



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-170

Application of a STUDENT WITH A DISABILITY, by her parents, 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:

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, 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 parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2020-21 and 2021-22 school years were appropriate. 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 disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, the student received a diagnosis of autism at a young age and has attended the NYC Lab High School for Collaborative Studies, a district school, since the 2019-20 school year (Parent Ex. BB). On December 14, 2020, a CSE convened to conduct the student's annual review and develop her IEP for the 2020-21 school year (10th grade) (Dist. Ex. 28 at pp. 1, 3, 23).¹ Finding the student eligible for special education and related services as a student with autism, the

¹ The hearing record includes multiple copies of the student's 2020-21 IEP (see Parent Exs. A; D; U; Dist. Exs. 20; 23; 28).

CSE recommended a 12-month program of integrated co-teaching (ICT) services in a general education classroom with related services of speech-language therapy on an individual and group basis (*id.* at pp. 18-19). A prior written notice dated January 5, 2021 was issued regarding the December 2020 CSE meeting (Dist. Ex. 26). On December 2, 2021, a CSE convened to conduct the student's annual review and develop her IEP for the 2021-22 school year (11th grade) (Dist. Ex. 10 at pp. 1, 33). Finding the student eligible for special education and related services as a student with autism, the CSE recommended a program of ICT services in language arts, math, social studies and science in a general education classroom with related services of speech-language therapy on an individual and group basis, and 12-month services consisting of individual and group speech-language therapy (*id.* at pp. 1, 26-28).² Prior written notices regarding the December 2021 CSE meeting were issued dated January 3, 2022 and February 18, 2022 (Dist. Exs. 3; 12).

A. Due Process Complaint Notice

By due process complaint notice dated May 18, 2022 the parents indicated that the district failed to provide a FAPE to the student for the 2020-21 and 2021-22 school years (IHO Ex. XI at pp. 3, 5-6; *see* IHO Decision at pp. 3, 12). The parents claimed, among other things, that the present levels of performance were insufficient to inform the student's reading and writing annual goals, specially designed direct instruction was not provided, and teachers did not collect data to determine progress on goals (*id.* at pp. 7-9). On June 2, 2022, the parents "corrected" their original due process complaint notice with the addition of six appendices labeled A through F (which were listed as enclosures on the original due process complaint notice) (IHO Exs. XI at p. 13, XII at pp. 1-42; *see* IHO Decision at pp. 3, 12).³ Among other things, the appendices noted "errors made in the IEP process . . . during the 2021 and 2022 IEP processes" in development, implementation and annual reviews including: (1) failure to include required components in the student's IEP; (2) failure to include all the student's educational needs in the present levels of academic achievement and functional performance; (3) failure to provide relevant and meaningful special education services that address all of the student's educational needs, noting that services identified must help the student advance in achieving her annual goals; (4) failure to collect data to monitor student progress and make instructional changes when needed; (5) failure to implement services and supports "with fidelity," or as listed on the IEP (6) failure to involve parents in the IEP process; and (7) inaccurate and inefficient present levels of academic achievement and functional performance statements (IHO Ex. XII at pp. 1-4). Also included were claims regarding the student's needs, annual goals, and progress (IHO Ex. XII at pp. 11-13, 17-25, 33-42). As relief, the parents identified the next steps they intended to take through the impartial hearing process, and among those steps were: (1) seeking proper documentation of present levels of academic achievement and functional performance statements, management needs, and annual goals in the student's 2022 IEP, as the current IEP was missing "vital" information; (2) obtaining compensatory and ongoing support sessions of two hours per week on a 1:1 basis for the student to learn "concrete strategies to support [her] abstract thinking/reading and writing needs" identified in the student's

² The record includes multiple copies of the student's 2021-22 IEP (*See* Parent Exs. B; W; X; Dist. Exs. 1; 10).

³ As noted by the IHO, the student is a triplet, and the appendices include references to two of the parents' other children who attend the same grade and school as the student (IHO Ex. XII; *see* IHO Decision at p. 3).

2021 IEP, to "extend through [her] senior year" until June 2023 "via the related service provider group that [wa]s supporting the [student] with [her] speech goals"; and (3) to evaluate "suing" the district to send the student to a different school for her senior year at public expense (IHO Ex. XI at p. 12).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings and the IHO conducted a prehearing conference on June 23, 2022, a status conference on July 15, 2022, and a hearing on the merits that began on July 27, 2022 and concluded on September 16, 2022 (June 23, 2022 Tr. pp. 1-44, July 15, 2022 Tr. pp. 1-43, July 27, 2022 Tr. pp. 45-185, September 16, 2022 Tr. pp. 1-182).⁴ The parents appeared pro se before the IHO (Tr. pp. 4-6). In a final decision dated November 4, 2022, the IHO accepted the testimony of all of the district's witnesses, who the IHO found "were credible and sufficiently qualified and experienced to express the opinions proffered, regarding the program developed and related services recommended for [the s]tudent" (IHO Decision pp. 7-8). Regarding the parents' allegations of a denial of a FAPE for the 2020-21 and 2021-22 school years, the IHO further found that the parents' assertions that the district failed to develop IEPs that were reasonably calculated to confer an educational benefit to the student were not supported by the hearing record, finding that the district offered the student a FAPE for those years (id. at p. 7). The IHO denied the parents' request for an order finding that the district denied the student a FAPE for the 2020-21 and 2021-22 school years, and found no basis and/or evidence in the hearing record to support any additional relief (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parents, appearing pro se once again, appeal and allege that the IHO erred in finding the district witnesses credible and in failing to find that "11 distinct violations" of "federal IDEA law or N[ew] Y[ork] state" law and regulations identified by the parents resulted in a denial of a FAPE to the student, without sufficient explanation and a "1 sentence response" to the parent's submission of "over 500 pages of evidence and hours of testimony." As relief, the parents request either a detailed explanation as to why the 11 violations they enumerated are not a denial of FAPE for the student or, if a denial of FAPE is determined, payment of tutoring services for the student's reading and writing goals that were not addressed by the district.

In an answer, first, the district alleges that the parents' appeal is untimely as the IHO decision was dated November 4, 2022 and the parents served their request for review on December 21, 2022. According to the district, 40 days from the decision date was December 14, 2022, thereby rendering the request for review untimely by one week and the parents did not proffer any rationale to explain why the late filing should be excused. The district also alleges that the parents' request for review fails to comply with the pleading requirements of 8 NYCRR 279.3 by failing to include a notice of request for review. The district requests the parents' appeal be dismissed with prejudice on these bases. Second, the district argues that the evidence presented at the impartial hearing establishes that the IHO decision was procedurally sufficient and based on substantive

⁴ In a written clarification, the IHO noted that the September 16, 2022 hearing transcript was correct but contained a typographical error incorrectly noting the date of the hearing as July 27, 2022.

grounds. The district further argues that the district met its burden of proof that it offered the student a FAPE as demonstrated by documentary and testimonial evidence that the program recommended and implemented for the student was specifically tailored to address her deficits, reasonably calculated to enable the student to obtain educational benefit, and that the IEPs developed allowed the student to make more than adequate progress during the two school years at issue. The district contends that the IHO's credibility findings in relation to the district's witnesses should be afforded due deference as the testimonial evidence is corroborated by the documentary evidence. As relief, the district requests that the parents' appeal be dismissed with prejudice.

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]).

The district is correct in its procedural defense and the appeal must be dismissed. The parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The administrative record shows that the IHO's decision was dated November 4, 2022 (IHO Decision at p. 8). The parents were therefore required to serve the request for review on the district no later than December 14, 2022, 40 days after the date of the IHO's decision.⁵ The parents failed to file an affidavit of service as required by 8 NYCRR 279.4, however, the date of December 21, 2022 they placed on the request for review and verification sufficiently indicates that the parents in fact had not served the district by December 14, 2022. Accordingly, I find the request for review was untimely served.

⁵ The IHO decision included a Notice of Right to Appeal which stated that the parties have a right to appeal the decision to a State Review Officer within 40 days of the date of the IHO decision and further that the appealing party's request for review shall be served upon the opposing party within 40 days from the date of the IHO Decision (IHO Decision at p. 9).

Additionally, the parents have failed to assert good cause—or any reason whatsoever—in their request for review for the failure to timely initiate the appeal from the IHO's decision.⁶ Accordingly, there is no basis on which to excuse the parents' 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]).

VI. 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.

I have considered the parties' remaining contentions, including the district's other asserted basis for rejection of the request for review, and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 February 13, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

⁶ Moreover, once the district responded to their appeal by alleging their request for review should be dismissed as untimely, there is no indication that the parents thereafter attempted to serve or file a reply to the district's procedural defense that the request for review is untimely.