



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-030

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:

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 a decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice. 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

Given the state of the hearing record in the present matter, a recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the limited nature of the appeal and dismissal of this matter on procedural grounds. Briefly, according to the parent, on January 2, 2018, a Committee on Preschool Special Education (CPSE) recommended that the student receive eight hours per week of 1:1 special education itinerant teacher (SEIT) services and three 30-minute sessions of occupational therapy (OT) per week (Due Process Compl. Notice at pp. 1-2).¹ The parent further indicated that, on April 16, 2019, a CSE convened to conduct a "turning

¹ Due to the procedural posture of this matter, at the time of the parent's request for review, there had been no

five" review and to develop an individualized education services program (IESP) for the student (id. at p. 2). The parent stated that the April 2019 CSE recommended three periods of special education teacher support services (SETSS) per week in a separate location (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 25, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) on an equitable basis for the 2019-20 school year (Due Process Compl. Notice at p. 1). The parent alleged that the April 2019 IESP failed to include "any new standardized evaluations" (id. at p. 2). Further, the parent argued that, despite noting the student's need for a combination of approaches and provision of redirection, the IESP did not include services to address these needs (id.). The parent objected to the CSE's recommendation of three periods per week of SETSS and argued that the mandate could not address the student's needs as "fully" as the SEIT services recommended for the student for the prior school year (id.). In particular, the parent noted that the three periods of SETSS per week were recommended in a separate location and at a reduced frequency compared to the eight hours of SEIT services per week the student received during the 2018-19 school year (id.). Moreover, the parent alleged that, although the IEP included an annual goal to address the student's attention-related needs, it was intended that the goal would be addressed during OT in a separate location and without the "additional 5 hours" of special education teacher support the student had previously received (id.). The parent indicated that the "lack of addressing this issue" could cause the student to regress (id.). The parent also noted that the "SETSS provider [wa]s not tasked with indirect service to communicate with the teachers and the parent, further neglecting the needs of the child" (id.).

For relief, the parent requested "a continuation of SEIT services, mainly within the classroom, at a rate of 8 hours a week," as well as an additional hour per week of indirect SEIT services (Due Process Compl. Notice at p. 6). The parent also requested an independent neurological evaluation at the district's expense (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was scheduled for December 5, 2019 (see Tr. pp. 1-9). On that date, the parent's advocate and the district representative appeared before the IHO, but the parent was not in attendance (see Tr. p. 1).² According to the parent's advocate, the parent did not appear at the impartial hearing because the neither the parent nor her advocate had been "consulted" regarding the scheduling of the hearing, the parent was not available, and the advocate had not been advised that the parent had to attend the hearing date in person (Tr. pp. 2-3, 6). The IHO stated that it was "hard to believe" that the parent's advocate had not been consulted regarding the scheduling of the impartial hearing and, further, emphasized that the parent's advocate had requested that the hearing be scheduled (Tr. p. 3). The IHO also indicated that the parent's advocate

evidence received at the impartial hearing; accordingly, the factual background is derived from allegations in the due process complaint notice (see generally Tr. pp. 1-9; Due Process Compl. Notice).

² According to the district representative, the parties "agree[d] about the services" and the only issue to be resolved during the impartial hearing related to "the enhanced rate" the parent was seeking (Tr. p. 4).

had other matters "with our office" and, therefore, should have known that the parent was required to appear in person (*id.*). The IHO gave the parent's advocate an opportunity to request "a continuance," but the advocate declined and requested that the matter "move forward" (Tr. pp. 3, 5-6). Therefore, the IHO stated that he was going to "dismiss the matter for the Parent's failure to attend" but that the dismissal would be without prejudice (Tr. pp. 5-6).

In a decision dated December 8, 2019, the IHO memorialized his dismissal of the parent's due process complaint notice without prejudice (IHO Decision at p. 6).³ The IHO indicated that the parent "did not appear at the impartial hearing despite instructions known to the advocate from other proceedings that the Parent's personal appearance was required" and that the parent's advocate declined the opportunity to adjourn the matter "arguing that nothing would change" (*id.* at pp. 3-4). The IHO recited that "the parties to an impartial hearing are obligated to comply with the reasonable directives of the [IHO] regarding the conduct of the impartial hearing" and set forth various provisions of State regulations relating to the manner in which the impartial hearing may be conducted (*id.* at pp. 4-5). The IHO further indicated that an IHO "may require the parties to be present at the impartial hearing" and articulated some rationales for his requirement that all parties attend and all witnesses appear at impartial hearings in person, including the "deteriorat[ion]" of the adjudication of claims under the IDEA due, in part, to the over-reliance on telephonic testimony, and the fact that "parties hav[e] a greater stake in the litigation" when the parties and their witnesses are required to appear in person (*id.* at pp. 4-6). The IHO noted that the requirement for personal appearance was "subject only to 'exigent' circumstances" (*id.* at p. 6). Based on the foregoing, the IHO dismissed the parent's due process complaint notice "for want of prosecution in a timely manner, without prejudice" (*id.*). The IHO noted that if the parent wanted to refile her request at some point during the school year, she could do so (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in dismissing the due process complaint notice. As an initial matter, in a footnote, the parent indicates that, although the IHO's decision was dated December 8, 2019, it was not "issued" until January 7, 2020.

The parent argues that the IHO denied her the opportunity to be heard and that the IHO's requirement that the parent appear at the impartial hearing in person was contrary to State regulation and broadly based on "his own procedural requirements," rather than on the "particular facts of the case." More specifically, the parent alleges that the State regulation relied upon by the IHO to support the proposition that the IHO could require the parties to be present relates, instead, to limitations on the time for each party to present a case. The parent also alleges that the IHO's requirement that the parent attend the impartial hearing in person was not communicated to the parent and that, as there was no indication that the parent's testimony was sought or required, there was no basis for evaluating whether the directive was reasonable. Instead, the parent argues that the requirement for personal appearance was based on "the IHO's own invented policy that he rigorously and wrongfully applies in every case without rhyme or reason." The parent also asserts that the IHO's refusal to hear telephonic testimony is counter to State regulations, which allow for the same. As for the parent's appearance, the parent points to State regulation, which allows the

³ The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO decision will reflect pages numbered "1" through "7," with the cover page identified as page "1."

parent to be represented by an attorney or an advocate, and argues that more should not be required of a parent in an impartial hearing than would be of a parent in a State or federal court where attorneys are permitted to represent their clients without their clients being present. Finally, the parent argues that the IHO's dismissal of the matter is contrary to State regulation, which requires that the impartial hearing be held at a time and place which is reasonably convenient to the parent and the student.

Based on the foregoing, the parent requests that the IHO's decision be reversed and that the parent be permitted to appear by and through her attorney or advocate "at hearings" and testify via telephone "absent a fact-specific finding as to why telephonic testimony would be improper."

In an answer, the district responds to the parent's allegations. In addition, the district asserts that the parent's request for review should be dismissed because it was served more than 40 days after the date of the IHO's decision. The district points out that the timeline for serving the request for review runs from the date of the decision, not from the date that a party receives the decision. The district asserts that the parent does not set forth good cause for the delay in the request for review and, instead, only indirectly references the timeline in a footnote. According to the district, the footnote includes an unsupported assertion that the IHO's decision was issued on a particular date. Moreover, the district points out that, even assuming the IHO's decision was not issued until January 7, 2020, the parent still had time to serve the request for review before the timeline expired—i.e., 40 days from the December 8, 2019 decision date—which the district argues was particularly feasible since there was no evidence or testimony received during the impartial hearing and, therefore, no record for the parent to review in preparing the request for review.

In the alternative, the district requests that the IHO's decision be affirmed in its entirety, noting the broad discretion accorded to IHOs in conducting impartial hearings, or that the matter be remanded to an IHO for further development of the hearing record.

V. Discussion—Timeliness of the 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 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. 6). 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 decision (see 8 NYCRR 279.4). However, the parent's affidavit of service indicates that the parent served the district by personal service on February 14, 2020 (Parent Aff. of Service), which renders the request for review untimely.⁴

Additionally, the parent has failed to assert good cause—or any reason whatsoever—in her request for review for the failure to timely initiate the appeal from the IHO's decision. Instead, in a footnote, the parent indicates that, although the IHO's decision was dated December 8, 2019, it was not issued until January 7, 2020 "as evidence by the email issuance of the Decision."⁵ 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 e-mail—for purposes of calculating the timelines for serving a petition (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 SRO appeal 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). Moreover, the regulation specifies the time period within which an appeal must be timely served upon a respondent, but in no way guarantees a minimum time period that a party has for preparation of an appeal (see 8 NYCRR 279.4[a]). 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. 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).

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 hearing record consisted of only 9 pages of transcript and no exhibits and the request for review presented a narrow allegation of IHO error. Moreover, while I might well have entertained a short delay in filing a late request for review by the parent in light of the fact that the IHO decision was received much later than would be expected, it is unclear why it took the parent approximately 38 more days after receiving the IHO's decision to serve the request for review on the district (Application of the Bd.

⁴ The request for review was dated and was verified by the parent on February 6, 2020 but was not served for another eight days thereafter.

⁵ The parent does not include a copy of the email or affirmatively allege that the decision was not transmitted to the parties by other means.

of Educ., Appeal No. 12-059 [noting that a delay of nine days in serving a request for review was too long in circumstances in which a shorter delay in service might have been countenanced]).⁶

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]).

As the IHO dismissed the parent's due process complaint notice without prejudice the parent is not foreclosed from pursuing her claims in an impartial hearing, and it would not appear as of the date of this decision that the relevant statute of limitations would foreclose the same.⁷

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.

⁶ With regard to the alleged delay in the issuance on the IHO's decision, on the notice of intention to seek review, the parent references that the decision was issued by the district's impartial hearing office. Notwithstanding that the IDEA does not preclude a school district from taking on ministerial actions to assist IHOs in issuing decisions (i.e. formatting, copying, postage), State regulation provides that the IHO "shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). To the extent the impartial hearing office is holding IHO decisions for a period of time before delivering them to the parties, in addition to affecting the parent's time to prepare an appeal as discussed herein, this practice has the potential to violate federal and State regulations governing the timelines for IHOs to render decisions and impede the due process protections afforded to students with disabilities and their parents (see 34 CFR 300.510[b][2]; [c]; 300.515[a]; 8 NYCRR 200.5[j][5]; see also "Requirements Related to Special Education Impartial Hearings," at pp. 3-5, Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>). Allegations of such practice are not clearly stated in the current matter and, even if they were, for the reasons stated in the body of this decision, the alleged delay in transmittal of the IHO decision would still not amount to good cause for the parent's late service of the request for review. Nevertheless, the district is warned that such practice could, if the circumstances warranted, support a finding that the district denied a student a FAPE.

⁷ It was several days prior to the date of this decision that all schools statewide were shuttered and many businesses began to curtail operations as a result of the Coronavirus (COVID-19) pandemic. In the event a new impartial hearing is requested, and the pandemic remains out of control, the ability to have in-person hearings may be severely impacted. The events related to COVID-19 post-date the events related to the timelines for serving a request for review in this case.

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**
 March 19, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER