



The University of the State of New York

The State Education Department State Review Officer

No. 08-148

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, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals 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 2008-09 school year was appropriate, and denied the parent's request for the student to remain at his prior placement and to be awarded supplemental tutoring from an outside organization. The appeal must be dismissed.

During the 2007-08 school year, the student attended an inclusion class at a public school in the district where he received special education teacher support services (SETSS) (Tr. p. 16). The CSE recommended that the student's placement be changed to 12-month programming in a 12:1+1 special class in a specialized school with related services for the 2008-09 school year (Dist. Ex. 1). The student's eligibility for special education services as a student who is classified with autism is not in dispute in this appeal (*id.*; *see* 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Initially, I will address a procedural matter. The parent requests leave to file an untimely appeal (Pet. at ¶ 4). The district asserts as an affirmative defense in its answer that the petition for review was untimely served and should be dismissed.

In general, the failure to comply with the practice requirements of Part 279 of the Commissioner's regulations may result in the dismissal of a petition for review by a State Review Officer (*see, e.g., Application of the Bd. of Educ.*, Appeal No. 07-055; *Application of the Dep't of Educ.*, Appeal No. 05-082; *Application of the Dep't of Educ.*, Appeal No. 01-048). 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). 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 19, 2008 (IHO Decision at p. 5). The parent served the district with the petition for review on December 3, 2008 (Parent Aff. of Service), which is 106 days after the date of the decision from which she appeals and therefore not timely served according to State regulations.

The parent 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]). 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. 08-116; Application of a Student with a Disability, Appeal No. 08-065). Excluding the presumed date of mailing of August 20, 2008 and the four days subsequent, the petition for review needed to be served by the parent upon the district no later than September 29, 2008 (see 8 NYCRR 279.2[b]).¹ As stated, the parent served the district with the petition for review on December 3, 2008, 65 days beyond the regulatory time period (Parent Aff. of Service). Thus, the petition for review was not timely served.

In the petition, the parent requests that the delay in service of the petition for review be excused stating, among other things, that she was unable to obtain immediate assistance with the petition. 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. 6). 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 generally set forth in the parent's petition constitute good cause to excuse the untimely service of the petition for review. In the absence of good cause, I will dismiss the appeal as untimely.

Based upon the above, I find that the parent has 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 she has not sufficiently alleged good cause for her significant untimeliness. I find that the impartial hearing officer's August 19, 2008 decision is the final determination of the issues from which the petitioner 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 Student with a Disability, Appeal No. 08-114; Application of a Student with a

¹ The petition would have needed to be served by September 28, 2008 had that date not fallen on a Sunday (see 8 NYCRR 279.11).

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; 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**
 December 23, 2008

PAUL F. KELLY
STATE REVIEW OFFICE