



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-044

**Application of the BOARD OF EDUCATION OF THE
HARBORFIELDS CENTRAL SCHOOL DISTRICT for
review of a determination of a hearing officer relating to the
provision of educational services to a student with a disability**

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Pamela Anne Tucker, PC, attorney for respondents, Pamela Anne Tucker, 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 Bay Ridge Preparatory School (Bay Ridge) for the 2008-09 school year. The appeal must be dismissed.

During the 2008-09 school year, the student attended Bay Ridge (Dist. Ex. 1 at p. 4; Parent Ex. RR). Bay Ridge has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The merits of the district's appeal need not be discussed because, as discussed more fully below, the district has not properly initiated the appeal.

An appeal 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 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).

Exceptions to the general rule requiring personal service of the petition include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a], 279.1[a];¹ Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission may be obtained from a State Review Officer for an alternate method of service (8 NYCRR 275.8[a], 279.1[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).

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 served by mail upon 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 (8 NYCRR 279.2[b], [c]).² 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; and 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.*). All pleadings shall be verified (8 NYCRR 279.7). Service of all pleadings subsequent to a petition shall be made by mail, by private express delivery service, or by personal service (8 NYCRR 275.8[b], 279.5, 279.6, 279.11).

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

¹ As applied to State-level reviews conducted pursuant to Part 279 of State regulations, "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department" (8 NYCRR 279.1[a]).

² 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).

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 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 26, 2010 (IHO Decision at p. 36). The hearing record does not reflect whether the impartial hearing officer's decision was served by mail. The district's petition was served upon the parents on May 7, 2010 (Dist. Aff. of Service). Regardless of whether the impartial hearing officer's decision was mailed, the district did not timely serve the petition upon the parents as required by State regulations. Even assuming that the impartial hearing officer's decision was served by regular mail and the district is entitled to the presumptive additional "date of mailing and four subsequent days thereto" exclusion in calculating the time for service of a petition, the petition should have been served by Wednesday, May 5, 2010. The district does not assert any excuse or good cause in its petition for the late service, therefore there is no basis upon which to excuse the delay (see 8 NYCRR 279.13).^{3, 4} The district is represented by counsel who appears before State Review Officers and who has represented districts in prior appeals involving challenges to the timeliness of service of petitions (see, e.g., 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 Bd. of Educ., Appeal No. 97-29). Thus, based upon the district's failure to properly initiate the appeal and the absence of good cause for the untimeliness, I will exercise my discretion and dismiss the petition 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. Sept. 25, 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 15, 2006] [upholding dismissal of a late petition where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition that was served one day late]; 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.

³ Although the petition states that the parties received the impartial hearing officer's decision on April 5, 2010, State regulations mandate that the time for serving a petition is calculated from the date of the impartial hearing officer's decision, not the date of receipt of that decision (8 NYCRR 279.2[b], [c]; see 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).

⁴ The untimely receipt of an impartial hearing officer's decision has been held, in certain circumstances, to amount to good cause when alleged as an excuse for the untimely service of a petition (see Application of a Child with a Disability, Appeal No. 04-060; Application of a Child with a Disability, Appeal No. 04-051).

Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 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] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

In addition, the hearing record reflects that the petition was not personally served upon the parents (see 8 NYCRR 279.2[c]). The district's affidavit of service indicates that it mailed the petition by overnight carrier to the attorney who represented the parents in the impartial hearing below (Dist. Aff. of Service). The hearing record does not contain and the parties do not allege that there was an agreed upon waiver of personal service of the petition, any need to effectuate alternate service upon the parents, or that the district sought permission from a State Review Officer for service by means other than personal service (Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 09-075). Under the circumstances of this case, I will also dismiss the petition for failure to comply with the personal service requirements of Parts 275 and 279 of State regulations without a determination of the merits (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 09-094; Application of the Dep't of Educ., Appeal No. 09-075; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 4, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**