The University of the State of New York

The State Education Department

State Review Officer

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No. 18-108

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Elmira City School District, the Board of Education of the Elmira Heights Central School District, and Notre Dame High School

Appearances:

Sayles & Evans, attorneys for respondent Board of Education of the Elmira City School District, by Conrad R. Wolan, Esq., of counsel

Hogan, Sarzynski, Lynch DeWind & Gregory, LLP, attorneys for respondent Board of Education of the Elmira Heights Central School District, by Wendy K. DeWind, 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 determined that respondent Board of Education of the Elmira City School District (Elmira City SD) satisfied its child find obligations for the 2007-08 through 2017-18 school years and denied their request to be reimbursed for their son's tuition costs at respondent Notre Dame High School (Notre Dame) for the 2012-13 through 2017-18 school years. 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 hearing record reflects that the student attended public schooling provided under the auspices of respondent Board of Education of the Elmira Heights Central School district (Elmira Heights CSD), the school district of residence, from the

2005-06 school year (kindergarten) through the 2011-12 school year (sixth grade) (see Dist. of residence Ex. 3). According to progress reports submitted by the Elmira Heights CSD, the student was receiving academic intervention services (AIS) by the 2007-08 school year; additionally, it appears the student received AIS during the 2008-09, 2009-10, 2010-11 and 2011-12 school years (see Tr. p. 213; Dist. of residence Ex. 4).[1] The parents removed the student from the Elmira Heights CSD and placed the student at Notre Dame for the 2012-13 school year (Tr. p. 241; IHO Ex. VI at p. 36).[2] Notre Dame is a nonpublic school located within the boundaries of the Elmira City SD, the district of location (Tr. p. 45; IHO Ex. VI at p. 36). At the beginning of the 2012-13 school year, staff at Notre Dame developed an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 (504 plan) for the student, and continued to do so every year thereafter, including the 2017-18 school year (12th grade) (Tr. pp. 355-56; see Parent Ex. M).

On August 24, 2010, when the student was 10 years old, an evaluator administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) as part of an independent evaluation obtained by the parents (Parent Ex. K).[3] The evaluator found that the student performed in the average range on verbal comprehension tasks, in the borderline range on perceptual reasoning, working memory, and processing speed tasks, and that the student's full scale IQ (81) was in the low average range (id. at p. 4).[4] An October 23, 2012 note from the student's physician also identified that the student "has a diagnosis of Attention Deficit Hyperactivity Disorder" (ADHD) for which he was prescribed medication (Parent Ex. J).

The student is currently 18 years old and, according to the student's father, the student was a senior at the time of the impartial hearing and on track to graduate from Notre Dame with a Regents diploma in June 2018 (see Tr. p. 368; Parent Exs. J; K at pp. 1-2; M at p. 1).[5]

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[1] According to testimony from the school psychologist at Elmira Heights CSD, the student received AIS in ELA from the 2007-08 through 2010-11 school years, and services in ELA and math for the 2011-12 school year (see Tr. p. 213).

[2] The IHO exhibits are not consecutively paginated as entered into evidence at the impartial hearing; they are cited herein by reference to the number of pages and their ordering as submitted, rather than by internal pagination.

[3] The evaluation report noted that there was no data available regarding the student's parents, living arrangements, the student's language, the student's developmental history, information relative to behavioral observations, sensory and motor status, medical, psychiatric, and neurological status, or the student's use of medications (Parent Ex. K at p. 2). Moreover, there was no information with respect to the student's educational history or performance with respect to "attendance, conduct, and academics" or his past or recent performances on standardized achievement tests (id.).

[4] Administration of the Kaufman Brief Intelligence Test to the student on January 21, 2009 determined that his "overall IQ" was in the "high-average classification," and that while he demonstrated "better" verbal ability, there was no significant difference between his verbal and nonverbal abilities (Parent Ex. L at p. 5).

[5] Elmira Heights CSD asserted in its Answer that "[u]pon information and belief, since the hearing dates, [the student] has graduated from Notre Dame with a New York State Regents Diploma" (Dist. of residence Answer ¶ 15; Dist. of residence Mem. of Law at pp. 4, 11, 13).

A. Due Process Complaint Notice

A lay advocate, on behalf of the parents and the student, filed the due process complaint notice on February 1, 2018 (see Dist. of residence Ex. 1).[6, 7] In the due process complaint notice, the parents claimed that Elmira Heights CSD ignored an independent evaluation report that the parents provided in 2010 (id. at p. 2). The parents also alleged that Elmira Heights CSD failed to evaluate the student in all areas of suspected disability in violation of IDEA's child find requirement (id.). Moreover, the parents claimed that Elmira Heights CSD did not implement the "appropriate procedures" with respect to child find (id. at p. 3). The parents argued that Elmira Heights CSD failed to provide the parents and the student with procedural safeguards notices, which resulted in them being unaware of Elmira Heights CSD's requirements for child find and initial evaluations (id. at pp. 2-3).

The parents asserted that the student was placed at Notre Dame, located within Elmira City SD for the 2012-13 school year (seventh grade) (Dist. of residence Ex. 1 at p. 3). The parents also maintained that since 2012 Elmira City SD also failed to create and implement procedures to locate, identify and evaluate students in violation of their child find obligations; the parents also contended that both Elmira City SD and Elmira Heights CSD violated their child find obligations by failing to locate, identify and evaluate the student since 2010 (id. at pp. 3, 6). The parents claimed that in 2012 Notre Dame unilaterally determined the student was eligible for services under section 504 of the Rehabilitation Act of 1973 (section 504) without further evaluation, and Notre Dame and Elmira City SD failed to ensure that comprehensive evaluations were conducted to determine the student's eligibility for special education (id. at p. 4).[8, 9] The parents also alleged

[6] The parents failed to date the due process complaint notice, but both the transcript and the IHO Decision identify that the date of the due process complaint was February 1, 2018 (see Tr. p. 395; IHO Decision at p. 27).

[7] Both the parents and student together filed the due process complaint (see Dist. of residence Ex. 1 at p. 1). I remind the parents that, in previous cases where a student has filed a due process complaint notice on his or her own behalf, this office has determined that New York State law "does not grant a child who has reached the age of majority all rights previously granted to parents under IDEA," including the right to file a due process complaint on their own behalf ("Individuals with Disabilities Education Act (IDEA) Part B Final Supplemental Regulations Issued December 1, 2008 and Effective December 31, 2008 – Non-Regulatory Guidance" [VESID May 2009] [emphasis in original], available at http://www.p12.nysed.gov/specialed/idea/ nonregulatoryguidancememo.htm; Application of a Student with a Disability, Appeal No. 17-077). However, as a result of the outcome of this decision, I find no need to address this matter further.

[8] The parents argued that they requested Notre Dame review the student's eligibility for special education and related services in September 2012, but that by November 2012 Notre Dame unilaterally determined, without the benefit of any evaluations, that the student was not eligible for special education and that he qualified as a "student with a disability" under section 504 (Dist. of residence Ex. 1 at p. 5). The parents claimed that Notre Dame did not provide them with procedural safeguards or a "prior written notice denying the student's eligibility for special education;" the parents also maintained that Notre Dame did not provide them with proper meeting notice and that the meeting held did not include all necessary members (id.).

[9] The parents also asserted that Notre Dame allowed the 504 plan to expire before holding a new meeting, leaving the student without the benefit of necessary accommodations at that time (Dist. of residence Ex. 1 at p. 7).

that Notre Dame made its decision without consultation from Elmira City SD or Elmira Heights CSD (id. at p. 5).

In the due process complaint notice the parents stated allegations anticipating that Notre Dame would argue it was not a proper party to a due process proceeding because it is a private school (Dist. of residence Ex. 1 at p. 7). However, the parents argued that Notre Dame acted under the "guise of a public school district, stepped outside of their own jurisdiction, and made a unilateral decision that deprived the parents and [the student] of their rights to challenge" those decisions; the parents also maintained that Notre Dame had led the parents to believe it had "programmatic responsibility over the [student's] special education in the same manner as a public agency" (id. at pp. 6-7). Moreover, the parents claimed that Notre Dame was "complicit" in denying the student an appropriate education by "hindering the eligibility process and arbitrarily and capriciously develop[ing] a [s]ection 504 plan...without any consultation from" Elmira Heights CSD or Elmira City SD (id. at p. 6).

For relief, the parents requested that the IHO order the following independent evaluations at public expense: neuropsychological, occupational therapy, physical therapy, speech-language therapy, adaptive physical education and assistive technology, as well as a functional behavioral assessment (FBA) (Dist. of residence Ex. 1 at p. 13). The parents also requested the IHO order the CSE to convene a meeting for the student in "consultation with Notre Dame," to determine the student's eligibility for special education services within 10 days of receipt of the evaluation reports (id.). The parents requested that the IHO order Notre Dame to reimburse the parents for "any and all tuition paid on behalf of the Student from 2012 to present," and for Elmira Heights CSD, Elmira City SD and Notre Dame to receive training as to their "responsibilities under child find, the evaluation procedures, and their obligations with respect" to students with disabilities placed in a nonpublic school (id.).

B. Impartial Hearing Officer Decision

In an interim decision dated April 2, 2018, an IHO (IHO 1) dismissed all claims with respect to Notre Dame for "lack of subject matter jurisdiction" as the definition of a local educational agency under the IDEA does not include private schools, and thus, are not subject to the due process procedures of the IDEA (IHO Ex. VII at p. 61).[10] IHO 1 later recused himself, and a second hearing officer (IHO 2) was appointed by mid-May 2018 (see IHO Exs. I; II; III; IV). The parties then proceeded to an impartial hearing on May 30, 2018, which concluded on May 31, 2018 after two hearing days (Tr. pp. 1-396).

In a final decision dated July 22, 2018, IHO 2 determined that nothing in the student's progress reports from when he attended school in Elmira Heights CSD would have given Elmira City SD reason to suspect that the student had a disability (IHO Decision at p. 15). IHO 2 found that the parents conflated the student's receipt of AIS with response to intervention (RtI) services when they claimed that the school utilized AIS to avoid referring the student to the CSE, and IHO 2 determined that Elmira City SD used AIS to provide assistance in meeting "State and school district standards to students irrespective of their eligibility for special education services" (id. at

[10] Additionally, IHO 1 noted that the regulations related to child find and prior written notice only refer to public school districts, not private schools (IHO Ex. VII at p. 61).

pp. 17-18). Moreover, IHO 2 concluded that Elmira City SD did not fail to meet its child find obligations (id. at p. 24). Once the student transferred to Notre Dame, IHO 2 found that the responsibility for child find passed from Elmira Heights CSD to Elmira City SD (id. at p. 18). IHO 2 found that Elmira City SD's "child find efforts were successful" and it did not fail in its child find obligations, and that, in any case, Elmira City SD had no knowledge of the student or contact with the parents prior to this proceeding (id. at pp. 20, 24).[11]

IHO 2 determined that the parents' arguments that the two-year statute of limitations should preclude their claims that are older than two years—specifically that both districts failed to provide the parents with procedural safeguards notice which triggered the withholding of information exception—were unavailing as the student was never identified by either district as a student with a disability or as a student suspected of having a disability, and so, the parents were not required to be provided with procedural safeguards notices (IHO Decision at pp. 21-22). As a result, IHO 2 determined that the withholding of information exception did not apply (id. at p. 22). With respect to Elmira Heights CSD's claim that the due process complaint should be dismissed based on the parents' failure to participate in a scheduled resolution session, IHO 2 noted that the hearing record did not support that a resolution meeting was scheduled "so unambivalently that the due process complaint notice should be dismissed on the ground of the parents' nonattendance" (id. at pp. 22-23).

IHO 2 dismissed all claims with respect to the child find provisions of the IDEA and section 504 be "to the extent that they concern events prior to September 6, 2014," or "two years before the date of the College Board's denial of the request for testing accommodations" (IHO Decision at p. 25).[12] IHO 2 also denied Elmira Heights CSD's motion to dismiss for failure to attend a resolution meeting and, in keeping with IHO 1's interim decision, IHO 2 reiterated that all claims in the due process complaint with respect to Notre Dame were dismissed (id.).

IV. Appeal for State-Level Review

On behalf of the parents, the lay advocate filed a request for review dated August 20, 2018 with the Office of State Review. The Office of State Review received the August 20, 2018 request for review and opened a file designated Application of a Student with a Disability, Appeal No. 18-096. In a letter dated August 22, 2018 the undersigned directed the Office of State Review to inform the parents that their request for review was being returned to them and would not be considered because it failed to comply with the requirements of Part 279 of the practice regulations. However, because the 40-day timeline for filing an appeal had not yet elapsed, the Office of State Review also informed the parents that they could prepare an amended request for review which

[11] IHO 2 also noted that, with respect to whether he had jurisdiction over the parent's 504 claims, "my determination regarding child find will apply to the parents' child find claims both under IDEA and under [section 504]" (IHO Decision at p. 24).

[12] A party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). It is unclear from IHO 2's decision why the parents' claims would be specifically limited to two years before the date the College Board denied the student's request for testing accommodations.

"must be verified and served upon the district no later than 40 days after the date of the impartial hearing officer's decision" (8 NYCRR 279.4[a], [b], [e]). In the same letter, the parents were informed that in the event they were unable to complete and serve the amended request for review within the 40-day timeline, good cause for untimely service must be set forth in the request for review (8 NYCRR 279.13). On September 14, 2018, more than two weeks after the 40-day deadline for serving a request for review had elapsed, the Office of State Review sent a second letter notifying the parents that "in the absence of an amended request for review," the file, Application of a Student with a Disability, Appeal No. 18-096 had been marked closed.

On September 17, 2018 the parents' lay advocate contacted the Office of State Review and left voice messages, which the Office of State Review responded to by letter copied to all parties dated September 18, 2018. The letter acknowledged the lay advocate's request that the Office of State Review not close the file in Application of a Student with a Disability, Appeal No. 18-096. At my direction, the Office of State Review declined that request, but informed the parents that if they served "another request for review and filed it with the Office of State Review, the Office of State Review [would] open a new appeal number upon receipt of such a filing." In the letter, the Office of State Review further indicated that, if the parents decided to serve an amended request for review, "State regulation permits a State Review Officer, in his or her sole discretion to excuse a failure to timely serve or file a request for review 'for good cause shown.'"

More than two weeks later, the parents filed an amended request for review with the Office of State Review which was received on October 4, 2018. The current appeal file, Application of a Student with a Disability, Appeal No. 18-108, was duly opened by the Office of State Review. The affidavits of service attached to the amended request for review identified that the parents had served the document on Elmira City SD on September 20, 2018, Elmira Heights CSD on September 27, 2018, and Notre Dame on September 28, 2018.

In the appeal, the parents assert that the amended request for review was submitted outside the timeline of appeal due to the SRO's "refusal to consider" their first request for review submitted within the regulatory timelines. The parents assert that the lay advocate should not be held to the same statutory and regulatory standards as an attorney, and the lay advocate had previously filed appeals on her own children's behalf without double spacing or including citations in the appeal, and those requests for review were not rejected. In addition, the parents claim that the regulations do not require a specific amount of citations in the request for review nor do they require that page numbers and specific exhibits be identified. The parents also claim that the 10-page limit in part 279 of State regulations governing requests for review would deny them their right to appeal all issues, which is the reason why the amended request for review is longer than 10 pages and includes a memorandum of law. The parents maintain that the informal dismissal of the request for review was unfair to them, and they should have received a formal decision.

The parents argue that IHO 2 erred dismissing their claims against Elmira Heights CSD and Elmira City SD, as his determination was entirely based on the student's advancement from grade to grade, despite his receipt of AIS "under an RTI process" year after year. Rather, the parents claim the student was unable to meet State-approved grade-level standards on State testing. The parents also argue that the IHO relied "too heavily" on testimony from district witnesses as the evidence submitted by the parents contradicted their testimony. The parents maintain that five years of AIS data from Elmira Heights CSD should be sufficient to warrant an evaluation from

Elmira City SD. Moreover, the parents claim that the provision of 504 services by Elmira City SD was a means to delay evaluations and conduct child find procedures; the parents also claim that Elmira City SD does not have child find procedures in place. The parents contend that IHO 1 erred in dismissing Notre Dame from the proceedings as it severely prejudiced the parents' case and limited their ability to present testimonial evidence. The parents also contend that IHO 1's decision regarding Notre Dame should be vacated because he failed to disclose that he was under investigation for misconduct before rendering a decision.

For relief, the parents request five million dollars in damages for pain and suffering endured by the parents and student for the public school districts' denials of FAPE, the completion of independent evaluations, reimbursement for transportation to and from the evaluations, that the CSE convene to determine the student's eligibility and to develop an IEP as needed, and that mandated training be provided for the "entire [d]istrict staff regarding their child find obligations" under the IDEA and section 504.

In an answer,[13] Elmira City SD generally argues that the IHO 2's decision should be affirmed in its entirety, and the parents' appeal should be dismissed. In addition, Elmira City SD claims that the appeal should be dismissed for failure of the parents to properly serve Elmira City SD. Specifically, Elmira City SD contends that no copy of the notice of intention to seek review was personally served upon the district. Rather, Elmira City SD claims that the notice of intention to seek review was incorrectly served upon the law firm acting as counsel to the district, and that the notice of intention to seek review was not initiated by a party. Additionally, Elmira City SD did not waive its objection to the parents' improper service of the notice of intention to seek review when it provided a certified copy of the hearing record. Elmira City SD also contends that the amended request for review was filed late and "without any showing of good cause to merit an extension of time to serve." Elmira City SD also maintains that the amended request for review was not actually verified by a party.

In an answer, Elmira Heights CSD asserts that the IHO's decision should be affirmed in its entirety. Although named by the parents as a respondent, Notre Dame did not attempt to appear or file an answer in this appeal.

V. Applicable Standards

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

[13] Elmira City SD requested and was granted a specific extension of the timelines in order to serve and file its answer.

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]). 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]).

VI. Discussion

In this proceeding, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review, as the parents principally failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations and there is no good cause to support the acceptance of a late request for review in this case. IHO 2's decision was dated July 22, 2018 (IHO Decision at p. 25). The parents were therefore required to serve the request for review on the school districts no later than August 31, 2018, 40 days from the date of the IHO decision (8 NYCRR 279.4[a]). As noted above, the parents originally submitted a request for review to the Office of State Review on August 20, 2018, which failed to comply with practice regulations governing a request for review and thus was returned with a letter from the Office of State Review on August 22, 2018. Although the parents were given curative instructions to assist them with complying with Part 279 as well as an opportunity to file an amended request for review, they did not elect to do so within the 40-day timeline for serving a request for review on respondents. Consequently, the file was administratively closed as an unperfected appeal on September 14, 2018 in the absence of receipt of an amended request for review. The parents now argue that this "informal dismissal" of the request for review was unfair and that they should have received a formal decision. However, as has been noted in previous cases, failure to comply with the practice requirements of Part 279 of the State regulations may either result in the rejection of the submitted documents or the dismissal of a request for review by an SRO, depending on the circumstances of each case (8 NYCRR 279.8[a]-[c]; 279.13; see T.W., 891 F. Supp. 2d at 440-41 [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). I agree with the sentiments of the J.E. court and, consequently, that is why the parents and their lay advocate were granted the opportunity to cure the defects with their filing.

The parents had ample time—ten days from the date of the Office of State Review's rejection letter on August 22, 2018 to August 31, 2018 when the request for review was due to be served—to cure the defects present in the request for review and they were clearly informed of the

timelines required under State regulation to serve an amended request for review on the respondents. However, the parents served their amended due process complaint on the respondents several weeks after the August 31, 2018 deadline.

The parents assert in the amended request for review that their advocate should not have been held to the "same standard as an attorney" with respect to adhering to the regulations governing the serving and filing of requests for review to the Office of State Review, and that previous requests for review filed by the lay advocate, acting as a pro se parent on her own children's behalf, were "accepted and decided upon," and so, rejection of the request for review in this case was unfair (Amended Req. for Rev. at pp. 1-2).

First, I am unpersuaded by the parents' claims that a lay advocate should not be held to the same standard as an attorney for filing a request for review as outlined in State regulations. This is precisely the kind of assistance that parents, presumably unfamiliar with due process and appeals procedures, would expect from their advocate and expect an advocate to be familiar with. Additionally, I have stated in previous decisions that lay advocates, while not attorneys, are generally held to a higher standard than pro se parents and should have a better understanding of the appeals process, particularly as it relates to compliance with the practice regulations for filing appeals (<u>see</u> <u>Application of a Student with a Disability</u>, Appeal No. 17-103). The inference to be drawn from the lay advocates' argument is that the practice regulations should apply only to attorneys and not to her. Neither the IDEA nor Part 279 makes a distinction to support such an outcome. It is patently unfair to allow lay advocates to rely on that status to skirt the requirements of State regulations and, while I have overlooked minor defects that are mere technicalities by pro se parties and have routinely provided parties with reasonable opportunities to correct more significant defects, I decline to go so far as to hold that the practice regulations should apply differently to different parties. The practice regulations in Part 279 apply to all parties, albeit with leeway for providing somewhat greater assistance to pro se parents. In this case, greater leeway to achieve compliance was given to the lay advocate, but she has failed to take advantage of the opportunity.

Next, as to the factual assertions regarding prior compliance, the parents provide no support for their claim that the lay advocate had previously filed requests for review that did not conform to the pleadings requirements but were nonetheless accepted by the Office of State Review. A review of cases in which the lay advocate was a party acting pro se shows that she has been in the role of a petitioner once before, and in that case, the lay advocate achieved virtually full compliance with the practice regulations in effect at that time, far more so than in this case. In the remainder of those cases, the advocate was the respondent and was not required to serve a request for review. The responsive pleadings she filed in those cases were also markedly more compliant with the practice regulations, and in one case, she even took the petitioning school district to task for non-compliance with Part 279, citing approximately a dozen SRO decisions with parentheticals deftly citing the various Practice regulation non-compliances that SRO's have ruled upon in the past.[14]

[14] I have conducted an in camera inspection of the prior pleadings to which the lay advocate refers, however, out of an abundance of caution and in order to protect the lay advocates' privacy as a parent of a student with a disability I have determined not to provide citation to the lay advocates' cases involving her own child. I leave it up to the lay advocate to determine who she wishes to share that information with, but I note that it leaves respondents at a disadvantage insofar as they are privy to those pleadings only to the extent to which the lay

In short all of her prior pleadings were of good quality, far better than some attorneys. Thus, as a factual matter, the lay advocate significantly understates her ability to comply based upon her past performance in this forum, which has been quite remarkable in the past.

Additionally, even if the lay advocate had no experience, there is an entire section dedicated to assisting pro se parents with drafting, serving and filing appeals on the Office of State Review's website (see "Parent Guide to Appealing the Decision of an Impartial Hearing Officer" available at https://www.sro.nysed.gov/book/filing-request-review-section-i). The website includes useful information directly related to overcoming the obstacles the parents now argue resulted in their failure to meet the case initiation deadlines; the website identifies how to prepare an appeal, including how to appeal the specific IHO determinations, the correct page length of the request for review, a description of effective hearing record citation techniques, explanations of when and how to serve a request for review, and even examples of what is likely to constitute good cause (see "Parent Guide to Appealing the Decision of an Impartial Hearing Officer" available at https://www.sro.nysed.gov/book/filing-request-review-section-i). As a result, I am unpersuaded by the parents' arguments that the lay advocate's alleged inability to comply with the practice regulations should excuse the non-compliances.

As for the parents' argument that they should have received a final State-level determination in Application of a Student with a Disability, Appeal No. 18-096, the process employed was used to preserve every opportunity for the parents' to file an appeal that was reasonably compliant with the practice regulations that should proceed to be heard on the merits. To that end, the August 22, 2018 letter from the Office of State Review was sent on the day of receipt of the noncompliant filing in order to maximize the parents' opportunity to correct the defects within the 40-day period for filing timely appeals, but as noted above, they did not avail themselves of that opportunity. The letter also explained that if that was not possible to comply with the timeline, the parents could still follow the procedure of asserting good cause for failure to timely serve in the amended request for review. In the absence of a request for review, the file was administratively closed without a determination. This too was used in an effort to preserve the possibility that the parents might at some later point in time attempt to file a late request for review with a viable assertion of good cause for the delay. Had the parents appeal been dismissed in final decision in Application of a Student with a Disability, Appeal No. 18-096 due to noncompliance with the practice regulations, I would have been powerless as an SRO to undo that determination and allow another appeal to proceed. This is because an SRO is precluded from reopening or reconsidering a final determination. As explained by the United States Department of Education "Once a final decision has been issued, no motion for reconsider is permissible." (Letter to Weiner, 57 IDELR 79 [OSEP 2010]; see C.C., Jr. v. Beaumont Indep. Sch. Dist., 2015 WL 13648561, at *10–*11 [E.D. Tex. Mar. 23, 2015]). In fact the parents in this case did avail themselves of the opportunity to file a late request for review; however, examination of the amended request for review shows that no good cause has been asserted or found to excuse the untimely service of the amended request for review on the public school districts and Notre Dame (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7

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advocate chooses to disclose it with them. In the event this matter proceeds to judicial review, upon request I will provide a reviewing court the same documents for in camera inspection or in another manner as the court may direct.

[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 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).

As a final point, the lay advocate made some strides to ensure the amended request for review conformed with regulatory requirements. Notably, the amended request for review is double-spaced and has been verified by one of the petitioners (8 NYCRR 279.7[b]; 279.8 [a][2]).[15, 16] In addition, the parents identified rulings issued by the IHO with relative precision, specifically noting their disagreement with the IHO's determinations to dismiss the parents' claims against the Elmira Heights CSD and Elmira City SD. The parents also argued that the IHO relied too heavily upon testimony than on evidence submitted by the parents, that the IHO did not provide conclusions of law to support his findings and order and did not apply relevant statutes or legal principles to the facts of this case, that the IHO's reliance on testimony concerning a referral packet for child find purposes was an error of law, that the IHO erred in his decision to dismiss Notre Dame from the proceedings, and that the IHO erred in his decision to dismiss all claims against Elmira City SD prior to 2014 on statute of limitations grounds. However, the amended request for review continues to not appropriately identify the issues presented for review "with each issue numbered and set forth separately" as required by State regulation (8 NYCRR 279.4[a]; 279.8[c][3]). Moreover, the amended request for review contains very few references to the hearing record, and it continues to be over 10 pages in length, even allowing some leeway for technical errors (8 NYCRR 279.8[b], [c][3]).[17] As a result, even if untimeliness were not a factor in this case, the amended request for review still falls significantly short of compliance with the practice regulations and would have been dismissed.

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[15] The parents neither signed nor verified the request for review in Application of a Student with a Disability, Appeal No. 18-096, and my recollection is that the pleading was over nine pages single spaced, which, in effect, circumvented the pleading length rules by a significant margin.

[16] In Elmira City SD's answer, the district claims that the amended request for review was not verified by a party. The amended request for review was verified by the student's father, one of the petitioners in this case (8 NYCRR 279.7[b]). As a result, the district's claim with respect to improper verification is without merit.

[17] The parents included their memorandum of law in the body of the amended request for review, not as a separate document, resulting in the amended request for review being 20 pages in length (see Amended Req. for Rev. at pp. 11, 20). Yet again, giving the parents the benefit of the doubt in this case that they intended the request for review and memorandum of law to be two separate documents, the section labeled as the amended request for review alone is still 11 pages in length, more than allowed by regulation (8 NYCRR 279.8[c][3]; Amended Req. for Rev. at p. 11). In addition, only the memorandum of law includes the parents' requested relief, meaning that the request for review did not actually identify the relief sought (8 NYCRR 279.8[c][1]).

VII. Conclusion

Having found that the amended request for review must be dismissed because the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 8, 2018

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JUSTYN P. BATES
STATE REVIEW OFFICER