The University of the State of New York

The State Education Department
State Review Officer
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No. 18-026

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
The Patrick Donahue Law Firm, PLLC, attorneys for petitioner, by Patrick Donohue, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from the decision of an impartial hearing officer (IHO) determining their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2016-17 school year. The IHO determined that the student's pendency placement was the placement established pursuant to the student's April 2016 individualized education program (IEP). The district cross-appeals from the IHO's determination that the April 2016 IEP constituted the basis for pendency. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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 unnecessary. Briefly, the hearing record reflects that the student has significant delays in many

areas of development, as well as a seizure disorder which impacts his functioning (Parent Ex. D at pp. 1-2).[1]

A CSE convened on April 13, 2016, to develop the student's educational program for the 2016-17 school year (Parent Ex. D). The April 2016 CSE recommended a 12-month school year program in a 6:1+1 special class at a State-approved nonpublic school with related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 10-13). The parties agree that the district failed to identify a State-approved nonpublic school to implement the IEP and the student attended the International Academy of Hope (iHOPE) for the 2016-17 school year at district expense pursuant to an agreement (Tr. pp. 6-8, 16).

A. Due Process Complaint Notice

By due process complaint notice dated October 30, 2017, the parents asserted that the district failed to offer the student a free appropriate public education for the 2017-18 school year (Parent Ex. A at p. 1). The parents requested an interim order on pendency, asserting that the basis for pendency "lies in the April 13, 2016 IEP" and that, based on the district's failure to identify a nonpublic school placement for the 2016-17 school year, the parents "selected iHope as the appropriate school . . . [and the student] continue[d] to attend iHope to receive these services for" the 2017-18 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 9, 2017, and concluded the pendency portion of the hearing on November 17, 2017, after two days of proceedings (see Tr. pp. 1-22). At the impartial hearing, counsel for the parents asserted that the district was incapable of implementing the April 2016 IEP and that the student's program at iHOPE was substantially similar to the program recommended by the April 2016 IEP, making it the student's pendency placement (Tr. pp. 5-7). By decision dated November 27, 2017, the IHO determined the student's pendency placement was a State-approved nonpublic school pursuant to the April 2016 IEP (IHO Decision at p. 1). The IHO denied the parents' motion for pendency "in a non-approved school, the school the student is presently attending" (id.).

IV. Appeal for State-Level Review

The parents appeal. The parents argue that the IHO erred by denying their motion for pendency. The parents assert that when the district failed to identify a State-approved nonpublic school to implement the April 2016 IEP, they placed the student at iHOPE, which "provides special education and related services which are 'substantially similar' to" those recommended by the April 2016 IEP. The parents argue that iHOPE "satisfies all three variations" on pendency described by the Second Circuit and the district did not offer any school placement location to implement the

[1] No hearing record was submitted by the district in connection with the parents' appeal; however, the parents' appeal from the IHO's final decision on the merits of their complaint is currently pending before this SRO (Application of a Student with a Disability, Appeal No. 18-025). All exhibit and transcript citations in this decision are to the portions of the hearing record filed by the district with the Office of State Review with respect to Application of a Student with a Disability, Appeal No. 18-025 that were made a part of the hearing record as of the date of the interim decision at issue in this appeal (see 8 NYCRR 279.9[d]).

student's pendency placement during the proceedings. The parents accordingly assert that iHOPE is the student's pendency placement for the 2017-18 school year. Further, the parents submit additional documentary evidence which they argue the IHO erred in refusing to admit and consider as evidence that iHOPE provided substantially similar services to the April 2016 IEP (Parent Exs. B; E; F), as well as documents related to the parties' stipulation of settlement regarding the 2016-17 school year.

In an answer and cross-appeal, the district responds by generally denying the parents' allegations. The district asserts that the parents' appeal should be dismissed because it is untimely and procedurally deficient as it does not comply with the practice regulations. In the alternative, if the SRO determines that the appeal should not be dismissed, the district requests that the matter be remanded to an IHO for a hearing regarding the student's pendency placement. Further, the district cross-appeals the IHO's determination that the April 2016 IEP constituted the basis for pendency because the IEP was not implemented and the student was unilaterally placed at iHOPE for the 2016-17 school year. Finally, the district argues that the parents' submission of the settlement agreement for the 2016-17 school year violated the terms of the stipulation of settlement and that the agreement should not be considered.

In an answer to the cross appeal, the parents assert that the IHO properly determined that the April 2016 IEP established the basis for the student's pendency placement. The parents acknowledge that the request for review was not timely served; however, they assert timely service was impossible due to weather conditions. Moreover, the parents argue that the regulations do not require appeals of interim IHO decisions be filed within 40 days from the interim decision. In addition, the parents assert that a request for review does not have to comply with the form requirements of Part 279 as these are "guidelines" and "not mandatory." Finally, the parents contend that they properly submitted the stipulation of settlement to show that the district was unable to implement the student's pendency placement.

V. Applicable Standards & Discussion

Upon review, 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 decision to be reviewed (id.). However, while a party may appeal from an IHO's interim pendency determination while the impartial hearing is still ongoing, the party may also seek review of the interim decision in an appeal from the IHO's final decision (8 NYCRR 279.10[d]). 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, e.g., 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). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the

request for review (id.). "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]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

In this case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's pendency decision was dated November 27, 2017 (IHO Decision at p. 2). The parents were, therefore, required to personally serve the request for review upon the district no later than January 8, 2018 (8 NYCRR 279.4[a]).[2] However, the request for review was first served upon the district on March 8, 2017 (see Parent Aff. of Service). 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). In this case, the parents failed to assert good cause for the failure to timely initiate the appeal—or any cause whatsoever—in their request for review. The parents did provide an excuse for their failure to timely initiate the appeal in the answer to the cross-appeal; however, this does not constitute good cause.

The parents correctly assert that they may seek review of an IHO's interim decision on pendency "in an appeal to the Office of State Review from a final determination" (8 NYCRR 279.10[d]). However, the request for review was not timely served from the IHO's final decision on the merits, which was dated January 26, 2018. An appeal from the final decision had to be personally served on the district by March 7, 2018.

Further, the parents did not assert good cause in the request for review to excuse the untimely service of the request for review on the district. In their answer to the cross-appeal, parents' counsel admits the request for review was served late and contends that the weather on March 7, 2018 "created significant travel delays and other logistical problems that made prompt service impossible" (Answer to Cross-Appeal). However, parents' counsel does not explain how he was able to effect service on the district in Appeal No. 18-025 on March 7, 2018, the same date on which he asserted the weather made it impossible to timely serve the district in this matter.[3]

Accordingly, no good cause has been asserted or found to excuse the untimely service of the request for review on the district or to raise a claim relating to pendency in the parents' timely served request for review (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., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009

[2] The 40th day fell on a Saturday, January 6, 2018; therefore, the parents had until the following Monday, January 8, 2018, to timely effectuate service (8 NYCRR 279.11[b]).

[3] Both because of the parents' failure to identify good cause for their failure to timely appeal in the request for review, and their attempt to appeal twice from the same IHO decision, it is unnecessary to determine whether inclement weather conditions which caused "significant travel delays and other logistical problems"—and which were known in advance to be likely—constituted good cause for the failure to timely serve the district in this matter; however, the parents supplied no specific details of the sort that might assist an SRO in determining whether good cause has been set forth.

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 [Feb. 28, 2006]). Consequently, the parents failed to comply with State regulations regarding service of a request for review, and the request for review is therefore dismissed (8 NYCRR 279.4[a]; 279.13).

Additionally, as noted above, the parents did, in fact, separately serve and file a request for review from the final decision, which is still pending. Accordingly, even if this appeal on pendency were timely, it is questionable whether State regulations would permit the parents, as they have attempted here, to file two separate appeals from the final IHO Decision. If the parents wished to seek review of the decision on pendency within 40 days of the IHO's final decision, it was incumbent on them to raise the issue in their request for review appealing from that decision (see 8 NYCRR 279.8[c][4] ["any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"). However, the parents did not raise the issue of pendency in their request for review in Appeal No. 18-025.

Moreover, the form requirements of Part 279 are not merely guidelines, and the failure to comply with the practice regulations is grounds for the request for review to be rejected (see 8 NYCRR 279.8[a]). However, under these circumstances, where the parents have not timely initiated this proceeding, it is unnecessary to determine whether the failure to comply with Part 279, alone, would warrant rejection of the request for review.

Finally, a cross-appeal is generally considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]). The district's cross-appeal is, accordingly, also dismissed (Application of a Child with a Disability, Appeal No. 05-078).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 11, 2018

STEVEN KROLAK
STATE REVIEW OFFICER