The University of the State of New York

The State Education Department
State Review Officer
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No. 25-047

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:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioner, by Erik Paul Seidel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 respondent (the district) fund the costs of her son's tuition at the International Academy for the Brain School (iBrain) for the 2024-25 school year. The parent also appeals from the IHO's determination on pendency. 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 the facts relating to the student's educational history is not necessary. Briefly, however, a CSE convened on March 5, 2024, found the student eligible for special education as a student with a traumatic brain injury and developed an IEP with an implementation date of March 18, 2024 (Dist. Ex. 11 at pp. 1, 57).[1] The March 2024 CSE recommended a 12-month program for the student consisting of a 12:1+(3:1) special class placement in a specialized school (id. at pp. 51-52, 57). The March

[1] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

2024 CSE recommended one 60-minute session per month of parent counseling and training, and that the student receive: three periods per week of adapted physical education; five 60-minute sessions per week of individual occupational therapy (OT); five 60-minute sessions per week of individual physical therapy (PT); four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of group speech-language therapy; individual school nursing services as needed; and a daily full-time individual health paraprofessional (id. at pp. 50-51). The March 2024 CSE also recommended that the student receive the following special transportation accommodations and services: "[t]ransportation from the closest safe curb location to school"; a lift bus; and accommodations for a regular sized wheelchair (id. at pp. 56-57).

On June 21, 2024, the parent executed an enrollment contract with iBrain for the student's attendance during the 2024-25 school year from July 2, 2024 through June 27, 2025 (see Parent Ex. E at pp. 1, 6-7).[2] Additionally, on June 24, 2024, the parent executed a transportation contract with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the round-trip transportation of the student between her home and iBrain during the 2024-25 school year beginning on July 2, 2024 and concluding on June 27, 2025 (Parent Ex. F).[3]

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 and 2024-25 school years based on various procedural and substantive violations (see Parent Ex. A pp. 1-10). Specifically, for the 2021-22 school year, the parent alleged that though there was a final SRO decision on the merits regarding such school year, no relief was considered for the district's failure to offer a FAPE and thus the parent requested as relief compensatory education for the 2021-22 school year and prior school years including the student's pre-school years (id. at p. 4). In addition to the compensatory education relief, the parent sought an order directing the district to directly pay iBrain for the costs of the student's tuition in accordance with the enrollment agreement; to directly fund the costs of the student's special education transportation services with "a 1:1 transportation paraprofessional, air conditioning, a lift bus, a regular-sized wheelchair, and limited travel time of 90 minutes"; to fund the costs of an independent educational evaluation (IEE) consisting of a psychological evaluation, a neuropsychological evaluation, and an educational needs assessment; to reconvene a CSE meeting to "address [the student's] developmental needs"; and for extended eligibility for special education services to the age of 21 (id. at pp. 9-10). The parent also requested an order on pendency maintaining the student's placement at iBrain with private transportation services for the duration of this matter (id. at pp. 2-3)

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 12, 2024 and concluded on September 30, 2024 after five days of proceedings

[2] The Commissioner of Education has not approved iBrain as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Both parties submitted copies of the iBrain enrollment contract and the transportation contract with Sisters Travel (compare Parent Exs. E-F, with Dist. Exs. 18-19). For purposes of this decision, only the parent exhibits are cited.

including a prehearing conference (Tr. pp. 1-268).[4, 5] Both parties submitted closing briefs on October 18, 2024 (see Parent Closing Br.; District Closing Br.). In a decision dated November 29, 2024, the IHO found that the district offered the student a FAPE for the 2024-25 school year (IHO Decision at pp. 13, 17, 20-22). The IHO also determined that, even if the parent established a right to tuition and transportation funding, equitable considerations would not favor the parent (id. at pp. 23-26). Accordingly, the IHO denied the parent's request for direct funding of the student's tuition costs at iBrain and private transportation services costs for the 2024-25 extended school year (id. at pp. 26-27). As for pendency, the IHO determined that a prior IHO decision dated November 18, 2023 provided the basis of the student's pendency program, but that the substantial increase in tuition costs at iBrain constituted a change in the student's program (id. at p 17). The IHO determined the student was entitled to prorated tuition costs for the 2024-25 school year under pendency, limited to the amount of monthly tuition charged by iBrain for the 2023-24 school year, as awarded in the prior November 2023 IHO decision (id.; see Parent Ex. C). The IHO also denied the parent's request for funding for the student's private transportation under pendency (IHO Decision at p. 19).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The essence of the parties' dispute on appeal is whether the IHO erred in determining that the district offered the student a FAPE for the 2024-25 school year; whether the IHO erred by not addressing whether iBrain was an appropriate unilateral placement to address the student's needs; whether the IHO erred in determining that equitable considerations did not favor the parent's claims for direct funding; whether the IHO erred in her pendency determination; and whether the parent failed to timely serve the request for review.

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

[4] The district filed two motions to dismiss the parent's claims for the 2021-22 school year: (1) under res judicata and the statute of limitations; and (2) for failure to prosecute (see Aug. 1, 2024 Dist. Mot. to Dismiss; Sept. 3, 2024 Dist. Mot. to Dismiss). The parents filed a response to the district's August 1, 2024 motion to dismiss under res judicata and the statute of limitations but did not respond to the district's September 3, 2024 motion to dismiss for failure to prosecute (see Aug. 9, 2024 Parent Response to Dist. Mot. to Dismiss; see also Tr. pp. 184-85). The IHO granted the district's motion to dismiss for the parent's failure to prosecute on the record (Tr. pp. 184-85).

[5] The district also filed a motion to dismiss dated August 1, 2024 for the parent's failure to participate in the resolution meeting; the IHO denied the motion to dismiss but considered the parent's actions during the resolution period as an equitable consideration (IHO Decision at pp. 8, 24).

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 timelines prescribed in Part 279 of the State regulations. The IHO's decision is dated November 29, 2024; thus, the parent had until January 8, 2025 to personally serve the district with a verified request for review (see IHO Decision at p. 27; 8 NYCRR 279.4[a]). The parent served the request for review upon the district on January 24, 2025; sixteen days late (see Parent Jan. 24, 2025 Aff. of Service).

The parent has failed to assert good cause in her request for review for the failure to timely initiate the appeal from the IHO's decision. In the request for review, the parent asserts that, although the IHO decision was dated November 29, 2024, it was not until January 14, 2025 that the parent's attorney became aware the IHO had issued a final decision. The additional evidence submitted with the parent's request for review and the district's answer offers some description of the circumstances of the issuance of the IHO's decision.[6] On November 29, 2024, the IHO emailed

[6] With the request for review, the parent submits six documents as additional evidence; however, the parent only cites to two documents in her request for review to support her argument that the request for review should be accepted though untimely. The two documents are threads of emails between the parties and the IHO, one which is undated and the other which is dated August 9, 2024 and January 14, 2025. The district submits with its answer an email from the IHO dated November 29, 2024 purported to have the IHO's decision attached. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the additional evidence concerns the IHO's transmittal of the decision in this matter to the parties and, therefore, could not have been offered at the time of the impartial hearing and is necessary for addressing the parties' arguments about the timeliness of the parent's appeal. Accordingly, two of the six documents submitted by the parent and the one document submitted by the district have been considered. Although unmarked, for purposes of this decision the first email, which consists of a one page undated email from the parent's attorney to the IHO will be cited as "SRO Ex. A"; the second email thread, which consists of a three page email between the impartial hearing order implementation unit, the district, and the parent's attorney dated August 9, 2024 and January 14, 2025 will be cited as "SRO Ex. B; the third email, which consists of a one page email from the IHO to the parties dated November 29, 2024 will be cited as "SRO Ex. C."

a copy of the decision in this matter to the parties (SRO Ex. C). However, the parent's attorney who signed the request for review indicates that the decision was not sent to him personally (Req. for Rev. ¶ 18). Instead, the decision was transmitted by email on November 29, 2024 to attorneys from the same law firm: specifically, the attorney who signed the parent's July 2, 2024 due process complaint notice and the attorney who appeared for the parent during the August 20, 2024 impartial hearing (SRO Ex. C; see Tr. pp. 58-181; Parent Ex. A at p. 10).

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 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. On the other hand, there may be circumstances that are outside a party's control where delay in receipt of an IHO's decision might contribute to lateness in the service of the request for review, such as where the 40-day time period has either: 1) already expired; or 2) is much closer to expiring and there is no reasonable way in which a party could prepare and serve an appeal within the remaining time frame (see Application of a Student with a Disability, Appeal No. 20-030; Application of a Student with a Disability, Appeal No. 20-029). However, this case presents neither circumstance.

In this instance, the IHO's November 29, 2024 decision was delivered to the parties on the date of issuance and there was no delay in the transmittal of the decision (compare IHO Decision at pp. 1, 27, with SRO Ex. C). According to the November 29, 2024 email, the decision was sent to two attorneys from the parent's attorney's law firm and the district's representative (SRO Ex. C). With regard to the alleged delay in the receipt of the IHO's decision, there is no allegation that the two other attorneys of the parent's law firm who were sent the email on November 29, 2024 did not receive the final decision. Though one recipient attorney's email address is not shown, the name of the recipient attorney is the same as the one who appeared at the August 20, 2024 impartial hearing (compare SRO Ex. C, with Tr. pp. 58-181).[7] The other attorney's email address on the November 29, 2024 email is visible and is the same email address reflected in a January 14, 2025 email submitted by the parent as additional evidence (compare SRO Ex. C, with SRO Ex. B). Additionally, the January 14, 2025 email from the impartial hearing order implementation unit appears to be sent to another individual from the parent's attorney's law firm that was then forwarded to the attorney who signed the request for review and the attorney who signed the parent's July 2024 due process complaint notice (SRO Ex. B). Thus, it is unclear why the attorneys

[7] The attorney who represented the parent at the August 20, 2024 impartial hearing presented testimony from the parent's witnesses and cross-examined the district's witness (Tr. pp. 58-181).

to whom the IHO directed the November 29, 2024 email could not have similarly forwarded the IHO's email to the appropriate attorney with the same firm (see SRO Exs. B-C). Further, it was not unreasonable for the IHO to send the final decision to one of the attorneys from the parent's attorney's law firm who appeared during the impartial hearing and to the attorney who signed the parent's July 2, 2024 due process complaint notice (Tr. pp. 58-181; IHO Decision at p. 2; Parent Ex. A at p. 10). The failure of the two other attorneys to share the final decision with the parent's attorney who filed the request for review is an oversight that is attributable to the attorney, supervising attorney, and/or the law office's practices, not the IHO's case management, and 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]).

The parent's attorney also argues in the request for review that "[o]ne week prior to the date that the [IHO's decision] was issued, the IHO sent an email addressed to the undersigned attorney of record as well as the [district]" and that such email "is clear evidence that the IHO knew" who the parent's attorney of record was. However, a review of the referenced emails does not support the parent's argument (see SRO Ex. A). The email is not dated and appears to be from the parent's attorney's law firm to the IHO, but it is unclear which attorney sent the email (id.). There are no other emails submitted by the parent for consideration other than the one dated August 9, 2024 and January 14, 2025 as indicated above. Further, even if such an email reflected that the IHO previously communicated regarding this matter with the particular attorney from Liberty & Freedom Legal Group, Ltd., that would not mean that the IHO's communications to other attorneys from the same firm would be inappropriate or ineffective.

Accordingly, because the parent failed to properly initiate this appeal by effectuating timely service upon the district and there was no good cause asserted for its untimeliness 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. 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 26, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER