



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-046

### **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, attorneys for respondent, Diane da Cunha, Esq., of counsel

#### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which ordered, among other things, an award of additional services in the form of five hours of tutoring for the student per day at the Huntington Learning Center (HLC) or the Sylvan Learning Center (Sylvan). The appeal must be dismissed.

#### **Background and Procedural History**

The merits of the parent's appeal need not be addressed because, as discussed more fully below, the parent has not properly initiated this appeal. Briefly, however, on April 15, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop an individualized education program (IEP) for the student for the 2010-11 school year (Dist. Ex. 11). The CSE continued to find the student eligible for special education and related services as a student with a learning disability; the student's classification is not in dispute in this appeal (Dist. Ex. 11 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

In a due process complaint notice dated June 29, 2010, the parent requested an impartial hearing challenging the April 2010 IEP (IHO Ex. I). As relief, the parent sought, among other things, funding for tuition at a specific private school (id. at pp. 3-4). The parent amended her due process complaint notice on September 23, 2010, stating that the private school she had sought funding for in her original due process complaint notice had denied the student placement and requesting relief in the form of, among other things, an appropriate placement and tutoring (IHO Ex. III).

An impartial hearing officer issued a decision dated December 20, 2010, finding in part, that the student was not offered an appropriate placement in a timely manner by respondent (the district) (IHO Decision at p. 10). In addition, the impartial hearing officer found that the student did not receive occupational therapy (OT) during the 2009-10 school year, in accordance with his 2009-10 IEP dated September 24, 2009 (id. at p. 11). The impartial hearing officer further determined that the student did not receive related services pursuant to his April 2010 IEP (id.). As relief, the impartial hearing officer ordered, among other things, five hours of tutoring at HLC or Sylvan each day if the district did not offer the student an appropriate placement by November 1, 2010; a Nickerson letter;<sup>1</sup> related services authorizations (RSAs) for additional services; and a "P3"<sup>2</sup> letter for tutoring at either HLC or Sylvan (id. at pp. 12-13). The impartial hearing officer also ordered the CSE to reconvene (id. at p. 13). Lastly, the impartial hearing officer ordered the CSE to reevaluate the student and determine the most appropriate placement for him (id.).<sup>3</sup>

The parent appeals, and challenges portions of the impartial hearing officer's decision. The parent also seeks a "mandamus" requiring that the April 2010 IEP be "honor[ed]." The parent requests an extension of time in which to serve the petition and submits documents for consideration as additional evidence on appeal.

The district submits an answer and seeks dismissal of the petition. The district argues, among other things, that the parent was not aggrieved by the impartial hearing officer's decision because she has received all of the relief that she requested below; therefore, she has no standing to bring the appeal. The district attaches a document for consideration as additional evidence on appeal.<sup>4</sup>

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<sup>1</sup> A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a student in a New York State approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

<sup>2</sup> It is presumed within the context of the hearing record that a "P3" letter is an abbreviation for a "Private Tutoring Eligibility Notice-P3" form.

<sup>3</sup> On January 18, 2011, the impartial hearing officer amended her decision to include additional orders (January 18, 2011 IHO Decision at p. 2). I note that an impartial hearing officer's jurisdiction is limited by statutory and regulatory law and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 10-118; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16).

<sup>4</sup> The parent submitted a reply to the district's answer. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent's reply does not respond to any procedural defenses interposed by the district nor does it respond to additional evidence submitted by the district. Therefore, I will not consider the parent's reply.

## 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. 11-052; 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]). 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 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. 11-052 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; 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 this case, the impartial hearing officer's decision included a statement advising the parties of their rights to seek review of the decision by a State Review Officer, and provided notice of the time requirements for filing an appeal (IHO Decision at p. 14; see 8 NYCRR 200.5[j][5][v], [k]). The parent served the petition upon the district by mail on April 25, 2011, more than 120 days after the December 20, 2010 impartial hearing officer's decision, which is well beyond the 35 days set forth in State regulations for filing a petition (8 NYCRR 279.2[b]). In her petition, the parent cites health concerns as good cause to support her request for an extension to file the petition. I do not find the parent's reasons set forth in the petition for good cause to be persuasive in this case, especially given the length in the delay in serving the petition upon the district (see Application of a Student with a Disability, Appeal No. 10-081; Application of a Child with a Disability, Appeal No. 07-085; Application of a Student with a Disability, Appeal No. 09-099; Application of a Student with a Disability, Appeal No. 08-043; 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; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-048; 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). Moreover, here, the parent served the petition upon the district by mail instead of effectuating personal service, as required by the regulations (8 NYCRR 279.2[b]).

Thus, based upon the parent's failure to timely and properly initiate the appeal, I will dismiss the petition for review (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]; 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. 11-012; 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]).

Moreover, even if the parent's appeal was timely, the district is correct that the parent was not aggrieved by the impartial hearing officer's decision because she has received all of the relief that she requested in her due process complaint notice. Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that

"[t]he administrative appeal process is available only to a party which is 'aggrieved' by an impartial hearing officer's determination").

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  
August 24, 2011**

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**STEPHANIE DEYOE  
STATE REVIEW OFFICER**