



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 10-081

Application of a STUDENT WITH A DISABILITY, by his 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:

John J. McGrath, Esq., attorney for petitioners

Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Lowell School for the 2009-10, 2010-11, and 2011-12 school years. The appeal must be dismissed.

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

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 Bd. of Educ., Appeal No. 10-044; 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).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]).¹ The party seeking review shall file with the Office of State Review the petition,

¹ 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).

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 a State Review Officer with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 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).

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 by a State Review Officer (8 NYCRR 279.8[a], 279.13; 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 the 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 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 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 upon the parent where the district served the parent by facsimile]).

In the present case, the impartial hearing officer's decision is dated July 18, 2010 (IHO Decision at p. 33). Both parties admit in their pleadings that the impartial hearing officer served the impartial hearing officer's decision by e-mail on July 19, 2010 (Pet. at p. 3; Answer ¶ 7).^{2, 3} The parents served the petition upon the district on August 27, 2010, at 7:40 p.m. (Parents Aff. of Service). In the petition, the parents' attorney argues that because the regulations do not

² In the petition, the parents' attorney alleges that although the impartial hearing officer's decision was dated July 18, 2010, the impartial hearing officer did not e-mail the decision to the parties until "July 19, 2010 after business hours," and therefore, service of the impartial hearing officer's decision "should be deemed to have been served on petitioners no sooner than July 20, 2010" (Pet. at p. 3) (emphasis added). However, an exhibit attached to the district's answer indicates that the impartial hearing officer sent the decision by e-mail on July 19, 2010, at "12:09 p.m." (Answer Ex. B). Regardless of this fact, however, State regulations mandate that the time for serving a petition is calculated from the date of the impartial hearing officer's decision, not the date of receipt of that decision (8 NYCRR 279.2[b], [c]; see Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the date the parents' allegedly received the impartial hearing officer's decision is irrelevant to the instant analysis regarding timeliness.

³ The untimely receipt of an impartial hearing officer's decision has been held, in certain circumstances, to amount to good cause when alleged as an excuse for the untimely service of a petition (see Application of a Child with a Disability, Appeal No. 04-060; Application of a Child with a Disability, Appeal No. 04-051).

explicitly contain rules regarding the timeframe for service of the petition when the impartial hearing officer serves a decision by e-mail, the parents should be allowed the additional time afforded for the service of a petition when the impartial hearing officer serves a decision by regular mail, thereby rendering the service of the petition on August 27, 2010 timely (see 8 NYCRR 279.2[b], [c] [excluding the "date of mailing and the four days subsequent thereto . . . in computing the 35-day period"]). In addition, as good cause for the delay in service, the parents' attorney alleges in the petition that but for a computer malfunction related to a "heavy rain storm on August 22, 2010," which "caused an irretrievable loss" of the petition, the petition would have been timely served on August 23, 2010 (Pet. at p. 3). Respondent (the district) asserts as an affirmative defense in its answer that the petition was untimely served and requests that a State Review Officer decline to find good cause to excuse the delay in service. The parents' attorney prepared a reply in response to the district's answer and reargues their position regarding the timeliness of the petition and that good cause was asserted in the petition to excuse any failure to timely serve the petition, and in addition, notes that the district suffered no prejudice as a result of the alleged untimely filing of the petition.

While it is true that the regulations do not explicitly state the timeframe for service of the petition when the impartial hearing officer serves a decision by e-mail, the additional time afforded by the "date of mailing and the four days subsequent thereto" exclusion in calculating the 35-day period clearly and unambiguously applies only to impartial hearing officer's decisions served by mail (8 NYCRR 279.2[b], [c]). Moreover, decisions by State Review Officers establish that when an impartial hearing officer's decision is served only by e-mail, the petition must be served within 35 days from the date of the impartial hearing officer's decision (see, e.g., Application of the Dep't of Educ., Appeal No. 08-139; Application of a Student with a Disability, Appeal No. 08-114; Application of a Child with a Disability, Appeal No. 05-066; Application of the Bd. of Educ., Appeal No. 04-058). Therefore, given that the impartial hearing officer served the decision by e-mail and that the parents are not entitled to the presumptive additional "date of mailing and four subsequent days thereto" exclusion in calculating the time for service of a petition, the timeframe for serving a timely petition in this case expired on August 22, 2010, or 35 days from the date of the impartial hearing officer's decision, which was dated July 18, 2010.⁴ The parents' service of the petition on August 27, 2010, is therefore, untimely.

Next, I am not persuaded that the attorney's computer malfunction and "irretrievable loss to much of the petition" constitutes good cause to excuse the untimely service of the petition on August 27, 2010 (Application of a Child with a Disability, Appeal No. 07-085 [delays in obtaining appeal forms and computer problems do not constitute good cause]; see Application of a Student with a Disability, Appeal No. 09-099 [finding that an attorney's miscalculation of the time within which to timely serve a petition failed to constitute good cause]; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 07-065; 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 was an attorney], that the hearing record was "dense," and that petitioners' available time to pursue the appeal was constrained by, including among other things, commitments to professional obligations, 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

⁴ Because August 22, 2010—the date which arises 35 days from the date of the impartial hearing officer's decision—fell on a Sunday, the parents could have effectuated timely service of the petition on Monday, August 23, 2010 (see 8 NYCRR 279.11).

appeal as untimely and finding that uncertainty as to whether or not to file appeal and attorney unavailability do not constitute good cause]; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-067; Application of a Child with a Disability, Appeal No. 02-065 [mistake of inadvertence does not constitute good cause]).

Thus, based upon the parents' failure to properly initiate the appeal and the absence of good cause for the untimeliness, I will exercise my discretion and dismiss the petition as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; see also Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; 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 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 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 generally 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]).

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 29, 2010


ROBERT G. BENTLEY
STATE REVIEW OFFICER