



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-072

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:

Natan Shmueli, Esq., attorney for petitioners

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail Eckstein, 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 for direct funding but granted tuition reimbursement for the cost of his son's tuition and related services at a nonpublic school (NPS) 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

Due to the nature of this appeal, a full recitation of the student's educational history is unnecessary.

A May 3, 2018 IEP indicated that the student was recommended to receive integrated co-teaching (ICT) services five periods per week in each of the following subjects: electives, math, English language arts (ELA), social studies, and sciences (Dist. Ex. 1 at pp. 12, 17).¹ For related

¹ The parent entered into the hearing record an IEP dated November 21, 2017, which the parent's counsel indicated was the last IEP the parent received (Tr. p. 13). The November 21, 2017 IEP recommended the same program as the May 3, 2018 IEP (compare Dist. Ex. 1 at pp. 12-13, with Parent Ex. H at pp. 6-7).

services, the May 2018 CSE recommended that the student receive one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at pp. 12-13).

The hearing record includes a prior written notice for the May 3, 2018 meeting, dated July 11, 2018 and a school location letter, also dated July 11, 2018 (Dist. Ex. 2).

The parents signed a contract on September 3, 2018 for the student to attend the NPS for the 2018-19 school year (see Parent Ex. B at pp. 1-3).

A. Due Process Complaint Notice

By due process complaint notice dated March 17, 2020, the parent argued that the district failed to provide the student with a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A at p. 2). The parent contended that the proposed school placement was unable to implement the student's IEP as it did not have a full-time ICT class, which was recommended for the student (id. at p. 1). Further, the parent asserted that when he informed the district of the "inadequacy and inappropriateness" of the proposed placement, he did not receive a subsequent placement offer for the 2018-19 school year (id.).

The parent also contended that the recommendation of a full-time ICT "classroom" was not appropriate to meet the student's "significant challenges that affected his ability to progress academically" and would not have enabled the student to make meaningful progress (Parent Ex. A at pp. 1-2). The parent indicated that the student required a 12:1:1 setting for the 2018-19 school year (id. at p. 2).

Due to the district's failures, the parent unilaterally placed the student at the NPS for the 2018-19 school year (Parent Ex. A at p. 2). The parent requested direct funding for the full amount of tuition (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on September 23, 2020, which concluded on November 5, 2020 after four days of proceedings (see Tr. pp. 1-130).

The IHO found that the district failed to meet its burden to establish that it offered the student a FAPE for the 2018-19 school year (IHO Decision at pp. 4-5). The IHO held that the hearing record did not contain any testimony in support of the district's assertion that it offered the student a FAPE as the district failed to present any testimony regarding the CSE meeting, evaluations conducted, the student's needs, or how the IEP met those needs (id. at p. 4). Therefore, the IHO found that the district did not include "any explanation, let alone a cogent and responsive explanation, for the CSE's recommendations," noting that statements made during opening and closing statements did not substitute for testimony (id.).

Although the IHO found that the district presented no evidence regarding the CSE process and recommendations, the IHO did note that the district presented evidence regarding the proposed

school placement (IHO Decision at p. 4). However, the IHO found that this evidence demonstrated that the proposed school placement would not have been able to implement the IEP because the school only had a part-time ICT classroom available while the IEP recommended a full-time ICT classroom (id.).

As to whether the unilateral placement was appropriate, the IHO noted that the district did not contest the appropriateness of the NPS (IHO Decision at pp. 5-6). The IHO also found that the parent presented uncontroverted testimony that the NPS was appropriate and provided the student with specially designed instruction to meet his unique educational needs (id. at p. 6). Turning next to equitable factors, the IHO held that "equitable factors d[id] not preclude tuition reimbursement" (id.).

The IHO determined that the parent was entitled to tuition reimbursement at the NPS for the cost of tuition, BCBA services, and the related services of speech-language therapy, counseling, and OT; however, the IHO determined that the parent was not entitled to reimbursement for the cost of a portion of the student's program that the IHO found to be religious in nature (IHO Decision at p. 6).

Regarding the parent's request for direct funding, the IHO noted that in order for a parent to be entitled to direct funding, "a parent must show that 'his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school'" and the IHO found that the parent did not meet this requirement (IHO Decision at pp. 6-7). The IHO held that the parent's testimony was vague and unpersuasive and that he failed to present his tax returns, which was routine in this type of case (id. at p. 7). Further, the IHO took judicial notice "that the Parent testified differently before [her] in two hearings held in relatively close proximity to each other" (id.).² The IHO determined that she was "not sure if the Parent was employed, receiving public assistance, or both" and that she was "not sure if the Parent's annual income was \$40,000.00, \$50,000.00 per year, or perhaps much more" (id.). Therefore, the IHO made no findings "as to what the Parent's actual income was, or as to whether the Student's father was employed or receiving public assistance"; noting again that the parent's testimony was vague and inconsistent (id.). The IHO indicated that the lack of other documentation, such as a tax return, to "shed light on the family's financial situation" was a concern and declined to award direct funding (id.).

The IHO granted tuition reimbursement for the cost of tuition at the unilateral placement in the amount of \$65,00.00 and reimbursement for related services during the 2018-19 school year, including BCBA services not to exceed \$3,600.00, two 30-minute sessions per week of speech-language therapy at a rate not to exceed \$90.00 per hour (totaling \$3,600.00), two 30-minute sessions per week of counseling at a rate not to exceed \$90.00 per hour (totaling \$3,600.00), and two 30-minute sessions per week of OT at a rate not to exceed \$90.00 per hour (totaling \$3,600.00) (IHO Decision at p. 8).

² The IHO noted that the parent testified in this case that he believed his income was \$40,000.00 per year and family expenses were \$32,000.00; while in the other case before the IHO, the parent testified that his income was \$50,000.00 that year (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO's denial of direct funding should be reversed and that "[a]t no point during the hearing did the [district] oppose the Parent's request for direct funding." The parent contends that the IHO erred in her findings regarding the parent's income and that based on the testimony, the parent's household income was \$40,000 for both 2018 and 2019 and he was not able to afford the tuition for the NPS.³ The parent asserts that if the IHO had raised the issue of "purported vagueness, discrepancy, or lack of a tax return," he would have been able to explain that his 2018 and 2019 tax returns had not yet been filed.⁴ The parent asserts that it was clear that he was unable to afford the cost of the student's tuition at the NPS and as such, he should have been awarded direct funding. The parent requests that the IHO's decision denying direct funding be reversed and that the district be ordered to directly fund the costs of tuition and related services at the NPS for the 2018-19 school year.

In the answer, the district contends that the parent's appeal should be dismissed as it was not served within the time period provided for by State regulation. The district asserts that the IHO decision is dated January 20, 2021 and that 40 days from that date was March 1, 2021; however, the parent did not serve the request for review until March 5, 2021. According to the district, this renders the request for review untimely as it was four days late. The district further argues that the parent has not shown good cause, or provided any explanation, for the failure to timely serve the request for review. Therefore, the district contends there is no basis to excuse the lateness and accept the appeal.

If the SRO does entertain the request for review, the district contends that the IHO correctly denied the request for direct funding as the parent did not meet the requirements to receive direct funding. The district asserts that the parent's vague and inconsistent testimony without supporting documentation did not provide a basis for granting direct funding.⁵

VI. 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

³ The parent argues that it was "inappropriate for the IHO to base any part of her decision on a transcript that was not part of the record in this case and which the Parent did not have an opportunity to review or respond to."

⁴ The parent attached the 2019 tax return with the request for review as proposed SRO Exhibit A.

⁵ Regarding the proposed SRO Exhibit A, the district contends that the SRO should not allow this additional evidence to be entered into the hearing record. The district argues that tax returns for 2019 were due in July 2020, yet the parents did not file until December 2020. Although the tax return was not available at the time of the hearing, "proof of the underlying sources was presumably available at the time of the hearing, and thus, this exhibit should be rejected."

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 202.8.⁶

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

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**;

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.

⁶ 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).

("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).

As the IHO decision being appealed from is dated January 20, 2021 (see IHO Decision at p. 8), pursuant to the Thirteenth Revised General Order, the relevant timeline for serving the request for review is of the timeline prescribed in Part 279 of the State regulations. Accordingly, the parent was required to serve the request for review upon the district no later than March 1, 2021, 40 days from the date of the January 20, 2021 IHO decision (see 8 NYCRR 279.4[a]). However, the parent's affidavit of service indicates that the parent served the district on March 5, 2021, 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.⁷ The parent's counsel did not even acknowledge timeliness in the request for review and has provided no excuse for the failure to timely serve the request for review.⁸ 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 parents 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]).

VII. Conclusion

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

⁷ The parent has not submitted a reply to the district's assertion that the request for review is untimely.

⁸ The affidavit of service indicated that the request for review was served pursuant to the Fourteenth Revised General Order (Parent. Aff. of Service). The Fourteenth Revised General Order did not further modify the timelines to appeal from an IHO's decision and instead only extended the allowance for alternative service (see "Fourteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at p. 3, Office of State Rev. [Mar. 5, 2021], available at <https://www.sro.nysed.gov/common/sro/files/14th-revised-general-order-3.5.21.pdf>).

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**
 April 26 2021

STEVEN KROLAK
STATE REVIEW OFFICER