



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-012

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Spencerport Central School District

Appearances:

Law Office of Susan N. Burgess, attorney for petitioners, Susan N. Burgess, Esq., of counsel

Harris Beach, PLLC, attorneys for respondent, Kate L. Hill, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for the costs of their daughter's tuition at the Hope Hall School (Hope Hall) for the 2009-10 school year. The appeal must be dismissed.

Background and Procedural History

As discussed more fully below, the merits of the parents' appeal need not be addressed because the parents have not properly initiated this appeal. Briefly, however, the Committee on Special Education (CSE) convened on June 10, 2009 to conduct the student's annual review and to develop an individualized education program (IEP) for the 2009-10 school year (Joint Ex. 3 at pp. 1-2).

In a due process complaint notice, dated February 18, 2010, the parents alleged, among other things, that the district failed to properly identify the student's disability, the IEP goals were inappropriate, and therefore, the IEP did not offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (Joint Ex. 41 at pp. 3-7). For relief, the parents sought reimbursement for the costs of the student's tuition at Hope Hall, costs for a private tutor, the cost of an independent educational evaluation (IEE), and attorney's fees (*id.* at p. 7).

An impartial hearing was convened on April 8, 2010 and concluded on July 13, 2010, after ten nonconsecutive days of testimony (Tr. pp. 1, 2227). In a decision dated November 20, 2010,

the impartial hearing officer determined, among other things, that the district had offered the student an appropriate program for the 2009-10 school year (IHO Decision at pp. 46-52). Consequently, the impartial hearing officer denied the parents' request to be reimbursed for the costs of the student's tuition at Hope Hall for the 2009-10 school year (*id.* at p. 56).¹

The parents appeal, challenging the impartial hearing officer's determination. The parents assert that the impartial hearing officer erred in concluding that the district offered the student a FAPE for the 2009-10 school year. An Affirmation prepared by the parents' counsel accompanied the petition for review. In its answer, the district asserts that the petition for review should be dismissed because the impartial hearing officer transmitted the decision by mail, the petition was not timely served upon the district, the parents failed to set forth good cause in the petition for review for their failure to timely serve the petition, and that the petition exceeds the page length requirements set forth in the regulations.

Discussion and Conclusion

An appeal from an impartial hearing officer's decision 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. 10-119; 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 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 sent by mail to 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]).² The party seeking review shall file with the Office of State Review the petition, 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; 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 (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

¹ In denying the parents' requested relief, I note that the impartial hearing officer's decision appears to contain a typographical error regarding the school year at issue (see IHO Decision at p. 56).

² 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. 08-065).

shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

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 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 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 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 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 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 upon the parent where the district served the parent by facsimile]).

In the present case, the impartial hearing officer's decision is dated November 20, 2010, and includes the required statement advising the parties of their rights to seek review of the decision by a State Review Officer, and further provides notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which is also underlined (IHO Decision at pp. 56-57; see 8 NYCRR 200.5[j][5][v]). Although neither the petition for review nor the Affirmation prepared by the parents' counsel indicates how the impartial hearing officer delivered the decision, the district asserts in its answer that the impartial hearing officer sent the decision by mail. As such, the date of mailing and the four days subsequent thereto are excluded from calculating the 35-day period within which to timely serve the petition for review. According to the parents' affidavit of service, the petition for review was personally served on the district on January 25, 2011—approximately 66 days after the impartial hearing officer's decision. While the petition for review fails to set forth good cause for the failure to timely serve the petition therein, as required by regulation, the parents contemporaneously submitted an Affirmation prepared by their counsel, which alleges various reasons—including a scheduled vacation and other commitments—why the parents could not timely serve the petition for review. Based on my review of the Affirmation, however, I find that, even had these reasons been properly contained in the petition for review, they do not constitute good cause for the significant delay in serving the petition (see 8 NYCRR 279.13).³

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

³ The parents also assert that although the impartial hearing officer's decision is dated November 20, 2010, they did not receive the decision until November 30, 2010. State regulations do not rely upon the date of receipt of an impartial hearing officer's decision for purposes of ascertaining the deadline for serving a petition for review (8 NYCRR 279.2[b], [c]; see Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the date of the parents' alleged receipt of the impartial hearing officer's decision is irrelevant to the instant analysis regarding timeliness.

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. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [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. 11-013; Application of a Student with a Disability, Appeal No. 10-081; Application of the 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 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; 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. 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] [Sup. Ct. Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

I also note that the State regulations also provide that a petition for review may not exceed 20 pages in length and that a State Review Officer may reject a pleading or memorandum of law that does not comply with the regulations governing practice before the Office of State Review (8 NYCRR 279.8[a][5]). In this instance, I will also dismiss the appeal on the basis that the late petition, which is 67 pages in length, far exceeds the permissible page limitations and leave to refile an amended pleading is not warranted in this instance (Application of a Child with a Disability, Appeal No. 04-033; see Application of a Child with a Disability, Appeal No. 04-001).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 23, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**