The University of the State of New York

The State Education Department
State Review Officer
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No. 25-017

Application of a STUDENT WITH A DISABILITY, by his 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 Thomas W. MacLeod, 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) 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 programing for students with disabilities under the 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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 procedural posture of the matter—namely that it was dismissed with prejudice prior to an impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts and educational history of the student in this matter is limited to the procedural history including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

A. Due Process Complaint Notice

In a due process complaint notice dated July 16, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (see Due Process Compl.). According to the parent, a CSE last convened on May 5, 2021, and developed an IESP for the student that recommended that the student receive four periods per week of direct group special education teacher support services (SETSS), one 30-minute session per week of individual counseling services, and two 30-minute sessions per week of individual speech-language therapy (id. at p. 1). The parent contended that the district denied the student a FAPE by not supplying providers to deliver the services recommended in the May 2021 IESP to the student for the 2023-24 school year (id. at p. 2). The parent asserted that for the 2023-24 school year, she was unable to find a provider at the district's rates and therefore she had "no choice but to retain the services of an agency to provide the mandated services at an enhanced rate set by the provider" (id. at p. 2). Further, the parent asserts that the district failed to review the student's current IESP in a timely manner, thus depriving the student of a FAPE for the 2024-25 school year (id. at p. 2).

For relief, the parent requested, among other things, a pendency hearing and order, direct funding/reimbursement for SETSS, counseling services, and speech-language therapy services recommended in the May 5, 2021 IESP at enhanced rates for the 2023-24 and 2024-25 school years, and a bank of compensatory education services for any services that were not provided to the student due to the district's failure to implement services during the 2023-24 school year (Due Process Comp. at p. 3).

The hearing record includes a response from the district to the parent's due process complaint notice dated September 5, 2024, asserting several defenses (see Due Process Response).[1] Attached to the response is a prior written notice, dated September 28, 2023, referring to a CSE meeting that took place on September 20, 2023, at which an IESP was developed (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

In an prehearing order, the parties were warned, among other things, that failure to comply with adjournment request procedures or failure to appear could result in a dismissal for failure to prosecute (IHO Decision at p. 1; IHO Ex. I at p. 1).[2] The matter was appointed to the IHO by the Office of Administrative Trials and Hearings (OATH) on October 8, 2024 (IHO Decision at p. 1). The impartial hearing was initially scheduled for November 15, 2024, along with three unrelated cases involving students represented by the same lay advocate; the IHO agreed that, if the matter was not convened by 12:00, he would not object to the parent's request that the matter be adjourned

[1] The IHO indicated that the district filed no response to the due process complaint notice (see IHO Decision at p. 1). It is unclear if this was error or if the IHO was not made aware of the district's response.

[2] According to the IHO, the prehearing order was issued by another IHO on August 6, 2024 (IHO Decision at p. 1).

for another date (IHO Decision at p. 1; IHO Ex. IV at p. 1).[3] The parties jointly agreed to adjourn the impartial hearing to November 26, 2024, and the IHO sent an email to the parties on November 15, 2024, confirming that date (IHO Decision at pp. 1-2; IHO Ex. V at p. 1).

At the impartial hearing on November 26, 2024, a representative for the district was present but neither the parent nor her representative appeared (Tr. pp. 3-4; IHO Decision at p. 2). According to the IHO, the parent's representative did not communicate with the IHO or the district prior to or after the impartial hearing about their absence at the scheduled hearing date (Tr. p. 3; IHO Decision at p. 2).

In a decision dated November 26, 2024, the IHO found that the parent's failure to appear for the hearing or otherwise comply with adjournment procedures previously outlined by the IHO constituted a failure to prosecute and consequently justified a dismissal with prejudice (see IHO Decision). The IHO noted that the parent's representative had expressly agreed to the November 26, 2024, hearing date, and had received both a confirmation email from the IHO as well as a meeting invitation for the hearing date (id. at p. 2). Given the representative's actual notice of the hearing date as well as the prior warning that a failure to appear could result in a dismissal, the IHO concluded that the representative's failure to appear was willful and intentional (id. at p. 3). The IHO dismissed the parent's due process complaint notice with prejudice without addressing any of the parent's claims (id.).

IV. Appeal for State-Level Review

The parent appeals, through a lay advocate from Prime Advocacy, LLC, alleging that the IHO erred in concluding that the parent failed to prosecute her case based on a single missed appearance and dismissing the parent's due process complaint notice with prejudice. Additionally, the parent argues that should the case be dismissed, it should be so dismissed without prejudice.

In its answer, the district alleges, among other things, that the appeal was untimely and did not conform to the pleading requirements of 8 NYCRR 279.[4]

In a reply, the parent asserts that any pleading irregularity constituted a mere technicality that did not prejudice the district or form a sufficient basis for dismissing the case with prejudice.

[3] The district filed a motion to dismiss dated November 7, 2024, to which the parent responded (IHO Exs. II-III).

[4] The district submits with its answer two proposed exhibits and requests that they both be considered on appeal. 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]). The proposed exhibits consist of emails between the parties regarding electronic service and show when the district received the parent's complete requests for review (SRO Exs. 1-2). The exhibits will be considered as they are necessary to render a decision regarding the timeliness of the parent's appeal (see, e.g., Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]).

V. Discussion – Timeliness of Appeal

As a threshold matter, it must be determined whether 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]).

Here, the parent failed to initiate the appeal in accordance with the timeline prescribed in Part 279 of the regulations. The IHO issued his decision on November 26, 2024 (see IHO Decision). Therefore, the parent had until January 6, 2025 to serve the district with a verified request for review (see IHO Decision; see also 8 NYCRR 279.4[a]; 279.11[b]).[5] However, the verified request for review was not served until January 7, 2025 (Req. for Rev. at p. 6; see also SRO Ex. 1). Although the parent's lay advocate purportedly served an unverified request for review on January 6, 2025 (see Parent Aff. of Serv.; SRO Exs. 1-2), this service was defective as it did not include an affidavit of verification (see SRO Ex. 2; see also Appeal of Acosta, 54 Ed Dep't Rep., Decision No. 16,782 [2015] [dismissing a petition where the verification was not included with papers served on respondent], available at https://www.counsel.nysed.gov/Decisions/volume54/d16782). Additionally, the parent has failed to assert good cause in the request for review for the failure to timely serve the verified request for review. Accordingly, there is no basis on which to excuse the parent's 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"]).

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

[5] Day 40 fell on Sunday, January 5, 2025, meaning that Monday, January 6, 2025, was the final day for timely service (8 NYCRR 279.11[b]).

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]).

In addition to being untimely, the parent's request for review suffers from further defects. State regulation requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). Here, the parent's request for review is signed by the parent's lay advocate, who is not an attorney (Req. for Rev. at p. 4). In addition, as it appears that the parent's advocate served the district by email with consent (see SRO Exs. 1-2), the affidavit of service filed in this matter with the parent's appeal is inaccurate in that it states that the lay advocate served the district by personal service at the address of the offices of the lay advocate, Prime Advocacy (see Parent Aff. of Serv.). While State regulations do not preclude a school district and a parent from agreeing to waive personal service or to consent to service by an alternate delivery method, the method of service used must be accurately set forth in the affidavit of service. It appears that the lay advocate did not understand how to properly draft the affidavit of service and it is defective.[6] Finally, contrary to State regulation, the parent's reply was served more than three calendar days after the district served its answer (see 8 NYCRR 279.6[a]; 279.11[a]).[7]

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.

[6] SROs have stated in previous decisions that lay advocates, while not attorneys, must have an understanding of the appeals process, particularly as it relates to compliance with the practice regulations for filing appeals (see Application of a Student with a Disability, Appeal No. 18-108; Application of a Student with a Disability, Appeal No. 17-103). In addition, the parent's lay advocate in this matter has been repeatedly warned about her failures to comply with the practice regulations governing appeals before the Office of State Review.

[7] The parent's advocate requested an extension of time to serve and file a reply; however, the Office of State Review denied the request due, in part, to the advocate's miscalculation of the time permitted to serve the pleading. Although given leave to resubmit, the parent's advocate did not submit a corrected extension request.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determination above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 24, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER