



The University of the State of New York

The State Education Department State Review Officer

No. 08-113

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 Board of Education of the [REDACTED] School District

Appearances:

Albany Law Clinic and Justice Center, attorney for petitioner, Bridgit Burke, Esq., of counsel

Kean & Beane, P.C., attorney for respondent, Stephanie M. Roebuck, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2007-08 school year were appropriate. The appeal must be dismissed.

At the time of the impartial hearing, and pursuant to an individualized education program (IEP) dated August 30, 2007, the student was attending a district school in its Therapeutic Support Program (TSP), a general education setting with resource room and related support services that included counseling (Tr. pp. 46-47, 136-39; Dist. Ex. 5 at p. 1). An "accommodation plan" was also included in the student's IEP to address the student's needs related to his diabetes (Dist. Ex. 5 at pp. 1, 7-11). The IEP provided for flexible seating, scheduling and testing accommodations to be applied during State and district wide assessments and in the student's general education program (*id.* at p. 2). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (*id.* at p. 1; *see* 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The impartial hearing officer's decision was dated July 28, 2008 (IHO Decision at p. 23).

The merits of the parent's appeal need not be discussed because, as discussed more fully below, the parent has not properly initiated the appeal.

Subsequent to the receipt of the impartial hearing officer's decision, by letter dated August 8, 2008, the parent's former counsel wrote the New York State Education Department's Office of State Review requesting an extension to September 26, 2008 to file the appeal so that his client could secure representation from the Albany Law School's Albany Law Clinic and Justice Center (the Clinic) and so that the Clinic students' class schedules could be accommodated. It is clear by the content of the letter that the parent, the former counsel and counsel on appeal anticipated initiating an appeal from the impartial hearing officer's decision that was not in compliance with State regulation timelines.¹ By letter dated August 11, 2008 the Office of State Review declined to grant permission to initiate an appeal beyond the regulatory timeline, and the parent was notified that the determination of whether to excuse the late service and filing of a petition can only be made by a State Review Officer after a petition is received (see 8 NYCRR 279.13). The August 11, 2008 letter was sent to the parent, her former counsel, and her current counsel on appeal. The August 11, 2008 letter also notified the parent that if a petition submitted for review is untimely, it should state the reasons for the untimely filing along with a request that it be accepted by a State Review Officer, as provided for by section 279.13 of the State regulations. On August 13, 2008, the parent served the district with a notice of intention to seek review.

On October 2, 2008 the parent served the district with the notice with petition.² In addition to asserting that the impartial hearing officer reached the wrong decision in the matter, the parent also argues that a State Review Officer should accept the untimely petition because she has good cause for the delay. Specifically, the parent argues that her preferred counsel, the Clinic, was not available to begin working on the matter until the commencement of classes at the Albany Law School on August 25, 2008. The parent also asserts that the district has not opposed the acceptance of the untimely petition and has not been prejudiced by the delay in serving the petition.

On October 10, 2008, the district timely requested and received an extension of time to serve their answer.³ The district thereafter timely served the answer upon the parent's counsel on October 20, 2008. In its answer, the district raised substantive arguments in support of the impartial hearing officer's decision and cast two of these arguments in the form of affirmative defenses. On October 27, 2008, the parent served the district with a reply that addressed the district's affirmative defenses. By letter dated November 6, 2008, the district requested that a State Review Officer strike the parent's reply, arguing that a reply was not appropriate because the district's answer did not contain any additional evidence and did not interpose any procedural defenses.

¹ The parent's current and former counsels have previously brought appeals before a State Review Officer and are presumed to be aware of the 279 practice regulations.

² The petition is signed by the parent, although one of the attachments to the petition consists of a retainer agreement dated prior to the service of the petition, between the parent and the Clinic, providing for the Clinic's representation of the student in the present matter.

³ See 8 NYCRR 279.10(e) regarding extensions of time to answer or reply. See also 34 C.F.R. § 300.515(c) regarding extensions subsequent to filing an appeal.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition for review by a State Review Officer (see, e.g., Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition for review upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition for review 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 the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition for review upon the parent where the district served the parent by facsimile]). More specifically, 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). If the decision has been served by mail upon a petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.). In this case, the impartial hearing officer's decision provided notice to the parties of their right to appeal to a State Review Officer and the timelines for initiating an appeal (IHO Decision at p. 23). The impartial hearing officer's decision also advised the parties that directions and sample forms were available at the Office of State Review website (id.).⁴ As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065). State regulations provide the State Review Officer with the authority to dismiss sua sponte a late petition for review (8 NYCRR 279.13; see Application of a Child with a Disability, 04-003). 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) (see, e.g., Application of a Child with a Disability, Appeal No. 08-047 [finding good cause to accept parent's appeal where the decision below was undated]; Application of a Child with a Disability, Appeal No. 04-111 [finding good cause for late service of a petition where the parents timely served a notice of petition and two copies of a memorandum of law, but inadvertently omitted a copy of the petition and corrected the mistake]; Application of a Child with a Disability, Appeal No. 04-051 [finding good cause for late service of the parents' petition where the impartial hearing officer's decision included erroneous information regarding the timelines to appeal, which the parents relied upon to their detriment]; Application of a Child with a Disability, Appeal No. 04-003 [finding good cause for late service of the parents' petition where the impartial hearing officer failed to provide the parties with a transcript of the hearing, as promised, until after issuing his decision]). The reasons for the failure to timely seek review must be set forth in the petition (8 NYCRR 279.13; Application of a Child with a Disability, Appeal No. 07-073 [finding good cause excusing late service stated in the parents' petition]). The parties may not stipulate to an extension of time in which to initiate an appeal to a State

⁴ The Office of State Review website offers sample forms for bringing an appeal to a State Review Officer, which may be downloaded for the use of parties wishing to bring an appeal and provides access to prior decisions of State Review Officers (<http://www.sro.nysed.gov/>).

Review Officer (see Application of a Child with a Disability, Appeal No. 05-106). The service of the petition for review "initiates the review" (8 NYCRR 279.4).⁵

In the present case, the impartial hearing officer's decision was dated July 28, 2008 (IHO Decision at p. 23). The decision is presumed to have been mailed to the parties the following day. By excluding the date of mailing of the impartial hearing officer's decision and the four days subsequent, the notice with petition and verified petition needed to be served by the parent upon the district no later than September 6, 2008, a Saturday (8 NYCRR 279.2[b]). State regulations provide that if the last day for service is a Saturday or Sunday, then timely service may be made on the following Monday, which in this case was September 8, 2008 (see 8 NYCRR 279.11). Accordingly, the parent's October 2, 2008 service of the petition for review was untimely by 24 days.

The parent's asserted reason for the failure to timely serve the petition, specifically that her counsel was not available to begin working on the matter until the commencement of classes at the Albany Law School on August 25, 2008, does not constitute good cause for untimely service of a petition. According to the sequence of events proffered by the parent, the parent's counsel had 15 days in which to initiate the appeal during the period from August 25, 2008 to September 8, 2008, inclusive. The fact that the parent requested an extension of time to serve the petition well before the time to initiate the appeal had elapsed shows that the parent was aware of the timeliness requirements. Moreover, the service of the petition was beyond the extension of time which the parents' had requested (September 26, 2008) in their August 8, 2008 letter to the Office of State Review. Lastly, there is no assertion that the parent made an attempt to timely serve the petition, but was unable to do so due to circumstances beyond her control (see Application of a Child with a Disability, Appeal No. 05-043 [excusing the parents' late service where attempt was made to effectuate service within the regulatory timeframe and service was refused]; Application of the Bd. of Educ., Appeal No. 04-085 [excusing the untimely service of a petition where the district attempted timely service]; Application of a Child with a Disability, Appeal No. 04-084 [finding good cause for late service of a petition where the parent was unfamiliar with the appeals process, made diligent good faith attempts to bring the appeal in a timely matter and quickly corrected any mistakes upon notice thereof]; Application of the Bd. of Educ., Appeal No. 04-072 [excusing the untimely service of a petition where the district attempted timely service]). I have also taken into consideration that in this case the petition was served significantly beyond the timelines mandated by the State regulations. Based upon the

⁵ On August 13, 2008, the parent served the district with a notice of intention to seek review. It is the service of the petition, not the notice of intention to seek review, which determines whether an appeal is timely commenced (see e.g., Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; Application of a Child with a Disability, Appeal No. 07-128; Application of a Child with a Disability, Appeal No. 05-106; see also Application of a Child with a Disability, Appeal No. 03-008; see Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]). The purpose of a notice of intention to seek review is to ensure that the hearing record is provided to the State Review Officer in a timely manner by giving a district notice that the hearing record must be assembled and forwarded to the Office of State Review (Application of a Student with a Disability, Appeal No. 08-022; Application of a Child with a Disability, Appeal No. 04-08; Application of a Child with a Disability, Appeal No. 04-014; Application of a Child with a Disability, Appeal No. 02-074; Application of a Child with a Disability, Appeal No. 01-055; Application of a Child with a Disability, Appeal No. 99-3).

circumstances as presented, in the exercise of my discretion, I decline to excuse the parent's delay.

Upon the facts before me, I find that the impartial hearing officer's July 28, 2008 decision is the final determination of the issues from which the parent seeks review, and that such decision on those issues became final in the absence of a timely appeal (20 U.S.C. § 1415[i][1][A][2004]; 34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][5][v]). Therefore, I find that the petition must be dismissed (8 NYCRR 279.13; see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Bd. of Educ., Appeal No. 07-074; Application of the Dep't of Educ., Appeal No. 06-078; Application of a Child with a Disability, Appeal No. 06-071; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 05-022; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding a review panel's dismissal of a late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]; Northview Pub. Schs., 43 IDELR 131 [SEA MI 2005] [dismissal by a State Review Officer of an untimely appeal from an impartial hearing officer's decision]).

In light of my determination herein the parties' remaining contentions need not be addressed.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 5, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**