The University of the State of New York

The State Education Department
State Review Officer
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No. 18-109

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Abbie Smith, Esq., and Linda A. Goldman, Esq.

Keane & Beane, PC, attorneys for respondent, by Stephanie M. Roebuck, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Windward School (Windward) 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 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, a subcommittee on special education ("CSE subcommittee") convened on May 3, 2017 to develop an IEP for the 2017-18 school year (Dist. Ex. 16). According to the meeting information summary, the student had demonstrated minimal progress in the area of reading (id. at p. 1). Continuing to find the student eligible for special education and related services as a student with a learning disability, the CSE subcommittee recommended that the student attend a 12:1 special class in English language arts (ELA) for one hour and 30 minutes per day, and receive small group speech-language therapy and occupational therapy, along with the support of a 2:1 teaching assistant in social studies and science and the provision of other supports and accommodations (id. at pp. 1, 9-10).[1]

[1] The student's eligibility for special education programs and related services as a student with a learning disability

On May 19, 2017, the parents signed an enrollment contract with Windward for the student's attendance for the 2017-18 school year (Parent Ex. I).[2]

The hearing record also includes a second IEP dated May 3, 2017, which was stamped "Revised" with a hand-written date of June 19, 2017 ("June 2017 revised IEP") (Dist. Ex. 14). This IEP is identical in all respects to the May 2017 IEP except for the student-to-teacher ratio of the special class in ELA and the district elementary school listed on the IEP (compare Dist. Ex. 14 at pp. 1, 9; with Dist. Ex. 16 at pp. 1, 9). The June 2017 revised IEP indicated that the student would attend a 15:1+2 special class in ELA for one hour and 30 minutes per day (Dist. Ex. 14 at pp. 1, 9).

By letter dated August 9, 2017, the parents requested a "follow up IEP meeting" and enclosed privately-obtained testing results (Dist. Ex. 11). The CSE subcommittee convened on August 31, 2017 to review the private evaluations shared by the parents (Dist. Ex. 5 at p. 1). According to the meeting information summary, the CSE subcommittee revised the student's annual goals and added supports for school personnel on behalf of the student but declined to recommend a full-time special class for the student since "the student's needs could be met in a less restrictive setting" (id.; see Dist. Ex. 5 at pp. 10-13). The August 2017 IEP included the CSE subcommittee's recommendation that the student attend a 15:1+2 special class for ELA with related services (Dist. Ex. 5 at pp. 1, 9). The IEP noted that the special class would be located at a specific district public elementary school—the same school listed on the June 2017 revised IEP (compare Dist. Ex. 5 at pp. 1, 15, with Dist. Ex. 14 at p. 1). According to the meeting information summary, the parents informed the CSE subcommittee that they would be placing the student in a nonpublic school for the 2017-18 school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 4, 2017, the parents alleged that the district denied the student a FAPE for the 2017-18 school year (Dist. Ex. 1 at p. 1). Specifically, the parents asserted that the district failed to disclose to the parents the change in the student-to-teacher ratio of the recommended special class from the 12:1 special class listed in the May 2017 IEP to the 15:1+2 special class included in the August 2017 IEP, thereby depriving the parents of an opportunity to participate in the development of the student's IEP (id. at pp. 3-4). The parents also contended that it was unclear "where or how" the special class would be implemented, given that two different schools were identified by the district, and that the inconsistent information provided by the district resulted in a denial of a FAPE to the student (id. at p. 4). The parents further argued that the student's IEP for the 2017-18 school year—regardless of which classroom ratio for the ELA special class was recommended—was substantively inappropriate for the student because it did not offer the student a "full-time special education program" or recommend sufficient special education support in academic areas other than ELA (id. at pp. 4, 5).

The parents further alleged that the proposed 15:1+2 special class would not have provided an appropriate peer group for the student for academics or social/emotional needs (Dist. Ex. 1 at

is not in dispute (see 34 CFR 300.8[a][10]; 8 NYCRR 200.1[zz][6]).

[2] The Commissioner of Education has not approved Windward as a school with which districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).

p. 4). The parents contended that after visiting a 12:1 special class, they determined it was not appropriate for the student and "could not address the full depth and breadth of her needs" (id. at p. 5). Additionally, the parents alleged that the "physical separation of the program from the other students would be incredibly painful for [the student]" (id.). The parents also alleged that the proposed IEP failed to address the impact of "such a segregation" and rendered the IEP deficient (id.).

The parents argued that their unilateral placement of the student at Windward was appropriate for the 2017-18 school year and that there were no equitable considerations barring reimbursement (Dist. Ex. 1 at p. 5). As relief, the parents sought tuition reimbursement for the cost of the student's attendance at Windward for the 2017-18 school year (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 23, 2018, which concluded on May 21, 2018 after three days of proceedings (Tr. pp. 1-527). By decision dated August 22, 2018, the IHO found that the district had submitted sufficient proof that it offered the student a FAPE for the 2017-18 school year and denied the parents' request for tuition reimbursement (IHO Decision at p. 15). The IHO acknowledged that the district caused confusion as a result of the inconsistent recommendations but that, prior to the beginning of the 2017-18 school year, the August 2017 IEP included an ultimate recommendation for the 15:1+2 special class, and that this program appeared "suitable on its face to provide the child with a reasonable amount of progress in terms of her limitations" (id. at p. 14). The IHO also observed that the district placement, rather than a full-time special education program, would be the student's least restrictive environment (id. at p. 15).

IV. Appeal for State-Level Review

The parents appeal. The parents allege that the IHO erred in finding that the district sustained its burden of proving that it offered a FAPE to the student. The parents also argue that Windward was an appropriate unilateral placement for the student and that equitable considerations weigh in favor of an award of tuition reimbursement. As relief, the parents request the costs of the student's tuition at Windward for the 2017-18 school year.

In an answer, the district generally admits or denies the parents' allegations and argues that the IHO's decision should be upheld in its entirety.

V. Discussion—Timeliness of Appeal

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 e.g., 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). 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]).

The parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated August 22, 2018 (IHO Decision at p. 15). The parents were, therefore, required to personally serve the request for review upon the district no later than October 1, 2018, 40 days from the date of the IHO decision (see 8 NYCRR 279.4). However, the parents' affidavit of service indicates that the parents served the district by personal service on October 2, 2018 (Parent Aff. of Service), which renders the request for review untimely. Additionally, the parents have failed to assert good cause—or any reason whatsoever—in their request for review for the failure to timely initiate the appeal from the IHO's decision. Accordingly, there is no basis on which to excuse the parents' failure to timely appeal the IHO's decision (see 8 NYCRR 279.13).

Because the parents failed to properly initiate the appeal by effectuating timely service upon the district, and there is no basis asserted in the request for review on which to excuse the untimely personal service of the request for review on the district, in an exercise of my discretion, 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., 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 [S.D.N.Y. Feb. 28, 2006]; Application of a Student with a Disability, Appeal No. 18-046 [dismissing request for review for being served one day late]).

VI. Conclusion

As the appeal was not timely filed, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 26, 2018

STEVEN KROLAK
STATE REVIEW OFFICER