



The University of the State of New York

The State Education Department State Review Officer

No. 08-065

Application of a STUDENT WITH A DISABILITY, by her 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, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the educational program that respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2008-09 school year was appropriate, and denied the parent's request that the district pay her daughter's tuition costs at Bishop Ford Central High School (Bishop Ford) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a public school in the district pursuant to a March 25, 2008 individualized education program (IEP) that recommended that the student receive three periods per day of direct special education teacher support services in a general education setting, and four periods per day of paraprofessional support (Tr. pp. 16, 32; Dist. Ex. 11 at p. 1). The student was also receiving a number of related services, including occupational therapy, physical therapy, speech-language therapy and counseling (Dist Ex. 11 at p. 18). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The impartial hearing officer's decision is dated May 12, 2008.

As further elaborated below, the parent has not properly initiated her appeal.

On July 8, 2008, the parent personally served the district with a notice of intention to seek review, notice with petition and verified petition (Parent Aff. dated July 8, 2008). The district submitted a complete hearing record in this matter to the Office of State Review (8 NYCRR 279.9).

The district filed an answer, wherein the district argues that the petition was untimely, that the appeal is procedurally defective, that the impartial hearing officer correctly found that the district provided the student with an appropriate educational program and that the parent did not carry her burden to show that Bishop Ford was an appropriate placement for the student.

The parent has not filed a reply to the procedural defenses raised in the district's answer.¹

State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the regulations (8 NYCRR 279.13). To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2).² If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (*id.*). 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.*).

The May 12, 2008 decision of the impartial hearing officer was served upon the parties by mail. The hearing record shows that the decision was mailed on the same day as the date of the decision (Answer ¶ 39; Answer Ex. 1).³ The notice of intention to seek review should have been served within 25 days from the date of the impartial hearing officer's decision (with the date of mailing and the four days subsequent excluded), and at least ten days earlier than the notice with petition and verified petition (8 NYCRR 279.2[b]). The 25th day within which to serve the notice of intention to seek review fell on June 10, 2008. Accordingly, the parent's July 8, 2008 service of the notice of intention to seek review was untimely.⁴

By excluding the date of mailing of the impartial hearing officer's decision and the four days subsequent, the notice with petition and verified petition needed to be served by the parent upon the district no later than June 20, 2008 (8 NYCRR 279.2[b]).⁵ The parent served the district

¹ A petitioner may serve and file a reply for consideration by a State Review Officer "to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6).

² In this case, the impartial hearing officer's decision provided notice to the parties of their right to appeal to a State Review Officer and the timelines for initiating an appeal (IHO Decision at p. 7). The impartial hearing officer's decision also advised the parties that directions and sample forms were available at the Office of State Review website (*id.*).

³ 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. Here the hearing record identifies the date of mailing.

⁴ Even if the notice of intention to seek review had been timely, it is the service of the petition, not the notice of intention to seek review, that determines whether an appeal is properly commenced (see Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]).

⁵ As noted in footnote 3, 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 (Application of a Child with a Disability, Appeal No. 05-098). Here the hearing record identifies the date of mailing.

with the notice with petition and verified petition on July 8, 2008. The parent has not asserted any good cause in the petition for her failure to timely serve the petition.

Based upon the above, I find that the parent has not properly initiated an appeal due to the failure to effectuate proper service of the petition in a timely manner in violation of section 279.2 of the State regulations, and that she has not alleged good cause for her untimeliness. Therefore, I find that the petition must be dismissed (8 NYCRR 279.13; see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; Application of the Dep't of Educ., Appeal No. 08-006; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding dismissal of late appeal from impartial hearing officer decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006]).

Lastly, upon review of the hearing record, I see no reason to modify the impartial hearing officer's decision that determined that the district offered the student an appropriate educational program (Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 August 12, 2008

PAUL F. KELLY
STATE REVIEW OFFICER