The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-029

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:
The Law Office of Natan Shmueli, attorneys for petitioner, by Natan Shmueli, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of privately obtained special education services at an enhanced rate for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

The student was parentally placed in a nonpublic school for the 2019-20 school year (eighth grade) (see Tr. p. 19; Parent Ex. A at p. 1). The student was authorized to receive three hours per week of special education teacher support services (SETSS) for the 2019-20 school year according to a form that the district sent to the parent entitled "Authorization for Independent Special Education Teacher Support Services for Parentally Placed Student" (Parent Ex. C).[1] The form directed the parent to a list of eligible providers from which the parent could choose a special education teacher to deliver the student's SETSS (id.). According to a log kept by the parent, the parent contacted several special education teachers in an attempt to arrange for delivery of the mandated SETSS for the student but was unable to find a teacher with availability (Parent Ex. D). Ultimately, the parent arranged for the student to receive SETSS through a private agency, Diamond Achieving Corp., at the rate of $150 per hour (see Parent Ex. E).

In a due process complaint notice, dated May 28, 2020, the parents alleged that, by failing to assign a special education teacher to deliver the student's SETSS, the district failed to provide the student special education on an equitable basis for the 2019-20 school year (see Parent Ex. A). The parent requested that the district be required to fund the student's SETSS as delivered by the private provider "at an enhanced rate" for the 2019-20 school year (id. at pp. 1-2).

After a prehearing conference on October 28, 2020, the impartial hearing was held on December 10, 2020 (see Tr. pp. 1-27). In a decision dated December 17, 2020, the IHO determined that the district failed to provide the student appropriate special education on an equitable basis for the 2019-20 school year (IHO Decision at p. 9). However, the IHO denied the parent's request that the district fund the cost of privately obtained SETSS after finding that the parent had not presented evidence of an obligation to pay for those services and that the teacher who delivered the private SETSS lacked "reasonable qualifications" (id. at pp. 10-15). As relief, the IHO ordered the district to fund the student's SETSS for the 2019-20 school year for up to 108 hours at the district's "usual or standard rate" (id. at pp. 14-15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer thereto, and the parent's reply to the procedural defense asserted by the district is presumed and will not be recited here in detail. The gravamen of the parties' dispute on appeal is whether the IHO properly denied the parent's request for funding for the costs

[1] The hearing record does not include an IESP recommending SETSS for the student for the 2019-20 school year. With its answer, the district submits a copy of an IESP developed at a CSE meeting on April 19, 2018 and requests that it be considered (Answer Ex. 1). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the evidence was available at the time of the impartial hearing and is not necessary to render a decision in this matter.

of SETSS at an enhanced rate during the 2019-20 school year; however, the parent's request for review must be dismissed as untimely for the reasons set forth below.

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]). 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]).

Due to the COVID-19 pandemic, between March and December 2020, the Chief State Review Officer issued a number of General Orders permitting alternate forms of service of pleadings and prescribing that the COVID-19 pandemic was deemed good cause to serve a late request for review ("Coronavirus (COVID-19) Updates," Office of State Rev., available at https://www.sro.nysed.gov/coronavirus-covid-19-updates). The Chief State Review Officer's General Orders aligned with the Governor of the State of New York's Executive Order 202.8 and extensions thereto, although the General Orders continued beyond the final extension of Executive Order 202.8.[2]

Relevant to the timeliness of the parent's request for review, the Thirteenth Revised General Order states as follows:

[2] As described in the Thirteenth Revised General Order, the Governor declared under Executive Order 202.72 that the tolling provisions of Executive Order 202.8 and the extensions thereto were no longer in effect after November 4, 2020 ("Thirteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 3, Office of State Rev. [Dec. 31, 2020], available at https://www.sro.nysed.gov/common/sro/files/13th-revised-general-order-12.31.20_1.pdf). Executive Order 202.72 was published in the New York State Register on December 2, 2020. Thereafter, the Thirteenth Revised General Order was issued on December 31, 2020 and, in relevant part, sought "to avoid substantial injustice from a sudden, retroactive application of the November 4, 2020 expiration of the tolling provisions of Executive Order 202" ("Thirteenth Revised General Order," at p. 4).

> 5) . . . from **March 20, 2020 through January 29, 2021**, the continuing disaster emergency stemming from the COVID-19 pandemic is deemed good cause to serve a late Request for Review of an IHO decision dated on or after February 10, 2020 through December 14, 2020 pursuant to 8 NYCRR 279.4(a); provided however that **THIS LATE SERVICE PROVISION SHALL EXPIRE AFTER January 29, 2021**;
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> 6) the timelines for serving and filing a Notice of Intention to Seek Review, a Notice of Intention to Cross-Appeal, and a Request for Review of an IHO decision dated December 15, 2020 or later shall be adjudicated in accordance with the express terms of 8 NYCRR Part 279.

("Thirteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 4, Office of State Rev. [Dec. 31, 2020] [bolded emphasis in the original; underlined emphasis added], available at https://www.sro.nysed.gov/common/sro/files/13th-revised-general-order-12.31.20_1.pdf).

Because the IHO decision in the present matter is dated December 17, 2020 (see IHO Decision at p. 15), pursuant to the Thirteenth Revised General Order, the relevant timeline for serving a request for review of the IHO decision is that found under the express terms of 8 NYCRR part 279. The parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The parent was required to serve the request for review upon the district no later than January 26, 2021, 40 days from the date of the December 17, 2020 IHO decision (see 8 NYCRR 279.4). However, the parent's affidavit of service indicates that the parent served the district on January 29, 2021 (Parent Aff. of Service), which renders the request for review untimely.

The district asserts, and the parent admits, that the request for review was served after January 26, 2021 and is therefore untimely and that the continuing disaster emergency stemming from the COVID-19 pandemic is not deemed good cause to serve a late request for review of the IHO decision in this matter (Answer ¶¶ 6-11; Reply ¶¶ 2-5). Although the parent's counsel contends that he mistakenly held the belief that service of the request for review upon the district on January 29, 2021 was timely under the terms of the Thirteenth Revised General Order, no other good cause was asserted for the failure to timely initiate the appeal of the IHO's decision (see Req. for Rev.; Reply). 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; see also B.D.S. v. Southold Union Free Sch. Dist., 2011 WL 13305167, at *17 [E.D.N.Y. Apr. 26, 2011] [noting that "[i]nadvertence, mistake or neglect does not constitute good cause"]).

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is no 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]).

B. Rate

Although this matter is dismissed for the parent's failure to effectuate timely service upon the district, I will briefly address the merits of the parent's appeal in the alternative. The district does not dispute that the student was entitled to receive three hours of SETSS per week during the 2019-20 school year, and this matter now presents itself as a dispute solely as to the rate the district should pay the private provider arranged for by the parent to deliver those services after the district failed to meet its obligations.

This appears to be another case where the district's initial failure to provide SETSS has compelled a parent to engage in self-help and undertake the untenable task of determining how much services mandated by the IESP should cost. This de facto delegation from the district to the parent of the obligation to find a SETSS provider to implement the IESP at an acceptable rate is manifestly unreasonable because it is the district's nondelegable responsibility to ensure that services are delivered, whether in accordance with an IESP, an IEP, or pursuant to the stay put rule, and cost is not a permissible reason to defer or avoid the obligation to implement a student's services (see Application of a Student with a Disability, Appeal No. 20-087; Educ. Law § 3602-c[2][a]; [7][a]-[b] [providing that "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts" and that the cost for services is recoverable from the district of residence, either directly with the consent of the parent for a district of location to share information or through the Commissioner of Education and the State Comptroller]).[3]

While districts cannot deliver special education services called for by their educational programming in an unauthorized manner, due at least in part to the requirements that school officials and employees remain accountable under the statutory and regulatory mechanisms put in place by state and federal authorities, they can be made to pay for a privately obtained parental placement, a process that is essentially the same as the federal process under IDEA. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to

[3] Parents are required to cooperate with the provision of services by producing a child for services properly arranged for by the district.

select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Similar to the situation in Application of a Student with a Disability, Appeal No. 20-087 and Application of a Student with a Disability, Appeal No. 20-115, because the parent has not actually paid any money for which she must be reimbursed (see Parent Ex. E at p. 2), this matter is in a subset of more complicated cases in which the financial injury to the parent and the appropriate remedy are less clear.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, here, unlike the E.M. case, the hearing record contains no written contract between the parent and the agency providing the student the SETSS (or the SETSS provider himself) that indicates that the parent was responsible for the costs of the SETSS services for the 2019-20 school year.

The controller of Diamond Achieving Corp. testified that the agency charged $150 per hour for the cost of the student's SETSS; however, the parent did not pay for any of the services (Parent Ex. E at pp. 1-2). Although the controller indicated that the agency delivered an estimated 68 hours of services to the student, there is no evidence in the hearing record that indicates that the parent is financially responsible for the SETSS (Parent Ex. E at p. 2). As there is no other evidence in the hearing record, such as a written contract between the parent and the agency or an invoice directed to the parent, it is difficult to find that the parent incurred a financial obligation for the SETSS delivered to the student.

As there is inadequate proof that the parent is legally obligated to pay the costs of the SETSS services delivered to the student by the private agency, it is not appropriate equitable relief in these circumstances to require the district to pay the cost of the services as requested by the parent at a rate of $150 per hour. As the parent has not demonstrated a legal obligation to pay the costs of the SETSS or an inability to do so and there is inadequate proof that the parent has expended any funds to pay for SETSS for the 2019-20 school year, it would generally not be an appropriate form of equitable relief to require the district to either reimburse the parent for the costs of SETSS or to directly fund SETSS under the relevant legal standards discussed above. Accordingly, were this matter not dismissed as untimely, I would uphold the IHO's determination denying the parent's request for funding of the privately-obtained SETSS at an "enhanced rate." However, as the district has not appealed from the IHO's order for the district to pay the costs of 108 hours of SETSS for the 2019-20 school year at the district's "usual or standard rate," that order will stand.

VI. Conclusion

In view of the forgoing, the parent's request for review was not timely served and good cause for accepting a late request for review was not proffered. Moreover, even if the parent's appeal was timely, the evidence in the hearing record supports the IHO's denial of the parent's request for a higher rate for SETSS the 2019-20 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 26, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER