The University of the State of New York

The State Education Department
State Review Officer
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No. 25-045

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 that the respondent (the district) fund the cost of her son's privately obtained services delivered by YDS Associates Inc. (YDS) during the 2023-24 school year. The district cross-appeals from the IHO's decision setting forth an additional ground for dismissal of the parent's claims. The appeal must be dismissed. The cross-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 the facts relating to the student's educational history is not necessary. Briefly, a CSE convened on March 14, 2022, found the student eligible for special education services as a student with a learning disability and developed an IESP for the student with a projected implementation date of April 1,

2022 (Dist. Ex. 2).[1] The CSE recommended that the student receive three periods per week of direct group special education teacher support services (SETSS) (id. at p. 6).[2]

The record contains an email to the district dated May 23, 2023, which indicated that the parent placed the student in a nonpublic school in the district at her own expense and wanted the district to continue the student's special education services for the next school year (Parent Ex. F). The email indicated that the parent generated the document through a webform, it was transmitted through an unattended mailbox, and responses should be sent to the parent and copied to the unattended mailbox (id.).

The parent signed an agreement with YDS, "[e]ffective September 1, 2023," for the provision of three sessions per week of unspecified services to the student at a stated hourly rate for the 2023-24 school year (Parent Ex. C).[3] The contract also indicated that the parent retained a lawyer to obtain direct funding from the district, that the provider would not require payment until the process concluded, and that the parent assumed responsibility for payment if the district did not pay the provider directly (id.).

According to an affidavit of the chief executive officer of YDS, the company provided the student with three hours per week of SETSS during the 2023-24 school year based on the March 2022 IESP (see Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2024, the parent, through her attorney, alleged that the district failed to provide the student with a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (Parent Ex. A). The parent alleged that the last educational program developed for the student was the March 2022 IESP and that for the 2023-24 school year the student required the same services as recommended in the March 2022 IESP, consisting of three sessions per week of SETTS and related services (id. at p. 1).[4] The parent asserted that the district failed to assign special education and related services providers to deliver the student services for the 2023-24 school year (id.). The parent further asserted that she was

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] YDS is a corporation and 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).

[4] The due process complaint incorrectly stated that the March 2022 IESP was an "IEP" and that it recommended special education itinerant teacher (SEIT) services instead of SETSS (Parent Ex. A at p. 1). Additionally, it is unclear what the parent intended when she indicated that the March 2022 IESP included recommendations for related services and that the district failed to assign related services providers to deliver services to the student, as the March 2022 IESP only recommended three periods per week of SETSS (Parent Ex. A at p. 1; Dist. Ex. 2 at pp. 5-6).

unable to locate providers at the district's "standard rates" but was able to secure providers who were willing to deliver the student's services at "rates higher than standard [district] rate[s]" (id.). As relief, the parent requested direct funding for three sessions per week of services provided by a special education teacher for the 2023-24 school year with the parent's chosen provider at enhanced rates (id. at p. 2).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 14, 2024 (Tr. pp. 1-49).[5]

In a decision dated December 12, 2024, the IHO dismissed the parent's claims (IHO Decision at pp. 9-10). The IHO found the June 1 issue "dispositive," noting that the record did not contain credible evidence that the parent, or someone in a parental relationship to the student, submitted a timely request for equitable services by June 1, 2023 (id. at p. 9). The IHO found that the May 2023 email was sent through completion of a web form and that the unmonitored mailbox through which it was sent most likely belonged to the parent's former service agency (id. at p. 9). The IHO found that the parent's testimony contradicted the other evidence in the hearing record, as well as common sense, and was self-contradictory and accordingly found that the parent's testimony was "unworthy of belief" (id.). The IHO noted that she was unaware of any case law permitting a services agency to submit a June 1 request on behalf of a parent and that there was no evidence in the hearing record showing that the agency that had sent the letter was authorized to do so on the parent's behalf (id. at pp. 9-10). Overall, the IHO found that a request for equitable services sent from an agency did not meet the statutory requirements (id. at p. 10).

The IHO further held, in the alternative, that even if the June 1 notice were sufficient, the parent did not meet her burden to show that the unilateral services she obtained were appropriate as there was insufficient evidence to show that they were individualized to meet the student's needs, the provider lacked proper certification, and there was no objective evidence of progress (IHO Decision at p. 10). In addition, the IHO found that equitable considerations weighed against the parent because the private agency hired the parent's attorney and paid her legal fees and the IHO did not believe it was appropriate to order funding that incorporated those costs (id.). The IHO also found that the parent's lack of candor weighed against her as an equitable consideration (id.). Accordingly, the IHO dismissed the parent's due process complaint notice, with prejudice (id.).

[5] The hearing record includes an omnibus docket "Standing Scheduling Order" dated August 3, 2024 detailing expectations and requirements of the parties for the conduct of the impartial hearings (see IHO Omnibus Order). The district filed a motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction on October 22, 2024 (Dist. Mot. to Dismiss at pp. 1-4). In the email submitting the motion to dismiss, the district also raised the defense that the parent did not request equitable services prior to June 1 and requested the parent's appearance at the hearing and cross-examination of all witnesses. The IHO who presided over the hearing was subsequently appointed on November 6, 2024 (IHO Decision at p. 3). The IHO advised the parties during the hearing that she was denying the motion to dismiss (Tr. pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her request for funding of three sessions per week of SETSS for the 2023-24 school year. The parent asserts that the IHO erred in finding that she did not prove that she sent a June 1 notice and raises additional allegations as to why a June 1 notice was not a prerequisite to the receipt of equitable services. The parent further argues that the IHO erred in finding that the unilaterally obtained services were not appropriate, asserting that the IHO did not apply the correct standard as the IHO placed the burden of proof on the parent. In addition, the parent contends that, even if she had a burden, the testimony of the parent and the provider established that the services obtained by the parent were appropriate. The parent also contends that equitable considerations favor the parent as the district failed to develop an educational program for the student for the school year at issue and the district was, therefore, acting inequitably.

Finally, the parent acknowledges that the request for review was being served three days after the 40-day timeline for filing an appeal. The parent requests that the three-day delay be excused contending that it was caused by an internal error in calendaring because the IHO's decision was part of an omnibus set of cases and the other matters that were part of that omnibus had decisions issued on December 16, 2024 with a deadline to appeal falling on January 27, 2025, while in this matter, the IHO decision was dated December 12, 2024. The parent argues that there is no prejudice to the district.

As relief, the parent requests that the dismissal be reversed and that her request for direct funding of three periods per week of SETSS for the 2023-24 school year at the provider's contracted rate be granted.

In an answer and cross-appeal, the district argues, among other things, that the appeal should be dismissed because the parent served the request for review late without "good cause" and the request for review did not comport with practice regulations in that it was not verified.

V. Discussion

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness.

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]).

Here, it is undisputed that the parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision is dated December 12, 2024, thus the parent had until January 21, 2025 to personally serve the district with a verified request for review (see IHO Decision at p. 10; 8 NYCRR 279.4[a]; 279.11[b]). However, according to the "Affirmation of Service" filed with the request for review, counsel for the parent served the parent's request for review on counsel for the district via email on January 24, 2025 (see Parent Aff. of Serv.). Therefore, the parent did not effectuate service until the 43rd day after the date of the IHO's decision, three days after the deadline, which renders the request for review untimely.

While it is undisputed that the parent failed to timely serve the request for review upon the district, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline specified for good cause shown (8 NYCRR 279.13). State regulation requires that 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] [finding that "attorney error or computer difficulties do not comprise good cause"]).

In the request for review, parent's counsel acknowledges that the request for review was not timely filed but requests that the delay be excused due to a law office failure in calendaring the deadline; however, law office failure does not constitute "an event that the filing party had no control over" (see Application of a Student with a Disability, Appeal No. 18-021 ["Generally, courts are unwilling to accept law office failure as a reasonable excuse absent a "'detailed and credible explanation of the default at issue'"], citing Scholem v. Acadia Realty Ltd. Partnership, 144 A.D.3d 1012, 1013 [2d Dep't 2016]; see also Application of a Student with a Disability, Appeal No. 24-425 [finding that parent's explanation relating to office internet difficulties did not constitute sufficient good cause]). To the contrary, "counsel had control over its calendaring of the deadline" and, therefore, "any clerical error cannot constitute good cause" (Polanco v. Porter, 2023 WL 2751340, at *5 [S.D.N.Y. Mar. 31, 2023]).

The parent also asserts that the district was not prejudiced by the delay, noting that the matter pertains to a prior school year, that during the impartial hearing both parties asked for extensions of the hearing timeline, and the parent's counsel has consistently granted the district's request for extensions in other matters. 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"]). Accordingly, the parent's assertion of good cause for the late service of the request for review is without merit as the parent has not alleged an event that the party did not have control over.

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, 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]).

Lastly, to the extent the district's answer included a cross-appeal, a cross-appeal is considered timely when it is served upon the petitioner together with a timely-served answer (see 8 NYCRR 279.4[a], [f]; 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the request for review was untimely and, therefore, the cross-appeal is also untimely and there is no basis to consider it (see Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]; Application of the Bd. of Educ., Appeal No. 12-059). Thus, the district's cross-appeal is also dismissed.

VI. Conclusion

Having exercised my discretion to dismiss the request for review because the parent failed to timely initiate the appeal pursuant to State regulations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 19, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER