



The University of the State of New York

The State Education Department State Review Officer

No. 08-006

Application of the XXXXXXXXXXXX DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to the student and ordered it to reimburse respondents for the student's tuition costs at the Bishop Ahern High School (Bishop Ahern) for the 2007-08 school year. The appeal must be dismissed.

At the commencement of the impartial hearing, respondents' son was attending Bishop Ahern (Tr. pp. 20, 180). Bishop Ahern is a private school which has not been 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). The student's eligibility for special education as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). The impartial hearing officer's decision is dated December 21, 2007.

The merits of petitioner's appeal need not be discussed because petitioner has not properly initiated its appeal.

On January 24, 2008, petitioner's process server went to an address in Staten Island to attempt to serve respondents a "verified petition" (see Pet. Ex. 1 at p. 1). The process server determined that respondents were "not known at this address" (*id.*). Thereafter petitioner searched its records which reflected that as of January 2, 2008, respondents lived at another address in Staten Island (Pet. ¶ 73). All subsequent service attempts were made at this second address.

On January 25, 2008 and again on January 28, 2008, the same process server attempted to serve a "verified petition and memo of law" at this second address (see Pet. Ex. 2 at p. 1). The process server "rang the bell and no one answered the bell either time" (id.).

Later in the day on January 28, 2008, a second process server went back to the same address (see Pet. Ex. 3 at p. 1). The process server affixed a true copy of a "verified petition and memo of law" to the door and mailed a copy to the same address (id.).

On January 31, 2008, the first process server returned to the same address (see Pet. Ex. 3 at p. 3). He affixed to the door a true copy of the "amended verified petition and memorandum of law" (id.). The affidavit of service also indicates that the process server "placed the papers in the doors after... [he] rang the bell, knocked on the door and no one answered" (id.). Copies of the "amended verified petition and memo of law" were also mailed to the address (id.).

On February 4, 2008, petitioner filed an original notice of petition, amended verified petition, and memorandum of law with the Office of State Review. In the cover letter that accompanied this filing, petitioner advised that the verification page for the amended petition "initially served on January 31, 2008" was inadvertently not included. As such, on February 4, 2008, petitioner mailed another copy of the amended petition to respondents with the verification as well as a copy of the memorandum of law (see SiligmueLLer Aff. ¶ 3).

To date no answer or response has been received from respondents.

State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the Regulations (8 NYCRR 279.13). To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[c]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

State regulations require personal service of a petition on a respondent whether the petitioning party is a parent or a board of education (8 NYCRR 275.8; 279.1[a]; Application of a Child with a Disability, Appeal No. 07-066; Application of the Dept. of Educ., Appeal No. 06-078; Application of the Bd. of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 01-048).¹ If respondent cannot be found upon diligent search, petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]).

¹ Part 279 of the Regulations of the Commissioner of Education governs the practice on review of hearings by a State Review Officer. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279.

Petitioner has acknowledged that "[a] timely Petition had to be served upon the parents by January 25, 2008, 35 days from the date of the decision to be reviewed" (Pet. ¶ 70).² When petitioner initially attempted service on January 24, 2008, 34 days from the date of the impartial hearing officer's decision, petitioner went to the wrong address to attempt service (see *Ewans Aff.* ¶ 1). Petitioner had notice that respondents had moved because respondents testified at the impartial hearing that they had purchased a townhouse the day before the impartial hearing began and were moving (Tr. pp. 134, 137), and because petitioner's records reflected a change in residential address as of January 2, 2008 (Pet. ¶ 73).

Petitioner's subsequent service attempts on January 25, 2008, 35 days after the impartial hearing officer's decision, and on January 28, 2008, 38 days after the decision, also proved unsuccessful (see Pet. Ex. 2). When petitioner had a second process server go back for the second attempt on January 28, the fourth attempt overall, the process server affixed the "verified petition and memo of law" to the door and mailed the same (see Pet. Ex. 3). The affidavit of service does not indicate whether a notice of petition was served.³

On January 31, 2008, 41 days after the impartial hearing officer's decision, the process server again affixed to the door an "amended verified petition and memo of law" (see Pet. Ex. 3 at p. 3). He also "placed the papers in the door" and mailed copies of the documents to the same address (id.). Additionally, the affidavit of service references the "amended petition" (id.).⁴ This "amended petition" further calls into question the adequacy of the prior January 28th attempt to serve the "petition" via "nail and mail" service because that attempt at service apparently involved an un-amended, outdated document or prior draft. Moreover, by a subsequent letter dated February 4, 2008, petitioner indicated that the "amended verified petition" left for respondents on January 31, 2008 was apparently not verified.⁵

On February 4, 2008, petitioner apparently tried to cure the defect in pleading verification by mailing another copy of the amended verified petition and memorandum of law (see *Siligmuller Aff.*). This was the sixth attempt at service. Like the prior affidavits of service, this affirmation of service also fails to mention whether a notice of petition was served (see id.). The service is also untimely because it occurred on the 45th day after the date of the impartial hearing officer's decision (id.).

² Petitioner failed to reference the last sentence in section 279.2(c) which provides that "[i]f the decision has been served by mail upon the board, the date of mailing and the four days subsequent thereto shall be excluded in computing the 35-day period" (8 NYCRR 279.2[c]). This failure to mention this additional five-day provision suggests that petitioner did not receive the impartial hearing officer's decision by mail.

³ State regulations require that each petition contain a notice that, among other things, informs a respondent that an answer must be served within ten days after the service of the petition for review and that a copy of such answer must be filed with the Office of State Review within two days after service of the answer (8 NYCRR 279.3).

⁴ It is unclear from the record how the prior version of the petition was "amended."

⁵ State regulations require that "[a]ll pleadings shall be verified" (8 NYCRR 279.7).

In this case, respondents were neither personally served nor was service made to a person of suitable age and discretion at respondents' residence. State regulations do not provide for "nail and mail" service (compare CPLR § 308[4], with 8 NYCRR 275.8[a]). No permission from a State Review Officer was sought by petitioner for alternate service (see generally 8 NYCRR 275.8[a]); Application of a Child with a Disability, Appeal No. 07-066; Application of the Bd. of Educ., Appeal No. 01-048).⁶ The service was improper. Also, the appeal has not been initiated in a timely manner with proper service, and good cause is not sufficiently stated in the petition that would excuse the untimeliness of petitioner's appeal. Lastly, the record does not show that the required documents were ever served (i.e., notice of petition) or timely served (i.e., verified petition).

Petitioner is aware of the procedural requirements associated with initiating an appeal for review of a decision of an impartial hearing officer, having had prior petitions dismissed for failure to comply with the required procedures (see Application of the Dep't of Educ., Appeal No. 06-078 [dismissing petition for failure to timely and appropriately serve petition]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing petition for lack of personal service]; Application of the Bd. of Educ., Appeal No. 05-060 [dismissing petition for failure to timely file the hearing record pursuant to Part 279]). Additionally, petitioner was cautioned in the past, and warned of the possibility of a dismissal for failing to comply with the requirements of the State regulations (see Application of the Bd. of Educ., Appeal No. 05-073 [failure to comply with service requirements excused and petition not dismissed because respondent effectively responded to the allegations upon receipt of the petition]).

Based upon all of the above, I find that petitioner has not properly initiated an appeal due to the failure to effectuate proper service of required papers in a timely manner in violation of sections 275.8(a), 279.2, 279.3, 279.4, and 279.7 of the State regulations. I further find, in the exercise of my discretion, that the petition must be dismissed (8 NYCRR 279.13).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 6, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁶ Section 279.1 states in pertinent part "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (8 NYCRR 279.1).