



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-094

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:

Frishman & Faber, attorneys for petitioners, Jill F. Faber, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie M. Roebuck, 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 2006-07 and 2007-08 school years was not appropriate, but denied in part, the parents' requested relief. The parents also appeal that portion of the decision of the impartial hearing officer which determined that the district was not required to provide the student with special education services during the 2008-09 school year. The appeal must be dismissed.

At the time the impartial hearing convened in January 2009, the student was being educated by the parents pursuant to an individualized home instruction plan (IHIP) (Tr. p. 1231; Parent Exs. GG-HH; see 8 NYCRR 100.10). Prior to the parents' decision to instruct the student at home in June 2008, the CSE prepared an individualized education program (IEP) for the 2008-09 school year, recommending that the student attend a 15:1+2 special class in the district's middle school with speech-language therapy, social skills, and parent training integrated in the student's program, as well as occupational therapy provided in both individual and group settings (Dist. Ex. 40 at p. 3). The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute in this appeal (id. at p. 2; see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

At the outset, two procedural matters must be addressed regarding the initiation of this appeal. The impartial hearing officer's decision in this case was dated July 15, 2009 (IHO

Decision at p. 39). The parents' petition for review was served upon the district's counsel by overnight carrier on August 21, 2009 (Parent Aff. of Service). In its answer, the district asserts that the petition for review should be dismissed because the parents improperly served the petition for review on its counsel by overnight carrier. The district also asserts that the parents thereafter untimely effectuated personal service of the petition for review upon the district on August 25, 2009. In a reply to the procedural defenses raised in the district's answer, the parents argue that they "timely served a copy of the Verified Petition on the Respondent via Federal Express on August 24, 2009," but concede that the petition for review was not personally served upon the district by August 24, 2009. The parents also allege that a second copy of the petition for review was personally served upon the district on August 25, 2009, and assert that the petition for review should not be dismissed.

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 a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; 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]).

Turning to the district's assertion that the petition for review was untimely when it was personally served on August 25, 2009, 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). State regulations also provide that each petition must contain a notice that, among other things, informs a respondent that an answer must be served within 10 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). The petition for review shall be personally served upon the respondent(s) within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). Additionally, a parent who seeks review by a State Review Officer shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). 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 25- or 35-day period (id.). Additionally, the party seeking review shall file with the Office of State Review the petition for review, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; and 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). 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 Student with a Disability, Appeal No. 08-113; 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). The reasons for the failure to timely seek review must be set forth in the petition (*id.*). All pleadings shall be verified (8 NYCRR 279.7). Service of all pleadings subsequent to a petition shall be made by mail, by private express delivery service, or by personal service (8 NYCRR 275.8[b], 279.5, 279.6 279.11).

Here, the impartial hearing officer's decision is dated July 15, 2009 and, excluding the four days subsequent thereto in calculating the 35-day time period to account for mailing, the parents were required to personally serve the district by August 24, 2009. Although the parents subsequently personally served the district on August 25, 2009, they failed to offer any reasons in either the petition for review or the reply why they could not personally serve the petition within the 35-day timeline set forth in State regulation (8 NYCRR 279.13;¹ Application of a Student with a Disability, Appeal No. 09-099; Application of a Child with a Disability, Appeal No. 05-032; Application of a Child with a Disability, Appeal No. 04-067). Consequently, I will dismiss the parents' petition for review as untimely (see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009], [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]).

With regard to the district's assertion that the service of the petition for review upon the district's counsel by overnight courier was improper, an appeal to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082). Exceptions to the general rule requiring personal service of the petition for review include the following: (1) if a respondent cannot be found upon diligent search, a 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 a State Review Officer (8 NYCRR 275.8[a],

¹ State regulations place the responsibility of providing "good cause" for a delay in personal service of the petition for review on the petitioner (8 NYCRR 279.2[b]; 279.13).

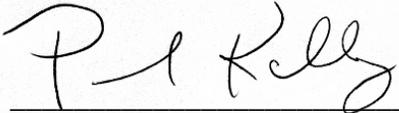
279.1[a];² Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission may be obtained from a State Review Officer for an alternate method of service (8 NYCRR 275.8[a], 279.1[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048). 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 (8 NYCRR 279.8[a], 279.13).

Here the parents concede that they did not personally serve the district by August 24, 2009 (Reply ¶ 6), and their affidavit of service indicates that they first attempted to initiate this appeal by serving the district's counsel by overnight carrier (Parent Aff. of Service). Furthermore, the hearing record does not contain, nor do the parties allege, that there was an agreed upon waiver of personal service of the petition for review, any need to effectuate alternate service upon the district, nor did the parents seek permission from a State Review Officer for service by means other than personal service (Application of the Dep't of Educ., Appeal No. 09-075). The parents are represented by counsel who has previously appeared before the Office of State Review (see Application of the Bd. of Educ., Appeal No. 09-040). Under the circumstances of this case, I will dismiss the petition for review for failure to timely comply with the personal service requirements of Parts 275 and 279 of State regulations without a determination of the merits (8 NYCRR 279.13; see Application of the Dep't of Educ., Appeal No. 09-075; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082).³

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 2, 2009**


**PAUL F. KELLY
STATE REVIEW OFFICER**

² As applied to State-level reviews conducted pursuant to Part 279 of State regulations, "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department" (8 NYCRR 279.1[a]).

³ I also remind the parents' counsel that State regulations direct the parent to file the notice of intention to seek review with the Office of State Review together with proof of personal service upon the district (8 NYCRR 279.2[a], 279.4[a]), documents that were not filed in this case.