The University of the State of New York

The State Education Department
State Review Officer
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No. 19-103

Application of the BOARD OF EDUCATION OF THE ORCHARD PARK 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:
Hodgson Russ LLP, attorneys for petitioner, by Ryan L. Everhart, Esq., and Lindsay A. Menasco, Esq.

Kenney Shelton Liptak Nowak, LLP, attorneys for respondent, by Patrick M. McNelis, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for the student's tuition costs at a high school in the Eden Central School District (Eden) for the 2018-19 school year.[1] 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

[1] For purposes of this decision, all references to the parent are to the student's legal guardian (see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]).

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

According to the student's treating psychologist, the student has received diagnoses that include major depressive disorder, post-traumatic stress disorder, and anxiety (Tr. pp. 230-31; Parent Ex. D; Dist. Ex. 13). Leading up to the school year in question, the student experienced several life changes and significant family trauma (Parent Ex. D).

For the 2017-18 school year (ninth grade), the student attended a public high school in Eden and had an IEP that provided for daily resource room services, a 15:1 special class for math and social studies, and direct consultant teacher services for English language arts (ELA) and science (see Parent Ex. C; Dist. Ex. 38 at p. 8). On March 20, 2018, an Eden CSE convened to develop the student's IEP for the 2018-19 school year and, finding that the student remained eligible for special education as a student with a learning disability, recommended daily resource room services, a 15:1 special class for social studies, and one session of psychological counseling services every two weeks, along with the provision of additional time to complete assignments and use of a calculator (see Dist. Ex. 37 at pp. 1, 8).[2]

The student moved into the district prior to the beginning of the 2018-19 school year (tenth grade) (see Dist. Ex. 36).[3] On September 25, 2018, the CSE convened for the purpose of conducting a "transfer in" meeting (Dist. Exs. 30 at p. 1; 31). The CSE adopted the March 2018 IEP from Eden with the addition of integrated co-teaching (ICT) services in English and with modification of the counseling services to provide that a social worker would deliver the services, instead of a psychologist (Dist. Exs. 29 at p. 8; 30 at p. 1; Dist. Exs. 27; 28 at pp. 1-2; see Tr. pp. 168-73). For the beginning of the school year, the student's attendance was unpredictable and sporadic both in regard to coming to school or, if at school, attending classes (see Tr. pp. 87-88, 175-76; Dist. Ex. 51 at pp. 1-2; 54 at p. 4; 55; 56). The CSE convened on October 30, 2018 to conduct a program review and discussed, among other things, the student's inconsistent attendance (Dist. Exs. 23 at p. 1; 24 at p. 1; 31). Compared to the student's program and placement upon entering the district, the October 2018 CSE removed resource room services and added a special class for math (compare Dist. Ex. 29 at p. 8, with Dist. Ex. 24 at pp. 8-9; see Dist. Exs. 21; 22 at p. 1; 23 at p. 1; 24 at p. 2).

By December 2018, the student's attendance worsened (see Dist. Ex. 43; 44; 46; 47; see also Tr. pp. 93-94, 289-90), and the parent began inquiring about the possibility of home instruction, an alternative placement, or the student's attendance at the public high school located in Eden despite her residency in the district (see Dist. Ex. 46). On a medical request form dated December 20, 2018, the student's psychologist requested home instruction for the student "until placement in Eden or [a] setting outside" the district could be secured (Dist. Ex. 19). The application noted that the student experienced "severe anxiety and mood lability before school each day and depression exacerbated by negative interactions at school, perceived daily" (id.).[4] By letter dated January 4, 2019, the parent "formally request[ed] home instruction" for the student (Dist. Ex. 18).

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8 [c][10]; 8 NYCRR 200.1 [zz][6]).

[3] For approximately two weeks at the beginning of the 2018-19 school year, the student was hospitalized and received instruction from the school district in which the hospital was located at district expense (see Dist. Ex. 34; see also Dist. Exs. 60 at pp.1-2; 61 at p. 4).

[4] On December 21, 2019, via a request for special education mediation, the parent asked that the district place the student at Eden at district expense (Dist. Ex. 20).

On January 16, 2019, the CSE convened and discussed several options for the student, including meeting the student's needs in the district, a Board of Cooperative Educational Services (BOCES) program, or "dual home instruction," and the parent requested that the district fund the student's attendance at the high school in Eden, to which the CSE chairperson responded that the district would not pay for the tuition (Dist. Ex. 8 at p. 2; 14 at pp. 1-2, 4).[5] The CSE recommended continuation of the student's IEP, but the meeting minutes also reflect that the district would go forward to set up the "home school" (Dist. Exs. 8 at p. 1; 14 at p. 4).[6]

By letter to the district dated January 22, 2019, the parent noted that the arrangements for "home instruction" appeared "to be taking an unreasonable amount of time on the district's end" and inquired about "a more efficient way" for the student to obtain her missed work in the interim (Parent Ex. F). The parent also "reiterate[d]" to the district her intent to enroll the student in Eden and seek reimbursement of the costs of the student's attendance from the district and further indicated that she had "already filled out the Non-Resident Enrollment packet" but that "the Superintendent need[ed] to approve the registration and payment need[ed] to be made" (id.).[7]

On January 22, 2019, the student's psychologist submitted another medical request for home instruction for the student, this time specifying that the duration would be limited until the student's symptoms remitted, an alternative placement was secured, or upon reassessment in six weeks (Dist. Ex. 13). On January 24, 2019, the district approved homebound instruction for the student, and arrangements were made for the student to receive instruction at the library commencing on January 29, 2019 (Dist. Ex. 11 at p. 3; 12; 17 at pp. 1-2).

The student began attending the high school in Eden at the parent's expense as of the end of January 2019 (see Tr. pp. 351-53, 361; Parent Ex. H). The student's Eden IEP was amended on January 29, 2019, by agreement without a meeting, to reflect the Eden CSE's recommendations for daily resource room services, and a 15:1 special class for English (daily), math (once weekly), and social studies (daily) (Dist. Ex. 65 at pp. 1, 8). The meeting information summary reflected that the student was a parentally placed nonresident (id. at p. 1).

The district CSE again convened on February 28, 2019, with attendees from Eden, to conduct a "reevaluation" review (Dist. Exs. 62; 63 at p. 1).[8] The CSE discussed the student's transition to Eden and determined that there was no need for any changes to the student's IEP (Dist.

[5] The hearing record includes a CSE meeting attendance sheet dated January 11, 2019 (Dist. Ex. 31); however, it appears that the date may be a typographical error, as the CSE meeting notices and the meeting minutes reflect that the meeting took place on January 16, 2019 (compare Dist. Ex. 31, with Dist. Exs. 9; 14 at p. 1; 16; 64).

[6] It does not appear that a new IEP was generated as a result of the January 2019 CSE meeting.

[7] By letter dated January 23, 2019, the district responded to the parent, stating that it would not provide any tuition reimbursement for the student's attendance at a public high school in Eden (Parent Ex. G at pp. 1-2). The district indicated that it would not fund the tuition since Eden was not a private school as contemplated by the IDEA and because the district could provide the student with "adequate and appropriate educational services" (id. at p. 1).

[8] According to the CSE chairperson, the February 2019 CSE was a "joint" meeting with staff from Eden, for the purpose of developing an IEP to reflect the services that would be provided by Eden (Tr. p. 192).

Exs. 3; 4; 63 at p. 2). According to the prior written notice, the February 2019 CSE recommended that the student "continue to receive Special Education Services and be parentally placed at Eden Central" (Dist. Ex. 4 at p. 1). The prior written notice indicated that the recommended program consisted of resource room services, a 15:1 special class for English, math, and social studies, and counseling (id.).[9]

A. Due Process Complaint Notice

In a due process complaint notice dated February 28, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Dist. Ex. 1 at pp. 1-4).

The parent alleged that the student population at the district high school was larger than the school the student attended in Eden for the 2017-18 school year, and that the "nature of [the district high school], including the dramatic increase in size . . . , exacerbated the [s]tudent's mental health needs and impaired her ability to receive meaningful educational benefit from her special education program" (Dist. Ex. 1 at p. 3). The parent asserted that the student "developed severe school avoidance" and accumulated a significant number of absences (id.). As a result, the parent alleged that she requested that the student receive homebound instruction, which was supported by a recommendation from the student's treating psychologist, but that the district delayed approval of the request, resulting in the student missing more than a month of instruction (id. at pp. 3-4). Further, the parent asserted that, "at all times," the district failed to sufficiently recognize the student's educational needs based upon her mental health needs and, instead of taking steps to address the student's trauma, anxiety and depression, approached her nonattendance "as a maladaptive behavior" in isolation rather than as a symptom of an underlying, more comprehensive, mental health issue (id. at p. 4).

For relief, the parent requested that the district provide the student with a FAPE, including "placement in a general education setting capable of addressing the [s]tudent's mental health needs in an environment that will not overwhelm her" (Dist. Ex. 1 at p. 4). In addition, the parent sought reimbursement for the costs of the student's attendance at the high school in Eden as a "tuition paying, non-residential student," as well as the costs of transportation (id.). Finally, the parent sought "additional services" or "other appropriate relief," including that the district fund the student's continued attendance at the high school in Eden as a nonresident student (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference on April 9, 2019, the parties proceeded to an impartial hearing on June 3, 2019, which concluded on July 18, 2019, after two days of proceedings (see Tr. pp. 1-389; IHO Ex. 63 at pp. 1-2). In a decision dated September 6, 2019, the IHO found that the

[9] It does not appear that a new IEP was generated as a result of the February 2019 CSE meeting.

district failed to offer the student a FAPE for a portion of the 2018-19 school year (IHO Decision at pp. 20-22).[10, 11]

Specifically, the IHO found that from "January 201[9] to June 201[9]," the district failed to offer the student "a therapeutic environment sufficient to allow Student to meaningfully access the curriculum" (IHO Decision at p. 20). The IHO found that, although the program set forth in the IEP developed by the district CSE was very similar to the IEP developed by the Eden CSE, given the student's circumstances, "the placement or physical environment where instruction and counseling were to take place, was paramount" (id. at p. 21). As of the January 2019 CSE meeting, the IHO noted that CSE was aware of the student's nonattendance, her disengagement, and the parent's request that the student be allowed to attend school in Eden (id. at pp. 21-22). Notwithstanding this, the IHO indicated that the CSE failed to consider the parent's request or to offer to "cross-contract" with Eden to deliver the student's program (id.). Based on these findings, the IHO concluded that the "IEP/placement was not reasonably calculated to enable the [student] to make progress appropriate in light of []her circumstances" (id. at p. 22).

With regard to the unilateral placement of the student at the high school in Eden, the IHO determined the placement to be "reasonable under the circumstances" (IHO Decision at p. 23). The IHO cited the student's "immediate improvement" and consistent attendance upon her placement in Eden (id.). For equitable considerations, the IHO found that the parent provided the district with notice of her intent to unilaterally place the student at district expense and cooperated with the CSE (id. at pp. 23, 24). The IHO acknowledged both the parent's and the district's efforts "to work together" to address the student's needs but indicated that "the analysis got distilled down to why [the] district, at the January 201[9] meeting in particular, would not offer the pathway to the one solution with a decent chance of success" (id. at p. 25).

Next, the IHO rejected the district's argument that the IDEA did not allow for tuition reimbursement in a case such as the present, where the unilateral placement was at a public school in another district rather than in a private school (IHO Decision at pp. 25-28). The IHO found that where the public school provides education to a nonresident student with a disability in exchange for payment of a tuition fee, "the public school essentially acts as a private educational program" (id. at p. 27). As a final matter, the IHO found that it was unnecessary to reach the parent's request for compensatory education as an alternative remedy (id. at p. 28).

Based upon the foregoing, the IHO ordered the district to reimburse the parent for the costs associated with the student's attendance at the school in Eden "for the second semester of the 2018-19 school year," including tuition and transportation expenses (IHO Decision at p. 29).

[10] The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO's decision will reflect pages numbered "1" through "35," with the cover page identified as page "1."

[11] Although the IHO found that the district "failed to provide a FAPE from January 2018 to June 2018," it is presumed that this was a typographical error and he meant January 2019 to June 2019 (IHO Decision at p. 20).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for a portion of the 2018-19 school year and that the unilateral placement of the student in Eden was appropriate. The district argues that the IHO erred in applying a reasonableness standard in evaluating the appropriateness of the unilateral placement. Further, the district alleges that the IHO erred in finding the parent entitled to reimbursement for the costs of the student's enrollment in Eden, notwithstanding that it was not a private school.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety.[12]

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 district failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated September 6, 2019 (IHO Decision at p. 29). The district was, therefore, required to personally serve the request for review upon the parent no later than October 16, 2019, 40 days from the date of the IHO decision (see 8 NYCRR 279.4). However, the district's affidavit of service indicates that the district served the parent by personal service on October 21, 2019 (Dist. Aff. of Service), which renders the request for review untimely. Additionally, the district has failed to assert good cause—or any reason whatsoever—

[12] While it appears that the answer was not drafted with text double-spaced as required by State regulation (see 8 NYCRR 279.8[a][2]), if the answer had been properly double-spaced, it would not have exceeded the 10-page limit (8 NYCRR 279.8[b]). Accordingly, the form violation in this instance is technical in nature. Counsel for the parent is reminded to ensure that papers filed with the Office of State Review comply with the form requirements of State regulation.

in its request for review for the failure to timely initiate the appeal from the IHO's decision.[13] Accordingly, there is no basis on which to excuse the district's failure to timely appeal the IHO's decision (see 8 NYCRR 279.13).

Because the district failed to properly initiate the appeal by effectuating timely service upon the parent, 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 parent, 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
December 2, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[13] The district asserts in the request for review that "[t]he District's time to appeal the [IHO's] Decision to the Office of State Review has not expired under 8 N.Y.C.R.R. § 279.2(c)" (Req. for Rev. ¶ 8). Section 279.2(c) of the State regulations governing appeals to the Office of State Review does not set forth the timelines for serving an appeal from an IHO's decision (see 8 NYCRR 279.2[c]). By way of speculation, it appears that the district may have relied, in part, upon the regulatory requirements governing practice before the Office of State Review before the regulations were amended over three years ago (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Prior to the amendments, section 279.2(c) of the State regulations governing appeals to the Office of State Review provided that a district's "petition" had to be personally served upon the parent within 35 days from the date of the IHO's decision to be reviewed (former 8 NYCRR 279.2[c], as amended Sept. 23, 2008). The regulation before the amendments also expressly provided that, if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto would be excluded in computing the period within which to timely serve the petition (former 8 NYCRR 279.2[b], [c], as amended Sept. 23, 2008). Accordingly, assuming the IHO sent the decision to the parties by mail, the district had the same 40 days under either the old or new versions of the regulations (compare 8 NYCRR 279.4[a], with former 8 NYCRR 279.2[b], [c], as amended Sept. 23, 2008). It may be that the district relied upon the 40 days permitted under the new regulations (8 NYCRR 279.4[a]) but added the five days for mailing as permitted under the old regulations (former 8 NYCRR 279.2[b], [c], as amended Sept. 23, 2008). In any event, even if the district had articulated this misunderstanding in the request for review, ignorance of the regulatory requirements would not be the sort of thing that would contribute to a finding of good cause (see B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011]).