



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-170

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:

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 dismissed her due process complaint notice against respondent (the district) regarding the 2022-23 school year with prejudice. The 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 programming 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

Given the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student's educational history is not necessary. Briefly, the evidence in the hearing record indicates that a CSE convened on October 10, 2018, and developed an IESP for the student that recommended six periods per week of group special education teacher support services (SETSS), one 30-minute session per week of individual counseling, and two 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. B at pp. 1, 8).

According to the parent, prior to the 2022-23 school year, she did not receive communication from the district regarding an annual review CSE meeting and no updated IESP was developed for the student (Parent Ex. E ¶ 3).

On June 12, 2022, the parent executed a contract with Benchmark Student Services (Benchmark) for the delivery of special education teacher services to the student during the 2022-23 school year (Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated September 12, 2022, the parent alleged that, for the 2022-23 school year, the district had failed to implement the student's IESP and therefore denied the student a free appropriate public education (FAPE) and equitable services (Parent Ex. A at p. 1). The parent indicated that she "was forced to implement the services on her own by utilizing the services of an agency at enhanced rates" (*id.* at p. 2). For relief, the parent sought "an order compelling the District to implement" the student's SETSS and related services "at enhanced market rates," as well as a bank of compensatory education services for any services not delivered during the 2022-23 school year (*id.*). The parent also invoked pendency, alleging that the student's stay put placement lay in the October 2018 IESP, which mandated six periods of SETSS, one 30-minute session of counseling services, and two 30-minute sessions of speech-language therapy per week (*id.*).

B. Impartial Hearing Officer Decision

The parties appeared before the IHO on 10 dates between November 22, 2022 and June, 2023 (Tr. pp. 1-223).^{1, 2} After the initial appearance on November 22, 2022, a hearing date devoted to addressing the student's pendency placement on November 28, 2022, and three status conferences at which it was indicated that the parties might settle the matter, the substantive portion of the impartial hearing devoted to addressing the merits of the parent's claims began (*see* Tr. pp. 1-54). On March 27, 2023, the district stated that it did not intend to present evidence or contest the parent's allegations (Tr. p. 51); five parent exhibits were entered into evidence (*see* Tr. pp. 45-48; Parent Exs. A-C; E-F). Another status conference took place on April 26, 2023, at which the district raised its intention to subpoena the agency providing the unilaterally obtained services and the parent's advocate raised objections (*see* Tr. pp. 55-82). On May 18, 2023, two more parent exhibits were entered into evidence; in addition, a discussion ensued about a different version of exhibit C—the parent's contract with the provider—that the parent included in the set of exhibits prepared for that day (Tr. pp. 83-121; Parent Exs. G-H).

Leading up to a hearing date scheduled for June 13, 2023, on June 9, 2023, the parent's advocate informed the IHO and the district that the parent wished to withdraw the due process complaint notice (*see* Tr. pp. 125-26). At the June 13, 2023 hearing date, the district objected to

¹ No representative from the district appeared for the first four dates (Tr. pp. 1, 7, 13, 18).

² In an interim decision on pendency dated November 28, 2022, the IHO, noting that the district did not object to the parent's pendency request, directed the district "to continue . . . to provide" the student the services in the October 2018 IESP during the proceedings (Interim IHO Decision).

the withdrawal of the due process complaint notice without prejudice (*id.*). On June 21, 2023, the IHO gave the parties another opportunity to present their positions regarding whether the due process complaint notice should be deemed withdrawn with or without prejudice (Tr. pp. 187-223).

The parent's advocate stated the parent's position that, regarding the parent's request for relief in the form of SETSS, the issue was moot as the district funded the student's private services pursuant to pendency, and that, because the district did not proffer any evidence in the matter, it was not prejudiced (Tr. pp. 196, 209). The parent's advocate contended that outstanding issues existed regarding delivery of the student's OT and counseling services, and for that reason, the parent wished her withdrawal to be without prejudice (Tr. pp. 196-97).

The district stated its position that, although it did not present documentary or testimonial evidence, it had "extensively prepared for hearing" in the matter, noting particularly the need to compare various versions of disclosures sent by the parent's advocate to ensure discrepancies did not exist similar to the different versions of the contract that had been raised at an earlier appearance, and had met internally with other district officials and appeared several times before the IHO arguing discrete issues (Tr. pp. 197-205). The district also implied that a withdrawal without prejudice "would enable the Parent's advocate to submit new disclosures likely inconsistent with the two that have been admitted here" referencing the different versions of the parent's contract with the agency (Tr. p. 205).

Finally, the parent's advocate stated her position that, if the IHO intended to deem the withdrawal with prejudice, she would "withdraw [the] withdrawal" (Tr. p. 197). To this last remark, the IHO noted that, if either of the parties disagreed with the outcome, they could appeal the IHO's termination order (Tr. pp. 197, 211-14).

In an order of termination dated June 22, 2023, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision).

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 dismissing the due process complaint notice with prejudice. In its answer, the district asserts that the parent's request for review should be dismissed on the basis that the parent failed to timely initiate the appeal.

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 August 1, 2023, 40 days from the date of the June 22, 2023 IHO decision (see 8 NYCRR 279.4[a]). However, the parents' affidavit of service indicates that the parents served the district on August 11, 2023 (Parent Aff. of Service), which renders the request for review untimely.

Additionally, the parent has failed to assert good cause in her 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 June 22, 2023, the decision was not remitted to the parent until July 21, 2023. The parent offers additional evidence with the request for review regarding the transmittal of the decision (SRO Exs. A-B).³ In particular, the parent's additional evidence shows that on July 21, 2023, the district's impartial hearing office and, separately, a representative from the district, emailed a copy of the IHO's decision to the parent's advocate.

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 [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

³ 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.

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.

To the extent that the parent asserts that a delay in the transmittal of the IHO's decision contributed to any lateness in the service of the request for review, there may be circumstances that are outside a party's control where such a delay 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.⁴

Here, the appeal is limited in scope to the IHO's decision to deem the parent's withdrawal of the due process complaint notice to be with prejudice and the IHO gave the parent fair warning that this was a possible outcome. Taking this into consideration, the parent had ample time (11 days) to timely serve the request for review upon purported receipt of the IHO's written order of termination on July 21, 2023. Accordingly, there is insufficient basis to exercise my discretion and excuse the parent's failure to timely appeal from the IHO's decision (8 NYCRR 279.13).

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]).

Nevertheless, a final word on the merits of the parent's appeal is warranted. Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall

⁴ With regard to the alleged delay in issuance of the IHO's decision, the parent alleges that the decision was remitted to the parent when the district's impartial hearing office emailed the decision to the parent's advocate (SRO Ex. A). 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 practices of the district's impartial hearing office are not clearly described, and it is unclear if the IHO separately transmitted the decision to the parties. In any event, even if there were any alleged processing errors with the impartial hearing office, this alone would not amount to good cause for the parent's late service of the request for review.

issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]).

Here, even if the parent's appeal was timely, the IHO's termination order deeming the withdrawal to be with prejudice would not be disturbed. After hearing the positions of both parties during the impartial hearing, the IHO decided that she would deem the withdrawal to be with prejudice (see IHO Decision). Based on the timing of the parent's request to withdraw her due process complaint notice without prejudice, the district's opposition to a withdrawal without prejudice, and the parties' arguments made during the hearing, the IHO's decision not to permit a withdrawal without prejudice was not an abuse of discretion.

VI. 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.

**Dated: Albany, New York
October 23, 2023**

**CAROL H. HAUGE
STATE REVIEW OFFICER**