



No. 96-83

The University of the State of New York
The State Education Department
State Review Officer

**Application of a CHILD WITH A DISABILITY, by his parent,
for review of a determination of a hearing officer relating to the
provision of educational services by the Board of Education of
the City School District of the City of New York**

Appearances:

Neal H. Rosenberg, Esq., attorney for petitioner

Hon. Paul A. Crotty, Corporation Counsel, attorney for respondent, Jennifer Causing, Esq.,
of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which held that the pendency provisions of Federal and State Law (20 USC 1415 [e][3][A]; Section 4404 [4] of the Education Law) did not require respondent to pay for the tuition of petitioner's son in a private school during the 1996-97 school year, notwithstanding the fact that respondent had been ordered in a prior proceeding to reimburse petitioner for the cost of the boy's tuition in that private school for the 1994-95 and 1995-96 school years. The appeal must be dismissed.

At the outset, I note that there is an extremely limited record in this appeal, apparently by the design of the parties. Petitioner's son, who is ten years old, has been classified as learning disabled. His classification is not in dispute. He is reportedly a resident of respondent's Community School District No. 15. The hearing officer in a prior proceeding found that respondent did not have an educational placement available for petitioner's son during the 1994-95 and 1995-96 school years. Petitioner enrolled his son in the Mary McDowell Center for Learning which is a private school in New York City which has not been approved by the State Education Department as a school for children with disabilities.

A board of education may not contract with an unapproved school for the education of a child with a disability (Section 4402 [2][b][2] of the Education Law). However, a board of

education may be required to pay for educational services obtained for a child by the child's parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]; Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 [1993]).

On November 17, 1995, a hearing was held at petitioner's request for the purpose of determining whether petitioner was entitled to be reimbursed by respondent for the cost of the child's tuition in the Mary McDowell Center for Learning during the 1994-95 and 1995-96 school years. Neither the committee on special education (CSE) of Community School District No. 15 nor any other representative of respondent appeared at the hearing. Petitioner, who was present and was represented by counsel presented evidence to establish the appropriateness of the services which the Mary McDowell Center for Learning had provided to his son during the school years in question. Although the CSE had reportedly recommended that the child be educated in a regular education class with supplemental instruction in a resource room and speech/language therapy during the 1995-96 school year, representatives of the child's private school reportedly testified at the hearing that the boy required a more intensive level of instructional services to address the deficits in his language processing skills.

In his decision, which was dated December 26, 1995, the hearing officer in the prior proceeding found that petitioner had demonstrated his entitlement to reimbursement by respondent for the cost of the child's tuition for both school years. He ordered respondent to pay petitioner the sum of \$33,550. Respondent did not seek review of the hearing officer's decision and order, which became binding upon it.

On June 11, 1996, the CSE of Community School District No. 15 recommended that for the 1996-97 school year, petitioner's son be educated primarily in a regular education program, except for supplemental instruction in a resource room program once per day, and speech/language therapy in a group of no more than three children twice per week. The child was reportedly offered a placement in P.S. 58, the public school which he would ordinarily have attended because he lives in the school's attendance zone.

On June 20, 1996, petitioner requested that an impartial hearing be held to review the appropriateness of the CSE's recommendation. A hearing was scheduled to be held on July 5, 1996. However, it was adjourned at petitioner's request, until September 17, 1996. In his written decision granting the adjournment, the hearing officer indicated that petitioner's attorney had requested the adjournment because certain witnesses who were employed by the Mary McDowell Center for Learning were unavailable to testify during the summer, and that a CSE representative had represented to him that the CSE did not oppose the adjournment.

Petitioner and his attorney appeared before a new hearing officer on September 17, 1996. The assistant chairperson of Community School District No. 15's CSE participated by telephone

in the hearing. The parties' representatives informed the hearing officer that they were not prepared to go forward with the case, and they asked her to grant yet another adjournment of the hearing. They also requested that the hearing officer initially address the pendency issue, based upon a record consisting of the other hearing officer's decision with regard to the 1994-95 and 1995-96 school years, and a copy of the individualized education program (IEP) which the CSE prepared for the boy for the 1996-97 school year. The parties apparently also agreed that their respective attorneys would provide memoranda of law to the hearing officer, by no later than October 1, 1996. The hearing officer then indefinitely adjourned the hearing with regard to the IEP for the 1996-97 school year, but she retained jurisdiction over the proceeding.

In her decision, which was dated October 30, 1996, the hearing officer noted that the facts were not in dispute. She referred to the memoranda of law (which are not part of the record which is before me), and to a memorandum dated January, 1994 by the Counsel to the State Education Department (which is also not part of the record before me). The hearing officer held that reimbursement could be awarded pursuant to the Burlington and Carter decisions only after an administrative or judicial determination that the parent had satisfied the three Burlington criteria with respect to the "current" school year. She also held that petitioner had satisfied the second of the three Burlington criteria, i.e., that the services which the child would receive in the Mary McDowell Center for Learning during the 1996-97 school year were appropriate, even though no evidence of the school's program or services for that school year was in the record before her. Instead, the hearing officer determined that the finding with regard to the private school's services, which the hearing officer had made in the prior proceeding was res judicata against respondent in this proceeding.¹ However, she found that there was no basis in the record for her to determine whether respondent had met its burden of proof with respect to the first Burlington criterion, i.e., whether it had offered an appropriate educational placement to the child for the 1996-97 school year. The hearing officer rejected petitioner's contention that the pendency provisions of the Individuals with Disabilities Education Act and the New York State Education Law compelled respondent to pay for the child's tuition in the Mary McDowell Center for Learning.

Petitioner asserts that the hearing officer misconstrued the pendency provisions of Federal and State law. The Federal statute, in material part, provides that:

"Except as provided in subparagraph (B) during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial

¹Since the issue of the appropriateness of the private school's educational services was not relevant to a determination of the issue which was before her, i.e., whether the private school was the child's pendency placement, I find that the hearing officer's finding was dictum, which I will not review in this appeal.

admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed." (20 USC 1415 [e] [3] [A])

The State counterpart reads as follows:

During the pendency of any proceedings conducted pursuant to this section and during the initial identification, evaluation and placement procedure pursuant to this section and during the initial identification, evaluation and placement procedure pursuant to section forty-four hundred two of this article, unless the local school district and the parents or persons in parental relationship otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a school, shall be placed in the public school program until all proceedings have been completed.

Petitioner contends that the hearing officer erroneously distinguished between placement and tuition reimbursement. He argues that the Mary McDowell Center for Learning became his child's pendency placement when respondent failed to seek review of the December 26, 1995 hearing officer's decision in the prior proceeding. It should be noted that the private school was not the child's pendency placement when petitioner commenced the prior proceeding. Respondent argues that the hearing officer in the prior proceeding ordered it to reimburse petitioner for the cost of the child's tuition during the 1994-95 and 1995-96 school years, but the hearing officer did not order that the child be placed in the private school. It contends that the Mary McDowell Center for Learning did not become the child's pendency placement as a result of the hearing officer's decision in the prior proceeding.

The pendency provisions of Federal and State law operate as an automatic preliminary injunction (Zvi D. v. Ambach, 694 F.2d 404 [2d Cir., 1982]). They are intended to provide stability and consistency in the education of a child with a disability (Honig v. Doe, 484 U.S. 305 [1987]). A child's pendency placement is his or her "then current educational placement." As used in both statutes, the term "then current educational placement" means the child's last mutually agreed upon placement at the moment when a due process proceeding is commenced. In order to satisfy the pendency requirement, a board of education must provide each of the required components of the child's last mutually agreed upon IEP (Application of a Child with a Disability, Appeal No. 95-5). Implicit in the maintenance of the status quo under the pendency provisions is the requirement that the school district continue to finance an educational placement which it made, and the parent agreed to, prior to the parent's request for a hearing.

The record which is before me does not reveal whether there has ever been any mutually agreed upon IEP for petitioner's son. This proceeding began on or about June 20, 1996, when petitioner requested that a hearing be held to review the boy's proposed IEP for the 1996-97 school year. When petitioner requested the hearing, respondent was obligated to pay for the boy's tuition at the private school. The hearing officer's decision which awarded petitioner the remedy

of tuition reimbursement for the 1994-95 and 1995-96 school years did not expressly, or impliedly, address the issues of the child's educational program and placement for the 1996-97 school year, or respondent's financial responsibility for paying for the child's private school tuition during that school year.

Respondent relies upon the decision in Zvi D. v. Ambach, *supra*, in which the Court indicated that a board of education was not required to pay for a parent-initiated placement because of the pendency provision of Federal statute. The Board of Education contends that since the hearing officer in the prior proceeding did not order it to place the child in the Mary McDowell Learning Center, the child's placement there during the 1996-97 school year is simply a parent-initiated placement for which it is not financially responsible.

Petitioner relies upon the decision in Susquenita School District v. Raelle S., 96 F 3d 78 (3d Cir., 1996), in which the Court held that although a parent who rejects a proposed IEP bears the initial expenses of a unilateral placement, the school district becomes responsible for paying for the child's education in the private school when there is an administrative or judicial decision vindicating the parent's position. In doing so, the Court relied in part upon an observation by the U.S. Supreme Court in the Burlington decision that a State-level review panel's decision in favor of the parents appeared to constitute the State's agreement to a change in the child's placement for purposes of the pendency provision.

In Zvi D., the Court of Appeals ruled that neither a stipulation by which a board of education and the child's parent agreed to postpone a child's evaluation and to have the board of education pay for the child's tuition in a private school for part of a school year, nor an impartial hearing officer's decision which ordered the board of education to pay the child's tuition for all of the next school year because the CSE was invalidly composed, constituted a public placement of the child in the private school. The Court noted that the CSE had never determined that the private school was appropriate. Similarly, the CSE in this case has never determined that the Mary McDowell Center for Learning was appropriate for the child, and respondent did not agree to pay for the child's tuition in that school. Under the circumstances, I find that the pendency provisions of Federal and State law do not require respondent to pay for the child's tuition in the Mary McDowell Center for Learning during the pendency of this proceeding to review the CSE's recommendation for the 1996-97 school year.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 4, 1997


ROBERT G. BENTLEY