The University of the State of New York

The State Education Department
State Review Officer
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No. 23-294

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Kimberly C. Tavares, Esq., attorney for petitioners

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at Three Points Center North Carolina, LLC (Three Points) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the disposition of this matter on procedural grounds, a detailed recitation of facts relating to the student is not necessary.

Briefly, the student has received diagnoses of attention deficit hyperactivity disorder (ADHD), borderline personality disorder, major depressive disorder, oppositional defiant disorder, and disruptive mood dysregulation disorder, and has a history of psychiatric hospitalizations and placement in residential treatment programs (Parent Exs. L at pp. 1, 8; M; see Parent Exs. I; N; P-T). In 2021, a CSE recommended that the student attend a State-approved day school and deferred placement to the district's central based support team (CBST) to identify a school; however, all of the schools the district referred the student to "rejected her case," as her "psychiatric needs [we]re

too severe and her needs [could not] be met" (Parent Ex. F at p. 3). After attending a wilderness camp from July 7, 2021 through September 29, 2021, for the 2021-22 school year, the student attended Asheville Academy (Asheville), an out-of-State therapeutic residential program (Parent Exs. G; I; see Parent Ex. BB ¶¶ 8, 9).

In a letter dated June 15, 2022, the parent notified the district that educational planning had not occurred for the student for the 2022-23 school year "in a timely fashion" and, as a result, the parent intended to "continue to unilaterally place [the student] at Asheville School for the 2022-2023 school year" and seek tuition reimbursement for the costs thereof from the district (Parent Ex. B at p. 1). On June 19, 2022, the student was discharged from Asheville because interventions provided at the program "ha[d] not shifted responses and [the student] present[ed] as treatment resistant" and it was determined that the student required "a higher level of support" (Parent Ex. G at p. 5). On June 20, 2022, the parent entered into a contract with Three Points, an out-of-State therapeutic boarding school, for the student's attendance for a period of three months (Parent Ex. U).[1]

A CSE convened on July 21, 2022, found the student eligible for special education as a student with an emotional disability, and recommended that the student attend a 12:1+1 special class in a State-approved nonpublic residential school with related services of two 60-minute session of individual and five 60-minute sessions of group counseling per week for the 12-month school year (Parent Ex. F at pp. 1, 17-18, 22).[2] The CSE deferred the matter to the CBST to identify a State-approved nonpublic residential school (id. at pp. 3, 4, 9, 17).

In a letter to the district dated September 10, 2022, the parent detailed her disagreement with two State-approved residential schools that had contacted her after having been identified by the district as possible placements for the student, and further indicated that she reached out to two other possible school options but that one did not have an opening and the other had not received "a packet" and had not returned her call (Parent Ex. C; see Parent Exs. D; E). The parent indicated that she would continue to consider any residential schools identified by the district but notified the district that, because an appropriate therapeutic residential school placement had not yet been found, she would continue to unilaterally place the student at Three Points and seek tuition reimbursement from the district for the costs thereof (Parent Ex. C at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 21, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). In particular, the parent raised allegations pertaining to the composition of the July 2022 CSE, the CSE's consideration of evaluations, the parent's ability to participate in the CSE, the sufficiency and appropriateness of the content of the IEP, including the description of the student's present levels of performance and the annual goals developed for the

[1] Three Points has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

student (id. at pp. 3-4). In addition, the parent asserted that the district failed to identify an appropriate residential school for the student to attend to receive the program and services recommended in the July 2022 IEP (id. at pp. 5-6). The parent alleged that Three Points was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's requested remedy (id. at pp. 6-7). For relief, the parent requested reimbursement from the district for the costs of the student's tuition at Three Points for the 2022-23 school year, as well as private transportation and private evaluations (id. at p. 7).

B. Impartial Hearing Officer Decision

After a prehearing conference and a status conference before the Office of Administrative Trials and Hearings (OATH), held on April 12, 2023 and April 27, 2023, respectively, an impartial hearing convened on June 8, 2023 and August 24, 2023 (June 8, 2023 Tr. pp. 1-94; Aug. 24, 2023 Tr. pp. 1-120; IHO Exs. 1-2). Before the impartial hearing on the merits, the district communicated to the IHO and the parent's attorney that it would not be presenting evidence or argument regarding its offer of a FAPE to the student or equitable considerations (IHO Ex. 3).

In a decision dated October 31, 2023, the IHO found that the district conceded that it did not offer the student a FAPE for the 2022-23 school year; however, the IHO found that the parent had not met her burden of proving that Three Points was an appropriate unilateral placement (IHO Decision at pp. 14-15, 21). The IHO found deficiencies in the documentary evidence, noting that, although evidence in the hearing record indicated that a master treatment plan, session notes, and progress reports were developed for the student, they were not offered into evidence (id. at p. 17). In addition, the IHO found that the testimony of the clinical therapist from Three Points "was not wholly reliable," as her testimony at the impartial hearing contradicted her written testimony (id.).

The IHO found inadequate evidence "to show the relationship between noneducational needs and 'the educational opportunities such services were designed to support,'" noting that, although the parties agreed that the student needed a residential placement, Three Points "appear[ed] to be focused on treating the Student from a mental health perspective and facilitating a better working relationship and dialogue between the Student and her Parents" (IHO Decision at pp. 16-17). In addition, the IHO noted that aspects of the program at Three Points were similar to the State-approved residential schools and that the parent had rejected the State-approved schools based on these same aspects (id. at pp. 19-20).

More specifically, the IHO found insufficient evidence in the hearing record regarding the educational component of Three Points, citing documents from Three Points that stated the school was not designed for students with learning disabilities and that the academic components such as teacher credentials, course offerings, time in class, or student-to-teacher ratios were not guaranteed and could change (IHO Decision at pp. 17, 21). The IHO also noted the lack of peers in the same grade level as the student and the lack of evidence of the functional levels of the other students, concerns that the IHO found the parent had raised regarding the residential schools proposed by the district (id. at pp. 18-19). The IHO also noted that the school employed only three teachers for 28 students and that the hearing record did not include evidence regarding the credentials or skills of the teachers, but noted that evidence showed that none of the teachers held special education licenses or certifications (id. at p. 19). The IHO found that, at the nonpublic school, "viewing the

Student through an academic lens [wa]s secondary to treating the mental health issues of the Student, and the two [we]re decidedly separate" (id.).

Regarding the therapeutic component, the IHO noted that, whereas the IEP recommended five 60-minute group sessions and two 60-minute individual sessions of counseling per week, Three Points offered equine therapy for one of five group therapy sessions per week and offered only one 45-minute session of individual therapy per week (IHO Decision at p. 19). The IHO described testimonial evidence showing that the student made progress with her treatment goals at Three Points before noting that the hearing record did not include sufficient evidence to show that Three Points provided the student with specially designed instruction to meet her unique needs (id. at pp. 20-21).

Based on the foregoing, the IHO found that the parent had not met her burden to prove that Three Points was an appropriate unilateral placement for the student for the 2022-23 school year and denied the parent's requested relief (IHO Decision at p. 21).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision, alleging that the IHO erred in finding that the parent did not meet her burden of proof to show that Three Points was an appropriate unilateral placement for the 2022-23 school year. The parent argues that, contrary to the IHO's finding, the evidence in the hearing record was sufficient to establish the appropriateness of Three Points. With respect to the IHO's finding about the reliability of the clinical therapist's testimony, the parent explains the purported inconsistency in the testimony identified by the IHO and describes the support and services delivered by the clinical therapist which addressed the student's dysregulation, allowing her to remain in the educational program.

The parent asserts that the IHO overlooked the student's needs and her ability to regularly attend school and maintain enrollment in an educational program without the support of a therapeutic placement. The parent argues that the therapeutic supports provided at Three Points addressed the student's dysregulation that occurred in the classroom and allowed the student to remain in an academic placement until she demonstrated readiness for discharge. In addition, the parent points to evidence about the academic components at Three Points and the teachers' qualifications and credentials. The parent asserts that the IHO erred in finding that the therapeutic and academic components of the private school were distinct, arguing that the IHO held unreasonable expectation that the private school's witnesses would possess knowledge outside of their own service area and pointing to evidence that the staff met to discuss students.

Based on the foregoing, the parent requests a finding that Three Points was an appropriate unilateral placement and that the parent is entitled to tuition reimbursement for the costs of the student's attendance for the 2022-23 school year.

In an answer, the district responds to the parent's material allegations and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues that the parent's appeal was untimely served and did not comply with State regulations governing appeals before the Office of State Review.

In a reply, the parent argues that the request for review was timely.

V. Discussion—Timeliness of Appeal

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for failure to comply with State regulations governing appeals before the Office of State Review.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and 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]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations, including the failure to properly serve an initiating pleading in a timely manner, may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-66 [S.D.N.Y. Sept. 6, 2013] [upholding an SRO's dismissal of a parent's appeal where, among other procedural deficiencies, the amended petition was not personally served upon the district]; Application of a Student with a Disability, Appeal No. 16-015 [dismissing a parent's appeal for failure to effectuate proper personal service of the petition upon the district where the parent served a district employee not authorized to accept service]; Application of a Child with a Disability, Appeal No. 06-117 [dismissing a parent's appeal for failure to effectuate proper personal service in a timely manner where the parent served a CSE chairperson and, thereafter, served the superintendent but not until after the time permitted by State regulation expired]; see also Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner where the parent served the district's counsel by overnight mail]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a

hearing record on appeal]; Application of a Child with a Disability, Appeal No. 05-045 [dismissing a parent's appeal for, among other reasons, failure to effectuate proper personal service where the parent served a school psychologist]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

Here, the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO issued his decision on October 31, 2023, thus the parent had until December 11, 2023—the Monday following the Sunday expiration of the 40-day timeline—to personally serve the district with a verified request for review (see IHO Decision; 8 NYCRR 279.4[a]; 279.11[b]).

The parent's attorney submitted an "Affirmation of Service" indicating that she served the request for review on December 11, 2023 by emailing the district's representative (Parent Aff. of Serv.); however, the district asserts that the parent did not serve the pleading until December 12, 2023. Both parties submit additional evidence consisting of the emails by which the parent purports to have effectuated service (Answer Exs. A-B; Reply Exs. A-B; F).[3] The parent and district both submit a copy of an email from parent's counsel to district's counsel with no subject and no message in the body of the email, with an attachment identified as "RFR WITH VERIFICATION .pdf" (Answer Ex. A; Reply Ex. A). The parent's copy of the email is timestamped December 11, 2023 at 11:59 PM, whereas the district's copy of the email is timestamped December 12, 2023 at 12:00:07 AM (compare Reply Ex. A, with Answer Ex. A). Both parties also submit a copy of a second email, sent and received approximately 15 minutes later, which includes identifying case information for the present matter in the subject line, a message to "see attached," and an attachment identified as "[student last name] RFR MEMO AND POS.pdf" (Answer Ex. B; Reply Ex. B).

In the reply, the parent's attorney indicates that:

> Leading up to serving the Respondent, the Petitioner had been having problems with her scanner and computer in attaching documents to the Verified Request for Review. Subsequently, the Petitioner re-served the Verified RFR with an attached Memorandum of Points and Authorities and Proof Service shortly after serving the original Verified Request for Review.

(Reply ¶ 3). According to the reply, the next morning, the parent's attorney realized that the Notice of Request for Review "did not attach" and contacted the district to discuss the omission (Reply ¶ 4; see Reply Exs. C; E). On December 14, 2023, the parent's attorney emailed attorneys for 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 submitted with the answer and the reply could not have been presented at the impartial hearing and is necessary to consider in order to render a decision about the timeliness of the parent's appeal (Answer Exs. A-B; Reply Exs. A-F).

district indicating that the Notice of Request for Review had been "inadvertently left off" the documents served and asked if the district would "as a professional courtesy . . . accept service" of the Notice of Request for Review at that time (Reply Ex. F). An attorney for the district responded "[r]eceived" (Reply Ex. D).

The parent indicates "Petitioner believed that service had been timely based on the date stamp of the email and as a result, did not submit a letter to the SRO explaining the complications that ensued the night of December 11, 2023 in serving the appeal" (Reply ¶ 6).

Based on the explanation in the reply, the parent essentially concedes that the appeal documents, consisting of the notice of request for review, request for review, affidavit of verification, and memorandum of law, were not timely served on December 11, 2023. With respect to the first email sent, which included no identifying case information and attached just the request for review and affidavit of verification, the parent's attorney may have hit "send" on December 11, 2023 at 11:59 pm but the email was not received by the recipient's email server until December 12, 2023 12:00:07 am (compare Reply Ex. A, with Answer Ex. A). In addition, the attachment to the first email did not include the memorandum of law or the notice of request for review, which were served later, on December 12, 2023 and December 14, 2023, respectively (see Reply Exs. B; F; see also Answer Ex. B).

The explanation set forth in the reply for the late service focuses on the parent's attorney's trouble with her scanner and computer; however, the parent's attorney proffers no explanation why she waited until the literal last minute on the last day for service to attempt to email the documents. It was entirely foreseeable that problems with scanners, computers, and emails could arise and, further, that the email would not be delivered instantaneously and, instead, at least a few seconds for delivery would be required, thereby causing the documents to be untimely served the next day. Additionally, State regulation requires personal service in order to initiate an appeal, which would generally need to be effectuated on a district during business hours, or at a time when a process server may reasonably expect to find someone authorized to accept service (see 8 NYCRR 279.4[a]-[b]). In this instance, although the parent's proof of service does not reference a specific agreement for the district to accept service by email, the district presumably consented to service by email as it does not object to service by email in its answer. However, while service by email may afford litigants greater flexibility and convenience, it comes with sacrifices to the formality and assurances that personal service affords. State regulation is clear that "[s]ervice shall be complete upon delivery to the party being served" (8 NYCRR 279.4[d]). Here, the parent's attorney took a gamble in waiting until the last possible moment to serve the request for review and in relying on service by email, which takes time from when a message is sent to when it is delivered; because of this, the parent ultimately failed to timely serve the request for review and accompanying documents on the district.

Based on the foregoing, the parent did not serve the district within the timelines set forth in State regulation. Additionally, the parent's explanation relating to scanner, email, and attachment difficulties does not contain sufficient good cause. As described above, good cause would be an event that the party does not have control over (Grenon, 2006 WL 3751450, at *5; T.W., 891 F. Supp. 2d at 441).

Because the parent failed to properly initiate this appeal by effectuating timely service upon the district, and there is not sufficient good cause asserted in the request for review or subsequent filings, 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]).

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 28, 2024

STEVEN KROLAK
STATE REVIEW OFFICER