



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-249

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 Westhampton Beach Union Free School District

Appearances:

Anne Leahey Law, LLC, attorney for respondent, by Anne C. Leahey, 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 dismissed his request for an order directing respondent (the district) to prevent a particular district employee from serving on the district's Committee on Special Education moving forward. 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

This student has been the subject of 11 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, because the parties are familiar with the facts and procedural history preceding this case—as well as the student's educational history, it is not necessary to repeat them in detail herein. Additionally, given the disposition of this matter on procedural grounds, a detailed recitation of the student's educational history is not necessary.

In an undated due process complaint notice, filed with the district on August 30, 2021, the parents alleged that certain actions taken by the district's director of pupil personnel services, who served as a CSE chairperson for the student's CSE meetings, gave rise to an "IDEA-based retaliation" claim that could be asserted by the parent and, as relief, the parent requested an order "removing [the director of pupil personnel services] as an active member upon the complainant's CSE moving forward" (IHO Ex. I at pp. 1-3; see IHO Ex. II at p. 1).

On September 14, 2021, the district served the parent with a combined answer and motion to dismiss the due process complaint notice along with a supporting affirmation by the district's attorney (IHO Exs. II-III).

An impartial hearing convened on October 4, 2021 for a prehearing conference to clarify the hearing issues and schedule briefs on the district's motion to dismiss (IHO Decision at p. 5).¹ The parent submitted an undated response in opposition to the district's motion to dismiss on or about October 18, 2021 and the district submitted a reply in support of the motion dated October 27, 2021 (IHO Exs. V; VI; see IHO Decision at p. 5).²

In a decision dated November 12, 2021, the IHO sustained the district's motion to dismiss the due process complaint notice and determined that the due process complaint notice had failed to state a claim upon which relief could be granted as the IHO did not have authority to remove the director of pupil personnel services, the alleged action did not subvert the prior due process proceeding, and the parent lacked standing to bring the asserted retaliation claim (IHO Decision at pp. 8-14).

IV. Appeal for State-Level Review

The parent appeals from the decision of the IHO; generally, the central issue raised by the parent is whether the IHO erred in dismissing the undated due process complaint notice that initiated the impartial hearing below due to the IHO's findings as to his lack of authority to remove the district's director of pupil personnel services, the impact of the director's alleged actions on the parent's due process rights, and the parent's lack of standing.

The district's answer to the request for review asserts that the IHO correctly granted its motion to dismiss the due process complaint notice on the merits, and additionally asserts that the parent's request for review should be dismissed as untimely.

Because the parent's request for review must be dismissed as untimely for the reasons set forth below, further discussion of the rationale behind the parent's request for review and the district's answer is not necessary.

¹ The hearing record does not include a transcript or written summary of the prehearing conference as required by State regulation (8 NYCRR 200.5 [j][3][xi]).

² The hearing record consists of six IHO exhibits and does not include any transcripts; according to the IHO decision, the decision was based on the parties' submissions to the district's motion to dismiss (IHO Decision at pp. 9-10; see IHO Exs. I-VI).

V. 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 December 22, 2021, 40 days from the date of the November 12, 2021 IHO decision (*see* 8 NYCRR 279.4[a]). However, the affirmation of service of the verified request for review and other supporting documents filed with the parent's verified request for review indicates that the parent served the district on December 27, 2021 (Dec. 27, 2021 Parent Aff. of Service), which renders the request for review untimely.³

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 (*see* Req. for Rev.). 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]

³ In its answer the district relates that it was never personally served with the request for review, indicating that its administrative offices were closed between December 23, 2021 and January 3, 2022, at which date district personnel retrieved documents from the parent in "an unattended drop box" at its administrative offices (Answer ¶14; *see* Dec. 27, 2021 Parent Aff. of Service). The parent has not submitted a reply to the district's contention as to service. However, it is not necessary to address how service was effectuated in this matter because as of the time that the district asserts its offices were closed, the parent's time to appeal from the November 12, 2021 IHO Decision had already passed. Additionally, the request for review itself is dated December 27, 2021 and was verified on December 27, 2021, which was after the parent's time to appeal from the November 12, 2021 IHO Decision had passed.

[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 concluded 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**
 January 28, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER