



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-098

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 Board of Education of the Rye City School District

Appearances:

Briglia Hundley, PC, attorneys for petitioners, by William DeVinney, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Alessandra P. Pulit, 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 decisions of an impartial hearing officer (IHO) which dismissed the parents' claims pertaining to the 2019-20 school year and 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 school year was 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]-[j]).

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's educational history is not necessary. Moreover, the student has been the subject of a prior State-level administrative appeal (see Application of Student with a Disability, Appeal No. 20-172). Accordingly, the parties' familiarity with the facts and procedural history preceding that matter is presumed.

On June 10, 2019, a CSE convened for the student's annual review and to develop an IEP for the 2019-20 school year (11th grade) (Parent Ex. B). For the 2019-20 school year, the CSE recommended that the student attend a general education class placement and receive daily integrated co-teaching (ICT) services in language arts and math, one 40-minute session per day of resource room services in a group of up to eight students, and one 40-minute session per week of counseling in a small group, together with numerous supplemental aids and program modifications and supports for school personnel on behalf of the student, including a counseling consult (id. at pp. 11-14).

Regarding the 2020-21 school year (12th grade), the CSE convened on June 22, 2020 for an annual review (Dist. Ex. 7 at p. 1). The CSE recommended that the student attend a 15:1 educational support class six days per eight-day cycle (id. at p. 11). For related services, the CSE recommended one 30-minute session of small group (3:1) counseling services per week, one 30-minute session of individual counseling services per week, one 30-minute session of small group (5:1) speech-language therapy services per week, and one 30-minute session of individual speech-language therapy services per week (id. at pp. 11-12). The CSE also recommended assistive technology, testing accommodations, transition services, and several "supplementary aids and services/program modifications/accommodations," and supports for school personnel on behalf of the student (id. at pp. 12-17).

The CSE met again during the 2020-21 school year on February 23, 2021 for an annual review and developed an IEP with a projected implementation date of February 24, 2021 (Dist. Ex. 9 at p. 1). The February 2021 CSE made the same special class and related services recommendations as the June 2020 CSE (compare Dist. Ex. 9 at pp. 11-12, with Dist. Ex. 7 at pp. 11-12). The CSE reconvened on May 18, 2021 and June 7, 2021, to conduct a requested review, discussed the results of an independent neuropsychological evaluation, and reviewed the student's progress towards meeting graduation requirements (see Dist. Ex. 19 at pp. 1-2).

A. Due Process Complaint Notices

By due process complaint notice dated June 15, 2021, the parents alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years (Dist. Ex. 1). In particular, the parents asserted that the district failed to implement the ICT services and counseling consult mandated in the June 2019 IEP for the entire 2019-20 school year and failed to provide the resource room services between March and June 2020 after school buildings closed due to the COVID-19 pandemic (Dist. Ex. 1 at pp. 2-3, 5). Additionally, the parents argued that the district failed to implement the June 2020 IEP from September 8, 2020 to May 20, 2021 by failing to provide individual and group speech-language therapy services (id. at pp. 3, 5). The parents also challenged the student's IEPs for the 2020-21 school year, alleging that the district failed to offer the student programs that would meet her individual needs and that were appropriately ambitious and the district failed to revise the student's IEP to address her lack of progress (id. at pp. 3, 6).¹ The parents also contended that the CSEs failed to develop measurable annual goals to meet the student's needs and failed to recommend appropriate transition services or transition services goals (id.).

The parents contended that the district failed to appropriately evaluate the student and identify all of her areas of need (Dist. Ex. 1 at p. 6).² Moreover, the parents argued that the district "unlawfully failed" to authorize the independent educational evaluation (IEE) requested by the parents "in the area of transition services" or file a due process complaint notice (id.). Lastly, the parents contended that the district committed several procedural violations for which the cumulative effect was a denial of a FAPE (id.).

¹ The parents asserted that the student regressed during the school years at issue (Dist. Ex. 1 at pp. 3-5).

² The parents asserted that they made five written requests for the student to be re-evaluated starting in December 2020, all of which, per the parents, were "unjustifiably ignored" (Dist. Ex. 1 at p. 3).

As to relief, the parents requested a finding that FAPE was denied "from September 9, 2019 until present" and an order directing the district to fund a re-evaluation of the student (Dist. Ex. 1 at p. 7). The parents also requested an IEE in the area of transition services by a provider of their choosing and the provision of appropriate transition services inclusive of a college readiness program (id.). The parents requested reimbursement for speech-language therapy services and the provision of services as outlined by the independent neuropsychological evaluation (id.). Lastly, the parents requested compensatory education services for the deprivation of FAPE for the 2019-20 and 2020-21 school years for related services at the prevailing community rate (id.).

The district also filed a due process complaint notice, which was dated June 16, 2021 (Dist. Ex. 2 at p. 2). The district alleged that the parents requested an IEE on May 18, 2021; however, the district had determined that the "existing evaluations were sufficiently conducted to create an accurate profile of the Student" (id. at p. 3). The district asserted that it conducted a transition assessment in May 2021, which it argued was sufficient, based on the student's minimal deficits (id.). The district also contended that the parents "failed to provide any justification as to why it was necessary to exceed the District's criteria" (id.).

B. Impartial Hearing Officer Decision

The IHO held five pre-hearing conferences on dates between July 26, 2021 and September 12, 2022 (see Jul. 26, 2021 Tr. pp. 1-27; Sept. 15, 2021 Tr. pp. 1-30; Nov. 3, 2021 Tr. pp. 1-17; Mar. 2, 2022 Tr. pp. 1-22; Sept. 12, 2022 Tr. pp. 1-24). In an interim decision, dated August 21, 2021, the IHO ordered that the parents' and district's due process complaint notices be consolidated (IHO Ex. VI). In a second interim decision, dated December 1, 2021, the IHO dismissed the parents' claims pertaining to the 2019-20 school year, finding that the parents' claims were barred by the doctrines of res judicata and collateral estoppel (IHO Ex. XI).

On March 7, 2022, the parties proceeded to the substantive portion of the impartial hearing, which concluded on January 18, 2023 after seven days of hearings (see Tr. pp. 1-1071). In a final decision, dated April 16, 2023, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 27, 39-40). The IHO held that the district had sufficient evaluative information and credited the district regarding the issue of whether it attempted to get consent from the parents to conduct new evaluations (id. at p. 29-30).³ The IHO determined that both the parents and the student were able to fully participate at the CSE meeting and were actively involved in developing the IEP (id. at p. 30). The IHO found that the student's goals "were appropriate and measurable" (id.).⁴ Next, the IHO held that the program offered to the student "was appropriately ambitious, and designed to convey educational benefit" (id.).

As to the implementation of speech-language therapy, the IHO determined that the parents rejected these services (IHO Decision at pp. 31-32). The IHO held that the parents' refusal to work with the high school speech-language pathologist was not justified and there was nothing in the hearing record to support the claim that the district was retaliating against the parent by assigning

³ The IHO held that the parents "thwarted" the district's attempts to re-evaluate the student by failing to give consent (IHO Decision at p. 30). The IHO also denied the parents' request for an educational IEE by finding the district sufficiently evaluated the student in all areas of suspected disability (id. at p. 36).

⁴ The IHO determined that math goals were not required, and the lack of speech-language therapy goals was a clerical error (IHO Decision at p. 30).

a particular speech-language pathologist (id. at p. 31). The IHO noted that the district continued to try to find a speech-language pathologist suitable to the parents in order to provide the student with the recommended services (id. at pp. 31-32).

The IHO did not credit the testimony of the independent neuropsychologist and found the reliability of the test scores she reported to be questionable (IHO Decision at p. 34). The IHO also determined that the information in the hearing record showed an "overall picture" of the student as having made "tremendous progress, and not . . . regressing" (id. at p. 35). The IHO credited the testimony of the district witnesses that they had provided the student with post-secondary transition services (id. at pp. 35-36). The IHO found that the parents' claim regarding any potential procedural violation lacked specificity (id. at p. 36). Overall, the IHO held that the CSE developed an appropriate program for the 2020-21 school year that was reasonably calculated to confer educational benefits on the student and meet her unique needs (id. at p. 37).

The IHO denied the parents' request for compensatory education services and reimbursement for private speech-language therapy (IHO Decision at pp. 37-38). Regarding speech-language therapy, the IHO held that the parents did not present any witness or evidence for the 2020-21 school year from the private provider or establish "that the private services were appropriate and specifically designed to meet the unique needs of the student" (id. at p. 38). Additionally, the IHO noted that there was no evidence regarding the frequency of the services (id.). As to equitable considerations, the IHO found that the parents "actively thwarted the District[]"s ability to evaluate the student" and that, therefore, equities favored the district (id.). The IHO denied all the parents' request for relief and dismissed the parents' due process complaint notice (id. at p. 39). The IHO granted the district's request for an order that it fully evaluated the student in all areas of suspected disability and was not entitled to an IEE (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by dismissing their implementation claims related to the 2019-20 school year and in finding that the district offered and provided the student a FAPE for the 2020-21 school year and that equitable considerations did not support the parents' requested relief.⁵ For relief, the parents request an order for the district to fund a re-evaluation of the student, to fund an IEE in the area of transition services, to provide appropriate transition services to include reimbursement for a college-readiness program, to provide speech-language therapy services for three 60-minute session per week until the student turns 21 years old, to reimburse the parents for private speech-language therapy services obtained between October 1, 2020 and May 18, 2021, and to provide compensatory education services to redress the deprivation of FAPE from September 9, 2020 for the 2020-21 school year to be utilized until the student turns 21 years old.

In the answer, the district responds to the parents' allegations and argues that the IHO's decision should be upheld in its entirety. Moreover, the district asserts that the parents failed to timely and properly serve the request for review. The district contends that the request for review was not served until May 30, 2023, which was more than 40 days after the date of the IHO decision. Further, the district argues that the parents served the improper person on May 30, 2023, as the

⁵ The parent also raises a challenge to the manner in which the impartial hearing was conducted; specifically, regarding the use of a videotape in evidence.

request for review was handed to the secretary to the chief school officer, who is neither the district clerk nor an individual designated by the board of education to accept service.

V. Discussion—Initiation 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 parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The parents were required to serve the request for review upon the district no later than May 26, 2023, 40 days after the date of the April 16, 2023 IHO decision (see 8 NYCRR 279.4[a]). However, the declaration of service filed with the parents' appeal indicates that the parents served "the Secretary to the Chief School Officer," on May 30, 2023, which renders the request for review untimely.⁶

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. 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

⁶ State regulation requires that when a school district is the named respondent, "personal service of the request for review upon such school district shall be made by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). Notwithstanding the parents' representation that the secretary informed them that she was authorized to accept service for the superintendent, the district denies that this individual was designated by the board of education to accept service. Thus, their initiation of this appeal is defective on two grounds, both timeliness as further described below as well as defective service.

(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]).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 July 6, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER