The University of the State of New York

The State Education Department
State Review Officer
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No. 17-100

Application of the BOARD OF EDUCATION OF THE GREAT NECK UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Frazer & Feldman, LLP, attorneys for petitioner, by Timothy M. Mahoney, Esq.

Law Offices of Susan J. Deedy, attorneys for respondent, by Susan J. Deedy, 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. 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 Quad Preparatory School (the Quad School) for 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

[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 some of 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.

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 unnecessary. Briefly, the hearing record reflects that the student has received a diagnosis of an autism spectrum disorder and has received special education services since the age of three (Tr. pp. 683-86; Parent Ex. R at p. 8). During the 2015-16 school year, the student attended the Quad School at district expense pursuant to a settlement agreement (Tr. p. 698).

A CSE convened on April 14, 2016 to conduct the student's annual review and develop the student's IEP for the 2016-17 school year (Parent Ex. B at pp. 1-3). The CSE determined that it required more information from the Quad School and reconvened on May 31, 2016 (id. at pp. 1, 3-4). The May 2016 CSE found the student eligible for special education as a student with autism, and recommended a 6:1+2 special class placement with related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling, a behavioral intervention consultant, and program modifications and accommodations (id. at pp. 5, 11-12). The district also recommended that the student receive speech-language therapy and counseling services on a 12-month basis (id. at p. 12).

By letter dated June 3, 2016, the student's mother notified the district that she had concerns about the May 2016 CSE's recommendation, and indicated that the CSE had been unable to provide her with certain information about the program (Parent Ex. E). By letter dated June 17, 2016, the district supervisor of special education informed the student's mother of the public school site in which the program would be located, provided details about the staffing selection process, and described the student's summer services (Parent Ex. F).

By prior written notice dated June 30, 2016, the district notified the parents of the May 2016 CSE's recommendations for the student's educational program (Dist. Ex. 3). By letter dated August 16, 2016, counsel for the parents notified the district of their rejection of the student's May 2016 IEP and unilateral placement of the student at the Quad School for the 2016-17 school year, and further expressed their intent to seek public funding for the costs of the student's tuition at, and transportation to, the Quad School (Parent Ex. D).[2]

A. Due Process Complaint Notice

By due process complaint notice, dated October 17, 2016, the parents requested a bifurcated impartial hearing to address the district's failure to provide the student with transportation to the Quad School and contending that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (IHO Ex. 6). Initially, the parents requested an interim order directing the district to provide transportation to the Quad School (id. at p. 2). The parents alleged that the district failed to offer the student a FAPE for the 2016-17 school year for a variety of reasons, including that the district: failed to provide them with sufficient information regarding the CSE's program recommendation; failed to offer a program that appropriately met the student's academic, social/emotional, behavioral, sensory, and management needs; failed to offer appropriate related services; failed to offer sufficient program modifications and accommodations; failed to recommend adequate behavior consultant services; failed to offer sufficient parent counseling and training services; and failed to appropriately address the student's transition needs (id. at pp. 4-5). As a proposed resolution, the parents requested that the district reimburse them for the total cost of the student's tuition at the Quad School for the 2016-17 school year (id. at p. 5).

[2] The hearing record reflects that the parents executed a contract for the student's attendance at the Quad School for the 2016-17 school year in May 2016 (Parent Ex. O).

B. Impartial Hearing Officer Decision

The parties held a prehearing conference on November 18, 2016, at which time the IHO granted the parents' request for a bifurcated impartial hearing, to determine whether the program offered by the unilateral placement was similar to the program recommended by the CSE so as to require the district to provide transportation to the Quad School pursuant to Education Law § 4402(4)(d) (IHO Exs. 1; 2). The parties submitted briefing and proceeded to the first part of the bifurcated impartial hearing on January 19, 2017, limited to the issue of similarity between the programs (Tr. pp. 1-157; see IHO Exs. 3; 4; 5). In an interim decision dated February 7, 2017, the IHO determined that the program offered by the district in the May 2016 IEP and the program provided by the Quad School during the 2016-17 school year were sufficiently similar to require that the district provide transportation between the student's home and the Quad School for the 2016-17 school year (IHO Ex. 7 at pp. 1-2, 5-7). The IHO ordered the district to begin providing transportation immediately, and further ordered the district to reimburse the parents for transportation costs incurred during the 2016-17 school year (id. at p. 7).

The parties thereafter proceeded to the second part of the bifurcated impartial hearing on February 8, 2017, which concluded on August 3, 2017, after five non-consecutive days of proceedings (Tr. pp. 158-795). In a decision dated September 24, 2017, the IHO found that the student performed academically at grade level, and therefore concluded that the student's needs were "focused upon his behavioral issues" (IHO Decision at p. 14). The IHO held that considering the student's "serious and well documented behavioral difficulties," the issue of the district's provision of a FAPE was centered on whether the CSE's determination not to recommend a 1:1 aide nevertheless provided the student with an opportunity to make reasonable progress (id. at p. 15). After reviewing the recommended program, the IHO concluded that there was "clear and consistent testimony" that the student required a 1:1 aide and that the provision of a behavioral consultant for two hours per week was insufficient to address the student's needs, such that, in combination with the failure to recommend parent counseling and training or develop an FBA and BIP, the district denied the student a FAPE (id. at pp. 16-17).

Turning to the appropriateness of the parent's unilateral placement, the IHO noted that the Quad School's instructional and behavioral services were provided by State-licensed special education teachers, and the Quad School employed certified personnel to provide speech-language therapy, OT, counseling services, and parent counseling and training (IHO Decision at p. 17). The IHO further noted that the annual goals and objectives contained in the May 2016 IEP were developed with the assistance of representatives from the Quad School (id. at p. 18). The IHO therefore determined that the Quad School provided the student an appropriate educational placement (id.). Lastly, the IHO found that because the parents cooperated with the district and gave appropriate notice of their intention to unilaterally place the student, equitable considerations favored tuition reimbursement (id.). The IHO therefore ordered the district to reimburse the parent for the costs of the student's tuition and related expenses at the Quad School during the 2016-17 school year (id.).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the May 2016 IEP did not offer the student a FAPE for the 2016-17 school year. The district alleges that the IHO was mistaken in a number of his factual findings. The district next contends that the IHO failed to

apply the correct standard in determining that the student required a 1:1 aide. The district also alleges that the IHO erred by finding that it was required to perform an FBA and create a BIP prior to the May 2016 CSE meeting in order to offer the student a FAPE.

The district does not appeal the IHO's determination that the program offered by the district and the program provided by the Quad School were similar, or the resultant conclusion that it was required to provide transportation to the Quad School. Rather, the district alleges that because of the unchallenged determination that the programs were similar, the finding that the district's program was inappropriate required a finding that the Quad School was likewise inappropriate.

In an answer, the parent asserts general admissions and denials, and argues that the IHO's decision should be upheld in its entirety.

V. Discussion

As set forth below, the district's 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]).

The district failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision was dated September 24, 2017 (IHO Decision at p. 18). The district was, therefore, required to personally serve the request for review upon the parent no later than November 3, 2017 (see 8 NYCRR 279.2[b]). However, the request for review was served upon the parent on November 6, 2017 (see Dist. Aff. of Service). Accordingly, the service of the request for review upon the district was untimely.

The district acknowledges in its request for review that the IHO's decision was dated September 24, 2017, and further indicates the decision was delivered to the parties via email on September 25, 2017 (Req. for Rev. ¶2). The district may have mistakenly believed that the time period for service of the request for review did not begin to run until after transmittal of the IHO Decision, in which case the last day the district could have served the request for review would have fallen on Saturday, November 4, 2017, and based on 8 NYCRR 279.11[b] service would have

been allowed on the following Monday, November 6, 2017 (see Req. for Rev. at p. 1). However, I remind the district that the time period for appealing an IHO decision begins to run based upon the date of the IHO's decision, and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a petition (see 8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 16-029). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date upon which either party receives the IHO's decision is not relevant to the calculus in determining whether a petition for review is timely, and to the extent that the district may have misconstrued the relevant regulations regarding the date by which timely service was required to have been made, such a mistake does not excuse the district's failure to timely effectuate service of the request for review.

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). Circumstances that constitute good cause for late filing could include postal service error, or other events 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]). Here, the district failed to assert good cause—or any reason whatsoever—in its request for review for the failure to timely initiate the appeal, and in fact acknowledged the correct date of the IHO Decision in its request for review.

Accordingly, because the district failed to properly initiate the appeal by effectuating timely service and there is no basis on which to excuse the untimely personal service of the request for review on the parent, the appeal is dismissed (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W. 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]).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 2, 2018

STEVEN KROLAK
STATE REVIEW OFFICER