



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-119

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:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which directed respondent (the district) to conduct a functional behavioral assessment (FBA) and an educational evaluation of their son, without their consent. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Hallen School (Hallen) at the district's expense (Tr. pp. 26, 30). Hallen has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). According to the hearing record, Hallen is a special education school for students with autism, learning disabilities, speech or language impairments, other health impairments, and/or for students who have an emotional disturbance (Tr. p. 60).

The hearing record reflects that the student has diagnoses of autism and Tourette's Disorder (Parent Ex. U at p. 5; see also Parent Exs. R; T at pp. 4, 5).¹ An individualized education program (IEP) resulting from a January 4, 2010 Committee on Special Education (CSE) review indicates that the January 4 CSE determined that the student was eligible for special education programs

¹ The hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xi][c]).

and services as a student with autism (Ex. T at pp. 1, 2). At the time of the impartial hearing, the student had been in attendance at Hallen for two years (Tr. p. 60).

By due process complaint notice dated June 1, 2010, the district requested an impartial hearing seeking an order that would allow an FBA and educational evaluation of the student to be conducted without the consent of the parents (Parent Ex. B at p. 2). By letter dated June 14, 2010, the parents advised the district that they believed that the due process complaint notice was insufficient (see Parent Ex. A). The district subsequently filed an amended due process complaint notice dated June 21, 2010 (see Parent Ex. B at p. 1).

The impartial hearing began on August 9, 2010 and concluded on August 27, 2010 (Tr. pp. 1, 17, 83-84). By decision dated October 14, 2010, the impartial hearing officer found that an FBA and an educational evaluation of the student were appropriate and reasonable (IHO Decision at p. 6). The impartial hearing officer ordered that the district's request for an FBA and an educational evaluation be granted, that the Tourette's Syndrome Association be consulted in the process of conducting the FBA, and that both evaluations be conducted immediately (id.).

The parents appeal, contending among other things, that the impartial hearing officer did not consider evidence which they believe shows that the district deprived the parents and the student of their "due process rights," that the district continues to deprive the parents and the student of their "due process rights," that the parents wished to have an FBA conducted, that the impartial hearing officer gave undue consideration to the district, and that district should be directed to provide the student with an independent FBA at public expense.

The district answered the parents' petition for review. The district contends, among other things, that the petition for review should be dismissed because it was not timely served in accordance with State regulations. The district also asserts that the impartial hearing officer properly granted the district's request to conduct an FBA and educational evaluation of the student and that the parents' request for an independent FBA should not be granted. The district further asserts that a number of the allegations in the parents' petition for review should not be considered because they were neither the subject of the due process complaint notice nor the impartial hearing and because they had been the subject of a previous impartial hearing request which had been withdrawn.

In their reply to the district's answer, the parents assert that they properly counted "business days" to determine when the petition for review was required to be served and request that their petition for review be considered.² With respect to the district's assertion that a number of the allegations set forth in their petition for review should not be considered, the parents allege that such allegations were not presented as a part of their appeal but were "stated facts to establish [the parents'] purpose and support [their] claim for appeal" (Reply ¶ 15). The parents also assert that the withdrawal of their June 14, 2010 request for an impartial hearing did not constitute an

² The parents' petition for review was verified as required (see 8 NYCRR 279.7). However, the parents' reply was not verified and, therefore, does not comply with State regulations (id.).

abandonment of any issue relative to the current proceeding. The parents further assert that the district's answer was not timely.³

The merits of the parents' appeal need not be reached because, as discussed more fully below, the parents have not properly initiated the appeal.⁴

An appeal to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; 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. 08-056; Application of the Dep't of Educ., Appeal No. 05-082.

As to the time period for initiating an appeal, a 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]). State regulations expressly provide that 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 for review (8 NYCRR 279.2[b], [c]). 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]). 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 279.11).

State regulations provide a State Review Officer with the authority to dismiss sua sponte a late petition for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). 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 for review (*id.*). All pleadings shall be verified (8 NYCRR 279.7). Service of all pleadings subsequent to a petition for review shall be made by mail, by private express delivery service, or by personal service (8 NYCRR 275.8[b], 279.5, 279.6, 279.11).

³ 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). Some of the allegations in the parents' reply neither respond to any of the district's procedural defenses nor to the additional evidence submitted with the district's answer. Accordingly, such allegations of the reply are beyond the scope of the State regulations and will not be considered on appeal (see 8 NYCRR 279.6; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

⁴ Additionally, I do not agree with the parents' contention that the district's answer is untimely. Based upon a timely application submitted in accordance with State regulations (8 NYCRR 279.10[e]), the district was granted an extension of time until December 23, 2010 to serve their answer on the parents. The district timely served its answer on the parents on December 23, 2010 (Dist. Aff. of Service of Answer).

In general, 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; *see, e.g., Application of a Student with a Disability*, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition for review upon the district]; *Application of the Dep't of Educ.*, Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition for review in a timely manner]; *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]).

In the present case, the impartial hearing officer's decision is dated October 14, 2010 (IHO Decision at p. 6). 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. 7; *see* 8 NYCRR 200.5[j][5][v]).

The hearing record does not reflect whether the impartial hearing officer's decision was served by mail. The parents aver that the petition for review was served upon the district on November 29, 2010 (Parent Aff. of Service of Pet.). Even assuming, for the sake of argument, that the impartial hearing officer's decision was served by regular mail and the parents were entitled to exclude the "date of mailing and four subsequent days thereto" in calculating the time for service of a petition for review, the parents failed to serve the petition for review within the prescribed time limits. Accordingly, the petition for review is therefore untimely (*see* 8 NYCRR 279.2[c]).

I also note that the parents did not set forth any reason in their petition for review for serving a late petition for review (8 NYCRR 279.13).⁵ Further, based on my review of the parents' allegations in their reply, I find that they have not shown good cause for their failure to timely serve the petition for review (*see* 8 NYCRR 279.13). I am not persuaded by the parents' contentions that the time period for computing service of a petition for review should be measured in "business days." Although the word "day" is not explicitly defined in State regulations, it is to be read according to its plain language meaning (*Does v. Mills*, 2005 WL 900620, at *11 [S.D.N.Y. Apr. 18, 2005]). Consequently, the appropriate time period in 8 NYCRR 279.2(b) is to be measured in calendar days and not business days (*Application of a Child with a Disability*, Appeal No. 07-128). Furthermore, contrary to the parents' allegation that it is necessary to use "business days" as the counting period in order to meet the requirement of personal service, the service provisions in State regulations specifically distinguish days from business days, providing that

⁵ As indicated above, State regulations require that the reason for a failure to timely seek review must be set forth in the petition for review (8 NYCRR 279.13).

"[i]f the last day for service of a ... petition for review . . . 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 279.11). Finally, I have also reviewed and considered the parents' other allegations relating to the late filing of their petition for review. None of them persuade me that good cause exists for the untimely service of the petition for review.

Thus, based upon the parents' failure to timely initiate the appeal and in the absence of good cause for the untimely service of the petition for review, I will exercise my discretion and dismiss the petition for review as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; see also Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 10-081; Application of a Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; 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; see generally Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009], [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]).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 21, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**