The University of the State of New York

The State Education Department
State Review Officer
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No. 23-083

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 Zachary Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 her request to be reimbursed for her daughter's tuition costs and transportation costs at the International Institute for the Brain (iBrain) for the 2021-22 and 2022-23 school years.[1] Respondent (the district) cross-appeals from the IHO's issuance of an amended decision. The appeal must be dismissed. The cross-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

[1] Some documents in the hearing record alternatively refer to iBrain as the "International Academy for the Brain" (see Parent Exs. D; E; K ¶ 1).

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 parties' appeal and cross-appeal and the dispensation thereof, a detailed recitation of the student's educational history is unnecessary.

Briefly, the student has received a diagnosis of Lennox-Gastaut syndrome, a type of epilepsy, is minimally verbal, and is non-ambulatory (Parent Exs. J ¶¶ 2-3; K ¶ 9). The student

has right hemiparesis and severe cognitive and developmental delays and is able to communicate through an augmentative and alternative communication device, gestures, minimal vocalizations, and body language (Parent Exs. J ¶ 3; K ¶ 9; Dist. Ex. 8 at p. 3). The student attended a primarily home instruction program under an IEP for the 2020-21 school year and most of the 2021-22 school year (Parent Ex. J ¶¶ 4-5; Dist. Exs. 1; 4). Although the IEP mandated daily medical services and occupational therapy (OT), physical therapy (PT), and speech-language therapy each three times per week, the parent testified that none of these services were delivered to the student during the 2020-21 school year and only speech-language therapy was delivered to the student "for a short time" during the 2021-22 school year (Parent Ex. J ¶¶ 4-5; see Dist. Ex. 1 at pp. 10-11).

The student began attending iBrain in May 2022 and has been enrolled at iBrain attending in person since that time (Parent Ex. J ¶ 6; see Parent Ex. A at pp. 3-4). On May 11 and June 14, 2022 the parent signed enrollment contracts with iBrain for the student's attendance for a portion of the 2021-22 school year and for the 2022-23 school year, respectively (Parent Exs. D; E).

By letter dated June 17, 2022, the parent provided the district with notice that the district had failed to hold a timely CSE meeting or recommend a program for the student and that the parent would be enrolling the student at iBrain for the 2022-23 school year and intended to seek public funding for the costs thereof (Parent Ex. F).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated October 18, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22 and 2022-23 school years (Parent Ex. A at pp. 1, 6).[2] Initially, the parent alleged that the district had failed to recommend a program or placement for the student during the 2021-22 and 2022-23 school years and that the most recent IEP, developed in June 2020, was no longer appropriate for the student (id. at pp. 4-5). The parent also alleged that the district had denied the parent meaningful participation in the development of the student's programs, predetermined the outcome of the June 2020 IEP, and failed to assess the student in all areas of suspected disability (id. at pp. 5-6). The parent additionally contended that the district had failed to mandate sufficient related services, accommodations, and special transportation (id. at p. 5). The parent further 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 (id. at p. 6).

For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years; a finding that iBrain was an appropriate unilateral placement for the student for the 2020-21, 2021-22, and 2022-23 school years; an order directing the district to fund the costs of the student's tuition at iBrain for the 2021-22 and 2022-

[2] Although the October 2022 due process complaint notice alleged a denial of FAPE for the 2020-21 school year, the parent's position was clarified during a prehearing conference wherein it was discussed that the student had not attended iBrain during the 2020-21 school year and no claims regarding that school year were pursued at the impartial hearing (Jan. 20, 2023 Tr. pp. 9-10). Additionally, transcripts submitted from the impartial hearing are not consecutively paginated; for the purpose of clarity, the transcripts will be cited to in this decision by the hearing date and corresponding page number.

23 school years 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; and an order directing the district to fund an independent educational evaluation (IEE), in the form of a neuropsychological evaluation; and an order for the district to conduct any other necessary evaluations of the student (Parent Ex. A at pp. 6-7).

On November 16, 2022, a CSE convened for an annual review to develop an IEP for the student (Dist. Ex. 8 at pp. 1, 52-57). The CSE determined that the student was eligible for special education as a student with a traumatic brain injury and recommended a 12:1+4 special class placement in a special school with 1:1 paraprofessional services, 1:1 school nurse services, related services, assistive technology devices and services, 12-month services, and special transportation (id. at pp. 1, 46-48, 52-57).

B. Impartial Hearing Officer Decision

After the parties appeared for a prehearing conference on January 30, 2023, the parties proceeded to and concluded an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on February 27, 2023 (Jan. 30, 2023 Tr. pp. 1-19; Feb. 27, 2023 Tr. Pp. 1-53). In a decision dated April 2, 2023, the IHO found that, during the impartial hearing, the district failed to sustain its burden to prove that it offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 7-17). Next, the IHO found that iBrain was an appropriate unilateral placement for the student because it addressed the student's needs (id. at pp. 9-13). The IHO found that equitable considerations weighed in favor of the parent's request for tuition reimbursement, that the parent had an obligation to pay for tuition, and that the costs associated with iBrain were not unreasonable (id. at pp. 13-17). Lastly, the IHO determined that the student required the special transportation and accommodations set out in the contract with the private transportation provider for the 2022-23 school year (id. at pp. 17-18).

For relief, the IHO ordered the district to fund the student's "placement" at iBrain for the 2021-22 and 2022-23 school years at specified amounts, as well as to fund the student's special transportation at the rate of $495.00 per trip "within thirty (30) days of the [district's] receipt of an affidavit from the Transportation Provider certifying to the provision of the special education transportation services to the [s]tudent, and to the dates and number of trips provided, and setting forth the amount due" (IHO Decision at pp. 18-19; see Parent Ex. G at p. 2).

Although the IHO had already issued a final decision, the IHO issued a "corrected" findings of fact and decision dated April 4, 2023, which included an additional clause ordering relief directing the district to "fund the cost of the 1:1 full-time nurse provided to the [s]tudent during each of the 2021-2022 and 2022-2023 school years" (Corrected IHO Decision dated April 4, 2023 at p. 19).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in ordering payment for the cost of transportation of the student to and from iBrain at an "as used" rate as opposed to ordering payment

for transportation pursuant to the terms of the school transportation services agreement which required payment whether or not transportation services were utilized.

In an answer and cross-appeal, the district asserts that the IHO's order with respect to payment for the cost of transportation should not be disturbed because the IHO had the discretion to fashion appropriate equitable relief based on the evidence in the hearing record. In its cross-appeal, the district asserts that the IHO did not have the jurisdiction or authority to issue the corrected findings of fact and decision dated April 4, 2023 after issuing the final decision dated April 2, 2023. Although the district asserts that any substantive changes made to the April 2, 2023 final IHO decision are not valid, it nonetheless acknowledges that the IHO intended to add to his prior order a separate order for public funding of the 1:1 nursing services provided to the student during the 2021-22 and 2022-23 school years and "would not object if the SRO awards such additional relief" (Answer ¶¶ 10-12, at p. 7).

In a reply to the district's cross-appeal the parent restates the arguments in the appeal and contends that the corrected IHO decision is valid because it was a clarification of a minor error, typographical or clerical in nature.

V. Discussion

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 his decision on April 2, 2023 (IHO Decision at p. 19). The parent was therefore required to serve the request for review on the district no later than May 12, 2023, a Friday, 40 days after the date of the IHO's decision (see 8 NYCRR 279.4). Based on the parent's counsel's affirmation of service, the request for review was served on the district on May 15, 2023, three days after the timeline for service of a request for review had passed. Accordingly, the request for review was untimely served.

The parent may not rely on the date of the purported corrected decision from the IHO—or the date of her receipt thereof—to calculate the time to appeal. Although the IHO issued the corrected findings of fact and decision on April 4, 2023, apparently after communications with the parent regarding the ordered relief (see email communications dated April 3 and 4, 2023 between the IHO and counsel for the parent), 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 a Student with a Disability, Appeal No. 21-133; 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 2, 2023 decision, his jurisdiction over the matter ended.[3] 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.[4]

In this instance, the IHO issued a final written decision on April 2, 2023, which ended his jurisdiction over the matter. The IHO erred by rendering an amended decision on April 4, 2023, which substantively altered the relief awarded (compare April 2, 2023 IHO Decision at pp. 18-19, 25, with April 4, 2023 IHO Decision at pp. 18-19). Even were I to hold that the April 4, 2023 IHO decision was an allowable clerical or typographical correction, the operative date for the calculation of the timeliness of the appeal should remain the date of the initial April 2, 2023 IHO decision as the parent is not appealing from a portion of the IHO decision that the IHO attempted to change in the corrected decision.

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 identified or alleged as to why late service

[3] 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]).

[4] Additionally, if the parent's appeal is allowed, it would result in an IHO essentially having unilateral authority to grant a party an extension of time to appeal from an IHO decision. Such a result would frustrate the purpose of the timelines.

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]).

Although the parent's appeal has been dismissed herein as untimely and, consequently, the district's cross-appeal is also dismissed, there are statements in the district's pleadings indicating that the district does not oppose an order to fund the 1:1 nursing services provided to the student at iBrain during the school years in question (see Answer ¶¶ 10-12, at p. 7). Accordingly, as the district appears to concede that the IHO should have awarded funding for the cost of the student's nursing services as part of the relief awarded with respect to the student's unilateral placement at iBrain, and most likely intended to do so but inadvertently failed to include such directive in his initial decision, the district may decide to provide funding for those services and is encouraged to do so.

VI. Conclusion

Having concluded that the request for review should be dismissed because the parent failed to timely initiate the appeal, I find that there is no appeal before me from which the district may assert a cross-appeal and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 15, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER