

**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

APPLICATION OF VIRGIN ISLANDS

Docket No. 00-60-R

DEPARTMENT OF EDUCATION,

Recovery of Funds Proceeding

ACN: 02-95-01000

Applicant.

**INITIAL DECISION**

This is a proceeding initiated by the Virgin Islands Department of Education (VIDE) to contest a preliminary departmental decision issued by the Assistant Secretary for Special Education and Rehabilitative Services (Assistant Secretary) to recover \$169,196 of funds expended under Part B of the Individual with Disabilities Education Act. The Assistant Secretary moves for a dismissal of this proceeding asserting that VIDE did not file its appeal within the period prescribed by 20 U.S.C. § 1234a(b)(1) (2000) and 34 C.F.R. § 81.37 (2000). VIDE opposes the motion.

In the instant case, the Assistant Secretary issued a preliminary departmental decision to VIDE on September 26, 2000. It was sent by Federal Express to the Honorable Ruby Simmonds, Commissioner of VIDE, 44-46 Kongens Gade, St. Thomas, Virgin Islands. Federal Express did not deliver the preliminary departmental decision to VIDE's headquarters at Kongens Gade. Instead, pursuant to instructions outstanding for approximately one and one half years by VIDE, Federal Express delivered the preliminary departmental decision to VIDE's outlying office in Estate Annas Retreat. This office was located some five miles from the main office on Kongren Gade. The preliminary departmental decision was delivered to the outlying office on September 28, 2000, and was accepted and signed for by a clerk in that office. Thereafter, the preliminary departmental decision was forwarded to VIDE's main office at 44-46 Kongrens Gade and was received by that office on October 2, 2000. Subsequently, VIDE filed an application for review with the Office of Administrative Law Judges on November 30, 2000.

Whenever the Secretary determines that a recipient of a grant must return funds because the recipient has made an expenditure of funds that is otherwise not allowable under that grant, the Secretary shall give the recipient written notice of a preliminary departmental decision and notify the recipient of its right to have that decision reviewed by the Office of Administrative Law Judges. 20 U.S.C. § 1234a(a)(1). This notice must be sent "by certified mail, return receipt requested, or other means that ensure proof of receipt." 34 C.F.R. § 81.34(a). Under 20 U.S.C. § 1234a(b)(1), an application for review of a preliminary departmental decision by a recipient "shall [be] submit[ted] to the Office [of Administrative Law Judges] . . . no later than 60 days after receipt of notice of the preliminary departmental decision." Accord 34 C.F.R. § 81.37(b).

The Assistant Secretary argues that the 60-day period to file an application for review commences with the written acknowledgement of receipt of the preliminary departmental decision by the clerk in VIDE's outlying office on September 28, 2000. As such, the period to file an application for review expired on November 28, 2000. Since the appeal was filed on November 30, 2000, it was two days late and, therefore, untimely.<sup>[1]</sup> VIDE urges that the appeal period commences when the preliminary departmental decision was received on October 2, 2000, at 44-46 Kongens Gade, the address to which the decision was sent. It argues that Federal Express delivered the preliminary departmental decision to the separate, outlying office in error and that, it was accepted in error by the clerk. Under this view, VIDE had until Saturday, December 2, 2000, to file its appeal and, therefore, because this is a weekend day when the Office of Administrative Law Judges is closed, the last date of filing moves to Monday, December 4, 2000. cf. 34 C.F.R. §

81.12(d)(2). Since the appeal was filed on November 30, 2000, it was filed within the period prescribed by 20 U.S.C. § 1234a(b)(1).

Initially, the event which commences the appeal period under Section 1234a(b)(1) and 34 C.F.R. § 81.34(a) is the initial, written acknowledgement of receipt of the preliminary departmental decision by the addressee organization, not its delivery to the individual designated as the addressee. In re Commonwealth of Puerto Rico Dept. of Education, Dkt. No. 89-2-R, U.S. Dept. of Education (ALJ Dec. Sept. 1, 1989) (signed receipt by mail room attendant begins the appeal period rather than receipt by the addressee, the Secretary of Education). Here, the preliminary departmental decision was sent to VIDE's main office at 44-46 Kongens Gade but delivered, instead, to its outlying office located in Estate Annas Retreat. While VIDE claims that Federal Express made an error in its delivery, the Assistant Secretary provided evidence that VIDE's officials had previously requested Federal Express to reroute shipments addressed to the main office to its outlying office in Estate Annas Retreat. Thus, Federal Express did not err in its delivery. It was simply following the prior directive of VIDE. In this context, the delivery of the preliminary departmental decision to VIDE's office in Estate Annas Retreat constituted the delivery of the preliminary departmental decision to the addressee organization and the clerk's signature acknowledging receipt of the Federal Express envelope on September 28, 2000, satisfied the requisite proof of delivery required by Section 1234a(b)(1) and 34 C.F.R. § 81.34(a). As such, the application to review period commenced on September 29, 2000, and expired 60 days later on November 28, 2000. VIDE's application for review was not filed within this period and, therefore, its application was not timely.

### CONCLUSION

Based upon the submissions of the parties, the record, and for the reasons stated, supra, it is concluded that the appeal of the preliminary departmental decision by the Virgin Islands Department of Education was not filed within the period prescribed by 20 U.S.C. § 1234a(b)(1). Accordingly, the prior determination of jurisdiction of January 5, 2001 is reversed and the appeal is dismissed with prejudice.

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Allan C. Lewis  
Chief Administrative Law Judge

Issued: May 11, 2001  
Washington, D.C

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### SERVICE

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On May 11, 2001, the initial decision was forwarded by Department mail to the Honorable Rod Paige, Secretary of Education, U.S. Department of Education.

In addition, a copy of the initial decision was sent on the same day by certified mail, return receipt requested to the following:

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[\[1\]](#) In its brief, the Assistant Secretary believes the last day to appeal the preliminary departmental decision was Monday, November 27, 2000, and, therefore, the appeal was untimely by three days. The Assistant Secretary errs in counting the day of receipt as the first day of the appeal when the period begins, in fact, the next day. Hence, the appeal period terminated on November 28, 2000.