



The University of the State of New York

The State Education Department
State Review Officer

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No. 09-099

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 New York City Department of Education

Appearances:

Skyer, Castro, Cutler & Gersten, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2008-09 school year were appropriate and denied their request to be reimbursed for the costs of their son's tuition at the Learning Resource Center at Columbia Grammar (LRC).

At the outset, the district asserts in its answer as an affirmative defense that the parents failed to timely serve the petition for review and failed to assert good cause in the petition as to the reason for such failure (see 8 NYCRR 279.2[b], 279.4[a], 279.11, 279.13). According to State regulations, the petition for review 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]). 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 (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 good cause for failure to timely seek review must be set forth in the petition (id.).

In their reply, the parents' attorney admitted that the petition for review was not served in a timely manner and affirmatively alleged that the attorney who prepared the petition miscalculated the dates within which to timely serve the petition. The reply further noted that the attorney who

prepared the petition remained unaware of the failure to timely serve the petition until receipt of the district's answer. Notwithstanding the failure to timely serve the petition, the parents' attorney asserted that the one week delay caused no prejudice to the district, as the district timely prepared, served, and filed its answer, and further, that a State Review Officer should exercise discretion and excuse the failure to timely serve the petition.

Here, the impartial hearing officer's decision is dated July 6, 2009 (IHO Decision at p. 10). The impartial hearing officer's decision included the required statement advising the parents and the district of their rights to seek review of the decision by a State Review Office, and further, provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text and underlined (*id.* at p. 11; *see* 8 NYCRR 200.5[j][5][v]). During the course of the impartial hearing and the instant appeal, the parents were represented by an attorney (*see* Tr. pp. 1, 19, 154; Pet. at pp. 1-15; Reply at pp. 1-2). By excluding the date of mailing of the impartial hearing officer's decision and the four days subsequent thereto, the petition needed to be served by the parents upon the district no later than August 15, 2009, a Saturday (8 NYCRR 279.2[b]).¹ State regulations provide that if the last day for service is a Saturday or Sunday, then timely service may be made on the following Monday, which in this case was August 17, 2009 (*see* 8 NYCRR 279.11). The parents served the petition for review upon the district on August 21, 2009 (Parent Aff. of Personal Service).

As set forth in their reply, the parents' attorney, admittedly, miscalculated the date upon which to timely serve the petition and remained unaware of the miscalculation until receipt of the district's answer, thus acknowledging the failure to provide any explanation or good cause in the petition for review for failing to timely serve the petition. Moreover, even if the attorney's admitted miscalculation had been stated in the petition, I am not persuaded that the reason for the delay constituted good cause shown to excuse the untimely service of the petition for review (Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 07-085 [delays in obtaining appeal forms and computer problems do not constitute good cause]; 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 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]).

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 Child with a Disability, Appeal No. 05-098).

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], 279.11; see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at pp. *5-6 [N.D.N.Y. Dec. 19, 2006]; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding the 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]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of petition in a timely manner]; see generally Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition for review 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 for review 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 for review upon the parent where the district served the parent by facsimile]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
September 11, 2009

PAUL F. KELLY
STATE REVIEW OFFICER