The University of the State of New York

The State Education Department
State Review Officer
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No. 18-090

Application of the BOARD OF EDUCATION OF THE WAYLAND-COHOCTON CENTRAL 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:
Bond, Schoeneck & King, PLLC, attorneys for petitioner, by Jennifer M. Schwartzott, Esq.

Legal Assistance of Western New York, Inc., attorneys for respondent, by Ashley Westbrook, 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 a decision of an impartial hearing officer (IHO) which determined that the district failed to provide appropriate transportation services as recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2017-18 school year. 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

A full recitation of the student's educational history is unnecessary due to the disposition of this appeal on procedural grounds. Briefly, the student requires a wheelchair and other significant assistance with mobility and transitions, has significant impairments related to vision and communications, and requires assistance with feeding and other activities of daily living (see Tr. pp. 187-90; Dist. Ex. 3 at pp. 3-10).

During summer 2015, the parents and the student moved to the district and a committee on preschool special education (CPSE) developed an IEP for the student's 2015-16 school year (Tr.

pp. 18-20, 192-93; Parent Ex. B). Subsequently, the CPSE developed an IEP for the student's 2016-17 school year as well (Parent Ex. C).[1]

On May 30, 2017, the CSE convened to conduct a "Reevaluation CPSE to CSE Review" and to develop the student's IEP for the 2017-18 school year (Dist. Ex. 3; see Dist. Ex 9). The May 2017 CSE found the student eligible for special education as a student with multiple disabilities and recommended a 12:1+4 special class in a State-approved nonpublic day school with related services of individual occupational therapy, physical therapy, speech-language therapy, vision services, and skilled nursing services (Dist. Ex. 3 at pp. 1, 14, 17).[2] With respect to special education transportation, the CSE recommended the following accommodations/services: a bus with an attendant; a wheelchair accessible vehicle; "Door to Door Transportation"; and an air conditioned vehicle (id. at p. 17). The IEP also noted that the student required transportation to and from the State-approved nonpublic day school (id.).[3]

At the beginning of the 2017-18 school year, the district's bus driver assigned to the student's route picked up and dropped off the student each school day by entering the student's driveway and proceeding to a concrete pad with a wheelchair ramp attached to the student's house (Tr. pp. 152, 202-05, 241). On or about November 14, 2017, the bus became briefly stuck in mud on the parent's property, which resulted in district personnel deciding that the bus would no longer enter the driveway to pick up or drop off the student (Tr. pp. 152-53, 173-74, 178-80, 205-08, 215-16). The parent agreed to temporarily bring the student to the end of the driveway where it met the road, ostensibly while the district found a different vehicle to resume coming to the house to pick up and drop off the student, but she explained that, once winter weather set in, she would be unable to navigate the student and her wheelchair to the end of the driveway (Tr. pp. 41-43, 218-23). Starting in roughly January 2018, the parent began to transport the student to school by car and the district agreed to compensate the parent for the expense of this transportation (Tr. pp. 43-44).

A. Due Process Complaint Notice

By due process complaint notice, dated February 21, 2018, the parent asserted that the district failed to provide the student a free appropriate public education (FAPE) for the 2017-18 school year (Parent Ex. A at pp. 1-2). Specifically, the parent asserted that the district failed to implement the "door-to-door" special transportation called for in the student's May 2017 IEP in that, during the school year in question, the district refused to pick up and drop off the student at a ramp and platform attached to the student's house and instead offered to pick up and drop off the

[1] According to the August 2016 IEP and the meeting information attached thereto, a CSE meeting took place in February 2016 and the August 2016 IEP represented an amendment to the student's IEP generated without a meeting (see Parent Ex. C at pp. 1, 5, 9).

[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]).

[3] This special education transportation recommendation is the same as was recommended in the student's two preceding IEPs developed by the CPSE (see Parent Exs. B at p. 9; C at p. 17).

student at the end of the student's driveway (id. at pp. 2, 4-5). As relief, the parent requested that the district be required to provide the door-to-door transportation called for in the IEP and provide a vehicle of its choosing to come to the concrete loading platform to pick the student up in the morning and drop her off after school (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on March 28, 2018 (Tr. pp. 1-251).[4] In a decision dated June 22, 2018, the IHO determined that the district failed to provide the student with a FAPE during the 2017-18 school year (IHO Decision at p. 12). Specifically, the IHO found that the student was entitled to door-to-door transportation as indicated on the May 2017 IEP, which the parties understood to mean "going down the driveway and to the home" (id. at pp. 12-15). The IHO also determined that "the Student's significant needs require[d] that the transportation be door to door, meaning at her door" (id. at p. 15). Accordingly, the IHO directed the district to "transport the Student to and from her home and the recommended program and placement by picking up the Student, down the driveway and at her door (id. at p. 16).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to provide the student a FAPE during the 2017-18 school year based on the district's failure to drive down the driveway to the student's house to pick up and drop off the student. The district argues that the phrase "door-to-door" transportation as set forth in the May 2017 IEP should be interpreted to mean stopping directly at the end of the student's driveway at the road rather than a collective "pick-up point" at some other location where multiple students gather to be picked up for school away from their individual houses. The district further asserts that the driveway at issue in this matter is dangerous and that by picking up and dropping off the student at the road-side end of the driveway, and by compensating the parent for the cost of her transportation of the student that she voluntarily provided during the school year, the district properly implemented the otherwise appropriate IEP and provided the student a FAPE.

In an answer, the parent responds to the district's allegations. Additionally, the parent asserts that the district's appeal should be dismissed because it was not initiated by timely personal service of a verified request for review. Relatedly, the parent asserts that the district's notice of intention to seek review was untimely and improperly served and was not accompanied by a case information statement.

In a reply, the district contends that its notice of intention to seek review could not be served within the appropriate timeline because of clerical difficulties resulting from a change in law firms representing the district. Additionally, the district asserts that the parent was not personally served

[4] The IHO issued an interim order on pendency, dated May 4, 2018 (Interim IHO Decision at p. 1-6).

because the district's attorney did not want to violate the State's rules of professional conduct related to communication with represented parties.[5]

V. Discussion—Initiation of Appeal and Improper Service

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 the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; 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 this case, the district failed to properly initiate the appeal in accordance with the timelines and procedures prescribed in Part 279 of State regulations. The IHO's decision was dated June 22, 2018 (see IHO Decision at p. 16). The district was, therefore, required under the amended regulations—which applied to all pleadings served on or after January 1, 2017—to personally serve the request for review upon the parent no later than August 1, 2018 (8 NYCRR 279.4[a]-[b]).

The district's "affidavit of service" indicates that on the last day for service, August 1, 2018, the district served the case information sheet, the notice of request for review, and the request for review upon the attorney who represented the parent during the impartial hearing, rather than the

[5] With her answer, the parent attached an affidavit from the parent and an affirmation from her attorney (Answer Exs. A-B). With its reply, the district attached an affidavit from its attorney (Reply Affidavit). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As the additional evidence pertains, not to the merits of the matter, but to the district's service of the documents that make up this appeal, it was not available at the time of the impartial hearing and is necessary to review the timeliness of the district's appeal; accordingly, the evidence will be reviewed for this purpose.

parent herself (Dist. Aff. of Service). The district's "affidavit of service" does not specify how the service was complete, i.e., by way of personal service, regular mail, or by other means (id.). The parent asserts, and the district does not dispute, that the request for review was received by the parent's attorney by mail at her office on August 3, 2018 (Answer ¶ 42; Answer Ex. 2 ¶ 13; see generally Reply). The parent further asserts that she never waived personal service and, to date, has never been served with the request for review or any other documents that make up this appeal (Answer ¶¶ 29-30; Answer Ex. 1 ¶¶ 6-7). Although State regulation provides for alternate methods of service in the event that service of the request for review upon the parent cannot be made after diligent attempts, the district has not asserted that it made diligent attempts to serve the parent or that it employed any of the alternate service methods provided for in State regulation (see 8 NYCRR 279.4[c][1]-[3]). Accordingly, the district failed to properly serve the request for review and it is, therefore, untimely.[6]

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]). Here, the district has not attempted to effectuate personal service and has failed to assert good cause—or any cause whatsoever—in its request for review for the failure to timely and properly initiate the appeal of the IHO's decision.

In a reply, the district claims that it did not effectuate personal service on the parent, as called for in State regulations, for fear of running afoul of New York's Attorney Rules of Professional Conduct with respect to communication with a represented party. Rule 4.2(a) of the Rules of Professional Conduct reads as follows:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

[6] By the same affidavit of service, the district indicates that it served the notice of intention to seek review on the parent's attorney on July 26, 2018 (Dist. Aff. of Service). The district admits that the notice of intention to seek review—which should be accompanied by a case information statement (8 NYCRR 279.2[e])—was untimely under the requirements of 8 NYCRR 279.2(a) and (b) (Reply Aff. ¶ 4). Further, as with the request for review and other documents, the district does not dispute the parent's assertion that the notice of intention to seek review was received by the parent's attorney by mail (as well as by facsimile transmission) and was not personally served on the parent (Answer ¶¶ 34-36; Answer Ex. 2 ¶¶ 8-10; see generally Reply). The district's attorney asserts that she was unable to timely file the notice of intention to seek review due to clerical issues stemming from her movement from one law firm to another (Reply Aff. ¶ 4). Routine clerical mistakes and other "law office" errors are not generally accepted reasons for failures to comply with the practice regulations (see, e.g., Application of a Student with a Disability, Appeal No. 18-021 [collecting cases]).

(22 NYCRR 1200.0).

The rule allows the lawyer to communicate with a party if authorized by law to do so (see Topic: Commc'n with Represented Party; Serv. of Process, NY Eth. Op. 894 [Dec. 1, 2011]). State regulations provide that a request for review must be personally served upon a parent of a student with a disability (8 NYCRR 279.4[c]). The regulation makes no reference to whether or not the parent is represented. Thus, the concerns of the district's attorney about running afoul of her professional responsibilities appear to be without merit. In any event, the district does not assert that it sought consent from the parent's attorney to accept service on behalf of the parent and, as noted above, did not contact the Office of State Review to seek permission to effectuate alternate service based on the attorney's view of her professional responsibilities. Accordingly, even if the district's stated reason for failing to timely personally serve the parent was stated in the request for review as required by State regulation, it would not constitute good cause.

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 30, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER