The University of the State of New York

The State Education Department
State Review Officer
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No. 23-141

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 did not order compensatory education services as relief to address respondent's (the district's) alleged failure to offer or provide appropriate services to the student for the 2021-22 school year. The district cross-appeals from that portion of the IHO's decision which ordered it to fund private services obtained by the parent for his son for the 2021-22 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. Briefly, however, according to the parent, he contacted the district on March 16, 2021 and "signed the necessary

documents" to request that the student be evaluated for special education (Parent Ex. D ¶ 3). A CSE convened on June 4, 2021 to conduct an initial review of the student's eligibility for special education, and, finding the student eligible for special education as a student with a speech or language impairment, developed an IESP for the student with a projected implementation date of September 28, 2021 (Parent Ex. B at pp. 1, 10, 13). The CSE recommended that the student receive the following services on a weekly basis: five periods per week of group special education teacher support services (SETSS) in Yiddish; two 30-minute sessions of group speech-language therapy in Yiddish; and two 30-minute sessions of individual vision education services in English (id. at p. 10).

In a letter dated September 18, 2021, the parent's attorney indicated that the student's mother consented to the services recommended by the June 2021 CSE but that she could not locate providers at the district's "standard rate" (Parent Ex. C at p. 2). Accordingly, the letter set forth the parent's intent to "implement the IEP" through private providers and seek funding for the costs of the services from the district (see id.).

In a due process complaint notice, dated September 18, 2021, the parent alleged that the district failed to offer or provide the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A). The parent alleged that the timing of the CSE meeting and the late provision of a copy of the IESP to the parent consisted of a "denial of Child Find and FAPE" (id. at p. 2). In addition, the parent contended that the district failed to implement the June 2021 IESP and that the parent had been unable to locate providers on his own (id.). The parent asserted that he had located "appropriate services providers" to deliver the student's services privately "at their prevailing rate" (id.). For relief, the parent requested that the district be required to fund the private services delivered to the student during the 2021-22 school year (id. at p. 3). The parent also requested compensatory education to remedy the delayed CSE meeting and to make up for any services that were not delivered during the 2021-22 school year (id.).

An impartial hearing convened on March 28, 2022 and concluded on April 28, 2022 after two days of proceedings (Tr. pp. 1-23).[1] The IHO issued a final decision that was dated December 27, 2022 (IHO Decision).[2] The IHO determined that the district failed to meet its burden to prove that it provided the student the services mandated by the IESP (id. at pp. 6, 7). In considering the relief sought by the parent, the IHO opined about the terms "enhanced rate," "market rate," and "customary rate," and concluded that ordering private services at "market rate" would allow for equitable relief (id. at pp. 5-6, 7). Therefore, the IHO ordered the district to fund the costs of five periods of group SETSS per week in Yiddish delivered by a provider of the parent's choosing at market rate (id. at p. 8). The IHO also ordered the district to provide related service authorizations (RSAs) as needed or, alternatively, to fund two 30-minute sessions per week of group speech-language therapy in Yiddish and two 30-minute sessions per week of individual vision services in English delivered by providers of the parent's choosing at market rate (id.).

[1] The district did not appear at either hearing date (Tr. pp. 1, 3, 19, 39-40).

[2] The decision is titled "Corrected Findings of Fact and Decision"; the hearing record does not include a copy of the original decision (IHO Decision at p. 1).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail other than as discussed below as applicable to the timeliness of the appeal. Generally, the issue raised by the parent on appeal is whether the IHO erred in failing to order compensatory education services as relief. In its answer, the district asserts that the parent's appeal should be dismissed because it is untimely. The district further asserts in a cross-appeal that the IHO's determination that the parent was entitled to district funding of privately obtained services for the 2021-22 school year.

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 40 days from the date of the December 27, 2022 IHO decision (see 8 NYCRR 279.4[a]). However, the parent's affidavit of service indicates that the parent served the district on July 18, 2023 (July 18, 2023 Parent Aff. of Service), which renders the request for review untimely by more than five months if using a calculation most favorable to the parent.

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. In the request for review, the parent asserts that, although the IHO decision was dated December 27, 2022, for purposes of calculating the timeliness of the parent's appeal, the date that the decision was "processed and published" should be relied upon.[3] The additional evidence submitted with the parent's reply and answer to the cross-appeal offers some description of the circumstances of the issuance of the IHO's

[3] The parent indicates that the decision was "processed and published" on June 21, 2022 (Req. for Rev. at p. 1). This was a typographical error and it appears that the parent intended the date to read June 21, 2023, as stated in the parent's reply and answer to the cross-appeal (Reply & Answer to Cr.-Appeal at p. 3).

decision.[4] On July 3, 2022, the IHO emailed a copy of a decision in this matter to the parties (Reply & Answer to the Cr.-Appeal Ex. A at p. 1). By email to the IHO, dated July 8, 2022, an individual from the parent's attorney's office informed the IHO that it appeared that the decision had not been "submitted properly to the case managers and the [impartial hearing system]" and, therefore, had not been processed (id.). The individual further noted that the decision did not include relief in the form of compensatory education and inquired of the IHO if this was intentional (id.). Individuals from the parent's attorney's office "follow[ed] up" with the IHO on July 20, 2022, October 31, 2022, December 6, 2022, and December 26, 2022 (id. at pp. 1-2).

In an email to the parties, dated December 27, 2022, the IHO attached "a corrected version" of the decision and indicated that she had sent the decision "to IHO Decisions some time ago but erroneously omitted an email to the parties" and that "[t]he case number and date of [her] assignment were incorrect'" (Reply & Answer to the Cr.-Appeal Ex. B at p. 1). The IHO further indicated that "[a]lso corrected [wa]s the date, which should correspond to the receipt date by the parties" (id.). On January 17, 2023, an individual from the parent's attorney's office indicated that they had "still not received" the decision and asked the IHO to confirm that it had been "properly submitted to IHO decisions" (id.). The IHO responded that she had sent the decision to the email for the parent's attorney's office; an individual from the office confirmed the email address but indicated that the decision had "not yet [been] processed by the case management" (id. at pp. 1-2). According to the parent, the decision was not processed until June 21, 2023.[5]

The time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a request for review (see 8 NYCRR 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision, not from date of receipt via email or regular mail], aff'd 188 A.D.3d 889

[4] With the reply and answer to the cross-appeal, the parent submits two email threads as additional evidence. The district objects to consideration of the emails, arguing that the parent should have filed them as additional evidence with the request for review. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the additional evidence concerns the IHO's transmittal of the decision in this matter to the parties and, therefore, could not have been offered at the time of the impartial hearing and is necessary for addressing the parties' arguments about the timeliness of the parent's appeal. Accordingly, the documents have been considered. Although unmarked, for purposes of this decision, the first email thread, which consists of three pages of emails between the IHO and the parties dated between July 3, 2022 and December 26, 2022 will be cited as exhibit "A" to the reply and answer to the cross-appeal. The second email thread, which consists of two pages of emails between the IHO and the parties dated between December 27, 2022 and January 20, 2023 will be cited as exhibit "B" to the reply and answer to the cross-appeal.

[5] Consistent with this description, the district's certification of the record on appeal includes a clarification stating that the IHO's decision was dated December 27, 2022, but "was submitted to the parties the Impartial Hearing Office on June 21, 2023 [sic]" (Dist. Cert. of Record).

[2d Dep't 2020]; Application of a Student with a Disability, Appeal No. 19-043; Application of a Student with a Disability, Appeal No. 16-029; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely. On the other hand, there may be circumstances that are outside a party's control where delay in receipt of an IHO's decision might contribute to lateness in the service of the request for review, such as where the 40-day time period has either: 1) already expired; or 2) is much closer to expiring and there is no reasonable way in which a party could prepare and serve an appeal within the remaining time frame (see Application of a Student with a Disability, Appeal No. 20-030; Application of a Student with a Disability, Appeal No. 20-029). However, this case presents neither circumstance,

In this instance, the IHO's December 27, 2022 decision was delivered to the parties on the date of issuance and there was no delay in the parent's receipt of the decision (compare IHO Decision at p. 8, with Reply & Answer to the Cr.-Appeal Ex. B at p. 1). With regard to the alleged delay in the processing of the IHO's decision, there are various references in the email correspondence between the IHO and the parties regarding submission of the decision to case managers, the impartial hearing system, and "IHODecisions" (Reply & Answer to the Cr.-Appeal Exs. A at p. 1; B at p. 1-2). The practices of the district's impartial hearing office are not clearly described in the current matter; however, even if they were, the alleged processing errors would not amount to good cause for the parent's late service of the request for review. Notwithstanding that the IDEA does not preclude a school district from taking on ministerial actions to assist IHOs in issuing decisions (i.e. formatting, copying, postage), State regulation provides that the IHO "shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR 200.5[j][5]). Here, the parent does not deny receiving the decision and, contrary to the parent's characterization of the December 2022 IHO decision as a "draft," there is no indication that the December 27, 2022 decision was not a final and enforceable decision. The December 27, 2022 decision bore the signature of the IHO and was transmitted to the parties (IHO Decision at p. 8; Reply & Answer to the Cr.-Appeal Ex. B at p. 1).[6] State regulation in effect at the time of the December 27, 2022 version of the decision further specified that "[i]mpartial hearing officers must sign and date their decisions as of the date the decision is being distributed and shall distribute the decision to the parties on that same day. This date shall also constitute the case closure date reported by a district to the Office of Special Education in the New York State Education Department" and there is no evidence that the IHO in

[6] For that matter it appears that the IHO issued a final decision in this matter on July 3, 2022 and went on to issue a "corrected" decision only for purposes of changing the date of the decision and addressing the parent's concerns about the processing of the decision by the district's impartial hearing office (Reply & Answer to the Cr.-Appeal Exs. A at pp. 1-2; B at p. 1). If this earlier decision date was the operative date, the appeal would be approximately eleven months late. As the appeal is untimely even when relying on the date of the later "corrected" version of the IHO decision, it is unnecessary to require the district to file a copy of the July 3, 2022 decision as additional evidence and consider whether the IHO exceeded her authority in issuing a corrected decision, especially without also noting that a decision had previously been issued on July 3, 2022. Reissuing a decision with an altered decision date can result in grave consequences because school districts and IHO's lack the authority to alter material provisions of a final decision (see Application of a Student with a Disability, Appeal No. 19-018 n.6).

violated that requirement in this instance because the decision was distributed to both district personnel and the parent's representative (8 NYCRR 200.5[j][5][v]). The statement in the notice right to appeal contained the IHO's decision explicitly stated that the parent had 40 days from the date of the IHO's decision to, among other things, personally serve the request for review (IHO Decision at p. 9). The parent's argument that further actions were required such as "publishing" or sending the decision to case managers or "IHODecisions" are without merit with respect to the parent's obligation to timely serve a request for review within 40 days from the date of the IHO's decision.

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 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]).

Generally, a cross-appeal is considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[a], [f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]; Application of the Bd. of Educ., Appeal No. 12-059). The district's cross-appeal is, accordingly, also dismissed.

VII. Conclusion

Having found 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.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 29, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER