's] rights to a free appropriate public education [(FAPE)] and certain provisions concerning disciplinary matters" (Dist. Ex. 1 at p. 1). Specifically, the parents asserted that the district failed to convene an MDR meeting, the district failed to recommend an "appropriate special education program" for the student, the district failed to provide the parents with "proper notice of the CSE meeting," the district failed to conduct a functional behavioral assessment (FBA) and failed to develop an appropriate behavioral intervention plan (BIP), and the district failed to "coordinate with private treating providers" (id.). Moreover, the parents alleged that the district "frivolously threaten[ed]" to bring a hearing pursuant to 8 NYCRR 201.8 if the parents did not "waive all their rights" to a disciplinary hearing, an appeal, and an MDR meeting (id. at pp. 1-2).[5] In addition, the parents alleged that the April 2013 CSE failed to conduct an FBA or develop a BIP, and in September 2013, the district "removed" the student from attending a special class for science and placed him in a "regular education" science class (id. at p. 2). The parents further alleged that the May 2014 CSE subcommittee failed to conduct an FBA or develop a BIP (id. at pp. 3-4). In addition, the

[2] At the parents' request, the district rescheduled the student's disciplinary hearing from June 6, 2014 to June 10, 2014 (see IHO Ex. 5B at p. 1).

[3] By letters dated June 10, 2014, the district invited the parents to attend a CSE subcommittee meeting on June 19, 2014 to conduct the student's annual review (see Dist. Exs. 41 at p. 1; 42 at p. 1; see also Dist. Ex. 43 at p. 2).

[4] By letters dated July 10, 2014, the district scheduled a CSE meeting on July 17, 2014 as a "[r]equested [r]eview" (Dist. Exs. 44 at p. 1; 45 at p. 1).

[5] In reference to the settlement negotiations held on June 10, 2014, the parents indicated in the due process complaint notice that in an "exchange for a waiver of certain limited rights," the parents requested that the district "consider placing [the student] in a therapeutic setting for the remainder of the school year" and specifically suggested the Second Arc Life Center—however, the district rejected this proposal (Dist. Ex. 1 at p. 6).

parents noted that, to date, the district had not initiated a hearing pursuant to 8 NYCRR 201.8, nor had the district rescheduled the disciplinary hearing or held an MDR meeting (id. at p. 7). As relief, the parents requested that an IHO make the following findings and determinations: (1) the district failed to offer the student a FAPE for the 2013-14 school year; (2) the district violated the parents' rights to meaningfully participate at the May 2014 CSE meeting; (3) the district violated their rights to meaningfully participate in an MDR meeting related to the student's disciplinary matter; (4) the student's conduct forming the basis of the disciplinary matter was "substantially and/or directly related to the student's disability;" (5) the district violated the parents' rights by refusing to hold an MDR meeting and "threatening" to hold a hearing pursuant to 8 NYCRR 201.8 if the parents did not "waive all their rights;" and that the parents were entitled to (6) compensatory educational services in the form of prospective funding or reimbursement of the student's tuition at the Second Arc Life Center, or alternatively, that (7) the parents were entitled to reimbursement for the costs incurred for the student's placement at the Second Arc Life Center, including the costs of transportation and related services (id. at pp 7-8).

B. Events Post-Dating the Due Process Complaint Notice

On September 3, 2014, the district conducted an MDR meeting and determined that the student's conduct related to the disciplinary matter was a manifestation of his disability (see IHO Ex. 5F at p. 1).[6] On September 4, 2014—the first day of the school year—the student returned to the district public school (see Tr. p. 15).

C. Impartial Hearing Officer Decision

On September 4, 2014, the parties proceeded to an impartial hearing, and on September 16, 2014, the IHO issued an interim order, which found that evidence related to the settlement negotiations that occurred between the parties on June 10, 2014 was inadmissible (see IHO Ex. 6 at pp. 2-3; see generally IHO Exs. 1; 4 at pp. 1-11; 5 at pp. 1-25). In addition, the IHO found that as a result of the inadmissibility of such evidence, the district's application to disqualify the parents' attorney as a potential witness was moot (see IHO Ex. 6 at p. 3). Finally, the IHO denied the parents' subpoena seeking testimonial evidence (id.).

On October 1, 2014, the parties returned to the impartial hearing, and at that time, the parents requested clarification of the remaining issues for consideration in light of the IHO's interim order precluding evidence of the settlement negotiations (see Tr. pp. 88, 91-92). In reviewing the parents' due process complaint notice, the parties agreed that "[p]aragraphs one and two under the proposed resolution on page seven" remained pending; the parents' attorney stated that the "third paragraph" regarding the parents right to meaningfully participate in the MDR meeting "would be dismissed as a result of [the IHO's] decision; the parents' attorney then stated that the "fourth paragraph" was "withdrawn" on the first day of the impartial hearing and otherwise deemed "moot as a result of the CSE meeting which was held by the district on that same date;" as to "paragraph five," the parents' attorney stated that it was also dismissed as a result of the IHO's decision; and finally, with regard to the "sixth and seventh paragraphs," the parents' attorney stated that both claims for tuition reimbursement or prospective funding had been "dismissed as a

[6] As noted on the September 2014 IEP, the parents did not attend the MDR meeting held on September 3, 2014, "per their email communication" (IHO Ex. 5F at p. 1).

result of the [IHO's] decision" (Tr. pp. 91-98; see Dist. Ex. 1 at pp. 7-8). The IHO, however, disagreed with the parents' attorney's interpretation of the IHO's decision with respect to "paragraph six and seven," and clarified that the parents' request for either prospective funding or tuition reimbursement for the costs of the student's tuition at the Second Arc Life Center remained "on the table to be addressed" (Tr. pp. 101-03).

After a brief off-the-record discussion, the parents' attorney formally requested to withdraw the claims asserted in the due process complaint notice under the "first and second paragraph concerning the 2013-2014 school" without prejudice (Tr. pp. 104-06; see Dist. Ex. 1 at p. 7). As to the remaining claims in the due process complaint notice, the parents' attorney summarized her understanding that those claims had been dismissed as a result of the IHO's decision, except for "paragraphs one, two and four," which the parents had withdrawn (see Tr. pp. 109-11).

Having considered the parties' submissions, the IHO issued an order of termination (IHO decision) dated November 17, 2014, which found the following: paragraphs one, two, six, and seven in the due process complaint notice under the proposed resolution section were withdrawn without prejudice; paragraphs three and four in the same section of the due process complaint notice were deemed "moot" by the IHO's interim decision; and finally, paragraph five was "dismissed" (IHO Ex. X at pp. 3-4; see IHO Exs. VII-VIII).[7] The IHO further explained that since the district conducted the MDR meeting on September 3, 2014, the parents' allegations in paragraph three were therefore "moot;" similarly, the IHO found that as a result of the "CSE meeting," the parents' allegations in paragraph four were also rendered "moot" (IHO Ex. X at p. 3). Finally, the IHO opined that since the parties did not have a "'day in Court' to present substantive matters," the withdrawn issues could not be "'with prejudice'" (id. at p. 4).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in precluding evidence regarding the settlement negotiations that took place between the parties on June 10, 2014. Furthermore, the parents argue that the IHO erred in finding that paragraph three was deemed "moot" as a result of the IHO's interim decision precluding the submission of evidence. As relief, the parents seek determinations that the preclusion of evidence violated the parents' rights, the IHO's "unsupported decision" demonstrated bias and should result in the IHO's "disqualification to continue in this

[7] Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]). Finally, if a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to head the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

matter," and finally, the matter should be remanded to an IHO "who will allow full disclosure of all the relevant facts in support of all of the [p]arents' claims for relief."

In an answer, the district responds to the parents' allegations and generally argues to dismiss the petition for failure to conform to the regulatory requirements regarding pleadings. Alternatively, the district asserts that the petition must be dismissed as an interim appeal from evidentiary determinations. Finally, the district argues that if deemed a final decision, the IHO properly concluded that any issues not withdrawn by the parents were moot or dismissed.

V. Discussion—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]). 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 a State Review Officer (8 NYCRR 275.8[a]; 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).[8]

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 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 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]; see 8 NYCRR 279.2). 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). State regulations provide an SRO with the authority to dismiss sua sponte an untimely 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). 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 (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

[8] 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."

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 Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service of the petition on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; 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]).

In this case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. Here, the IHO's order of termination was dated November 17, 2014 (see IHO Ex. X at p. 4). Assuming for the sake of argument that the IHO's decision was transmitted to the parties by mail, the regulatory exception permitting the exclusion of the date of mailing and the four days subsequent thereto applied in calculating the 35-day period within which the petition could have been timely served; therefore, the parents were required to personally serve the petition upon the district no later than December 29, 2014 (see 8 NYCRR 279.2[b], 279.11 [allowing for service on the following Monday if the last day for service falls on a Saturday or Sunday]). However, the parents did not serve the petition upon the district until January 5, 2015 (see Parent Aff. of Service). Accordingly, the service of the petition upon the district on January 5, 2015 was untimely.

Additionally, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown, the reasons for the failure to timely seek review must be set forth in the petition (see 8 NYCRR 279.13). Here, the parents failed to assert good cause—or any reasons whatsoever—in the petition for the failure to timely initiate the appeal (see generally Pet. ¶¶ 1-108). Instead, the parents indicated in the affidavit of service that they attempted to serve the petition upon the district on December 23, 26, and 28, 2014, but found the district offices closed until January 5, 2015 (see Parent Aff. of Service). On January 5, 2015, the parents served the petition upon the district by delivering a copy upon the district clerk (id.). Even assuming that the parents could set forth good cause for the failure to timely seek review in the affidavit of service as opposed to the petition, the reason stated in this case—that is, finding the district offices closed until January 5, 2015—does not constitute good cause because State regulations allow personal service upon a school district through the following individuals: the

district clerk, any trustee or any member of the board of education of such school district, the superintendent of schools, or to a person in the office of the superintendent so designated to accept service (see 8 NYCRR 279.1[a]; 8 NYCRR 275.8[a]). In addition, if a respondent cannot be found upon diligent search, State regulations contemplate alternate forms of personal service and parties may also seek authorization for alternate forms of personal service through the Office of State Review (see 8 NYCRR 279.1[a]; 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). The parents provided no evidence that they attempted personal service upon the district through any of the individuals identified by regulation—other than the district clerk—or that any of the individuals identified by regulation could not be found upon diligent search or that the parents contacted the Office of State Review seeking permission for an alternate means of personal service upon finding the district offices closed when they attempted service on December 23, 26, and 28, 2014. The parents also provided no evidence that they attempted to contact counsel for the district in order to waive personal service or effectuate service through consent of the parties (see Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037). Therefore, because the parents did not timely serve the petition upon the district or otherwise set forth good cause for the failure to timely initiate this appeal in the petition, the parents' appeal must be dismissed.

VII. Conclusion

Having found that the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 6, 2015

CAROL H. HAUGE
STATE REVIEW OFFICE