The University of the State of New York

The State Education Department
State Review Officer
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No. 17-051

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the East Ramapo Central School District

Appearances:
Harris Beach, PLLC, attorneys for respondent, Howard J. Goldsmith, 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 the decision of an impartial hearing officer (IHO) which denied their request for respondent (the district) to provide full-time 1:1 nursing services for the student during the 2016-17 school year. The appeal must be dismissed.[1]

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] In September 2016, Part 279 of the practice regulations was amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

§§ 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 unnecessary. Briefly, however, the student presents with significant global developmental delays, with medical diagnoses of encephalopathy and spastic quadriplegia, and "requires maximum assistance with all aspects of self-care" (Dist. Exs. 2 at pp. 5-6; 5 at p. 1; 15; 21; 22). As a result of her needs, the student attended preschool and Kindergarten accompanied by a nurse provided by Medicaid (Tr. pp. 750-53). On May 18, 2016, a CSE convened to conduct the student's annual review and develop an IEP for the 2016-17 school year (Dist. Ex. 2 at p. 1). Finding the student eligible for special education as a student with multiple disabilities, the May 2016 CSE

recommended a 12-month school year program in an 8:1+2 special class with a 1:1 aide and related services of physical therapy (PT), occupational therapy (OT), speech-language therapy, vision services, and feeding therapy (id. at pp. 1, 10-11).[2]

A. Due Process Complaint Notice

By due process complaint notice dated July 7, 2016, the parents alleged that the student required full-time 1:1 nursing services for the 2016-17 school year to safely attend school and access her education (Joint Ex. 1 at pp. 1-3). More specifically, the parents alleged that the district did not recommend that the student receive full-time nursing services in spite of recommendations from multiple experts familiar with the student, who opined that the student required full-time 1:1 nursing services (id.). The parents further alleged that the district refused to write a letter to Medicaid indicating that the student needed full-time nursing services, resulting in the cessation of Medicaid funding for the nursing services during the school day (id. at p. 3). Moreover, the parents argued that the district did not conduct its own evaluation or assessment of the student's need for nursing services (id.). As relief, the parents requested full-time 1:1 nursing services for the 2016-17 school year, including during summer 2016, as well as for days that the student was out of school due to illness (id.). The parents also requested an assistive technology evaluation and compensatory relief, including reimbursement for the costs of obtaining transportation, the services of an aide, and/or nursing services (id.).

B. Events Post-Dating the Due Process Complaint Notice

On July 18, 2016, the district and the parents participated in a resolution meeting, which resulted in the district agreeing to reconvene the CSE to review additional medical records provided by the parents (Dist. Ex. 25 at p. 1). On August 1, 2016, the CSE reconvened and reviewed, among other things, the student's additional medical records, a July 2014 "modified barium swallow study" report, and various letters from the student's doctors (id.; Dist. Ex. 26 at pp. 2-4; see Dist. Exs. 14-18, 20-23). The August 2016 CSE developed an IEP which, in addition to the services included in the May 2016 IEP, recommended three hours and 45 minutes daily of 1:1 nursing services for the student for nebulizer treatments, administration of medication, and feeding and drinking (Dist. Ex. 26 at pp. 1-2, 11). The CSE also recommended that a suction machine be available to the student in the classroom (id. at pp. 1-2, 8). By letter to the district dated August 11, 2016, the parents expressed disagreement with the nursing services recommended in the August 2016 IEP and maintained that the student required 1:1 nursing services for the entire school day (Dist. Ex. 27). By prior written notice dated September 6, 2016, the district responded to the parents' August 11, 2016 letter and informed them that, based on the district physician's review of the student's medical records, the CSE did not recommend any changes to the recommendation for nursing services in the August 2016 IEP because the student did "not medically require full time 1:1 nursing services" (Dist. Ex. 29; see Dist. Ex. 28).

[2] The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

C. Impartial Hearing Officer Decision

On September 22, 2016, the parties proceeded to an impartial hearing, which concluded on November 10, 2016, after three days of proceedings (see Tr. pp. 1-845).[3] In a decision dated May 24, 2017, the IHO concluded that the district offered the student a FAPE for the 2016-17 school year (IHO Decision at pp. 8-15). Initially, the IHO determined that the August 2016 CSE did not predetermine the decision not to recommend full-time nursing services for the student because the parents participated in the August 2016 CSE meeting and the CSE modified the student's IEP to include 1:1 nursing services for the student for nebulizer treatments, administration of medication, and feeding and drinking (id. at pp. 8-10). The IHO also found that the recommended nursing services in the IEP were sufficient to meet the student's needs (id. at pp. 11-14). Lastly, the IHO found that the CSE recommended nursing services based on the student's needs and not based upon the availability of alternative funding sources for the services (id. at pp. 14-15).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in finding that the August 2016 IEP was appropriate and the student did not require full-time 1:1 nursing services during the school day.[4] Specifically, the parents assert that the IHO did not address the student's safety outside of the classroom while the student was receiving related services or during other activities. Next, the parents argue that the IHO should have deferred to the opinions of the student's providers, rather than the testimony of district witnesses who were not familiar with the student's complex medical needs. The parents also argue that the IHO erred in finding that their request for full-time 1:1

[3] While the parents did not amend their due process complaint notice to specifically challenge the August 2016 IEP, the parties proceeded at the impartial hearing, and proceed on appeal, by treating the August 2016 IEP as the operative IEP for purposes of the administrative proceedings.

[4] The parents note that the IHO issued the decision more than six months after the final day of the impartial hearing. State regulation provides that when parents initiate an impartial hearing, an IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the earliest of the parties agreeing in writing to waive the resolution meeting, the parties agreeing in writing during the resolution period that no agreement is possible, or the expiration of the resolution period (8 NYCRR 200.5[j][5]; see 34 CFR 300.510[b][2]; [c]; 300.515[a]). 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]). State regulation further provides that, in cases where extensions have been granted, the decision must be rendered and mailed no later than 14 days from the date that the IHO closes the record (8 NYCRR 200.5[j][5]). The date the record is closed is determined by the IHO and shall be indicated in the IHO's decision (8 NYCRR 200.5[j][5]; [j][5][v]). A hearing record must be closed "when all post-hearing submissions are received by the IHO" ("Guidance on Procedures Relating to Special Education Impartial Hearings," Office Special Educ., Special Educ. Field Advisory, [June 2016], available at http://www.p12.nysed.gov/specialed/publications/2016memos/documents/GuidanceonProceduresRelatingtoImpartialHearings.pdf; see "Changes in the Impartial Hearing Reporting System," Office of Special Education Mem. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). An IHO may not grant an extension for any reason after the record close date (8 NYCRR 200.5[j][5][iii]). In this case, the parties submitted their closing briefs to the IHO on December 22, 2016 (Parent Post-Hr'g Br. at p. 30; Dist. Post-Hr'g Br. at p. 31). However, the IHO determined the record close date to be May 10, 2017, nearly five months after the parties submitted their closing briefs, and the IHO issued his decision on May 24, 2017 (IHO Decision at pp. 1, 15). Although the hearing record contains extensions of the decision due date granted by the IHO, each of the extension requests made after the close of the impartial hearing was granted "in order to allow for adequate time for [the IHO's] review of the hearing record" (IHO Exs. X-XV). Accordingly, the hearing record supports the parents' position that the IHO did not comply with State regulations in issuing his decision.

nursing services was based on the availability of alternate funding for the services; rather, the parents assert that their request was based on the student's needs. As relief, the parents request that the student be provided with full-time 1:1 nursing services during the school day and on the school bus.

In an answer, the district denies the parents' allegations and argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the nursing services offered in the August 2016 IEP were recommended based on, and were appropriate to meet, the student's needs.

V. Discussion—Timeliness of Appeal

Based on the reasons set forth below, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. 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 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]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service 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 a parent's appeal for failure to properly effectuate service in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]).

In the instant case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated May 24, 2017 (IHO Decision at p. 15). The parents were, therefore, required to personally serve the request for review upon the district no later than July 3, 2017 (see 8 NYCRR 279.2[b]). However, the request for review was served upon the district on July 5, 2017 (see Parent Aff. of Service). Accordingly, the service of the request for review upon the district was untimely.

Furthermore, 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 must be set forth in the request for review (see 8 NYCRR 279.13). Here, the parents failed to assert good cause—or any reason whatsoever—in their request for review for the failure to timely initiate the appeal. Rather, in a letter to the Office of State Review accompanying their filing of the request for review, the parents indicated that they attempted to serve the district on July 3, 2017, but the district was closed in contemplation of Independence Day.[5]

[5] It does not appear that the parents copied the district on the letter describing the attempt to effectuate service.

Even assuming that the parents could set forth good cause for the failure to timely seek review in a letter to the Office of State Review as opposed to the request for review, the reason stated in this case—that the district was closed in contemplation of Independence Day—does not constitute good cause. "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]). Additionally, State regulations allow personal service of a request for review upon a school district through the district clerk, any trustee or member of the board of education, the superintendent of schools, or a person designated by the board of education to accept service (8 NYCRR 279.4[b]).

Here, the parents did not provide any proof that they attempted personal service upon the district through any of the individuals identified by regulation, or that any of these individuals could not be found after diligent search. Furthermore, there is no evidence that the parents contacted the Office of State Review seeking permission to effectuate service by alternate means upon finding the district office was closed when they attempted service on July 3, 2017. Based on the foregoing, there is no basis on which to excuse the untimely personal service of the request for review on the district (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 and noting that it was foreseeable that difficulties might arise when attempting to effectuate service on the day service was due]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 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 *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]).[6]

[6] As a final note, were I to reach the merits in this case, it is unclear what, if any, relief might be appropriate at this juncture if the parents were to prevail. In their due process complaint notice, the parents requested, among other things, that the student receive full-time 1:1 nursing services for the 2016-17 school year (Joint Ex. 1 at p. 3). On appeal, the parents request more broadly that the student be provided with full-time 1:1 nursing services during the school day and on the school bus. As the 2016-17 school year has ended and the parents are not seeking compensatory relief on appeal, it does not appear that any meaningful relief could be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428-29 [W.D.N.Y. 2008]). Further, to the extent the parents request on appeal that the district be required to provide full-time 1:1 nursing services for the 2017-18 school year or thereafter, any such order would be premature. At this point in the school year, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2017-18 school year (see Dist. Ex. 26 at p. 1; see also 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). An order requiring the district to provide the student with 1:1 full-time nursing services would circumvent the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

VI. Conclusion

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

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
August 9, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER