CPLR 308:2
practice commentaries

The tender of process directly to the defendant qualifies as personal delivery if the act is "unconditional and clear." *Matter of*

L. Bongsteel, 1962, 16 A.D.2d 324, 326, 228 N.Y.S.2d 301, 304 (3d Dep't). Assuming the papers are visible to the defendant, the process server need not say anything as the papers are tendered. Id. (As discussed below, however, an announcement must be made if the defendant "resists" service.) Enclosure in an envelope is ill-advised because it will complicate plaintiff's burden of proving that the defendant was "apprised of the fact 'that service [was] intended to be made.' " Id. If process is contained in an envelope, the process server should announce that service is being made and that the envelope contains a summons. See *Bertha G. v. Paul T.*, 1986, 133 Misc.2d 1122, 509 N.Y.S.2d 995 (Fam.Ct.Kings Co.). Cf. *Charnin v. Cogan*, 1998, 250 A.D.2d 513, 673 N.Y.S.2d 134 (1st Dep't) (under CPLR 308(2), delivery component satisfied where process server told recipient that envelope contained summons and complaint). An older case described the enclosure of process in an envelope as "contrary to the proper and regular method of service" but upheld a silent tender because the defendant immediately opened the envelope and saw that it contained a summons and complaint. *Jackson v. Schuylkill Silk Mills*, 1915, 92 Misc. 442, 446, 156 N.Y.S. 219, 222 (Sup.Ct.App.T.).

C

Family Court, Kings County, New York.
In the Matter of BERTHA G., Petitioner,
v.
PAUL T., Respondent.

Dec. 6, 1986.

On respondent's objection to validity of service of process, the Family Court, County of Kings, Richard M. Palmer, J., held that service of summons enclosed in plain envelope handed to respondent at graduation exercise was invalid where respondent rejected envelope without looking inside and server failed to notify respondent that rejected envelope contained summons.

Objection sustained.

West Headnotes

[1] Process 313 64

313 Process
313II Service
313II(A) Personal Service in General
313k64 k. Mode and Sufficiency of Service. Most Cited Cases

Although there is no general rule requiring process server to announce that he is making service when he does so, if person to be served evades or rejects service, process server cannot leave in silence but must announce his action.

[2] Process 313 153

313 Process
313III Defects, Objections, and Amendment
313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Service of summons enclosed in plain envelope and handed to respondent at graduation exercise was invalid, where respondent rejected envelope without looking inside and server failed to notify respondent that rejected envelope contained summons.

****995 *1122** Bertha G., pro se.

Winstone A. Maynard, New York City, for respondent.

RICHARD M. PALMER, Judge.

The Court has held a traverse hearing. Petitioner did not have an attorney and was not entitled to one at public expense under FCA § 262. Both parties testified.

****996** There was only a minor dispute as to the facts.

On June 24th at a graduation exercise at Great Neck Road Elementary School, Bernice T. handed the summons and petition to respondent. They were in a plain envelope addressed to him. Petitioner was present. According to her, respondent dropped the envelope on a table he was standing by. According to him, he handed the envelope back to Bernice. No one said he looked inside the envelope. Bernice is the 18 ***1123** year old daughter of petitioner. Respondent explained his rejection of the envelope by saying that he thought it had to do with an incident involving his stepdaughter with which he did not want to be bothered. Respondent's attorney contends that for service to be valid, the process server must announce what he is doing or otherwise advise the person to be served of what is being handed to him.

The issue of law presented is whether service of a summons and petition enclosed in a plain envelope is good service if the respondent rejects it without looking inside the envelope and the process server omits to notify the respondent that the rejected envelope contains a summons.

After research the court has been unable to find any case in point.

The following cases are helpful in indicating the answer.

Jackson v. Schuylkill Silk Mills, 92 Misc. 442, 156 N.Y.S. 219 (App. Term 1st Dept.1915). The issue was whether the City Court should have vacated service in New York on a general sales manager of a Pennsylvania corporation. After rejecting the main arguments of the defendant, the court dealt with the last one as follows:

> The fact that the summons, when delivered to Roach, was enclosed in an envelope, contrary to the proper and regular method of service, does not invalidate the service, because immediately upon its receipt Roach examined the envelope and found therein copies of the summons and complaint. Supra, p. 446, 156 N.Y.S. 219.

The implication is that service in an envelope is not proper and that it would not have been upheld if Roach had rejected it without looking inside.

Matter of Bonesteel, 16 A.D.2d 324, 228 N.Y.S.2d 301 (3rd Dept.1962). Here the court invalidated service on an 83 year old occupant of a nursing home after a detailed examination of the facts. The citation was left in an envelope and the process server did tell the respondent that he had a citation for her but his statement of what he was doing and would do was found to be equivocal and misleading. The facts are different from the present facts but what the Appellate Division wrote bears noting:

> The bare delivery of the process without explanation is enough; but when such a delivery is either so physically masked as to be misleading or the process server by some act or statement suggests that the process is being left for someone else, the service may well be so equivocal as to be incomplete.

***1124** *Heller v. Levinson,* 166 App.Div. 673, 152 N.Y.S. 35 (1st Dept.1915) The plaintiff appealed from an order on defendant's motion to set aside a default judgment. The process server had told the defendant that he had “a little paper” for him. Defendant started to walk away and, as he did so, the process server put the summons and complaint in defendant's outside pocket. Special term held service had been ineffectual because the process server did not disclose the nature of the papers or that service of process was intended. The Appellate Division reversed and reinstated the judgment. It held that it was not to be presumed that after the papers had been placed in defendant's pocket, he subsequently failed to ascertain their contents. In the present case there is no claim that the respondent learned the contents of the envelope.

Bulkley v. Bulkley, 6 Abb.Pr. 307 (S.Ct. 7th Dist.1858) A husband said goodbye to his wife on board a vessel at dock shortly before she was to sail on a long voyage to California. His process server, not identified as such, handed her a package which the husband described as a present. In **997 fact, it contained a summons and complaint for divorce. When the wife opened it she was out to sea. Months later when the wife returned from California, the court held her default should be set aside. This case is still cited occasionally. If the petitioner in the present case had served the summons and petition in an envelope to mislead the husband, then the service would clearly be no good. There is no evidence she had any fraudulent intent here; she might have put the papers in an envelope to avoid the possibility that respondent would not have taken an obvious summons into his hand. However, her motive might just as easily have been to try to avoid exposing his and her personal litigation at a public gathering.

Bossuk v. Steinberg, 58 N.Y.2d 916, 460 N.Y.S.2d 509, 447 N.E.2d 56 (1983). Here the process server identified himself as such and announced his purpose to the persons being served. They refused to open the door so the process server said he was leaving the papers on the stoop for

them and did so. The service was held good. The Court of Appeals ruled that if the person to be served takes evasive action he need not actually receive the papers provided that he is made aware that service of process is being made.

See also *Anderson v. Abeel,* 96 App.Div. 370, 89 N.Y.S. 254 (1st Dept.1904) for a similar opinion.

There was a time when service of process was a symbolic arrest as under a capias ad respondendum. In earlier days it might have been argued that the service here was good, even ***1125** though respondent was not given notice, because the process server had succeeded in handing him the papers. But the emphasis of the law now is on the giving of notice and an opportunity to be heard rather than on form. Cf. *Roth v. W.T. Cowan, Inc.,* 97 F.Supp. 675 (E.D.N.Y.1951).

[1] These and other authorities have persuaded the court that, while there is no general rule which requires that a process server announce that he is making service when he does so, it is required that, if the respondent evades or rejects the service, the process server cannot leave in silence but must announce his action.

Siegel, Handbook on New York Practice (1978) p. 68 is in accord.

[2] The petitioner and her daughter did not see that notice was given in the present case when they attempted service on June 24th. Therefore the objection by respondent should be sustained and the service should be set aside.

The court is not approving the evasive action of the respondent; it is expressing its opinion of what the governing law is and applying it to a close case.

The petitioner may believe that she did nothing wrong by using an envelope, especially since there was nothing in the instructions from the clerk's office that said she could not. However, her judgment in letting respondent reject the process without warning him of the consequences was questionable.

N.Y.Fam.Ct.,1986.
Bertha G. v. Paul T.
133 Misc.2d 1122, 509 N.Y.S.2d 995

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Not Reported in F.Supp., 1991 WL 22320 (N.D.N.Y.)
(Cite as: 1991 WL 22320 (N.D.N.Y.))

United States District Court, N.D. New York.
BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT, Petitioner,
v.
Thomas SOBOL, Commissioner of Education, and Robert and Cheryl Kantak, Respondents.

No. 90–CV–198.
Feb. 19, 1991.

O'Hara, O'Connell, Hrabchak & Gebo, P.C., Syracuse, N.Y. (Matthew J. Roe, of counsel), for petitioner.

Office of Counsel, New York State Education Department, Albany, N.Y. (Lizette A. Cantres, Counsel, Kathy A. Ahearn, Assistant Counsel), for respondent Sobol Education Building.

Legal Services of Central New York, Inc., Syracuse, N.Y. (Edward Luban, of counsel), for respondents Kantaks.

MEMORANDUM–DECISION AND ORDER
MUNSON, Senior District Judge.

***1** Presently before the court is respondent Sobol's motion to dismiss the petition against him for failure to properly execute service of process and for failure to commence this action within the four month statute of limitations. Also before the court is respondents Robert and Cheryl Kantak's motion to dismiss the petition against them as moot. Oral argument on the latter motion was heard on February 8, 1991, in Syracuse, New York. For the reasons stated below, this case is dismissed in its entirety.

I. *Background*

This action is intertwined with a variety of prior administrative and judicial proceedings centering around the Individualized Education Program ("IEP") for Cynthia Kantak, a multiply handicapped seventeen-year old currently enrolled at Liverpool High School. The Committee on Special Education ("CSE") of the Liverpool School District devised an IEP for Cynthia to commence in September 1988, through which she would be placed in an Option II special class for handicapped students. On October 4 of that year she was removed from the class for alleged behavior problems. The CSE adopted a revised IEP for Cynthia on October 28, 1988 which called for individualized instruction rather than participation in the Option II class. Cynthia's parents, Robert and Cheryl Kantak, objected to the revision and requested an impartial hearing to be held in accordance with 20 U.S.C. § 1415(b)(2). The hearing officer rendered a decision on April 14, 1989 calling for Cynthia's participation in the Option II class with a variety of related services, including a full-time teacher of the deaf for all instructional periods. The School Board appealed the hearing officer's decision to the New York State Education Department under 20 U.S.C. § 1415(c), whereupon Commissioner Sobol affirmed the independent hearing officer's decision in a ruling dated September 15, 1989.

The School Board moved to reopen its appeal of the hearing officer's decision before the Commissioner,[FN1] but in the interim complied in part with the decision by returning Cynthia to the Option II class. The School Board did not, however, supply the services of a teacher of the deaf. That omission led to the first of two lawsuits coming before this court. Robert and Cheryl Kantak filed an action seeking a preliminary injunction against the School Board and the Superintendent of Schools to enforce the hearing officer's decision that a full-time teacher of the deaf be provided for Cynthia during all instructional periods. The second lawsuit was filed by the School Board in state court, seeking an Article 78 review of the Commissioner's affirmance of the hearing officer's

ruling on the grounds that the affirmance was not supported by substantial evidence and that it was an arbitrary and capricious abuse of discretion. The petition, naming the Commissioner and the Kantaks as respondents, was allegedly served on respondents on January 22, 1990. It was removed to this court on February 20.

On March 29, 1990, the court issued a preliminary injunction in the first suit, ordering the school district to provide Cynthia with a full-time teacher of the deaf during all instructional periods in compliance with the hearing officer's and the Commissioner's rulings. The school district complied in April 1990. In July, as a result of the annual CSE review of Cynthia's IEP, a new IEP was agreed on whereby Cynthia would be provided a teacher of the deaf at all times. The new IEP thus extends beyond the court's preliminary injunction enforcing the hearing officer's decision that the school district must provide Cynthia with a teacher of the deaf during all instructional periods. The new IEP has been in effect since September 1990.

***2** There is a great deal of confusion surrounding the two lawsuits and the motions presently before this court. The first case, civil action number 90–CV–4, where plaintiffs Robert and Cheryl Kantak were successful on the preliminary injunction motion, is distinct from the instant case, civil action number 90–CV–198, where petitioner School Board is challenging the Commissioner's affirmance of the hearing officer's decision. The motions presently before the court are properly brought only in the context of the latter case. No consideration of the controversy numbered 90–CV–4 shall occur here. The proper procedure for disposing of that action requires that motions be brought in the context of that action.

II. *The Motions*

Respondent Sobol's motion to dismiss, taken on submission, asserts that service of the petition was inadequate and that the four month statute of limitations expired before the defect in service was corrected. In support of its motion, respondent Sobol recites the following facts. Petitioner received the Commissioner's affirmance of the hearing officer's decision on September 21, 1989. On January 22, 1990, the last possible day within the statute of limitations to appeal, a woman appeared at the Education Department and urged the security guard to let her in to deliver a package despite the fact that it was 8:30 p.m. After explaining that no office was open to the public at that hour and that he would have to accompany her, the security guard walked with the woman to a conference room used for general Education Department business. The conference room was not connected to the Commissioner's office nor to the office of his legal counsel. Entering the empty room, the woman deposited a sealed manilla envelop on an unoccuppied desk and left. The security guard stated that they encountered no one and that he did not sign anything indicating receipt of the woman's package. Several days later he was informed that it contained legal documents and was alleged to have been served upon the Commissioner. When respondent Sobol filed this motion to dismiss in state court on February 7, 1990, petitioner had not successfully remedied the defective service. Indeed, then-counsel for petitioner Susan Johns admitted in an affidavit that process was not personally served on respondent Sobol by close of business on January 22 and that no copies of the papers were mailed to respondent Sobol's home or place of business. Although the petition was telefaxed to the Federal Education Legislation Office on January 23, respondent Sobol points out that this is neither his office nor the office of his legal counsel. Hence, respondent Sobol argues that the court has no personal jurisdiction over him in this lawsuit. Further, as the four month statute of limitations for Article 78 proceedings expired on January 22, the service defect cannot now be cured and the petition must be dismissed.

Petitioner counters with a wholly unsupported assertion that “service was made on counsel for the Commissioner on or before the expiration of the statute of limitations.” Apparently this is an attempt

to incorporate an argument raised in the Susan Johns affidavit that the Commissioner's decision was not final until he denied petitioner's application to reopen on February 28, 1990, inferring that the statute of limitations did not expire until June 29, 1990 and service was perfected before that date. Petitioner then enters a convoluted discussion of how the Commissioner is an essential party to this litigation even if service was not perfected, and how the court has the authority under Civil Practice Laws and Rules ("CPLR") § 1003 to name the Commissioner as a necessary party thus preserving this suit.

***3** Respondent Sobol rejects both arguments as meritless. An appeal to reopen administrative review does not toll the statute of limitations in an Article 78 proceeding, he argues, because it is a discretionary remedy not extended to all parties and thus does not affect the finality of the previously rendered decision. The statute of limitations began to run on September 21, 1989, the date petitioner received the final determination, and expired on January 22, 1990 without service ever being made on respondent Sobol. Moreover, respondent Sobol contends that the statute of limitations cannot be circumvented as petitioner is attempting here by using the necessary party theory of CPLR § 1003.

Respondents Robert and Cheryl Kantak also move to dismiss the instant petition. Their motion is based on the new IEP implemented for Cynthia in September 1990. The fact that the School Board and the Kantaks agree that this IEP provides what Cynthia needs makes any controversy involving the old IEP moot, according to respondents. Absent a case or controversy, this court has no jurisdiction and the petition must be dismissed. Petitioner contends that this is a controversy capable of repetition yet evading review and, as such, falls within the exception to the mootness rule. Petitioner seems to be claiming that under 20 U.S.C. § 1415(e)(3) Commissioner Sobol did not have the authority to implement the hearing officer's decision while petitioner's appeal of that decision was pending. The argument is not clearly stated, and oral argument did nothing to clarify petitioner's position.

III. *Discussion*

CPLR § 308 sets forth the acceptable methods of personal service on a natural person:

> 1. by delivering the summons within the state to the person to be served; or
>
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" ...; or
>
> 3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318....

Service of process must conform to the requirements listed in the relevant subsection of CPLR § 308 in order to confer personal jurisdiction over a defendant, regardless of whether the defendant actually receives the documents by some other means. *Raschel v. Rish*, 69 N.Y.2d 694, 697, 504 N.E.2d 389, 390, 512 N.Y.S.2d 22, 24 (1986); *see also Velez v. Smith*, 149 A.D.2d 753, 754, 540 N.Y.S.2d 339, 339 (2d Dep't 1989) ("[n]otice by unauthorized means does not confer personal jurisdiction"). When alternative methods of service are available, proper service by any one method is sufficient to confer jurisdiction. *Reilly v. Scaringe*, 133 A.D.2d 900, 901, 520 N.Y.S.2d 874, 875, *appeal denied*, 70 N.Y.2d 609, 516 N.E.2d 1222, 522 N.Y.S.2d 109 (1987).

***4** There is some flexibility in the actual delivery of service under the subsections of CPLR § 308. For example, in *Bossuk v. Steinberg*, 58

N.Y.2d 916, 918, 447 N.E.2d 56, 57, 460 N.Y.S.2d 509, 510 (1983), the Court of Appeals ruled that leaving process on the stoop outside the dwelling of the person to be served after announcing his purpose, being refused entry by a person of suitable age and discretion, and stating that he was depositing the papers on the stoop was good service under subsection (2) because the person inside was aware that delivery was taking place. *See also Francis S. Denney, Inc. v. I.S. Laboratories, Inc.*, 737 F.Supp. 247, 248 n. 1 (S.D.N.Y.1990) (service by leaving an order to show cause outside the door of the person to be served was proper under subsection (1) when that person slammed the door and knowingly refused to open it to accept service). Nevertheless, there are limits to the flexibility. In ***Bertha G. v. Paul T.*, 133 Misc. 2d 1122, 1125, 509 N.Y.S. 2d 995, 997 (Fam.Ct. 1986)**, the court held that handing a plain, unmarked envelop to the person to be served was not proper service under subsection (1) when the person rejected the envelop without looking at the contents or being informed of the contents by the server.

The attempted service in the case at bar is more egregious than any case this court was able to uncover. Depositing a nondescript manilla envelop on an unoccuppied desk in an empty conference room cannot possibly be labeled proper service under any subsection of CPLR § 308, especially when the server failed to announce the purpose of her venture to the only person she encountered in the building that night. Not by any stretch of the imagination can petitioner's attempted service be classified as “reasonably calculated, under the circumstances, to apprise [respondent Sobol] of the pendency of the action” so as to meet the basic due process requirement that proper service was intended to fulfill. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). Therefore, the court concludes that service was not perfected on respondent Sobol on January 22, 1990, and accordingly the petition must be dismissed against him.

Whether this action is characterized as an Article 78 review or a review pursuant to 20 U.S.C. § 1415(e)(2), a four month statute of limitations applies. CPLR § 217; *Adler v. Education Department of the State of New York*, 760 F.2d 454, 456–60 (2d Cir.1985). It begins to run on the date the petitioner knows it is aggrieved by a final and binding administrative decision. *106 Mile Transport Associates v. Koch*, 656 F.Supp. 1474, 1485 (S.D.N.Y.1987) (citing *Martin v. Ronan*, 44 N.Y.2d 374, 382, 376 N.E.2d 1316, 1320, 405 N.Y.S.2d 671, 675, *reh'g denied*, 45 N.Y.2d 776, 380 N.E.2d 350, 408 N.Y.S.2d 1027 (1978)). Contrary to petitioner's contention, a motion to reopen an administrative proceeding before the administrative decision-maker does not extend or toll this four-month statute of limitations. *Filut v. New York State Education Department*, 91 A.D.2d 722, 722, 457 N.Y.S.2d 643, 645 (3d Dep't 1982), *appeal denied*, 58 N.Y.2d 609, 449 N.E.2d 426, 462 N.Y.S.2d 1026 (1983); *Walsh v. Superintendent of Highways of Town of Poestenkill*, 135 A.D.2d 968, 522 N.Y.S.2d 698 (3d Dep't 1987) . The statutory period in the case at bar commenced on September 21, 1989, the date petitioner received respondent Sobol's final determination affirming the hearing officer's decision, and expired on January 22, 1990. No service on respondent Sobol occurred within that period and thus the petition as it relates to respondent Sobol is barred from further pursuit by the statute of limitations.

***5** Petitioner's attempt to circumvent the statute of limitations problem by asserting the necessary party argument will not save this action. It is true that respondent Sobol is a necessary party within the meaning of CPLR § 1001(a), as the sole purpose stated in the petition is to review his decision affirming the hearing officer's findings, but courts in New York do not permit necessary joinder to be used as a device to assert a time-barred claim. *Tabolt v. KMZ Enterprises, Inc.*, 52 A.D.2d 995, 995, 383 N.Y.S.2d 452, 453 (3d Dep't 1976), *aff'd*, 43 N.Y.2d 687, 371 N.E.2d 827, 401 N.Y.S.2d 65 (1977); *cf. Allied Chemical v. Niagara*

Mohawk Power Corp., 129 A.D.2d 233, 517 N.Y.S.2d 635 (4th Dep't 1987) (court refused to exercise discretion to convert plenary action to Article 78 action "because an Article 78 proceeding, to which [the administrative decision-maker] must be made a party, would be time-barred as to the [administrative decision-maker]"). This court refuses to exercise the discretion provided for under CPLR § 1003 to join respondent Sobol as a necessary party in this action. To do so at this late juncture would be to ignore the sound policies embodied by the service of process requirements and statute of limitations. Accordingly, the court's analysis must continue without respondent Sobol as a party.

When service of process has not occurred or has been improperly carried out, and the unserved or improperly served party is a necessary party, the entire proceeding must be dismissed. *City of New York v. Long Island Airports Limousine Service Corp.,* 48 N.Y.2d 469, 475, 399 N.E.2d 538, 541, 423 N.Y.S.2d 651, 654 (1979); *Sahler v. Callahan,* 92 A.D.2d 976, 460 N.Y.S.2d 643 (3d Dep't 1983). Applying this principle to the case at bar, the action numbered 90–CV–198 must be dismissed in its entirety. The petition to review respondent Sobol's affirmance of the hearing officer's decision cannot proceed without respondent Sobol, who was not properly served with the petition and cannot now be served because the statute of limitations has expired. Although process was timely served on respondents Robert and Cheryl Kantak, petitioner names no basis upon which it can proceed against the Kantaks in the context of this petition for review of respondent Sobol's administrative decision. Therefore, the court grants respondent Sobol's motion to dismiss and directs the clerk of the court to dismiss this action in its entirety. In view of the court's holding, there is no need to address respondents Robert and Cheryl Kantak's motion to dismiss.

It is So Ordered.

FN1. The motion to reopen proceedings was denied on February 28, 1990.

N.D.N.Y.,1991.
Board of Educ. of Liverpool Cent. School Dist. v. Sobol
Not Reported in F.Supp., 1991 WL 22320 (N.D.N.Y.)

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