The University of the State of New York

The State Education Department
State Review Officer
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No. 22-157

Application of a STUDENT WITH A DISABILITY, by her 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 denied her request that respondent (the district) fund the costs of 1:1 nursing services delivered to the student for the 2022-23 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 limited nature of the appeal and disposition thereof, a detailed recitation of the student's educational history is unnecessary.

Briefly, the student has a brain injury resulting in severe impairments in the student's cognition, language, vision, memory, attention, reasoning, abstract thinking, judgement, problem solving, information processing, and speech (Parent Ex. C at pp. 1-2). The student is non-verbal, non-ambulatory, has profound hearing loss, is legally blind due to cortical visual impairment, and has also received diagnoses of infantile spasm seizure disorder and cerebral palsy (Parent Exs. C

at p. 1; J ¶ 2; Oct. 19, 2022 Tr. p. 17).[1] The student attended the Hebrew Academy for Special Children (HASC) for the 2018-19 school year until January 2022 (Parent Ex. J ¶ 3). In January 2022, the student began attending the International Institute for the Brain (iBrain) and has been enrolled at iBrain since that time (id.).[2]

On June 12, 2022, the parent signed an enrollment contract with iBrain for the student's attendance for the 2022-23 school year (Parent Ex. D).

On June 14, 2022, a CSE convened to develop the student's IEP for the 2022-23 school year (Parent Ex. E at pp. 1, 66). The CSE determined that the student was eligible for special education as a student with multiple disabilities and recommended a 6:1+1 special class placement in a State-approved nonpublic school day program with 1:1 paraprofessional services, 1:1 school nurse services, related services, assistive technology devices and services, and special transportation (id. at pp. 1, 59-61, 66).[3] On an interim basis, the CSE recommended placement in a 12:1+(3:1) special class in a district specialized school (id. at p. 59).

By letter dated June 17, 2022, the parent provided the district with notice that she was rejecting the June 2022 CSE's recommended program and would be enrolling the student at iBrain for the 2022-23 school year and that she intended to seek public funding for the costs thereof (Parent Ex. G at pp. 1-2). The parent also notified the district that she had not received a copy of the June 2022 IEP or notice of a proposed school location for the student's 2022-23 school year (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at pp. 1, 7). Initially, the parent alleged that the June 2022 CSE's interim recommendation for a 12:1+(3:1) special class in a district specialized school was predetermined (id. at p. 7). Next, the parent argued that the district failed to conduct appropriate and timely evaluations or convene a properly composed CSE, which denied the parent's the opportunity to meaningfully participate in the CSE process (id. at p. 6). The parent further argued that the CSE's interim recommendation for a 12:1+(3:1) special class in a district specialized school was inappropriate (id. at pp. 4-5). The parent alleged that the duration of sessions for the recommended related services was inappropriate and that the CSE failed to recommend music therapy, hearing education services, 1:1 nursing services, or appropriate special transportation (id. at pp. 6-7). Lastly, the parent argued that the district failed to provide the parent with an IEP or identify an

[1] The transcripts from the impartial hearing in this matter were not consecutively paginated; therefore, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Oct. 9, 2022 Tr. p. 17."

[2] The Commissioner of Education has not approved iBrain as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The student's eligibility for special education as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

appropriate State-approved nonpublic school or a district specialized school for the student to attend for the 2022-23 school year and also that the "[p]roposed [s]chool" could not implement the IEP (id. at pp. 4-5). Additionally, the parent argued that iBrain was an appropriate unilateral placement for the student and there were no equitable considerations that warranted denial of direct funding of the costs of the student's attendance at iBrain because the parent participated and cooperated in the CSE process (id. at p. 7).

For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2022-23 school year; a finding that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year; an order directing the district to fund the costs of the student's tuition at iBrain for the 2022-23 school year in addition to the costs of related services, 1:1 private nursing services, and 1:1 paraprofessional services; direct funding for the student's special education transportation; an order directing the district to reconvene and develop a new IEP; an order directing the district to conduct new evaluations; and an order directing the district to fund an independent educational evaluation (IEE), including a neuropsychological evaluation (Parent Ex. A at pp. 7-8).

B. Impartial Hearing Officer Decision

After the parties appeared for a prehearing conference on August 16, 2022, the parties proceeded to and concluded an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on October 19, 2022 (Aug. 16, 2022 Tr. pp. 1-23; Oct. 19, 2022 Tr. pp. 1-24).[4] In a decision dated October 20, 2022, the IHO found that, during the impartial hearing, the district conceded it had failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 6). Next, the IHO found that iBrain was an appropriate unilateral placement for the student because it addressed the student's needs (id. at pp. 7-11). Lastly, the IHO found that equitable considerations weighed in favor of the parent's request for tuition reimbursement (id. at pp. 11-12).

For relief, the IHO ordered the district to fund the student's "placement" at iBrain for the 2022-23 school year at a specified amount, as well as to fund the student's special transportation in the amount set forth in the "School Transportation Service Agreement" (IHO Decision at p. 13).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in failing to award reimbursement for the student's 1:1 nursing services and nursing transportation. The parent acknowledges that the request for review is untimely but asserts that the delay resulted because, on November 30, 2022, after the time to appeal the IHO's decision had expired, the district informed parent's counsel that it did not intend to fund the student's 1:1 nursing services. The parent requests that the request for review be considered even though it is untimely.

In an answer, the district alleges that the parent's request for review should be dismissed on the basis that the parent failed to timely initiate the appeal. The district also argues, in the

[4] Status conferences were held on September 1, 2022, September 21, 2022, and October 6, 2022 (Sept. 1, 2022 Tr. pp. 1-7; Sept. 21, 2022 Tr. pp. 1-10; Oct. 6, 2022 Tr. pp. 1-10).

alternative, that the IHO's decision should be affirmed, including the IHO's award which did not include funding for 1:1 nursing services. The district asserts that the parent did not offer evidence during the impartial hearing about the 1:1 nursing services, such as evidence of a contractual obligation to pay for nursing services or the costs of the services.

In a reply to the district's answer, the parent restates arguments raised in the request for review. The parent also requests an exercise of discretion to accept the parent's request for review because, although the request for review was late, "it was not excessively late" and the district was not prejudiced.

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 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 IHO rendered her decision on October 20, 2022 (IHO Decision at p. 13). The parent was therefore required to serve the request for review on the district no later than November 29, 2022, 40 days after the date of the IHO's decision (see 8 NYCRR 279.4). Based on parent's counsel's affirmation of service, , the request for review was served on the district on December 2, 2022, three days after the timeline for service of a request for review had passed. Accordingly, the request for review was untimely served, which was conceded by the parent in the request for review.

Turning to the parent's reasoning for the late service, the parent has failed to present good cause in her request for review for the failure to timely initiate the appeal from the IHO's decision. In her request for review, the parent asserts that her request for review was late because the district informed parent's counsel on November 30, 2022, that it was refusing to fund the student's 1:1 nursing services, which was after the date on which the parent could have timely served the appeal.

Here, the parent's explanation is unavailing. In particular, the parent's only claim on appeal is that the IHO failed to order the district to fund the student's 1:1 nursing services; the parent

asserts that the district did not inform her that it would not pay the cost of 1:1 nursing services until after the timeline for requesting an appeal had passed. However, given that the IHO's decision, itself, put the parent on notice that the district was not obligated to fund the student's 1:1 nursing services, the parent's reasoning is unfounded. The IHO determined that the district was obligated to fund the student's tuition at iBrain based on the iBrain enrollment contract and specifically stated in the order the total amount due, including a specific amount for base tuition and a specific amount for supplemental tuition (representing the cost of related services) (IHO Decision at p. 12; Parent Ex. D at pp. 1-2). Although the enrollment contract indicates that that the base tuition included the costs of an "individual paraprofessional" and a "school nurse," the parent's attorney made it clear to the IHO that the tuition costs at iBrain, based on the enrollment contract, did not include 1:1 nursing services (Tr. pp. 13, 31). Accordingly, as the parent was aware that the total cost of the student's tuition at iBrain pursuant to the contract, which was ordered by the IHO, did not include 1:1 nursing services and the IHO's decision did not otherwise address 1:1 nursing services, the parent was on notice at the time the IHO decision was issued that district funding for 1:1 nursing services was not included as a part of the IHO's decision. Accordingly, the parent's, or parent's counsel's, failure to thoroughly review the IHO's decision does not amount to a good cause basis for the untimely initiation of the appeal.

Based on the above, the parent failed to properly initiate this appeal by effectuating timely service on the district, and, since there is no good cause 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 Avaras v. Clarkstown Cent. Sch. Dist., 2019 WL 4600870, at *11 [S.D.N.Y. Sept. 21, 2019] [upholding SRO's decision to dismiss request for review as untimely for being served nine hours late notwithstanding proffered reason of process server's error]; 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

Having concluded that the request for review should 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 17, 2023

STEVEN KROLAK
STATE REVIEW OFFICER