



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-133

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 Board of Education of the West Islip Union Free School District

Appearances:

Law Offices of Thomas M. Volz, attorneys for respondent, by Michael G. Vigliotta, 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, in part, his request for compensatory educational services and other relief. 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 disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary.

Briefly, for the 2017-18 school year, the student attended a preschool for two half-days per week (Dist. Exs. 32 at p. 1; 34 at p. 1). The student was referred to the Committee on Preschool Special Education (CPSE) due to concerns about the student's speech (Dist. Ex. 32 at pp. 1, 2). A CPSE convened on November 20, 2017, found the student eligible for special education and related services as a preschool student with a disability, and recommended two hours per week of 1:1 special education itinerant teacher (SEIT) services, along with three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 9 at pp. 1, 8). Following completion of an occupational therapy (OT) evaluation on November 30, 2017, the CPSE additionally recommended that the student receive two 30-minute sessions per week of OT according to an IEP

dated December 18, 2017 (Dist. Exs. 8 at pp. 1, 10; 30 at p. 5). For the 2018-19 school year, a CPSE convened on June 11, 2018, and recommended that the student receive extended school year services consisting of individual speech-language therapy and individual OT each for two 30-minute sessions per week (Dist. Ex. 7 at pp. 1, 10; see also Dist. Ex. 3 at pp. 1, 12). For the 10-month portion of the 2018-19 school year, the June 2018 CPSE recommended two and one-half hours per day in a 12:1+2 integrated special class five times per week, as well as related services of three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT (one session pushed-in to the classroom, one session in the therapy room), and one 30-minute session per week of individual physical therapy (PT) (Dist. Ex. 7 at pp. 1, 9-10). On September 26, 2018, the student's IEP was amended by agreement without a CPSE meeting to add four new goals for the student (Dist. Exs. 6 at p. 1; 29 at p. 1). A CPSE convened on March 11, 2019, and recommended that the student receive counseling in a small group for one 30-minute session per week and that the student's speech-language therapy be reduced to two 30-minute sessions per week (Dist. Ex. 3 at p. 1). The March 2019 CPSE IEP indicated that counseling was recommended for the student to work on coping skills, frustration tolerance, and understanding the consequences of his behavior and was to be implemented beginning on March 25, 2019 (id.). For summer 2019, the March 2019 CPSE recommended a 15:1 special class, individual speech-language therapy for two 30-minute sessions per week, individual OT for one 30-minute session per week, and group counseling for one 30-minute session (Dist. Ex. 4 at pp. 1, 8, 9).

A CSE also convened on March 11, 2019 to develop the student's IEP for the 2019-20 school year (kindergarten), and found the student eligible for special education and related services as a student with a speech or language impairment (Dist. Ex. 5 at pp. 1, 2).¹ The March 2019 CSE recommended a 15:1 special class, two 30-minute sessions per week of group speech-language therapy, two 30-minute sessions per week of individual OT, and one 30-minute session per week of group counseling (id. at pp. 1, 2, 7). By letter dated September 19, 2019, the parent was notified of a "[d]isruptive [b]ehavior" event and that the student's principal was considering a one-day, out-of-school suspension of the student (Dist. Ex. 37). On September 24, 2019, the student's IEP was amended by agreement without a CSE meeting to add a behavior intervention services consultation for two hours per week (IHO Ex. I at pp. 1, 7-8).

In a due process complaint notice dated October 2, 2019, the parent alleged the student was denied a free appropriate public education (FAPE) from "November of 2016 until November of [sic] 2nd of 2019" or "going back TWO full years from the date of filing this request/complaint" (IHO Ex. II at pp. 3, 4, 5). The parent asserted that the student's IEP developed by the CPSE should have included appropriate goals that were "implemented and assessed daily" (id.). The parent also alleged that the student's related services goals in the areas of OT, PT, and speech-language therapy "were not appropriate or were deficient" (id.). In addition, the parent alleged that the "level[s]" of speech-language therapy, PT, and OT provided to the student during preschool were not appropriate and failed to meet the student's needs (id.). The parent contended that the student should have received individual speech-language therapy, PT, and OT "more frequently" due to the student's needs (id.). The parent asserted that a March 11, 2019 IEP "and

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute in this proceeding (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

any supplement to the IEP thereafter" improperly "discontinued" PT (*id.* at pp. 4, 5). The parent requested that the student receive PT and as relief the parent requested compensatory PT, OT, and speech-language therapy services (*id.* at pp. 3, 4, 5). Next the parent asserted that the district improperly changed the student's placement without convening a CSE meeting and that, as a result, the student's IEP had not been implemented since September 20, 2019 (*id.* at p. 6). The parent invoked pendency and alleged that the district had predetermined the student's "next CSE meeting" (*id.*). As relief, the parent sought "576 hours of compensatory special education," speech-language therapy five times per week, PT two times per week, and a "one on one TA in his 15;1 [sic] class" (*id.* at p. 8).

After a prehearing conference on November 13, 2019 (Nov. 13, 2019 Tr. pp. 1-53), the impartial hearing took place over 28 days of proceedings between November 21, 2019 and January 20, 2021 (Tr. pp. 1-4015). In an interim order on pendency dated November 27, 2019, the IHO determined that the student's pendency services consisted of a 15:1 special class, speech-language therapy in a small group for two 30-minute sessions per week, individual OT for two 30-minute sessions per week, counseling in a small group for one 30-minute session per week, and behavior intervention services consultation for two hours per week (Interim IHO Decision at p. 3). The IHO also ordered the district to continue utilizing a behavioral intervention plan that had been developed for the student, provide a 1:1 aide for the student, and provide special transportation with "curbside pickup and dropoff" and an attendant (*id.*).² In a decision dated April 30, 2021, the IHO determined that the district recommended appropriate related services to the student and offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 6-10, 19).³ However, concerning the district's implementation of a "truncated day" without a CSE meeting, the IHO found the district denied the student a FAPE and awarded independent educational evaluations (IEEs) in the areas of speech-language therapy and PT, 20 hours of compensatory speech-language therapy, and 20 hours of compensatory OT (*id.* at pp. 10-14, 18-20). The IHO further ordered the district to convene a CSE to review the IEEs within 15 days of completion (*id.* at pp. 18, 20).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised in the parent's request for review, the district's answer thereto, and the parent's reply is presumed and the issues will not be recited here in detail other than as discussed below as applicable to the timeliness of the appeal. Generally, the primary issues raised by the parent on appeal are whether the IHO failed to make findings related to the 2017-18 and 2018-19 school years and whether the IHO's award of compensatory educational services was adequate; however, the parent's request for review must be dismissed as untimely for the reasons set forth below.⁴

² The IHO also issued interim orders addressing the conduct of the hearing (Nov. 13, 2019 Interim IHO Decision) and an order ruling on a district motion (Jul. 15, 2020 Interim IHO Decision).

³ In an apparent error, the IHO frequently referenced the 2018-19 school year when discussing the 2019-20 school year (*see* IHO Decision at pp. 6, 8, 11).

⁴ The district asserts in its answer that the parent's request for review should be rejected for failing to comply with the regulatory requirement that a request for review include citations to the record on appeal. State regulations

IV. Discussion—Timeliness of Appeal

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (*id.*). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (*id.*). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

Here, 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 June 9, 2021, 40 days from the date of the April 30, 2021 IHO decision (see 8 NYCRR 279.4[a]). However, the parent's affidavit of service indicates that the parent served the district on June 14, 2021 (Jun. 14, 2021 Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parent has failed to assert good cause in his request for review for the failure to timely initiate the appeal from the IHO's decision. In his request for review, the parent indicates that the IHO's decision was dated May 4, 2021, "after email clarification to school district attorney and the parent" (Req. for Rev. at p. 1). In his reply, the parent argues that the later date of May 4, 2021 should be relied upon because the parties were waiting for clarification from the IHO on the number of hours of compensatory education that had been awarded. Based on the May 4, 2021 date, the parent opines that he had until June 14, 2021 to serve the district with a request for review.

The parent may not rely on the date of the purported clarification from the IHO—or the date of his receipt thereof—to calculate the time to appeal.⁵ Although the IHO offered clarification

provide that a request for review shall set forth "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). The district is correct that the parent's request for review lacks the required citations; however, as the parent's appeal must be dismissed on other grounds, I decline to exercise my discretion to reject the request for review on this basis.

⁵ The IHO's email was dated May 3, 2021 (Reply Ex. A at p. 4), but the parent argues that, because the IHO's email was sent "after business hours," the parent's time to appeal did not begin to run until May 4, 2021. Even if

in response to the district's attorney's concern that the award of compensatory education was unclear (see Reply Ex. A at p. 4), the email clarification was not a separate decision that re-set the timelines for appeal. Indeed, an IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). As such, when the IHO issued his April 30, 2021 decision, his jurisdiction over the matter ended.⁶ Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions.⁷

the email could be relied upon for purposes of calculating the parent's time to appeal, 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 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 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], aff'd 188 A.D.3d 889 [2d Dep't 2020]; 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 an IHO's decision is transmitted to the parties or the actual date either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely.

⁶ While a state may adopt a procedure allowing for a clarification or a motion for reconsideration, there is no such State law or regulation in this jurisdiction (see Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR 232, at p. 46 [OSEP 2013] [indicating that a state could allow motions for reconsideration before issuance of a final decision]; see also T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 930-31 [C.D. Ill. 2012] [discussing Illinois's statute that permits an IHO to retain jurisdiction to provide clarification of a written decision, so long as the request for such clarification by a party is provided in writing within five days of receipt of that decision]).

⁷ Additionally, if allowed, it would result in an IHO essentially unilaterally granting a party an extension of time to appeal an IHO decision.

Thus, 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, 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

Having found that the request for review must be dismissed because the parent failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 16, 2021**

SARAH L. HARRINGTON
STATE REVIEW OFFICER