



No. 97-77

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

Application of the BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Donoghue, Thomas, Auslander and Drohan, Esqs., attorneys for petitioner, James Drohan, Esq., of counsel

RosaLee Charpentier, Esq., attorney for respondents

DECISION

Petitioner, the Board of Education of the Hyde Park Central School District, appeals from an interim order by an impartial hearing officer which determined that the "pendency placement" of respondents' son for purposes of this proceeding was the private school in which his parents had unilaterally enrolled him, because in a prior proceeding I had upheld an impartial hearing officer's award of tuition reimbursement to the parents for the 1995-96 school year, and thereafter the parties had entered into a stipulation to resolve the parents' claim for tuition reimbursement during both the 1995-96 and 1996-97 school years. The appeal must be dismissed.

In July, 1995, respondents unilaterally enrolled their son in the Kildonan School, which is a private school for learning disabled children located Amenia, New York. The Kildonan School has not been approved by the State Education Department as a school for children with disabilities. The boy had entered petitioner's schools for the second grade during the 1990-91 school year. He had previously attended school in the Red Hook Central School District, where he had been classified as learning disabled, and he had been provided with resource room services. While in petitioner's schools, the boy was enrolled in self-contained special education classes for the second through fifth grades. For the sixth grade, petitioner's committee on special education (CSE) had recommended that the boy be enrolled in a regular education class, with resource room and consultant teacher services.

After placing their son in the Kildonan School for the 1995-96 school year, respondents requested that an impartial hearing be held to obtain an award of tuition reimbursement. In a decision dated July 9, 1996, an impartial hearing officer granted respondents the relief which they sought. The board of education's appeal from the hearing officer's decision was dismissed on November 26, 1996. (Application of the Board of Education of the Hyde Park CSD, Appeal No. 96-59). In that decision, I found that the board of education had not met its burden of proving that the educational program which the CSE had recommended for the 1995-96 school year was appropriate for the boy, that his parents had met their burden of proving that the services which they had obtained for their son were appropriate, and that equitable considerations supported their claim for tuition reimbursement. Therefore, respondents were entitled to receive tuition reimbursement pursuant to the decisions of the U.S. Supreme Court in School Committee of the Town of Burlington v. Department of Education, Massachusetts, (471 U.S. 359 [1985]), and Florence County School District Four et al. v. Carter by Carter (570 U.S. 7 [1993]).

In January, 1997, respondents requested that an impartial hearing be held with regard to an individualized education program (IEP) which petitioner's CSE had prepared for their son's education during the 1996-97 school year. At a pre-hearing conference which was held on February 28, 1997, respondents' attorney indicated that she would seek a "status quo" (pendency) determination by the impartial hearing officer in that proceeding. The hearing was to begin on April 22, 1997. On that date the hearing officer read the terms of a settlement agreement or stipulation by the parties into the record, and the hearing was concluded. The board of education has submitted a copy of the settlement agreement (Exhibit B to its petition). Pursuant to the settlement agreement, the board of education agreed to pay respondents the sum of \$30,000, as partial reimbursement for the tuition which they had paid to the Kildonan School for the 1995-96 and 1996-97 school years, and to pay their attorney \$31,000 for attorney's fees "... in full satisfaction of any and all claims for prevailing parties' attorney's fees regarding all proceedings relating to the 1995-96 and 1996-97 school years under the Individuals with Disabilities Education Act and 42 U.S.C. §1988".

The parties also agreed that:

"The Hyde Park Central School District, its Committee on Special Education and said parents agree to make a diligent search for a private school on the State's approved list capable of meeting [the child's] special education needs, where he will be educated with students similar to himself".

On August 25, 1997, the CSE reportedly recommended that the student be placed in public high school self-contained special education classes, but be mainstreamed for elective courses. Respondents disagreed with the recommendation, and on August 13, 1997, they requested an impartial hearing. Prior to the commencement of an impartial hearing, respondents made a motion to the impartial hearing officer for "emergency relief to implement a status quo placement". Respondents alleged that their child's current educational placement for purposes of the pendency provisions of Federal law was at the Kildonan School, and they requested that an

interim order be issued directing petitioner to reimburse them for the cost of tuition at the Kildonan School until the impartial hearing officer rendered his final decision.

On September 26, 1997, the impartial hearing officer issued an interim order granting respondents' motion and ordering petitioner to pay for respondent's tuition at the Kildonan School pending the outcome of the final determination of the impartial hearing. Petitioner has appealed from that interim order.

Pursuant to Federal and State law, a child with a disability must be maintained in his or her current educational placement until any due process proceeding has been completed, unless the child's parents and the school district agree upon another placement. The Federal and State statutes read, in material part, as follows:

“Except as provided in subsection (k)(7), during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed” (20 USC 1415 [j]).

“During the pendency of any proceeding 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 public school, shall be placed in the public school program until all proceedings have been completed” (Section 4404 [4] of the Education Law).

Although the Federal statute was slightly amended and renumbered in 1997, it is substantially the same as its predecessor (the former 20 USC 1415 [c][3][A]). Its purpose is to provide stability and consistency in the education of a child with a disability (Honig v. Doe, 484 U.S. 305 [1987]). In its decision in School Committee of the Town of Burlington v. Department of Education, Massachusetts, supra, the Supreme Court indicated that one purpose of the pendency provision was to prevent school officials from removing a child from a regular education public school classroom over the parents' objection, pending completion of a due process proceeding to challenge the proposed removal of the child from that classroom. The child's parents are not precluded from changing their child's educational placement during the pendency of a due process proceeding, but the Court in Burlington indicated that the parents do so at their own financial risk.

The term “then current education placement” means the child's last mutually agreed upon placement at the moment when a due process proceeding is commenced. Implicit in the concept of

a pendency placement is the requirement that a school district must continue to finance an educational placement which it made, and to which the child's parents agreed, prior to the parents' request for a hearing. The U.S. Office of Education has opined that a child's then current placement would "... generally be taken to mean current special education and related services provided in accordance with a child's most recent individualized education program (IEP)" (EHLR 21:481), (see also Zvi D. v. Ambach, 694 F. 2d 904 [2d Cir., 1982]; Drinker v. Colonial School District, 78 F. 3d 859 [3d Cir., 1996]; Gregory K. v. Longview School District, 811 F. 2d 1307 [9th Cir., 1987]).

In this instance, the last mutually agreed upon IEP for the child was prepared for the 1994-95 school year. It provided for the child to be enrolled in a regular education class with the child receiving a resource room/consultant teacher in the class all day. The next IEP which was prepared for the child by the CSE was challenged by respondent in a proceeding which resulted in my decision in Application of the Board of Education of the Hyde Park Central School District, Appeal No. 96-59. Notwithstanding the fact that the last mutually agreed upon placement for petitioner's child was in a public school program, the question remains whether my decision in Application of the Board of Education of Hyde Park Central School District, Appeal No. 96-59, or petitioner's subsequent agreement to reimburse the parents for the cost of the boy's tuition during the 1995-96 and 1996-97 school years affords a basis for concluding that the child's pendency placement was in the Kildonan School on August 13, 1997, when this proceeding commenced.

In its Burlington decision, the Supreme Court briefly noted that the determination of a State-appointed hearing officer that the private school in which the parent had unilaterally placed his child "...would seem to constitute an agreement by the State to the change of placement" (471 U.S. 359, at 372). In Susquenita School District v. Raelle S., 96 F 3rd 78 (3rd Cir. 1996), the Court of Appeals held that a child's unilateral placement by her parents in a private school became her pendency placement, after a State-level review panel concluded that the parents were entitled to an award of tuition reimbursement. However, the U.S. Court of Appeals for the Second Circuit has held that there is a distinction between placing a child pursuant to the Federal statute, and paying for the child's placement (Zvi D. v. Ambach, supra). I must point out that the sole issue before me in petitioner's prior appeal was whether the parents were entitled to an award of tuition reimbursement. I did not determine that the child should have been placed by the Kildonan School pursuant to the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), or Article 89 of the New York State Education law, nor could I have directed the board of education to place the child in an unapproved private school (Antkowiak v. Ambach, 838 F 2d 635 [2d Cir. 1988]). Unlike the approved private school which was involved in the Burlington decision, placement of the child in the Kildonan School was never an option for the board of education (See Section 4402 [2] [a] of the Education Law). By definition, a free appropriate public education under the Individuals with Disabilities Education Act must meet the standards of the state educational agency (20 U.S.C. 1401 [a] [18] [B]). However, the Supreme Court has held that those standards do not apply to parental placements, for the purpose of awarding tuition reimbursement to parents for their unilateral placements (Florence County School District Four v. Carter by Carter supra), which illustrates the difference between placing a child under the Federal statute, and obtaining tuition reimbursement for a parental placement of the child under the Federal statute.

In Zvi D v. Ambach, supra, a board of education and the parent of a child with a disability had entered into a written agreement by which the parent dropped her request for a hearing to review the CSE's recommendation for the 1978-79 school year, and the board of education agreed to pay for the boy's private school tuition for that school year. The agreement explicitly provided that "a review of [the child's] classification will be conducted at the end of the current year with a view toward placing him in an appropriate public program in September, 1979." Thereafter, there was a due process proceeding regarding the CSE's recommendation for the 1979-80 school year, which was invalidated by a hearing officer because the CSE lacked one of its required members. The Court noted that the local CSE had never determined that the private school was an appropriate placement for the child, and that neither the written agreement nor the hearing officer's decision determined that the unilateral private school placement was appropriate. The Court held that the private school placement had not become the child's pendency placement. In two more recent U.S. District Court cases involving stipulations between parents and boards of education, the determinative issue was whether the stipulation, was explicitly limited to a specific school year or definite time period. Absent such specificity, the courts held that the placement which the board of education had agreed to pay for became the child's pendency placement (Evans v. Bd. of Ed. Rhinebeck CSD, 921 F. Supp. 1184 [S.D. N.Y., 1996]; Doe v. Independent School District No. 9 of Tulsa County, 938 F. Supp. 758 [N.D. Okla., 1996]). In the instant matter, the parties' stipulation was intended to settle their dispute with respect to the 1995-96 and 1996-97 school years. Their mutual agreement to diligently search for an approved private school for the boy was not limited to a particular period of time. Given the fact that the agreement was reached on April 24, 1997, when the 1996-97 school year was nearly over, it is unlikely that the agreement was intended to deal with solely the 1995-96 and 1996-97 school years. Under the circumstances, I find that pendency must attach to the boy's placement in the Kildonan School.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 17, 1997**


FRANK MUÑOZ