



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-481

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 Board of Education of the Garden City Union Free School District

Appearances:

Law Offices of Guercio & Guercio, LLP, attorneys for respondent, by Douglas A. Spencer, 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 denied her request to be reimbursed for her daughter's tuition at the Devereux Glenholme School (Devereux) 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

The parties' familiarity with this matter is presumed and given the disposition of this matter on procedural grounds, the detailed facts and procedural history of the case will not be recited here. Briefly, the CSE convened on June 25, 2021 and finding the student continued to be eligible for special education as a student with an other health impairment, developed an IEP for the student with an implementation date of July 5, 2021 (see Dist. Ex. 3). The CSE noted that, at the time of the meeting, the student was placed by the parent at Devereux and the parent was requesting that the CSE consider a residential placement for the student (id. at pp. 1-2).¹ The June 2021 IEP

¹ Devereux Glenhome is an out-of-state residential program (see Parent Exs. EE at p. 1; R at p. 17). As of the date of this decision, the out-of-State program does not appear on the list of schools approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7), but one of the district's witnesses identifies it as State-approved (Dist. Ex. 49).

recommended that the student be placed in a Board of Cooperative Educational Services (BOCES) therapeutic day program in a 6:1+1 special class with related services consisting of one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; one 30-minute session per week of individual speech-language therapy; and one 30-minute session per week of group speech-language therapy (id. at p. 13-16). In a prior written notice dated June 30, 2021, the district notified the parent of the recommendations made by the June 2021 CSE and advised the parent that the district recommended the student attend the BOCES program (Parent Ex. DDD at p. 13). In June 2021, Devereux recommended that the student remain in a residential setting (Parent Ex. R at p. 15).

The CSE next convened on September 20, 2022 and recommended two 120-minute sessions per week of home-based individual special class instruction; two 30-minute sessions per week of home-based individual counseling; two 30-minute sessions per week of home-based individual speech-language therapy; and one 60-minute session per week of home-based individual parent counseling and training (Dist. Ex. 4 at pp. 1, 11-12). The district issued a prior written notice dated October 5, 2022 which notified the parties of the results of the September 20, 2022 CSE and noted that on September 8, 2022 the parent informed the district that the student was going to return home from Devereux within the week and requested an immediate special education program (Dist. Ex. 8 at p. 1).² The prior written notice noted that pursuant to the June 2021 IEP, the student had been accepted to and recommended for the BOCES program; however, the CSE chairperson informed the parent that the process for recommending an out-of-district placement would need to begin again (id. at p. 2). The prior written notice explained that pending the acceptance of the student in a therapeutic day program, the CSE had recommended interim home instruction and that the parent had disagreed and indicated she would keep the student enrolled at Devereux for the immediate future (id. at pp. 1, 2).

The CSE reconvened on November 1, 2022 at the parent's request and continued the recommendation for two 120-minute sessions per week of home-based individual special class instruction; two 30-minute sessions per week of home-based individual counseling; two 30-minute sessions per week of home-based individual speech-language therapy; and one 60-minute session per week of home-based individual parent training (Dist. Ex. 5 at pp. 1, 12). The November 2022 IEP noted that the CSE "recommended that [the student] requires a therapeutic day program with Special Education supports and related services based on her current identified needs" and that the "CSE has begun and will continue its pursuit of an Out of District placement" (id. at p. 1).

The CSE reconvened on November 30, 2022 noting that "[t]he purpose of this meeting was to review updated Transition Assessments" and to review and consider an acceptance for placement at the BOCES" program (Dist. Ex. 6 at p. 1). The November 30, 2022 CSE recommended placement in the BOCES therapeutic day program in a 6:1+1 special class; one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; two 30-minute sessions per week of group speech-language therapy; and one 60-minute session per week of individual parent training (id. at pp. 12-13, 15). The district sent the parent a prior written notice dated November 30, 2022, informing the parent of the program recommended by the November 30, 2022 CSE (Dist. Ex. 11 at p. 1). The prior written notice

² According to the parent, the student continued at Devereux until the end of January 2023 (Dist. Ex. 1 at p. 1).

reflected that during the November 30, 2022 CSE both the parent and the student had requested that the student remain in Devereux (id. at p. 2). The prior written notice also documented that "the CSE rejected the option of a residential program as it is not considered the least restrictive environment and [the student's] needs and IEP goals can be address[ed] in the recommended out of district day program" (id.). According to the parent, the student transitioned from Devereux to the BOCES in February 2023 (Dist. Ex. 1 at p. 1).

The CSE reconvened on May 23, 2023 and continued the same programming recommendation as had been made by the November 30, 2022 CSE (compare Dist. Ex. 7 at pp. 11-12, with Dist. Ex. 6 at pp. 12-13).

A. Due Process Complaint Notice

In a due process complaint notice dated June 8, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the summer of 2022 and the 2022-23 school year (see Dist. Ex. 1). Among other issues, the parent asserted that the district failed to recommend an appropriate placement for the student asserting that the student required "intensive, structures residential treatment to address her significant social-emotional need" (id. at p. 7). The parent disagreed with the results of district evaluations and reports and asserted that the student's removal from Devereux would have caused regression and emotional deterioration (id. at pp. 5-11).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 26, 2023 and concluded on March 13, 2024 after nine days of hearings (Tr. pp. 1-1154). In a decision dated June 10, 2024, the IHO found that the district provided the student with a FAPE for the 2022-23 school year (id.). The IHO held that the BOCES programming was an appropriate placement for the student and the hearing record did not support finding that the student required a residential placement (id. at pp. 22-23). However, the IHO found that the change in recommendations for speech-language services from one group and one individual session to only group sessions was not appropriate but did not rise to the level of a denial of a FAPE and, therefore the IHO awarded the parent compensatory speech-language services (id. at pp. 24-25). Although not necessary, the IHO went on to find that the parent met her burden of proving that Devereux was an appropriate unilateral placement for the student and that equitable considerations would have favored the parent (id. at pp. 25-26). Overall, the IHO denied the parent's request for reimbursement for the cost of the student's tuition at Devereux and awarded the student 20 hours of compensatory speech-language therapy to be provided by a provider of the parent's choosing at a fair market rate (id. at p. 27).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district provided the student with a FAPE for the 2022-23 school year. As relief, the parent requested that that the district be ordered to: reimburse the parent for the cost of the student's tuition at Devereux for the 2022-23 school year; reimburse the parent for the costs of her private speech and psychological evaluations; and fund the student's enrollment in a program designed for autistic adults for two years to remedy the harm caused by the student's misclassification. The parent's appeal was submitted together with an undated letter from the parent which stated "Please be aware that I did

not receive IHO [name redacted]'s Decision until I contacted her + she sent it on October 10, 2024. The Decision is dated earlier but I did not receive it or have knowledge of it."

In an answer, the district initially asserts that the parent's request for review is untimely and must be dismissed as untimely. The district also asserts that the parent's failed to comply with the requirements for pleadings in Part 279 of State Regulations.³ The district did not challenge any aspect of the IHO's determination. In the alternative, the district asserts arguments that the IHO's decision should be affirmed.

V. Discussion

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

³ In addition to being filed untimely as further described below, the parent's request for review was 15 pages and thus overlength and would have been rejected on that basis. State regulation provides that "the request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). The Office of State Review has published guidance to assist parties in complying with Part 279 that describes the requirements of the regulations in plain language (<https://www.sro.nysed.gov/book/overview-part-279-revised-effective-january-1-2017>).

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 decision is dated June 10, 2024, thus the parent had until July 22, 2024—the Monday following the Saturday 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, appearing in this matter pro se, submitted an "Affidavit of Personal Service" indicating that she served the notice of request for review on October 24, 2024. The district asserts that the parent's appeal is not timely. The parent explained in an undated letter submitted with her request for review, that she did not receive a copy of the IHO's decision until October 10, 2024 acknowledging that the decision was "dated earlier but [she] did not receive it or have knowledge of it." However, included in the hearing record is an email from the IHO to the parties indicating that the IHO decision was transmitted to the parties on June 10, 2024. The hearing record also indicates that the parent communicated with the IHO by email throughout the proceeding. While I am sympathetic to the challenges of litigation faced by pro se litigants, those challenges do not constitute good cause for serving a late request for review, and the parent's statement that she did not receive and was presumably unaware of the IHO's decision prior to October 10, 2024, is not born out by the documentation in the administrative hearing record as a whole. Accordingly, I do not find good cause shown for the four-month delay between the date of the IHO's decision and the filing of the parent's appeal.

Based on the foregoing, the parent did not serve the district within the timelines set forth in State regulation.

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]; Mt. Vernon City Sch. Dist., 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]).

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**
 November 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER