



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-052

**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 William Floyd Union Free School District**

### **Appearances:**

Bond, Schoeneck & King, PLLC, attorneys for respondent, Howard M. Miller, Esq. & Howard M. Wexler, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which dismissed her March 30, 2010 due process complaint notice. The appeal must be dismissed.

### **Background and Procedural History**

As discussed more fully below, the merits of the parent's appeal need not be addressed because the parent has not properly initiated this appeal. Briefly, however, a subcommittee of the Committee on Special Education (CSE) convened on June 7, 2010 to conduct the student's annual review and to develop an individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 1 at pp. 1, 6). The CSE subcommittee continued to find the student eligible for special education and related services as a student with autism; the student's classification is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In a due process complaint notice filed on March 30, 2010, the parent requested an impartial hearing and challenged the CSE subcommittee's June 7, 2010 recommendation (Application of a Student with a Disability, Appeal No. 10-130). An impartial hearing officer issued a decision dated November 19, 2010 in favor of the district without conducting an impartial hearing (id.). On appeal, the impartial hearing officer's November 19, 2010 decision was annulled and the matter was remanded to the impartial hearing officer to conduct an impartial hearing.

Upon remand, an impartial hearing convened in this matter on March 9, 2011, and concluded on the same day (Tr. pp. 1-88). On March 31, 2011, the impartial hearing officer issued

a decision determining, among other things, that the district offered the student a free appropriate public education (FAPE) for the 2010-11 school year and dismissing the March 30, 2010 due process complaint in its entirety (IHO Decision).<sup>1</sup>

The parent appeals, and seeks an order annulling the impartial hearing officer's March 31, 2011 decision. The district has not filed an answer to the petition.

## **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]). 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. 11-013 [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.,

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<sup>1</sup> State regulations provide that "[t]he impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer did not attach an exhibit list to his decision. I remind the impartial hearing officer to ensure compliance with this regulation in the future.

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 March 31, 2010 (IHO Decision at p. 12). The impartial hearing officer's decision included the required 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 (id.; see 8 NYCRR 200.5[j][5][v], [k]). 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 parent upon the district no later than May 10, 2011 (8 NYCRR 279.2[b]). According to the parent, the petition was personally served upon the district clerk on May 19, 2011 (Parent Aff. of Personal Service). The parent did not set forth good cause for failure to timely seek review in the petition (see Pet. at pp. 1-4).<sup>2</sup>

Thus, based upon the parent's failure to timely initiate the appeal and in the absence of good cause for the untimely service of the petition for review, I will 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. 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]).

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<sup>2</sup> The parent attached to the petition a document indicating in part that she either sought or obtained the approval of the district's counsel for an extension of time in which to serve the petition; however, I note that parties may not agree to an extension of time in which to initiate an appeal to a State Review Officer (see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 05-106).

I have considered the parent's 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**  
                  **June 16, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**