



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-142

### **Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

#### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Special Torah Education Program (STEP) for the 2007-08 school year. The appeal must be dismissed.

At the start of the impartial hearing, the student was attending STEP, which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student previously received diagnoses of cerebral palsy, mental retardation and a seizure disorder (Tr. p. 191; Parent Ex. O). The student's eligibility for special education programs and services and his classification as a student with multiple disabilities are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The merits of the parent's appeal need not be discussed because she has not properly initiated her appeal.

On July 29, 2008, the impartial hearing officer issued a decision (IHO Decision at p. 6).<sup>1</sup> This decision was mailed to the parties on the same day (Answer Attachment 3 at p. 3). On August 26, 2008, the parent served the notice of intention to seek review upon respondent (the district)

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<sup>1</sup> 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, including the timelines within which the notice of intention to seek review and the petition for review must be served (IHO Decision at p. 6). The decision also advised the parties that directions and sample forms were available at the Office of State Review website (id.).

(Answer Attachment 2 at pp. 1-2). Thereafter, on September 9, 2008, the district filed a complete hearing record in this matter with the New York State Education Department's Office of State Review (Office of State Review).

On December 2, 2008, the Office of State Review received an original notice of intention to seek review, date-stamped received by the district on August 26, 2008, and an original verified petition, dated November 27, 2008. Attached to the notice of intention to seek review was an original affirmation of service, dated November 28, 2008, indicating that the process server had "served the annexed" on the district "by delivering a copy" on August 26, 2008 (Answer Attachment 2). Attached to the verified petition was another original affirmation of service, dated November 28, 2008, indicating that the process server had "served the annexed" on the district "by delivering a copy" on August 26, 2008. Although the two November 28, 2008 affirmations of service were identical forms signed by the same affirmant and notary and both documents contained original signatures, one was attached to the petition and the other was attached to the notice of intention to seek review. The petition's verification page, in which the parent affirmed that she had read the "petition [sic] and knows the contents thereof," was affirmed to on November 27, 2008.

On December 15, 2008, the district served a verified answer by mail on the parent (see Dist. Aff. of Service).<sup>2</sup> In its answer, the district alleged two procedural affirmative defenses: that the parent's petition was untimely served, and that the parent's petition failed to include a notice of petition (see 8 NYCRR 279.2[b], 279.3, 279.13).

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).<sup>3,4</sup> 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 school district 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

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<sup>2</sup> The district refers to the affirmation of service as a "Declaration of Service" (Dist. Aff. of Service). Additionally, although this "Declaration of Service" indicated that the verified answer and attachments were served on December 15, 2008, the document was incorrectly dated September 16, 2008 (id.).

<sup>3</sup> Part 279 of the State regulations governs the practice of how a State Review Officer may review an impartial hearing. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279 (8 NYCRR 279.1[a]). Section 279.1(a) also states that "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (id.).

<sup>4</sup> Part 279 of the State regulations was amended, effective October 9, 2008, prior to the parent's petition dated November 27, 2008. As such, because the parent's petition is dated November 27, 2008, after the effective date of the amended Part 279, this decision's citations to Part 279 will be to the newly amended Part 279.

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]). 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.*). 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 275.8[b], 279.11). All pleadings shall be verified (8 NYCRR 275.5, 275.6). Service of all pleadings subsequent to a petition shall be made by mail or by personal service (8 NYCRR 275.8[a]).

In the instant case, the impartial hearing officer's decision is dated July 29, 2008 (IHO Decision at p. 6). Both the district and the parent have alleged that the parent served the notice of intention to seek review on August 26, 2008 (Answer ¶ 47; Attachment 2).<sup>5</sup> The district has alleged in its answer that the petition was required to be served by September 8, 2008, but that the district did not receive the petition until November 28, 2008 (Answer ¶¶ 45, 47). Although the affirmation of service attached to the petition indicates that "the annexed" was served on the district on August 26, 2008, in reviewing the record as a whole I find that the petition could not be served on the district in August 2008 because the petition itself and the petition's verification page are both dated November 27, 2008. Moreover, the parent conceded in the petition that the petition was not timely and attempted to show good cause for this failure by alleging that portions of the transcripts and exhibits were misplaced (Pet. ¶ 1). I am not persuaded that the reasons for the delay generally set forth in the petition constitute good cause to excuse the untimely service of the petition (8 NYCRR 279.13). I further note that the parent has not filed a reply to the procedural defenses raised in the district's answer.<sup>6</sup> In the absence of good cause, I will dismiss the appeal as untimely.

Based upon all of the above, I find that the parent has not properly initiated the appeal because she failed to serve the petition in a timely manner in violation of section 279.2 of the State regulations and has not sufficiently alleged good cause for her significant untimeliness. I find that the impartial hearing officer's July 29, 2008 decision is the final determination of the issues from which the parent 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

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<sup>5</sup> The district has not alleged that the service of the notice of intention to seek review was untimely. In any event, it is the service of the petition, not the notice of intention to seek review that determines whether an appeal is timely initiated (see 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. 08-031).

<sup>6</sup> A petitioner may serve and file a reply for consideration by a State Review Officer "to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6).

Student with a Disability, Appeal No. 08-148; 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; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Bd. of Educ., Appeal No. 07-074; Application of 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;<sup>7</sup> see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at \*4 [E.D. Pa. March 20, 2008] [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]; Northview Pub. Schs., 43 IDELR 131 [SEA MI 2005] [dismissal by a State Review Officer of an untimely appeal from an impartial hearing officer's decision]).

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                         **January 16, 2009**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**

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<sup>7</sup> The New York State Education Department's Office of State Review maintains a website at [www.sro.nysed.gov](http://www.sro.nysed.gov). The website explains in detail the appeals process and includes State Review Officer decisions since 1990.