



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-151

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Tracey Spencer Walsh, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the McCarton School (McCarton) for the 2009-10 school year. The appeal must be dismissed.

Background and Procedural History

As discussed more fully below, the merits of the district's appeal need not be addressed because the district has not properly initiated this appeal. Briefly, however, the Committee on Special Education (CSE) convened on June 5, 2009 to conduct the student's annual review and to develop an individualized education program (IEP) for the 2009-10 school year (Parent Ex. E at pp. 1-2).

In a due process complaint notice, dated July 7, 2010, and later amended on October 12, 2010, the parents alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school years based upon the following: the district failed to timely and properly evaluate the student, the student's IEP failed to identify a specific placement location, the district failed to recommend 1:1 instruction, the district failed to develop a behavior intervention plan (BIP), and "[u]pon information and belief" the recommended placement was not "willing and able" to implement the student's IEP (Parent Exs. A at pp. 1-5; C at pp. 1-6). As relief, the parents sought reimbursement for the costs of the student's tuition at McCarton, the provision of parent training and counseling, and transportation to and from McCarton (Parent Exs. A at pp. 5, 8; C at pp. 5-6, 9).

The parties proceeded to an impartial hearing on May 9, 2011 and concluded on September 22, 2011 after eight nonconsecutive days of testimony (see Tr. pp. 1, 690). In a decision dated October 11, 2011, the impartial hearing officer determined, among other things, that the district did not offer the student a FAPE for the 2009-10 school year, the parents' unilateral placement of the student at McCarton was appropriate, equitable considerations did not preclude an award of tuition reimbursement, and thus, she ordered the district to reimburse the parents for the costs of the student's tuition at McCarton for the 2009-10 school year, as well as the costs of transportation (IHO Decision at pp. 12-14).

The district appeals, challenging the impartial hearing officer's determination that it failed to offer the student a FAPE for the 2009-10 school year. The district attached two documents as additional evidence for consideration on appeal (Pet. Exs. 1-2). In its answer, the parents respond to the district's allegations with general admissions and denials, and seek to uphold the impartial hearing officer's decision in its entirety.

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]).¹ 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.).

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 Student with a Disability, Appeal No. 08-065).

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 October 11, 2011, 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 p. 15; see 8 NYCRR 200.5[j][5][v]). According to the additional documentary evidence attached to the district's petition, the impartial hearing officer transmitted a copy of decision to the district, to the parents' attorney, and to the parents by email on October 13, 2011 (Pet. Ex. 2 at pp. 1-2). The district admits that it only received the impartial hearing officer's decision by email (see Pet. at p. 1 fn.1; Pet. Exs. 1-2). As such, the district had until November 15, 2011—the 35th day from the date of the impartial hearing officer's decision—to timely serve the petition for review. According to the district's affidavits of service and a letter dated November 17, 2011, the district initially attempted personal service of the petition upon the parents on November 16, 2011, but were unable to accomplish personal service of the petition upon the parents until November 21, 2011 (Dist. Affs. of Attempted Service). In a footnote in the petition, the district asserts that although the impartial hearing officer's decision is dated October 11, 2011, it was not transmitted to the district until October 13, 2011, and thus, the petition would be timely served "on or before November 17, 2011" (Pet. at p. 1 fn.1). However, State regulations do not rely upon the date of receipt of an impartial hearing officer's decision—or the date the impartial hearing officer transmitted the decision by email—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 actual date the impartial hearing officer transmitted the decision to the district by email is irrelevant to the instant analysis regarding timeliness. Based upon the foregoing, I find that the district failed to timely serve the petition upon the parents.²

In addition, with regard to good cause, the district failed to set forth any cause for the failure to timely serve the petition therein, as required by regulation (see 8 NYCRR 279.13). To the

² Although the district was granted permission to use substituted service on two occasions, when the affidavits of service were filed it became clear the first attempts at service were made after the time for initiating the appeal had already elapsed. Authorization of an alternate method of service does not extend the time for initiating an appeal to a State Review Officer.

contrary, the district affirmatively asserts that the petition was timely served in this case (Pet. at p. 1 fn.1).

Thus, based upon the district'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 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. 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 have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.³

THE APPEAL IS DISMISSED.

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

**JUSTYN P. BATES
STATE REVIEW OFFICER**

³ Given the disposition of the instant matter, I will exercise my discretion and decline to render a determination on whether the impartial hearing officer's actions in this matter constituted misconduct or incompetence. However, the district may, on its own accord, avail itself of the procedures outlined in the State regulations to seek such determination from the Commissioner of Education (8 NYCRR 200.21[b]).