



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-062

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmuller, Esq., of counsel

The Law Offices of Melvyn W. Hoffman, attorneys for respondents, Melvin W. Hoffman, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending second grade at the Aaron School in a special education setting comprised of 12 students, one teacher, and an assistant teacher (Tr. pp. 101-02, 178-79; Dist. Ex. 8). The Aaron School is a private school 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's May 21, 2008 individualized education program (IEP) recommended special education services within one of the district's self-contained 12:1+1 classrooms in a community school for the 2008-09 school year (Dist. Ex. 2). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 24, 166, 179; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The parents assert as an affirmative defense in their answer that the petition for review was untimely and improperly served. In its reply, the district asserts, among other things, that the service was proper and timely. For the reasons set forth below, I will dismiss the petition for improper service.

As general rule, an appeal to a State Review Officer is initiated by 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. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-082; Application of the Dep't of Educ., Appeal No. 08-056).¹ Exceptions to the general rule requiring personal service 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 the Commissioner (8 NYCRR 275.8[a]; 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 is obtained from a State Review Officer for an alternate method of service (8 NYCRR 275.8[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).² 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).

In this case, personal service upon the parents did not occur, nor did service occur pursuant to any of the above enumerated exceptions to the personal service requirement. Here, the impartial hearing officer issued her decision on April 24, 2009. On April 27, 2009, the district's counsel sent the attorney who represented the parents during the impartial hearing an e-mail notifying him that the district was considering appealing the impartial hearing officer's decision, and inquiring whether the attorney still represented the parents (Reply ¶ 3). Upon receiving no response from the parents' attorney, the district's counsel telephoned the attorney on May 28, 2009, and learned, through the attorney's voice mail, that the attorney was out of the office until June 2, 2009 (*id.* at ¶ 4). The district's counsel then left a voice mail message on the parents' attorney's telephone indicating that the district was going to serve the attorney at his office on the following day, May 29, 2009 (*id.*). The district's counsel also sent an e-mail to the parents' attorney on May 28, 2009, indicating that she "wanted to confirm that you will be available to accept service of the Petition at your office tomorrow" (*id.*). On May 29, 2009, the district proceeded to serve the petition on a receptionist at the parents' attorney's "shared" law office (*id.* at ¶ 5). The district also sent the parents' attorney a courtesy copy of the petition by e-mail on the same day (*id.*).

The hearing record shows that the district did not personally serve the parents, obtain an agreed upon waiver of personal service, effectuate alternate service upon a suitable person at the

¹ Part 279 of the State regulations governs the practice on review of impartial hearings for students with disabilities. 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. Pursuant to 8 NYCRR 279.2(c), a petition must be personally served upon a parent when a district initiates an appeal.

² Pursuant to 8 NYCRR 279.1(a), "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."

parent's residence, or obtain permission from a State Review Officer for service by means other than personal service. The district attempted no personal service upon the parents. Instead, it attempted service of the petition on the attorney who represented the parents in the impartial hearing below. The hearing record further demonstrates that the district did not have confirmation that the attorney who had represented the parents at the impartial hearing would be representing them on appeal. Moreover, the hearing record demonstrates that the district's counsel was aware that the parents' attorney was not available to accept personal service on May 29, 2009, yet the district attempted service on the parents' attorney on that date, the last date on which the petition could be timely served (see 8 NYCRR 279.2[c]). The hearing record also demonstrates that a petition was not properly served upon the parents prior to the expiration of the district's time to initiate an appeal (8 NYCRR 279.2[c]; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 06-078).

I am not persuaded by the facts of this case, or by the administrative decisions cited by the district, that the improper service should be excused (see Application of the Dep't of Educ., Appeal No. 07-037 [excusing alleged service irregularities where district made attempts at personal service on parent and made request to a State Review Officer for permission for alternate service]; Application of the Dep't of Educ., Appeal No. 05-073 [cautioning district not to serve petition on parent by mail without consent and warning of possible dismissal for similar service in future]; but see Application of the Dep't of Educ., Appeal No. 05-082 [dismissing district's petition, in part, for service by mail without consent, noting prior cautioning in Application of the Dep't of Educ., Appeal No. 05-073]). The district is aware of the procedural requirements associated with initiating an appeal for review of a decision of an impartial hearing officer, having had prior petitions dismissed for failure to comply with the required procedures (see Application of the Dep't of Educ., Appeal No. 08-139 [dismissing petition for untimely service]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing petition for failure to personally serve respondents and for untimely service]; Application of the Dep't of Educ., Appeal No. 06-078 [dismissing petition for failure to personally serve respondents and for untimely service]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing petition for failure to personally serve respondents]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing petition for failure to timely file the hearing record pursuant to Part 279]; Application of the Bd. of Educ., Appeal No. 01-048 [dismissing petition for failure to personally serve respondents]).

Under the circumstances presented in this case, I will dismiss the appeal for failure to personally serve the petition upon the parents, without a determination of the merits of the district's claim (Application of the Dep't of Educ., Appeal No. 05-082).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 23, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**