



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-012

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Office of Michelle Siegel, attorneys for petitioner, by Justin P. Killian, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his son's tuition costs at the Robert Louis Stevenson School (RLS School) for the 2018-19 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

According to the parent, the student attended parochial schools from preschool through the seventh grade (see Parent Ex. B at p. 2). A full recitation of the student's educational history is unnecessary due to the disposition of this appeal on procedural grounds. Briefly, the student was referred by his mother for a private neuropsychological evaluation that was conducted between December 2017 and February 2018 and which noted, among other things, that the student had "a complex developmental and social-emotional-behavioral profile that has resulted in a variety of

provisional diagnoses throughout the course of his childhood" (id. at pp. 1, 11).¹ Administration of cognitive testing to the student yielded scores "largely within the [l]ow [a]verage range;" however, significant discrepancies were noted with scores from the very low to high average range among certain subtests (id. at pp. 11-12, 18). The evaluator described the student's executive functioning skills as "quite variable" with scatter in the responses among the student, parent, and teacher reports related to inattention, hyperactivity and impulsivity (id. at p. 12). According to the evaluator, while the student had symptoms that appeared consistent with an attention deficit hyperactivity disorder (ADHD), his profile was "muddled" by emotional difficulties that presented as both symptoms of anxiety and ADHD (id.). The student underwent academic achievement testing which showed "strength with regard to his sight word reading and decoding, spelling, basic writing skills, and basic math calculations" and "greater difficulty" with tasks involving listening comprehension, reading comprehension, solving math word problem or complex calculation formats, and developing an essay theme (id. at pp. 12, 21). Although the evaluator noted that while commonly associated with executive functioning difficulties, these areas were "negatively affected by [the student's] poor vigilance and anxiety" (id. at p. 12). The evaluator reported that a high number of concerns were noted in the student's "social-emotional-behavioral" and adaptive functioning areas and offered diagnoses of a generalized anxiety disorder and trichotillomania (id. at pp. 12-13). According to the evaluator, the student appeared to be developing signs of a depressed affect, and exhibited "repetitive, tic-like, and compulsive mannerisms in session that appeared to coincide with his anxiety and higher stress levels" (id. at p. 13). The evaluator explored the possible presence of an autism spectrum disorder but found that the student did "not meet full criteria" for that condition (id.). Recommendations included, among other things, further clinical assessment and therapy in several areas, "placement in a small ([i]e., student-to-teacher ratio), structured, and supportive learning environment designed for cognitively bright students without behavioral problems that is housed within a small, nurturing school setting," support for his executive functioning skills, classroom modifications and testing accommodations, and supports in the areas of reading comprehension, written expression, and math skills (id. at pp. 13-17).

The student's father met with the admissions director of the RLS School on September 7, 2018 and the student thereafter toured the school on September 24, 2018 (Parent Ex. J at pp. 3-4). In a letter dated September 27, 2018, the parent notified the district that the student had undergone a neuropsychological evaluation during the previous winter and requested that the CSE consider the student for special education services (Parent Ex. C). In the letter, the parent noted that the student had attended a parochial school "[u]ntil recently" and he provided consent to evaluate the student and to obtain records from the parochial school (id.). The parent recited his understanding that a CSE evaluation "may include a social history, psycho-educational evaluation, a classroom observation, and other appropriate assessments or evaluations as necessary to determine [the student's] educational needs" (id.). According to the letter, the parent offered to provide the private neuropsychological evaluation report to the district "[u]pon your request" (id.). The parent notified the district that "if the CSE is unable to offer an appropriate program and placement in a timely manner, I will be seeking funding for [the student's] placement at the [RLS] School along with

¹ According the parent, the student underwent a pediatric neurodevelopmental evaluation in January 2014, as well as psychotherapy and pharmacological treatment in 2017, but those older records are not part of the hearing record (Parent Ex. A at p. 2).

suitable transportation to and from his school" (*id.*). The student began attending RLS School on September 28, 2019 (Parent Ex. H).

A. Due Process Complaint Notice

In a due process complaint notice dated January 3, 2019, the parent alleged that the district denied the student a FAPE for the 2017-18 and 2018-19 school years by violating the IDEA's child find requirement (Parent Ex. A at pp. 1-2). The parent contended that the district failed to assess the student or respond within 60 days to the parent's September 27, 2018 letter to the district referring the student to the CSE (*id.* at pp. 3, 4). As relief, the parent sought direct funding for the student's enrollment at the RLS School during the 2018-19 school year, door-to-door "special transportation/suitable transportation" to the RLS School for the student, and reimbursement for the "December 2017/January 2018" neuropsychological evaluation privately obtained by the parent (*id.* at pp. 4-5).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on September 17, 2019 and concluded after one additional day on October 3, 2019 (Tr. pp. 1-62). In a decision dated December 8, 2019, the IHO noted that the district did not present any evidence in the proceeding, and "impliedly conceded" that it failed to offer the student a FAPE (IHO Decision at pp. 4-5).² The IHO also noted that the district did not challenge the parent's uncontroverted testimonial and documentary evidence that the RLS School was appropriate (*id.* at pp. 5-6). With regard to the district's challenge to the parent's request for reimbursement relief on equitable grounds, the IHO found that equitable factors precluded tuition reimbursement (*id.* at p. 6). The IHO found that the parent and student interviews, the \$30,000 payment to the RLS School, and the student's commencement of attendance occurred before or contemporaneously with the parent's referral of the student to the CSE for an initial evaluation (*id.*). Under these circumstances, the IHO determined that the parent had misled the district when indicating that the student was not attending school because the parent was "well aware" when writing the September 27, 2018 letter that the student would start attending the RLS School the following day as the parent had already made a substantial tuition payment (*id.* at pp. 6-7). The IHO found that the parent's testimony regarding when he obtained knowledge that he could seek services from the CSE was vague, that the parent would not have placed the student in a program proposed by the CSE, and that the parent was simply seeking help from the district because private schools were expensive (*id.* at p. 7). Further, the IHO found that the parent was aware of the student's need for a "different, and more supportive school setting" at the time the private neuropsychological evaluation was conducted, but that the parent waited to share that evaluation with the CSE and did not refer the student to the CSE at that time (*id.*). The IHO concluded that the parent waited until after investigating nonpublic school options and the student began attending the RLS School to provide notice to the CSE, thereby interfering with the district's ability to offer the student a timely and appropriate placement for the 2018-19 school year (*id.* at pp. 7-8). The IHO denied the parent's request for tuition reimbursement (*id.* at p. 8). The IHO also denied the parent's request for reimbursement for the private neuropsychological evaluation because the parent did not refer the student to or seek an evaluation from the CSE before obtaining

² The IHO also stated that the district violated its child find obligation (IHO Decision at p. 7).

it, did not share the evaluation with the CSE after obtaining it, did not follow the procedures for seeking an independent educational evaluation (IEE) at public expense from the district, and there was no evidence regarding the costs of the evaluation or that it was paid for by the parent (*id.* at pp. 8-9).³

IV. Appeal for State-Level Review

The parent appeals. The parent contends that the IHO erred in denying tuition reimbursement relief "despite an absence of evidence that Parent did anything other than cooperate with the District during Parent's actual dealings with the District, improperly ruled that Parent was not entitled ... to tuition reimbursement based solely on her interpretation of Parent's response to a hypothetical question regarding how Parent would have responded had the District conducted an IEP meeting within statutory timelines." ^{4, 5}

In its answer, the district asserts that the parent's appeal should be dismissed as untimely because it was not served within the regulatory timeframes. In the alternative, the district contends that the IHO decision should be upheld on the merits because the IHO's discretionary determination in denying reimbursement relief was supported by the testimonial and documentary evidence insofar as the parent delayed seeking assistance from the CSE for eight months and until after the parent had effectuated the student's unilateral placement at the RLS School. In a second alternative defense, the district argues that if any reimbursement relief is granted to the parent, it should be prorated to commence after the 60-day timeline from referral for evaluating the student and recommending an IEP had elapsed (*i.e.*, after January 9, 2019).

V. Discussion

A. 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]).

³ The IHO noted that the student's mother had requested the evaluation, but the student's father sought reimbursement for it (IHO Decision at p. 9).

⁴ The request for review does not assert any error with regard to the IHO's reasons for denying the parent's request for reimbursement for the private neuropsychological evaluation. As such, that determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; see also 8 NYCRR 279.8[c][2], [4] [noting that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

⁵ Although I will not delve into the merits of the appeal, it is a strained reading of the IHO's decision to state that she based her discretionary determination to deny reimbursement relief "solely" on the parent's response to a hypothetical question.

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 parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO's decision was dated December 8, 2019 (IHO Decision at p. 9). The parent was, therefore, required to personally serve the request for review upon the district no later than January 17, 2020, 40 days from the date of the IHO's decision (see 8 NYCRR 279.4). However, the parent's affidavit of service indicates that the parent served the district by personal service on January 21, 2020 (Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parent has failed to assert good cause—or any reason whatsoever—in his request for review for the failure to timely initiate the appeal from the IHO's decision.⁶ Instead, the parent asserts, in his memorandum of law only, that the IHO's decision was received by the parent's attorney on December 17, 2019 via email, and improperly conflates the date of receipt of the IHO's decision with the date clearly set forth on the IHO's decision (Parent Mem. of Law at p. 2). However, the time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by email—for purposes of calculating the timelines for serving a request for review (see 8 NYCRR 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an appeal to the SRO as untimely, as calculation of the 40-day time period runs from the date of an IHO decision not from date of receipt via email or regular mail]; Application of a Student with a Disability, Appeal No. 19-043; Application of a Student with a Disability, Appeal No. 16-029; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date upon which either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely. Moreover, the parent's argument that the December 17, 2019 email transmittal of the IHO's decision "curtailed Parent's right to appeal by 8 days" is also without merit as the regulation specifies the time period within which an appeal must be timely served upon a respondent, but in no way whatsoever guarantees a minimum time period that a party has for

⁶ The request for review was dated January 17, 2020 but was not served for another four days thereafter. The parent's accompanying memorandum of law is dated January 21, 2020.

preparation of an appeal.^{7, 8} Moreover, the eight-day argument is particularly unpersuasive in factual terms as it still leaves over a month to serve a request for review. Accordingly, there is no basis on which to excuse the parent's failure to timely appeal the IHO's decision (see 8 NYCRR 279.13). Thus, the district's assertion that the appeal was untimely served is correct.

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no cause, let alone good cause, asserted in the request for review as to why late service of a request for review should be excused, 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

In view of the forgoing discussion finding that the appeal was not timely filed and good cause for accepting a late request for review was not proffered, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 10, 2020**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

⁷ Upon receipt of a decision, there may be circumstances that are outside a party's control in which the 40-day time period has either: 1) already expired; or 2) is much closer to expiring and there is no reasonable way in which a party could prepare and serve an appeal within the remaining time frame. This case presents neither circumstance, especially when the substance of the request for review was clearly presented in one page and consists of a single allegation of IHO error.

⁸ As previously noted, the parent's argument is not set forth in the request for review but is only contained in the memorandum of law (Parent Mem. of Law at p. 2). However, it has long been held that a party is required to set forth the issues for review in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080).