



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-038

**Application of a STUDENT SUSPECTED OF HAVING 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:

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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, among other determinations, found that respondent (the district) did not violate its child find obligations, and denied the parents' request to be reimbursed for their daughter's tuition costs at the Staten Island Academy (SIA) for the 2020-21, 2021-22, and 2022-23 school years. 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 never attended public school, rather she has attended SIA beginning at age three and continued to attend SIA into the fourth grade (2023-24 school year) at the time of the impartial hearing (Tr. pp. 508-10, 633-34). In spring 2023, staff at SIA suggested to the parents that the student should be evaluated either by a district CSE or via a private evaluation and the parents obtained a private neuropsychological and educational evaluation conducted in June 2023 (see Tr. pp. 469-72, 647, 651-55; Parent Ex. B). The resulting evaluation report identified diagnoses of attention deficit hyperactivity disorder (ADHD), combined presentation, and specific

learning disorder with impairment in written expression (Parent Ex. B at p. 19). The evaluation report recommended a wide variety of supports as part of an academic plan including individualized academic support, occupational therapy, testing and classroom accommodations, as well as home and school strategies to address writing, attention, and executive functioning (id. at pp. 19-23).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE), in that it failed to locate and identify the student as a student with a disability in violation of the district's child find obligations during the 2020-21, 2021-22 and 2022-23 school years (Parent Ex. A). Among other relief, the parents requested various forms of compensatory education, an individualized education services program (IESP), reimbursement for the costs of the private neuropsychological evaluation, and tuition reimbursement for the costs of the student's attendance at SIA (id.).

The parents referred the student to the district's CSE for an initial evaluation in August 2023 (Tr. pp. 366-67, 628-34, 700-01).

B. Impartial Hearing Officer Decision

An impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) convened on August 23, 2023 and concluded on October 13, 2023, after six days of proceedings including prehearing and status conferences (Tr. pp. 1-746). In a decision dated December 22, 2023, the IHO determined that the district did not violate its child find obligations for the 2020-21, 2021-22 and 2022-23 school years and did not deny the student with a FAPE (IHO Decision at pp. 6-18). The IHO denied the parents' requested relief apart from ordering the district to "convene a meeting of the CSE, provide any evaluations that are needed in order to properly classify the student as a child with a disability, and develop an IEP for the student" (id. at p. 18).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer, and the parents' reply is presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parents' claims on appeal is that the IHO erred in finding no child find violation and in failing to order the parents' requested relief in full. The district asserts that the IHO correctly determined that the district had not denied the student a FAPE and further asserts that the parents' appeal should be dismissed for untimely and improper service of the request for review.

V. Discussion—Timeliness of Appeal

Initially, it is necessary to determine whether the parents' appeal should be dismissed as untimely.

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 Bd. 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 State regulations. The IHO's decision was dated December 22, 2023; thus, the parents had until January 31, 2023—a Wednesday, 40 days after the date of the IHO Decision—to personally serve the district with a verified request for review (*see* IHO Decision at p. 18; *see* 8 NYCRR 279.4[a]; 279.11[b]). However, the declaration of service filed with the parents' appeal indicates that the parents served a specified individual, who the parents identified as a superintendent of the district, on February 1, 2024, which renders the request for review untimely.¹

¹ 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]). The parents' affidavit of service of the request for review indicates that they served a specified individual who they identified as a superintendent at a particular location in the district (Parent Aff. of Serv.). The district contends that the "Chancellor of the DOE" is the superintendent in the district and the "Law Department" has been designated to accept service and that therefore the request for review was improperly served (Answer ¶¶ 6-7). Thus, the parents' initiation of this appeal may be defective on two grounds, both timeliness, as further described below, as well as defective service (*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

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"]).

In a reply to the district's answer, the parents set forth several explanations regarding the timing of their service of the request for review.² Even if these allegations were made in the request for review, as required by State regulation (see 8 NYCRR 279.13), none rises to the level of an event over which the filing party had no control (Grenon, 2006 WL 3751450, at *5; T.W., 891 F. Supp. 2d at 441). For example, the parents assert that, because the district received an extension of the timeline to submit an answer to the request for review, the district was not prejudiced and the late service of the request for review should be excused. However, lack of prejudice to the district is not a reason why the request for review was not timely served (see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 367 [S.D.N.Y. 2013] [indicating that, while an SRO might in his or her discretion "consider whether a party has suffered prejudice, the regulations require a showing of good cause to excuse untimeliness"]).³

The parents also assert that the IHO sent a copy of the decision to parents' advocate who then sent it to the parents "several days later." 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

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]; but see Application of a Student with a Disability, Appeal No. 08-089 [excusing a pro se parent's service on a high ranking district official who was not designated to accept service]).

² The parents' submitted a letter to the Office of State Review dated February 27, 2024, which, for purposes of this decision, is treated as a reply permitted under State regulation (see 8 NYCRR 279.6[a]); however, the pleading was not accompanied by a verification or proof of service on the district (see 8 NYCRR 279.6[b]; 279.8[b]). In addition, while the letter indicated that it was transmitted electronically and via mail, the Office of State Review received it by mail only.

³ The decision cited by the parents to support their position that prejudice to the answering party is a relevant consideration is distinguishable from the present matter as it pertained to a parent's untimely filing of a request for review with the Office of State Review after it had been timely served upon the respondent (Application of a Student with a Disability, Appeal No. 23-144).

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.

Because the parents 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., 971 F. Supp. 2d at 365-67; 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 properly initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 25, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER