



The University of the State of New York

The State Education Department State Review Officer

No. 08-116

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 [REDACTED] School District

Appearances:

Whiteman, Osterman & Hanna, LLP, attorneys for respondent, Beth A. Bourassa, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program that respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2007-08 school year was appropriate, and denied the parents' request to be reimbursed for the private tutoring services that they obtained for their daughter. The appeal must be dismissed.

At the time that the impartial hearing began in May 2008, the student was attending a second grade general education class at a public school in the district and receiving consultant teacher services (Tr. pp. 5-6; Dist. Ex. 5 at p. 2). In this appeal, the parties do not dispute the student's eligibility for special education and related services as a student with a learning disability (Tr. p. 5; Dist. Ex. 5 at p. 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).¹

Initially, I must address a procedural matter. The parents request leave to file an untimely appeal (Pet. at p. 1). The district asserts as an affirmative defense in its answer that the petition for review was untimely served. 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

¹ I note that the parties do not dispute that the student is eligible for special education services, but the parents are dissatisfied that the CSE did not include a diagnosis of dyslexia on the student's individualized education program (IEP) (see Tr. p. 476). However, that aspect of the parties' disagreement in no way alters the student's eligibility to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).

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 the 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.*).

In the instant case, the impartial hearing officer's decision is dated August 21, 2008 (IHO Decision at p. 32). During the course of the impartial hearing, the parents were represented by counsel. The hearing record indicates that the impartial hearing officer delivered his decision by e-mail to counsel for both parties on Friday, August 22, 2008 and advised them that he also was mailing a hard copy of the decision "next week" (Answer Ex. B; *see* Pet. at p. 1; Answer ¶ 48). The parents, initiating this appeal pro se, served the district with the petition for review on October 6, 2008 (Parent Aff. of Service), which is 46 days after the date of the decision from which they appeal and therefore not timely served according to State regulations.

The parents untimely served the petition for review upon the district even if afforded the exclusion of the "date of mailing and the four days subsequent thereto" in calculating timeliness (*see* 8 NYCRR 279.2[b]). According to the parents, the impartial hearing officer mailed a hard copy of the decision to the parties along with a cover letter dated August 25, 2008 (Pet. at p. 1; Reply ¶ A[2][a]).² Excluding the identified date of mailing of August 25, 2008 and the four days subsequent, the petition for review needed to be served by the parents upon the district no later than October 3, 2008 (*see* 8 NYCRR 279.2[b]). As stated, the parents served the district with the petition for review on October 6, 2008 (Parent Aff. of Service). Thus, the petition for review was not timely served even assuming that the parents are entitled to the presumptive additional "date of mailing and four subsequent days thereto" exclusion.

In the petition, the parents request that the delay in service of the petition for review be excused because they are appearing pro se, needed time to prepare the petition, and had difficulty finding a notary public. They also assert that the school district is not prejudiced by the delay. The parents also filed a reply, wherein they allege that they may have misunderstood State regulations as they relate to the time period for serving a petition for review and request that their lack of understanding be excused.

In this case, I note that 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. 32). 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.*). I am not persuaded that the reasons for the delay set forth in the petition constitute good cause shown to excuse the untimely service of the petition for review and in the absence of good cause stated, I will

² 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). Here, August 25, 2008 is the identified date of mailing.

dismiss the appeal as untimely (Application of a Child with a Disability, Appeal No. 06-117; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 05-106 [dismissing petitioners' appeal as untimely and finding that petitioners' reasons for untimely service, including that 'they proceeded without counsel (although one of the petitioners is an attorney) and that the hearing record was "dense," did not constitute good cause]; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-048 [dismissing petitioner's appeal as untimely and finding that petitioner's reasons for untimely service, including that "she had been undecided whether to file an appeal" and "her attorney was unavailable due to professional commitments to other clients" did not constitute good cause shown]; Application of a Child with a Disability, Appeal No. 05-026 [dismissing petitioner's appeal as untimely and finding that her delay in locating a notary public did not constitute good cause]; Application of a Child with a Disability, Appeal No. 04-103 [dismissing petitioner's appeal as untimely and finding that her advocate's delay in locating a notary public did not constitute good cause]; Application of a Child with a Disability, Appeal No. 04-067).

Based upon the above, I find that the parents have not properly initiated an appeal due to the failure to effectuate proper service of the petition in a timely manner in violation of section 279.2 of the State regulations, and that they have not alleged good cause for their untimeliness. 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]; Application of a Student with a Disability, Appeal No. 08-065; 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 a Child with a Disability, Appeal No. 07-065; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding dismissal of late appeal from impartial hearing officer decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
November 7, 2008

PAUL F. KELLY
STATE REVIEW OFFICER