

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T.F. and F.F., individually : CIVIL ACTION  
and on behalf of their son, T.F.:  
 :  
v. :  
 :  
NORTH PENN SCHOOL DISTRICT : NO. 98-6645

MEMORANDUM ORDER

Presently before the court is defendant's Motion for Extension of Time for Filing Appeal which plaintiffs have opposed.

Defendant seeks to appeal an award of attorney fees to plaintiffs under the Individuals with Disabilities Education Act ("IDEA") made by a judgment order entered on August 18, 1999 following a non-jury trial. Defendant filed a notice of appeal by mail. It was received on September 20, 1999, three days after the thirty day deadline.

In the motion, defense counsel states that the notice of appeal was mailed from Doylestown on September 15, 1999 and that mail from Doylestown is received at the courthouse in Philadelphia in "normally one day, but no later than two days." He suggests that the effects of Hurricane Floyd may have delayed delivery of the notice or that the Clerk may have received it on September 17th but "not stamped it in" until after the ensuing weekend. Counsel contends he has shown "good cause" for granting an extension.

The motion was not supported by any affidavit. The court entered an order giving defendant an opportunity to submit by November 9, 1999 affidavits from persons with appropriate knowledge to substantiate the time, manner and place of the mailing of the belated notice. Defendant has now done so. From the affidavits submitted, it appears that the envelope addressed to the Clerk containing the notice of appeal was placed by a law firm employee in a mail box outside a Doylestown post office shortly after 5:00 p.m. on September 15, 1999. Assuming the mail from that box was retrieved and processed the following morning, counsel allowed one day for delivery of the notice to the Clerk of Court.

Plaintiffs correctly note that defendant also failed to submit any memorandum setting forth the legal basis and supporting authority for the motion as required by L. R. Civ. P. 7.1(c). While this can be fatal to a motion and the court certainly does not condone it, the court will not deny defendant's motion on that basis.

Plaintiffs suggest that this is part of an effort by defendant to delay the recoupment of sums expended by the plaintiff parents to deter similarly situated persons of limited means from pursuing claims against the District. It is, however, the reason for the delay and not for the appeal that is

paramount. See Consolidated Freightways v. Larson, 827 F.2d 916, 919 (3d Cir. 1987), cert. denied, 484 U.S. 1032 (1988).

Plaintiffs correctly note that the potential effects in the region of Hurricane Floyd were predicted and widely publicized well in advance. Plaintiffs contend with some force that prudent counsel would have accelerated and not delayed any mailing in such circumstances. In a sworn certification accompanying plaintiffs' opposition, their counsel avers that he was told during the week of August 23rd by defense counsel that payment would not be forthcoming as defendant intended to appeal. It thus appears that defense counsel deferred filing a notice of appeal for at least nineteen days after the decision to appeal and then relied on the mail despite forecasts regarding the hurricane. See Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996) ("the unincarcerated litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period").

Moreover, plaintiff's counsel avers that although his office is also in Doylestown, he did not receive his copy of the notice of appeal until September 20, 1999 and that his office, which is serviced by the same post office as defense counsel's, experienced no delay in mail delivery during the period of Hurricane Floyd. This suggests that the hurricane was not a

factor and that even within Doylestown, one must allow more than one day to ensure mail delivery.

The Clerk advises that filings mailed from Doylestown are normally received two days later, although sometimes three days later. The Clerk advises that the date of receipt is stamped on every filing including the approximate five percent which are not actually docketed until the next business day.

As defendant has requested an extension after the notice of appeal was due, it may not be granted for "good cause" but only under the more stringent "excusable neglect" standard. See Thompson, 76 F.3d at 532-33; Bartunek v. Bubak, 941 F.2d 726. 728 (8th cir. 1991); Parke-Chapley Construction Co. v. Cherrington, 865 F.2d 907, 909-10 (7th Cir. 1989); Consolidated Freightways, 827 F.2d at 918 n.3.

An extension for excusable neglect may be granted when an untimely notice of appeal was "mailed at such a time and in such a manner that, under normal circumstances, the district court would have received [it] in a timely fashion." Ramseur v. Beyer, 921 F.2d 504, 507 (3d Cir. 1990). The court in Ramseur found excusable neglect where the notice of appeal had been mailed from a location five miles from the courthouse six days before the deadline. See also Zipperer v. School Bd. of Seminole County, Fla., 111 F.3d 847, 850 (11th Cir. 1997) (finding filing of notice of appeal from denial of attorney fee award under IDEA one day late resulted from excusable neglect where notice was

mailed six days before deadline and normal mail delivery required three days).

Prudent counsel would not have waited until after 5:00 p.m. on September 15th to deposit the notice of appeal in a mailbox. The court cannot conscientiously conclude that counsel mailed the notice at a time and in a manner which would ordinarily ensure its timely receipt by the Clerk. Nevertheless, the court will take counsel at his word that he believed that the notice would be delivered on September 17th and that such belief was not entirely unreasonable in view of his representation regarding mail deliveries on prior occasions. In such circumstances, the court concludes that the relatively brief delay did not result from any bad faith but occurred despite a substantially diligent effort by counsel to comply with the rules, and that an extension for excusable neglect is appropriate. See Ramseur, 921 F.2d at 506.

Accordingly, this                    day of November, 1999, upon consideration of defendant's Motion for Extension of Time and plaintiffs' response thereto, IT IS HEREBY ORDERED that said Motion is GRANTED in that defendant shall have until November 19, 1999 to file a proper notice of appeal herein.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**