



The University of the State of New York

The State Education Department State Review Officer

No. 08-139

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, attorney for petitioner, Emily R. Goldman, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorney for respondents, Lauren A. Baum, 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 their son's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2007-08 school year. The appeal must be dismissed.

At the start of the impartial hearing, the student was attending Mary McDowell, which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student previously received diagnoses of a reading disorder, a mixed-receptive expressive language disorder and a phonological disorder (Tr. pp. 363-64; Parent Ex. K at p. 15). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The merits of the district's appeal need not be discussed because the district has not properly initiated its appeal.

On October 14, 2008, the impartial hearing officer issued a decision (IHO Decision at p. 28).¹ The decision was e-mailed to the parties that same day (Answer ¶¶ 62-68). The district's

¹ 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. 34). The decision also advised the parties that directions and sample forms were available at the Office of State Review website <http://www.sro.nysed.gov/> (id.).

affidavit of service attached to its petition states that the petition was served on November 20, 2008 at 7:40 AM (Dist. Aff. of Service). On November 28, 2008 the Office of State Review received three additional affidavits of service and attempted service from the district detailing service activity on November 18, 19 and 20, 2008.

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).^{2, 3} State regulations also provide that each petition must contain a notice that, among other things, informs a respondent that an answer must be served within 10 days after the service of the petition for review and that a copy of such answer must be filed with the Office of State Review within two days after service of the answer (8 NYCRR 279.3). The petition for review shall be personally served upon the respondent(s) within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). Additionally, a parent who seeks review by a State Review Officer shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). 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 25- or 35-day period (*id.*). Additionally, the party seeking review shall file with the Office of State Review the petition for review, 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]). State regulations provide the State Review Officer with the authority to dismiss sua sponte a late petition for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, 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.*). 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; and if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 275.8[b], 279.11). All pleadings shall be verified (8 NYCRR 275.5, 275.6). Service of all pleadings subsequent to a petition shall be made by mail or by personal service (8 NYCRR 275.8[a]).

In the instant case, the impartial hearing officer's decision is dated October 14, 2008 and there is no indication in the decision showing the manner in which it was delivered to the parties (IHO Decision). The district does not allege that the decision was sent by mail to the parties, and the parents assert that the decision was sent to the parties on October 14, 2008, via e-mail. Therefore, the notice with petition and verified petition needed to be served by the district upon the parents no later than November 18, 2008 (8 NYCRR 279.2[b]). The affidavit of service

² Part 279 of the State regulations governs the practice of how a State Review Officer may review an impartial hearing. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279 (8 NYCRR 279.1[a]). Section 279.1(a) also states that "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (*id.*).

³ Part 279 of the State regulations was amended, effective October 9, 2008, prior to the district's petition dated November 18, 2008. As such, because the district's petition is dated November 18, 2008, after the effective date of the amended Part 279, this decision's citations to Part 279 will be to the newly amended Part 279.

attached to the petition states that the petition was served on November 20, 2008 at 7:40 AM (Dist. Aff. of Service).

The petition contains no excuse for the late service, but a cover letter and an affidavit from the district's counsel are attached to the copy of the petition filed with the Office of State Review and each has been copied to the parents' attorneys. Additionally, the district filed three affidavits of service with the Office of State Review dated November 18, 19 and 20, 2008. Collectively, these documents explain that the district's process server attempted to serve the wrong address a single time on November 18, 2008. At mid-day on November 19, 2008 the process server informed the district's counsel that service had not been completed and service was attempted at the proper address at 4:30 p.m. that day, but no one at the residence was over 18 years of age to accept service. Service was not completed until the morning of November 20, 2008, when the student's mother was personally served.

Based upon the circumstances as presented, in the exercise of my discretion, I decline to excuse the district's delay in service of the petition and find that the district has not properly initiated the appeal because it failed to serve the petition in a timely manner in violation of section 279.2 of the State regulations and has not alleged sufficient good cause for the untimely service (see Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of 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 for review 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 for review 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 for review upon the parent where the district served the parent by facsimile]).

Accordingly, I find that the impartial hearing officer's October 14, 2008 decision is the final determination of the issues from which the district seeks review, and that such decision on those issues became final in the absence of a timely appeal (20 U.S.C. § 1415[i][1][A][2004]; 34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][5][v]). 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]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]; Application of a Student with a Disability, Appeal No. 08-148; 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; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Bd. of Educ., Appeal No. 07-074; Application of the Dep't of Educ., Appeal No. 06-078; Application of a Child with a Disability, Appeal No. 06-071; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 05-022; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [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] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]; Northview Pub. Schs., 43 IDELR 131 [SEA MI 2005] [dismissal by a State Review Officer of an untimely appeal from an impartial hearing officer's decision]).

In light of my determination herein, the parties' remaining contentions need not be addressed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 January 28, 2009

PAUL F. KELLY
STATE REVIEW OFFICER