

BEFORE THE IMPARTIAL STATE REVIEW OFFICER

STATE OF NEVADA

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STUDENT,<sup>1</sup> by and through his  
Grandparent,

Petitioner-Appellant,

v

Lyn Beekman  
State Review Officer

CLARK COUNTY SCHOOL DISTRICT,

Respondent-Appellee.

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Gregory Ivie, Esq.  
Attorney for Petitioner-Appellant

Phoebe V. Redmond, Esq.  
Attorney for Respondent-Appellee

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**DECISION**

**BACKGROUND AND FACTS**

On July 21, 2010, Gretchen Greiner, the Hearing Officer below, rendered a Decision (SRO-1) in the above matter.<sup>2</sup>

What transpired thereafter is not in dispute and can be succinctly described as follows:

1. On July 21, 2010, Hearing Officer Greiner sent a copy of her Decision as an attachment to an email message to counsel for both parties requesting acknowledgement of its receipt (SRO-8A, 9A).

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<sup>1</sup> Personally identifiable information is attached as Appendix A to the Decision of this State Review Officer (SRO).

<sup>2</sup> The record on appeal includes 9 exhibits of this SRO (a list of which is attached to this Decision) referred to as "SRO-\_\_."

2. By an email dated July 22, 2010, Petitioner's counsel Ivie acknowledged receipt of the Decision (SRO-8C, 9C).

3. On August 17, 2010, Petitioner's counsel Ivie intended to send a letter by fax appealing the Decision to Dr. Rheault, Superintendent of the Nevada Department of Education, but the fax number used was wrong (SRO-9D).

4. Upon learning of the mistake (SRO-9E, 9F), he resent the letter appealing the Decision to the Department on August 23, 2010. The Department's date stamp reflects it was received on Monday, August 23, 2010 (SRO-2, 9G).

On August 25, 2010, the Nevada Superintendent of Public Instruction appointed this State Review Officer (SRO-3). Thereafter, a telephone conference call was held with counsel and, among other things, this SRO raised the question as to whether there was any issue relating to the timeliness of the filing of the subject appeal, noting he did not know when the Decision was received by counsel. Given its jurisdictional importance, a schedule was agreed upon for the filing of any motion and, if so, the filing of a response (SRO-7).

On September 3, 2010, the District filed a Motion to Dismiss for Lack of Jurisdiction (SRO-8), and thereafter on September 9, 2010, the Petitioner filed a response entitled Opposition to Respondent's Motion to Dismiss (SRO-9).

#### ISSUE

The issue presented by the pending Motion to Dismiss is whether the Petitioner's appeal was filed on a timely basis pursuant to the provisions of NAC 388.315.

#### CONCLUSIONS OF LAW

Under the Individuals with Disabilities Education Act (IDEA) and its regulations, a parent has the right to an impartial due process hearing on any matter relating to the

identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child (34 CFR 300.507(a)(1)). This right to hearing is reaffirmed in the Nevada State Board of Education regulations at NAC 388.308, resulting in the decision of a hearing officer (NAC 388.315 (NAC 388.310)). With regard to a decision stemming from a hearing, a state under IDEA has the option of providing for an appeal to the state educational agency (SEA) (34 CFR 300.514(b)). The SEA here, the Nevada State Board of Education, has chosen to implement this option by promulgating a regulation which reads in pertinent part:

A party may appeal from the Decision of a Hearing Officer made pursuant to NAC 388.310 within 30 days after receiving the Decision...  
NAC 388.315

The District in its Motion to Dismiss for Lack of Jurisdiction contends that the appeal here, having been received by the Department on August 23, 2010, 32 days after it was received by the Petitioner on July 22, 2010, is untimely (SRO-8). The 30<sup>th</sup> day after the Decision was received by the Petitioner was on Saturday, August 21, 2010. By way of response, the Petitioner cites and relies upon Rule 6 of the Nevada Civil Rules of Procedure, which reads:

(a) Computation:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included, unless it is a Saturday, a Sunday, or a nonjudicial day, .... in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, or nonjudicial days shall be excluded in the computation except for those proceedings filed under Titles 12 or 13 of the Nevada Revised Statutes.

The Petitioner submits that the method of computing any time period under Rule 6 is "indicative of standard custom used in all jurisdictions on this issue" (SRO-9). Therefore, she argues, given the 30<sup>th</sup> day fell on a Saturday, the filing on the next Monday is timely.

The State Board of Education's regulations implementing the hearing and appeal to the SEA under IDEA fail to contain any provision regarding the computation of any prescribed period of time. Further, neither counsel has provided any authority that directly addresses how periods of time under these specific regulations should be computed. Nor has this SRO as a result of his own research found any such authority. Accordingly, the issue as to how periods of time are computed under the State Board of Education's regulations regarding hearings and appeals to an SRO appears to be a question of first impression.

The Petitioner's contention that Rule 6 of the Nevada Rules of Civil Procedure should be used as the basis for computing such time periods under these regulations is rejected for two reasons. First, the rule, while noting that it shall be used in computing any period of time prescribed or allowed by, among other things, its rules and applicable statutes does not mention regulations.

Second, there are generally two approaches to computing periods of time relating to legal proceedings. One is to describe the period of time in calendar days, and then in computing the period if the last day is a Saturday, Sunday, or day when the agency administering the legal proceeding is not open, having the period run until the end of the next day when the agency is open. Such is the approach utilized in the Nevada Rules of Civil Procedure and many other agencies.

The other approach is to define different types of days and express the prescribed period of time for taking an action in terms of particular types of days. This latter approach is the one taken under IDEA, which defines a "day," a "business day," and a "school day" (34 CFR 300.11). Periods of time for taking various prescribed actions are then expressed in such terms. For example, disclosures of information must be provided at least five "business days" prior to a

hearing (34 CFR 300.512(b)), a settlement offer to possibly limit an award of attorney fees must be made more than 10 “days” before the hearing (34 CFR 300.515(c)(2)(i)(A)), and expedited hearings relating to disciplinary matters must be held within 20 “school days” and decisions rendered within 10 “school days” thereafter (34 CFR 300.532(c)(2)).

The State Board of Education in its regulations pertaining to special education matters, including these hearings and appeals, has adopted this latter approach. At NAC 388.34 it defines “day” as meaning calendar day. At NAC 388.265 “school day” is defined as used in that section. And, finally, at NAC 388.310, “business day” is defined as used in that section. All of these definitions use wording parallel to that in the IDEA regulation noted above.

Given the State Board of Education and its regulations utilized the same approach as in IDEA and its regulations, namely expressing periods of time to take various actions in terms of different types of days, rather than establishing all time periods in terms of just calendar days, it is not appropriate to use the computation method set forth in Rule 6 of the Nevada Rules of Civil Procedure.

Sometimes the statutes, regulations, or rules setting forth the periods of time in which some actions must be taken allow for exceptions under certain circumstances, such as here where it appears a simple, honest but critical mistake was made with regard to a fax number. But, NAC 388.315 provides for no such exceptions. Accordingly, this SRO has no authority to consider the circumstances that underlie the reason for the appeal being filed on the 32<sup>nd</sup> day after the Decision was received.

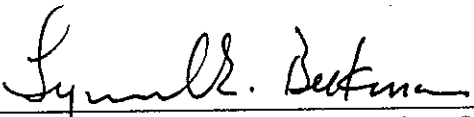
For those reasons set forth above, it is concluded that the appeal in this matter received by the Nevada Department of Education on August 23, 2010, some 32 days after the Petitioner

received the Decision, is untimely under NAC 388.315. Thus, this State Review Officer lacks jurisdiction to hear this appeal.

**ORDER**

It is hereby ordered that the District's Motion to Dismiss for Lack of Jurisdiction be granted and the appeal is hereby dismissed.

Dated: September 12, 2010

  
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Lynwood E. Beekman, State Review Officer

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**BEFORE THE IMPARTIAL STATE REVIEW OFFICER**

**STATE OF NEVADA**

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In the Matter of:

, by and through  
his Grandparent,

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CLARK COUNTY SCHOOL DISTRICT,

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**STATE REVIEW OFFICER EXHIBIT LIST**

The following is a list of those documents that were admitted into the record in this matter as part of the state review process:

1. Hearing Officer Decision dated July 21, 2010.
2. Fax message dated August 23, 2010, to Nevada Department of Education from Gregory Ivie (Petitioner's counsel), with attached Memo dated August 23, 2010, to Dr. Rheault (NDOE) from Ivie and letter dated August 17, 2010, to Rheault from Ivie requesting an appeal.
3. Letter dated August 25, 2010, to Beekman (SRO) from Rheault.
4. Letter dated August 25, 2010, to Ivie from Rheault.
5. Letter dated August 25, 2010, to Rulffes (District) from Rheault.
6. Email dated August 27, 2010, to Ivie and Redmond (District) from Beekman.
7. Email dated September 3, 2010, to Ivie and Redmond from Beekman.
8. Email dated September 3, 2010, to Beekman from Redmond, with attached Motion to Dismiss for Lack of Jurisdiction dated September 3, 2010, with the following attachments:

- A. Email dated July 21, 2010, to Ivie and Redmond from Greiner (HO).
- B. Email dated July 21, 2010, to Greiner from Redmond.
- C. Email dated July 22, 2010, to Greiner from Ivie.
- D. Letter dated August 25, 2010, to Rulffes from Rheault.

9. Opposition to Respondent's Motion to Dismiss dated September 9, 2010, with the following attachments:

- A. Email dated July 21, 2010, to Ivie from Greiner.
- B. Email dated July 21, 2010, to Greiner from Redmond.
- C. Email dated July 22, 2010, to Greiner from Ivie.
- D. Fax message dated August 17, 2010, to Rheault from Ivie, with attached Fax Call Report and letter dated August 17, 2010, to Rheault from Ivie.
- E. Email dated September 1, 2010, to Ivie from Rhu and email dated August 23, 2010, to Fitzpatrick from Rhu.
- F. Fax message dated August 23, 2010, to Rheault from Ivie.
- G. Fax Call Report dated August 23, 2010.
- H. Letter dated August 25, 2010, to Ivie from Rheault.