



The University of the State of New York

The State Education Department State Review Officer

No. 07-136

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Neal H. Rosenberg, Esq., attorney for petitioners

Michael Best, Esq., Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioners appeal pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education from an interim decision of an impartial hearing officer determining their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's recommended educational program for the student for the 2007-08 school year. Respondent cross-appeals from the hearing officer's determination that pendency began before petitioners commenced this proceeding. The appeal must be dismissed. The cross-appeal must be sustained.

At the time the impartial hearing began in November 2007, the student was attending a private school that the Commissioner of Education has not approved as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's prior educational history is discussed in petitioners' prior appeal, Application of a Child with a Disability, Appeal No. 07-075, and will not be repeated here in detail. The student's eligibility for special education services and classification as a student with an emotional disturbance are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

As relevant to this appeal, on December 7, 2006, the Committee on Special Education (CSE) convened and recommended a residential program as part of the student's individualized education program (IEP) for the student's final school year (Dist. Ex. 3). By due process

complaint notice dated December 8, 2006, petitioners requested an impartial hearing and sought tuition reimbursement for the student's unilateral placement for the 2006-07 school year (Application of a Child with a Disability, Appeal No. 07-075). An impartial hearing (Hearing 1) was conducted in January, March and April 2007 (*id.*). By decision dated May 29, 2007, an impartial hearing officer (Impartial Hearing Officer 1) determined that respondent failed to offer the student a free appropriate public education (FAPE), but petitioners did not meet their burden to establish that the student's unilateral placement was appropriate (*id.*). Therefore, Impartial Hearing Officer 1 did not award tuition reimbursement (*id.*).

A successful appeal ensued. By decision dated August 24, 2007 (Application of a Child with a Disability, Appeal No. 07-075), it was determined that respondent failed to offer the student a FAPE, that the unilateral private placement was appropriate and that equitable considerations did not preclude an award of tuition reimbursement (*id.*). Petitioners were awarded tuition reimbursement from December 21, 2006 until June 30, 2007 (*id.*).

Petitioners requested that respondent convene a CSE meeting by letter dated September 1, 2007 (Dist. Ex. 7). By due process complaint notice dated September 27, 2007, petitioners requested an impartial hearing, invoked pendency and sought reimbursement for tuition, room, board, transportation and related services for the continued placement of the student at the unilateral placement (Dist. Ex. 1). On November 6, 2007, a CSE meeting was held, at which time the CSE declassified the student (Dist. Ex. 8).

The impartial hearing (Hearing 2) commenced on November 14, 2007, and by decision dated November 21, 2007, the impartial hearing officer (Impartial Hearing Officer 2) found that the unilateral placement was the student's pendency program and ordered respondent to pay tuition, room, board and other costs associated with the student's attendance at the unilateral placement from August 24, 2007 until the conclusion of this administrative proceeding (IHO Decision at p. 5).

Petitioners appeal and assert that their right to be reimbursed under pendency for the student's unilateral placement began on July 1, 2007, the date that the 2007-08 school year began. Respondent cross-appeals and argues that petitioners' pendency claim did not begin until September 28, 2007, the date that it received petitioners' due process complaint notice.

The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the local agency or State otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). The pendency inquiry focuses on identifying the student's then current educational placement (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] *aff'd*, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). If, on appeal, a State Review Officer agrees with the student's parents that their desired placement is appropriate, as in Application of a Child with a Disability, Appeal No. 07-075, that

placement is treated as an agreement between the State and the parents for purposes of pendency (Murphy, 86 F. Supp. 2d at 359; 34 C.F.R. § 300.518[d]; 8 NYCRR 200.5[m]).

Turning first to respondent's cross-appeal, I agree with respondent's contention that petitioners' pendency claim did not begin until September 28, 2007, the date that it received petitioners' due process complaint notice. In order to invoke the pendency provisions of the IDEA, a due process proceeding must be pending. Since petitioners here did not commence this due process proceeding until September 28, 2007, the date that their due process complaint notice was filed with respondent, the impartial hearing officer erred by awarding petitioners pendency for the time period prior to the commencement of this proceeding.

Petitioners assert that pendency should have been retroactively awarded from July 1, 2007. I disagree. Unlike the parents in Mackey v. Bd. of Educ., 386 F.3d 158 (2d Cir. 2004), and Bd. of Educ. v. O'Shea, 353 F.Supp.2d 449 (S.D.N.Y. 2005), petitioners here do not allege that the administrative proceedings resolving their claims for the 2006-07 school year were untimely. Thus, I find that equitable considerations for a retroactive pendency award are not present in this case.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's interim decision dated November 21, 2007 is hereby modified to the extent that respondent is ordered to fund the student's unilateral placement and related costs beginning on September 28, 2007 instead of August 24, 2007.

Dated: **Albany, New York**
 February 14, 2007

PAUL F. KELLY
STATE REVIEW OFFICER