The University of the State of New York

The State Education Department
State Review Officer

No. 08-031

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 Pearl River Union Free School District

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Michael K. Lambert, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that respondent (the district) was not required to pay for the cost of private independent educational evaluations because the challenged public evaluations were appropriate. The appeal must be dismissed.

At the time of the impartial hearing, the parents' son was attending a public school in the district in a full-time special education program and was receiving a number of related services, including occupational therapy, physical therapy and speech-language therapy (Tr. p. 38). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]). The impartial hearing officer's decision is dated March 5, 2008.

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

On April 2, 2008, the parents served the district with a notice of intention to seek review. The parents' process server personally served the district by delivering the notice to the district clerk (Pet. Aff. dated Apr. 2, 2008; see 8 NYCRR 279.2). The notice of intention to seek review and the parents' affidavit of service of the notice of intention to seek review were filed with the Office of State Review on April 7, 2008. The district submitted a complete hearing record in this matter to the Office of State Review (8 NYCRR 279.9).

On April 14, 2008, the parents filed a notice with petition and a verified petition with the Office of State Review, but failed to include with their filing the required affidavit of service showing proof of service of these documents upon the district (8 NYCRR 279.4). Thereafter, the parents apparently served the notice with petition and the verified petition upon the district twice. The district maintains that on May 5, 2008, the notice with petition and verified petition were served upon the district by the student's parent. Thereafter, the parents filed an affidavit of service stating that on May 8, 2008, the notice with petition and verified petition were served upon the district by a person who is not a party to the appeal.

By letter to the Office of State Review dated May 12, 2008, the district requested an extension of time to file an answer in the matter as permitted by 8 NYCRR 279.10(e). An extension was granted and the district timely served its answer upon the parents by mail on May 19, 2008. Service of an answer by mail is permitted by 8 NYCRR 275.8(b). The district's answer contains three affirmative defenses. The district argues that the notice of intention to seek review was untimely, that the petition was untimely and that the petition was improperly served by a party to the appeal in contravention of State regulations 8 NYCRR 275.8 and 279.2.

The parents filed a reply to the district's answer.[1] Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, there was no additional documentary evidence served with the answer and the reply does not respond to the procedural defenses interposed by the district, therefore, I will not consider the reply (see Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; 8 NYCRR 275.14[a], 279.6).

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).[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.). In addition, the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers, must be served by "any person not a party to the appeal over the age of 18 years" (8 NYCRR 275.8[a]).

[1] I note that the district's answer was served by mail on May 19, 2008. The parents' reply was served on May 28, 2008. State regulations provide that a reply must be served within three days of service of the answer (8 NYCRR 279.5, 279.6). No request for an extension of time in which to serve the reply was made to the Office of State Review (8 NYCRR 279.10[e]). Therefore, the parents' reply was untimely served.

[2] 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. 30). The decision also advised the parties that directions and sample forms were available at the Office of State Review website (id.).

Because the March 5, 2008 decision of the impartial hearing officer was served upon the parties by mail, the notice of intention to seek review needed to be served upon the district no later than April 3, 2008 (8 NYCRR 279.2[b]). Additionally, the notice of petition and petition needed to be served upon the district no later than April 14, 2008 (8 NYCRR 279.2[b]).[3] On April 2, 2008, the parents served the district with a notice of intention to seek review. While service of the notice of intention to seek review was timely, the notice with petition and verified petition were served upon the district late. It is the service of the petition, not the notice of intention to seek review, that determines whether an appeal is properly commenced (see Application of a Child with a Disability, Appeal No. 04-067 aff'd Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]). Given that the earliest asserted date of service upon the district is May 5, 2008, the notice with petition and verified petition were untimely served. In addition, the parents have not asserted any good cause for their failure to timely serve the petition.

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 the Dep't of Educ., Appeal No. 08-006; 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 Sharp v. Mills, Index No. 2252/06 [Sup. Ct. Alb. Co. June 9, 2006]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 10, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[3] I note that based upon State regulations, the parents' last day to timely serve the petition fell on April 13, 2008, a Sunday. State regulations provide that if the last day for service falls on a Saturday or Sunday, service may be made on the following Monday, which in this case was April 14, 2008 (see 8 NYCRR 279.11).