



The University of the State of New York

The State Education Department State Review Officer

No. 08-114

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the XXXXXXXXXXXXX Central School District

Appearances:

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

Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Marc E. Sharff, Esq., of counsel

DECISION

Petitioners (the parents) appeal 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 their daughter for the 2007-08 school year were appropriate. The appeal must be dismissed.

The impartial hearing officer's decision was issued on July 25, 2008 (IHO Decision at p. 67). He concluded that the district offered the student an appropriate residential placement for the 2007-08 school year (id. at pp. 61-66). The impartial hearing officer ordered the CSE to convene prior to the commencement of the 2008-09 school year to review the appropriateness of the placement and he further ordered the district to establish a protocol to ensure that it is apprised of any ongoing parental complaints (id. at p. 65). The student's eligibility for special education services as a student with multiple disabilities is not in dispute (Dist. Ex. 10 at p. 1; see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The merits of the parents' appeal need not be discussed because, as discussed more fully below, the parents have not properly initiated the appeal.

Subsequent to the receipt of the impartial hearing officer's decision, by letter dated August 15, 2008, the student's father wrote the New York State Education Department's Office

of State Review requesting a 30-day extension of the time in which to file an appeal. He stated that the advocate who had assisted the parents at the impartial hearing was not able to conduct the appeal and that he intended to locate assistance in bringing the appeal pro se.¹ By letter dated August 20, 2008, the Office of State Review declined to grant permission to initiate an appeal beyond the regulatory timeline, and the parents were notified that a 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).² The August 20, 2008 letter also notified the parents that if a petition submitted for review is untimely, it should state the reasons for the untimely filing and request that it be accepted by a State Review Officer, as provided for by 8 NYCRR 279.13 of the State regulations. The letter further advised the parents that the procedures and timelines for bringing an appeal must be followed carefully. The letter directed the parents' attention to two documents enclosed in the letter to assist the parents in bringing the appeal³ and it identified the Office of State Review website⁴ as an additional resource regarding the appeal process.

On October 3, 2008 the parents served the district with the notice with petition. In addition to asserting that the impartial hearing officer reached the wrong decision in the matter, the parents also argue that a State Review Officer should accept the untimely petition because they have good cause for the delay. Specifically, the parents argue that their current counsel, the Albany Law Clinic and Justice Center (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 parents also assert that although the advocate who represented the parents at the impartial hearing received the impartial hearing officer's decision by e-mail on July 25, 2008, the date it was rendered; the advocate was on vacation at that time and the parents did not receive a copy of the decision until August 4, 2008. The parents did not initially include a memorandum of law with their petition, but later served the district with a memorandum of law dated October 9, 2008.

On October 10, 2008, the district timely requested and received an extension of time in which to serve their answer,⁵ given the late service of the parents' memorandum of law and the parents' assent to the extension. The district thereafter timely served the answer upon the parents' counsel on October 23, 2008. In its answer, the district raised substantive arguments in

¹ The hearing record reflects that in addition to the advocate who represented the parents at the impartial hearing, the parents retained legal counsel pertaining to the proceedings below (Tr. p. 1553). At the May 30, 2008 impartial hearing date, the parents' advocate submitted a notice of appearance on behalf of the parents, dated April 4, 2008, from a law firm located in White Plains, New York (Tr. pp. 1553-54).

² As amended effective January 1, 2004.

³ A printout of a document titled "Appeals Process" and a copy of the regulations pertaining to the timelines and procedures in bringing an appeal (8 NYCRR Part 279) were enclosed.

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/>).

⁵ See 8 NYCRR 279.10(e) regarding extensions of time to answer or reply.

support of the impartial hearing officer's decision and, as an affirmative defense, objected to the parents' late service of the petition noting that the parents were aware of the need to obtain counsel for appeal at the close of the hearing and therefore, had ample time to obtain counsel and serve a timely appeal.

On October 28, 2008, the parents served a reply that addressed the district's affirmative defenses, including the district's opposition to the late service of the petition. The parents argued that they were not aware that they would need to appeal until they received a copy of the impartial hearing officers' decision from their counsel on August 4, 2008. The reply also contends that by July 2008, the parents were aware that the advocate who represented the parents at the impartial hearing would not be able to represent them on an appeal.

In general, the failure to comply with the practice requirements of Part 279 of the Commissioner's regulations may result in the dismissal of a petition for review by a State Review Officer (see, e.g., Application of the Bd. of Educ., Appeal No. 07-055; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Dep't of Educ., Appeal No. 01-048). 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 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.*; Application of a Child with a Disability, Appeal No. 07-073). The parties may not stipulate to an extension of time in which to initiate an appeal to a State 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).⁶

In the present case, the impartial hearing officer's decision was dated July 25, 2008 (IHO Decision at p. 67). The decision was received by the parents' advocate via e-mail on that date.⁷

⁶ On August 11, 2008, the parents 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. 08-039; 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).

⁷ At the impartial hearing, the parents' advocate requested that the impartial hearing officer's decision be sent to her by electronic mail and she stated that she would in turn provide it to the parents (Tr. pp. 1553-54).

The parents do not claim, nor are they entitled to, the presumptive additional "date of mailing and four days subsequent thereto" exclusion in calculating the time for service of a petition served upon the parties by regular mail (see 8 NYCRR 279.2[b]; Application of a Child with a Disability, Appeal No. 05-066; Application of the Bd. Of Educ., Appeal No. 04-058). The impartial hearing officer's decision provided notice to the parties of their right to appeal to a State Review Officer and the specific timelines for initiating an appeal (IHO Decision at pp. 66-67).

Given the July 25, 2008 transmission of the impartial hearing officer's decision, the notice with petition and verified petition needed to be served by the parents upon the district no later than August 29, 2008 (8 NYCRR 279.2[b]). Accordingly, the parent's October 3, 2008 service of the petition for review was untimely by 35 days.⁸

The parents' asserted reason for the failure to timely serve the petition, specifically that their current 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. The petition reflects that the parents' current counsel did not have a retainer agreement finalized and did not "formally" commence representing the parents until September 25, 2008 (Pet. ¶ 124), after the date for timely service of the notice with petition had passed. The fact that the student's father requested an extension of time to serve the petition before the time to initiate the appeal had elapsed shows that the parents were aware of the timeliness requirements. Moreover, the service of the petition was beyond the 30-day extension of time which the parents' had requested in their August 15, 2008 letter to the Office of State Review. Lastly, there is no assertion that the parents made an attempt to timely serve the petition, but were unable to do so due to circumstances beyond their control (see e.g., Application of a Child with a Disability, Appeal No. 05-043; Application of a Child with a Disability, Appeal No. 04-084; Application of a Child with a Disability, Appeal No. 04-003; Application of a Child with a Disability, Appeal No. 02-085). 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 circumstances as presented, in the exercise of my discretion, decline to excuse the parents' delay.

Upon the facts before me, I find that the impartial hearing officer's July 25, 2008 decision is the final determination of the issues from which the petitioner 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. 08-039; 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

⁸ Even if the 35-day period is calculated from the date the parents assert that they received the copy of the impartial hearing officer's decision (August 4, 2008), the parents' October 3, 2008 service of the notice with petition was untimely.

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 review panel's dismissal of late appeal from impartial hearing officer 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][State Review Officer dismissed an appeal from an impartial hearing officer's decision as untimely]).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 1, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**