



**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 Mount Sinai Union Free School District**

**Appearances:**

Simonson, Hess and Leibowitz, P.C., attorney for petitioner, Dorothy A. Wendel, Esq., of  
counsel

Kevin A. Seaman, Esq., attorney for respondent

**DECISION**

Petitioner appeals from an interim order<sup>1</sup> by an impartial hearing officer which determined that the "pendency placement"<sup>2</sup> of petitioner's son as of October 17, 1996 was the placement which was indicated in the boy's individualized education program (IEP) for the 1994-95 school year. The appeal must be dismissed.

Petitioner's son, who is sixteen years old, has been classified as other health impaired (see 8 NYCRR 200.1 [mm][10]). He reportedly has a neurological impairment which is manifested at least in part by deficits in his language and organizational skills, and difficulty remaining on task. The boy's classification is not in dispute in this proceeding.

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<sup>1</sup> Although the hearing officer's Interim Order No. One addressed other issues in addition to the child's pendency placement, only that issue is reviewed in this appeal because it involves the child's placement.

<sup>2</sup> Federal and State statutes provide that during the pendency of a proceeding to review a school district's evaluation, classification, or provision of special education services to a child with a disability, the child shall remain in the then current educational placement, unless the school district and the child's parents otherwise agree to an alternative placement (20 USC 1415 [e][3][A]; Section 4404 [4] of the Education Law).

This proceeding began on or about February 21, 1995, when the boy's parents requested that an impartial hearing be held to determine their claim that respondent had not accommodated their son's attention deficit disorder, in violation of Federal and State laws pertaining to the education of children with disabilities and Section 504 of the Rehabilitation Act of 1993 (28 USC 794). The hearing in this proceeding did not begin until July 11, 1995. The hearing continued on July 27 and 18, 1995. On July 28, 1995, the hearing officer recused himself from the hearing, on the ground that there was at least a perception that he had exhibited a bias in conducting the hearing.

On October 11, 1995, the hearing resumed before another hearing officer, whose interim order is the subject of this appeal. The brief transcript of the hearing which was held on October 11 reveals that the parties agreed to adjourn the hearing to discuss a possible settlement of the proceeding. When the hearing resumed on October 20, 1995, the hearing officer, with the consent of the parties, indicated that the parents and the school district had agreed to prepare an IEP for the child to be implemented during the remainder of the 1995-96 school year. The attorneys for the parties and the hearing officer discussed various provisions of the proposed IEP, and agreed to continue their discussion when the hearing resumed on October 24, 1995.

On October 24, 1995, the parties' attorneys and the hearing officer extensively discussed the proposed IEP. They agreed that respondent's Assistant Superintendent of Schools, Dr. Anthony Bonasera, would prepare a written version of the IEP which would reflect the discussions which had been held on October 11 and October 24, 1995. The parties' tentative agreement about the contents of the boy's IEP occurred within the context of a proposed agreement to settle a number of issues which had been in dispute by the parties. The hearing transcript reveals that the board of education offered to reimburse the child's parents for the cost of two private evaluations of their son, and to pay for the child's tutoring during the summer of 1996. The hearing officer then stated that:

" The third major item will be that the plan will be implemented a week from next Monday, which is November 6th. All of this stipulation, including the IEP, the monetary settlement and the dates for implementing the plan is subject to the express approval of the Board of Education." (Transcript, page 199)

Petitioner's attorney asserted that portions of the proposed IEP for the 1995-96 school year were covered by the child's IEP for the 1994-95 school year, and were therefore already subject to the pendency provisions of Federal and State law. However, she did not dispute the hearing officer's additional description of the parties' agreement:

" So the deal is subject to the board approving this stipulation as has been spread upon the record, it's further my understanding the parties have agreed that on or about January 15, 1996 the IEP will be executed subject to the district having

substantially complied with the components of the IEP that has been spread upon the record. And that upon substantial compliance by the district with this IEP, that new IEP will become Robert's pendency placement for the '95-96 academic year." (Transcript, page 200)

The hearing officer also indicated that the parties had agreed that the school district and its employees would be released from all claims by the child's parents of alleged violations of the Federal Individuals with Disabilities Education Act (20 USC 1400 et seq) and Section 504 of the Rehabilitation Act of 1973, when the IEP was signed by the parents on or about January 15, 1996. The hearing officer also indicated that he had agreed to retain jurisdiction, at the parties' request, in the event a disagreement arose about the district's substantial compliance with the parties' agreement.

The proposed IEP was not signed by the parents, because of a dispute about the manner in which respondent had allegedly provided educational services to the child under the proposed IEP. On April 25, 1996, the hearing resumed before the same hearing officer. Petitioner's attorney requested that the hearing officer consider evidence of respondent's alleged violation of the agreement. The attorney indicated that she would also apply to the hearing officer for an interim decision with respect to the boy's placement during the pendency of this proceeding. Respondent's attorney asserted that the child's pendency placement would revert to the placement provided for in the child's 1994-95 IEP. Petitioner's attorney asserted that respondent should be estopped by its alleged non-compliance with the October, 1995 agreement from challenging petitioner's request that the child continue to receive educational services in accordance with the proposed IEP for the 1995-96 school year. Respondent's attorney indicated that respondent would continue to provide services to the child under the proposed IEP for the remainder of the school year, in an effort to preserve the October, 1995 agreement. The parties stipulated that the child would continue to receive services for the remainder of the 1995-96 school year under the proposed IEP. They also agreed that the hearing would resume in August, 1996.

The hearing reconvened on August 5, 1996, but it was quickly adjourned to afford the parties an opportunity to settle the matter. On August 12, 1996, a stipulation between the parties was read into the hearing record. The stipulation included various provisions relating to the child's IEP for the 1996-97 school year, the services which were to be provided to the child, and the financial compensation to be paid to the child's parents. The parties indicated in the stipulation that the proposed IEP for the 1996-97 school year would be presented to respondent's committee on special education (CSE), on the first or second day of school in September, 1996. It should be noted that the CSE is the multidisciplinary team which is responsible for preparing a child's IEP under Federal and State regulations (34 CFR 300.344-346; 8 NYCRR 200.4 [c][2]). The parties also agreed that:

"This stipulation shall have no precedential effect or value and may not be asserted or relied upon in any other action, matter or proceeding." (Transcript, page 297)

In addition the parties agreed that:

"The IEP created by this Stipulation shall be incorporated but not merge into this Stipulation such that the Parents will retain the right to enforce this IEP under the Individuals with Disabilities Education Act, §504 of the Rehabilitation Act of 1973 and Article 89 of the New York State Education Law in a proceeding separate and apart from the enforcement of this Stipulation." (Draft Stipulation, paragraph 23, as discussed at page 299 of the transcript)

It was also agreed that the stipulation was subject to being ratified by the Board of Education of the Mount Sinai Union Free School District (Transcript, page 299). The parties also agreed to a second stipulation regarding the services to be provided to the child during at least the next two school years. However, that stipulation is not directly relevant to the issues in this appeal. Once again, the hearing officer agreed to retain jurisdiction, in the event any "further deliberations" were required.

The parties appeared with their attorneys before the hearing officer on October 7, 1996. Petitioner's attorney asserted that respondent and/or its agents had acted in bad faith by rejecting the stipulations which had been discussed at the hearing which was held on August 12, 1996. She asked the hearing officer to issue subpoenas for various witnesses to testify about respondent's refusal to ratify the stipulations. However, the hearing officer denied the attorney's request for subpoenas. With respect to petitioner's request that the hearing officer order respondent to provide educational services to the child pursuant to the proposed IEP for the 1996-97 school year as the child's pendency placement, the hearing officer reserved his decision, and invited the parties' attorneys to submit written argument to him.

In his Interim Order No. One, which was dated October 17, 1996, the hearing officer rejected petitioner's contention that the IEP which had been prepared pursuant to the parties' agreement of October 24, 1995, and which had been implemented during much of the 1995-96 school year, was the child's pendency placement during the 1996-97 school year. He noted that the October 24, 1995 agreement was conditional upon the child's parents being satisfied with respondent's provision of services to the boy pursuant to the stipulation, and that the parents had been dissatisfied with the manner in which services were provided to their son. Since the condition upon which the proposed IEP was to have become the child's pendency IEP had not occurred, the hearing officer held that the parents could not rely upon the October 24, 1995 agreement as proof of the child's pendency placement.

With regard to the IEP which was prepared in accordance with the August 12, 1996 stipulation, the hearing officer framed the issue as whether the parents had made a sufficient showing to go forward with a hearing on the issue of respondent's alleged bad faith in rejecting that stipulation. He found that the parents had not offered an adequate basis to proceed to a hearing on that issue, and denied their request for an interim order requiring respondent to provide services in accordance with the August 12, 1996 stipulation, or finding that the IEP which had been prepared pursuant to that stipulation was the child's pendency placement.

Respondent opposes petitioner's appeal from the hearing officer's interim order on the ground that the State Review Officer allegedly lacks the authority to review an interim order. Section 4404 (2) of the Education Law provides, in part, that:

" A state review officer of the education department shall review and may modify, in such cases and to the extent that the review officer deems necessary, in order to properly effectuate the purposes of this article, any determination of the impartial hearing officer relating to the determination of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program and require such board to comply with the provisions of such modifications."

I find that the words "any determination" in the statute are broad enough to include a hearing officer's interim order, provided that the order is directly related to a child's educational program or services. In this instance, the hearing officer's interim order clearly related to the child's educational program or services. Therefore, I find that respondent's contention that I lack jurisdiction to review the interim order is without merit.

Respondent asserts that a meeting was to be held on December 6, 1996 to establish the terms under which the boy's educational program for the 1996-97 school year would be implemented. Implicit in respondent's assertion is the suggestion that the parties might resolve their dispute with respect to the child's educational program during the pendency of this proceeding. However, neither party has notified me that their dispute regarding the child's pendency placement has been resolved.

Federal and State statutes define a child's pendency placement as the child's "then current educational placement" (20 USC 1415 [e][3][A]; Section 4404 [4] of the Education Law). A child's then current educational placement is the child's last mutually agreed upon placement when a due process proceeding is commenced. The United States Office of Education has opined that a child's current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (EHLR 211:481). In this instance, the child's most recent IEP when his parents initiated this proceeding in February, 1995 was his IEP for the 1994-95 school year.

In the hearing request, petitioner's attorney alluded to a CSE meeting held on November 1, 1994. At that meeting, the CSE denied petitioner's request for tutoring for her child. The IEP which was then in effect (Exhibit 15) provided that the child was to be enrolled in regular education ninth grade classes, with five periods of resource room services per week, and counseling once per week. Therefore, respondent was required to provide the special education and related services which were indicated in that IEP during the pendency of this proceeding, unless the parents and the school district agreed to an alternative placement (Zvi D. v. Ambach, 694 F. 2d 904 [2d Cir., 1982]; Drinker v. Colonial School District, 888 F. 3d 859 [3d Cir., 1996]; Gregory K. v. Longview School District, 811 F. 2d 1307 [9th Cir., 1987]). It should be noted that a child need not remain at a particular grade level during a pendency placement (Application of a Child with a Disability, Appeal No. 96-64).

Petitioner asserts that the parties reached an agreement at the hearing in October, 1995 to create a new IEP for the child to be used during the 1995-96 school year. The new IEP included provisions for after school speech/language tutoring and individual therapy, the use of specialized equipment, extended time limits for completing written tests and assignments, and access to written class notes prepared by others. It also provided that petitioner's son would receive resource room services and counseling, while participating in tenth grade regular education courses. The IEP also included the following notation:

" This temporary IEP will be put into effect on November 6, 1995 on a conditional basis until mid-January. In mid-January, Dr. Lewis Wasserman, Impartial Hearing Officer, will determine if substantial compliance with this temporary IEP is occurring. If the (sic) determines it is both parties will sign the IEP and it will be made official at the January 30 CSE meeting. If it is determined that substantial compliance is not taking place, the parties will proceed with an impartial hearing."

Petitioner acknowledges that the new IEP was conditional. The condition upon which the IEP would become permanent was respondent's substantial compliance with the IEP. Although petitioner asserts that respondent did not comply with the terms of the conditional IEP, she nevertheless contends that the conditional IEP should become the child's pendency placement. The parties did not appear before the hearing officer in mid-January, 1995 to determine whether respondent had substantially complied with the conditional IEP. Indeed, there is no evidence in the record that the hearing officer has ever determined whether respondent substantially complied with the IEP. However, there is no evidence that the conditional IEP was signed by the parties, reviewed by the CSE, or otherwise made final in accordance with the parties' agreement.

Parents and school districts should be encouraged to resolve their differences whenever possible. Agreements typically require the parties to modify their respective positions, make concessions, and perhaps assume new obligations. The conditional IEP at issue in this appeal was prepared as part of a settlement agreement. The agreement never

became final. In essence, petitioner asks that I require respondent to comply with a portion of the agreement, while petitioner is relieved of her obligation to comply with other portions of the failed agreement, such as dropping her claims against the district and its employees. I find that it would not be equitable to do so.

With regard to the second tentative agreement which was reached before the hearing officer on August 12, 1996, but which was not ratified by respondent, petitioner argues that respondent's approval was not required as a matter of law, because the parties were engaged in "mediation". Petitioner offers no legal support for her argument. Although it is true that the parties may be held to the stipulation which they made at an impartial hearing (Bruschini v. Bd. of Ed. Arlington CSD, 911 F. Supp. 104 [S.D. N.Y., 1995]), the hearing transcript reveals that the proposed agreement was to be sent to the board of education for review (page 325). The hearing officer referred to the board's review of the stipulation, and asked the boy's parents if they understand the terms of the stipulation (page 326). I find that the board's approval was necessary for the August 12, 1996 stipulation to be enforceable. Since the board of education did not approve the stipulation, I find that petitioner may not rely upon the stipulation to require respondent to provide the services which were discussed at the hearing on August 12, 1996.

**THE APPEAL IS DISMISSED.**

Dated: Albany, New York  
January 13, 1997

  
ANN R. ELDRIDGE