The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-104

Application of the [redacted] for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, G. Christopher Harriss, Esq., of counsel

Law Office of Anton Papakhin, attorneys for respondent, Anton Papakhin, Esq., and Arthur Block, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education from the interim decision of an impartial hearing officer, which determined that respondent's (the student's)[1] pendency placement during the due process proceeding challenging the appropriateness of the district's recommended educational program for the 2011-12 school year.[2] The impartial hearing officer found that the student's

[1] According to State regulations, either a "parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability" (8 NYCRR 200.5[i][1]; see 8 NYCRR 200.1[ii][1]-[4] [defining "parent" and identifying individuals who may act in that capacity]). At the impartial hearing, counsel for the student stated that the "student" had requested the impartial hearing and that she was 21 years old (Tr. pp. 3-4, 26; see Parent Ex. D at p. 1). Counsel is cautioned that State regulations defining and identifying who may act in the capacity of "parent" do not include a student with a disability who has reached the age of 21, and further, that New York State does not provide for the transfer of all rights previously granted to parents under the Individuals with Disabilities Education Act (IDEA) to students who reach the age of majority (see 8 NYCRR 200.1[ii][1]-[4]; 34 C.F.R. § 300.520; http://www.p12.nysed.gov/specialed/idea/nonregulatoryguidancememo.htm).

[2] Although captioned as a "Request for an Impartial Hearing, Disputed Issues, and Proposed Resolution, Academic Year: 2011-12," I note that at this juncture the hearing record does not contain a due process complaint notice that can be reasonably read to allege any challenges to 2011-12 school year, including whether

pendency placement was in a residential placement at an out-of-State, approved nonpublic school (NPS). The appeal must be sustained.

Background and Procedural History

Given the limited scope of this interlocutory appeal, the parties' familiarity with the facts of the case, and the lengthy recitation of the student's educational history in a recent State Review Officer decision involving the same student, it is not necessary to repeat the student's educational history in this decision (see Application of the Dept. of Educ., Appeal No. 10-115 [Jan. 24, 2011]; Parent Exs. A at pp. 1-18; B at pp. 1-14). Briefly, the student had been incarcerated in a correctional facility in October 2007, and she remained incarcerated throughout the previous impartial hearing challenging the 2008-09 and 2009-10 school years (see Parent Exs. B at pp. 1-12; D at pp. 2-4; see also Tr. pp. 10-11). In a decision dated October 18, 2010, the previous impartial hearing officer acknowledged that although "a hearing officer cannot order the release of a student from a correctional facility," the Mental Health Court—at that time—sought to "transfer the [student] to a residential facility" and the Mental Health Court had the "power to transfer the [student] to a residential facility even over a District Attorney's objections" (Parent Ex. A at p. 15).[3] Ultimately, the previous impartial hearing officer found it "appropriate to order that [the student] be placed at [NPS] for the 2010-11 school year upon the appropriate order from [the Mental Health Court]" (id. at p. 17 [emphasis added]).[4] The district appealed the previous impartial hearing officer's decision to a State Review Officer, and the decision on appeal noted that the "Mental Health Court ordered the student's placement at NPS in

---

the district offered the student a free appropriate public education (FAPE), because the student—who turned 21 years old in January 2011—was no longer eligible to receive a FAPE for the 2011-12 school year (see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; Parent Ex. D at pp. 1-5). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Here, upon turning 21 years of age in January 2011 during the 2010-11 school year, the student's entitlement to continue to obtain services under the IDEA terminated on June 30, 2011, at the conclusion of the 10-month school year in which she turned 21 years old. Notwithstanding this fact, the due process complaint notice affirmatively alleges that the district failed to offer the student a FAPE for the 2009-10 school year, the district's failure constituted a gross violation of the IDEA, and the student was entitled to compensatory educational services in the form of residential placement at NPS for the 2011-12 school year (see Parent Ex. D at pp. 1-4). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

[3] The previous impartial hearing officer's decision included two subsequent "corrected" dates: October 29, 2010, and November 2, 2010 (Parent Ex. A at p. 18).

[4] In addition, the previous impartial hearing officer declined to order the student's placement at NPS for the 2011-12 school year as compensatory educational services because the hearing record failed to contain sufficient evidence that the student required "a two year placement at [NPS]" (Parent Ex. A at p. 18).

conjunction with the disposition of the student's criminal case on November 4, 2010"—which occurred shortly after the completion of the previous impartial hearing, but prior to the district's appeal of the impartial hearing officer's decision (compare Parent Ex. B at pp. 1, 7-8, 12, with Parent Ex. A at p. 18). The State Review Officer decision rendered in Application of the Dept. of Educ., Appeal No. 10-115 further found that although the district failed to offer the student a FAPE for the 2009-10 school year, the student was not entitled to compensatory educational services in the form of placement at NPS for the 2011-12 school year (Parent Ex. B at pp. 9-14). According to the hearing record, the student sought judicial review of the decision in Application of the Dept. of Educ., Appeal No. 10-115 with the district court for the Southern District of New York in May 2011 (Parent Ex. C at pp. 1-29).[5] The student has remained at NPS through the present time (Parent Ex. D at pp. 1-4).

Due Process Complaint Notice

By due process complaint notice, dated June 29, 2011, the student alleged that the district failure to offer the student a FAPE for the 2009-10 school year constituted a gross violation of the IDEA, and as relief, sought compensatory education in the form of one year of residential placement at NPS for the 2011-12 school year funded by the district (Parent Ex. D at pp. 1, 4; see Tr. pp. 3-4). The due process complaint notice also sought maintenance of the student's placement at NPS at district expense as her pendency placement during the due process proceedings (Parent Ex. D at p. 4).

Impartial Hearing

On July 8, 2011, the parties convened the impartial hearing to address the student's pendency placement (Tr. pp. 1, 7-12; Dist. Ex. 1; Parent Exs. D at p. 4; F). Initially, counsel for both parties argued their respective positions regarding the interpretation of how, if at all, the previous impartial hearing officer's decision involving the student and the State Review Officer decision resolving the appeal of the previous impartial hearing officer's decision related to a determination of the student's pendency placement (see Tr. pp. 1-38). Generally, counsel for the student argued that NPS was the student's pendency placement because that portion of the previous impartial hearing officer's decision directing that the student be placed at NPS had not been overturned, vacated, or otherwise annulled by the State Review Officer decision in Application of the Dep't of Educ., Appeal No. 10-115 (see Tr. pp. 1-12).[6] Counsel for the district alternatively argued the following: the student had no right to the protections afforded by

[5] Although the matter is pending in district court, the hearing record does not offer an explanation of why the student and her counsel did not directly seek injunctive relief in that forum (see Parent Ex. C at pp. 1-49; see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 390-400 [N.D.N.Y. 2001] [conducting an analysis of the traditional test for a preliminary injunction after concluding that the student—who had aged out of his entitlement to services under the IDEA—had no statutory right to pendency because neither the parents nor the district sought to change the student's individualized education program (IEP) after he had been placed in an out-of-state nonpublic school, and further noting that the parents had, instead, invoked due process to determine whether the student was entitled to compensatory educational services upon aging out]).

[6] Counsel for the student stated that "in order for [the student] to stay [at NPS], the school is requesting a determination for the upcoming school year" (Tr. p. 32). Counsel further stated that he brought the "pendency hearing, because [NPS] contacted [him] and basically told [him] that they cannot keep the [student], unless there [was] some kind of a decision authorizing her placement for another year" (Tr. pp. 32-33).

the pendency provisions because she had aged out of her entitlement to services under the IDEA; the Mental Health Court retained jurisdiction over the student's case, and thus, held the ultimate authority over where the student would be placed or if the student would be transferred; and finally, the issues currently before the impartial hearing officer were substantively identical to the issues to be determined in the student's application for judicial review of the State Review Officer decision in Application of the Dep't of Educ., Appeal No. 10-115 that is currently pending in federal district court (see Tr. pp. 12-18, 45-47; compare Parent Ex. C at pp. 1-29, with Parent Ex. D at pp. 1-4).

At the conclusion of counsels' arguments, counsel for the student presented the student's criminal defense attorney to testify on the student's behalf (Tr. pp. 38-65). Specifically, the criminal defense attorney testified that the student had been "placed at [NPS] as an alternative to incarceration" (Tr. p. 41). She explained that the student had been "offered a plea deal" that allowed her to plead "guilty" to the alleged offense, and serve "three years in jail" (id.). The criminal defense attorney further explained, however, that if the student agreed "to go to [NPS] for treatment"—as an alternative to incarceration—the student would "be released" from the correctional facility to go to "[NPS] to complete that treatment" (id.; see Tr. pp. 45-47 [noting that the Mental Health Court Judge, the assistant district attorney (ADA), and the student's criminal defense attorney collaboratively made the determination "with respect to [an] alternative disposition to incarceration" for the student in this case]).

According to the criminal defense attorney, the student regularly appeared before the Mental Health Court during her placement at NPS in 2010-11 to provide updates to the Court about her "progress" at NPS (see Tr. pp. 47-52). At the student's most recently scheduled appearance approximately two weeks before the date of the pendency hearing, however, NPS "representatives" appeared before the Court without the student, and reported that the student "was having some crisis" and was not allowed to attend Court because she was not "in a good state" (Tr. pp. 49-50). The criminal defense attorney testified that, according to her understanding of the situation, the student had exhibited a "series of behaviors" because she had "graduated" from NPS and the student "did not have any place to go after [NPS]. She had no family that was willing to take her" (Tr. pp. 51-52; see Tr. pp. 52-53, 62-64 [explaining that many students at NPS "were calling home for that July 4th weekend and [the student] had nowhere to go;" and "[the student] had become very upset and had to be restrained several times," and therefore, NPS staff did not "think it was safe to transfer [the student] to Court" for her most recent appearance]).

The criminal defense attorney also testified that if "[NPS] "did not work out for [the student]," "[w]e don't know where we would go. We were all kind of wondering what would happen if she's not able to stay at [NPS]" (Tr. p. 54). In addition, she testified that "the Judge, the D[istrict] A[ttorney]'s office, we are all very concerned [about] what will happ[en] to [the student] if she's not able to stay at [NPS]. We don't want to put her back [at the correctional facility] while we're looking for something else" (Tr. pp. 54-55).

Impartial Hearing Officer Decision

By decision dated July 27, 2011, the impartial hearing officer determined that NPS constituted the student's pendency placement for the duration of the administrative proceedings (Interim IHO Decision at pp. 2-3). In support of her determination, the impartial hearing officer concluded that the student had been placed at NPS "pursuant to a hearing officer decision dated November 2, 2010," and although the district had appealed the impartial hearing officer's decision, the "appeal resulted in a partial reversal but the [S]tate [R]eview [O]fficer did not specifically vacate or annul the hearing officer's order directing placement at [NPS]" (id. at p. 2). Alternatively, the impartial hearing officer determined that the student was "entitled to equitable relief allowing her to remain" at NPS, at district expense, as her pendency placement (id. at pp. 2-3). The impartial hearing officer concluded that the student met the requirements of the "traditional three prong test for injunctive relief," and explained that if removed from her current setting, the student would suffer an irreparable injury due to the nature of her disabilities; that based upon the "record so far," there was a likelihood of success on the merits; and further, that a "balancing of the equities" favored the student" (id.). The impartial hearing officer ordered the student to remain at NPS as her pendency placement, and ordered the district to fund the pendency placement (id. at p. 3).

Appeal for State-Level Review

The district appeals, and contends that the impartial hearing officer erred as a matter of law in determining that NPS constituted the student's pendency placement. Specifically, the district argues that the student's underlying claims are barred because the student lacks standing to bring the instant due process proceedings on her own behalf, and alternatively, because the student's underlying claims are barred based upon principles of res judicata, and therefore, an award of pendency would also be error as a collateral claim. In addition, the district contends that the impartial hearing officer's decision did not conform to State regulations and that the impartial hearing officer's determination of the student's pendency rights was based upon her misinterpretation of a State Review Officer decision. The district also asserts that the impartial hearing officer improperly awarded pendency based upon equitable grounds, and specifically notes that the student was no longer entitled to pendency as a matter of law because she had reached the age of 21 before the start of the 2011-12 school year. As a final matter, the district requests an order remanding the remaining due process proceedings to a new impartial hearing officer, and alleges that the current impartial hearing officer's injunctive relief in the interim decision on pendency demonstrates bias against the district. The district also requests the consideration of additional documentary evidence attached to its petition for review.

In her answer, the student responds to the district's allegations with general admissions and denials, and sets forth a statement of material facts incorporating information from an impartial hearing date, July 28, 2011, subsequent to both the pendency hearing and the date of the impartial hearing officer's interim decision on pendency. Next, the student asserts "affirmative defenses," and argues that the district's contentions in the petition for review regarding the issues of standing, res judicata, and whether to remand the matter to a new impartial hearing officer should be dismissed as being improperly raised for the first time on appeal or as being improperly raised in an interlocutory appeal on pendency. Ultimately, the

student seeks to uphold the impartial hearing officer's decision in its entirety. Like the district, the student also requests the consideration of additional documentary evidence attached to her answer. In a reply to the student's answer, the district alleges that it should be allowed to assert a defense for the first time on appeal, and further, that a State Review Officer may properly rely upon such defense in rendering a decision.

Discussion

Scope of Review

Initially, I note that State regulations governing the practice of appeals for students with disabilities limit appeals from an impartial hearing officer's interim determination to those involving pendency disputes (8 NYCRR 279.10 [d]; see Educ. Law § 4404 [4]). Thus, to the extent that the district asserts arguments in its petition for review related to whether the student has standing to initiate the instant due process proceeding, whether the remaining issues should be remanded to a new impartial hearing officer, or whether the issues in the underlying case are barred by the principles of res judicata, these issues are not properly raised in an appeal of an impartial hearing officer's interim determination establishing a student's pendency placement and will not be reviewed or ruled upon in this decision.[7]

Pendency

Turning to the district's appeal of the impartial hearing officer's pendency determination, the 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 board of education 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], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need

[7] To the extent that both parties submitted additional documentary evidence for consideration on appeal to address the issues outside the scope of the review of this appeal, I find that the additional evidence is not necessary to render a determination on the issue of the student's pendency placement, and thus, I decline to accept the documents. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). 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 Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student'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 [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Based upon a review of the evidence, I find that the impartial hearing officer erred in determining that NPS constituted the student's pendency placement because, as a threshold matter, NPS cannot be deemed to be the student's then-current educational placement at the commencement of the due process proceedings (see Murphy, 86 F. Supp. 2d at 359).[8] In this

[8] Although not specified in her decision, the impartial hearing officer appears to have found that NPS constituted the student's pendency placement based upon what she interprets as an unappealed portion of the previous impartial hearing officer's decision directing the student's placement at NPS (Interim IHO Decision at

case, the weight of the evidence indicates that the Mental Health Court—a noneducational agency, separate and apart from any IDEA related matters—ordered the student's placement at NPS as an alternative to incarceration; moreover, the hearing record is devoid of evidence that the student's placement at NPS was educationally necessary for the student to receive a FAPE or that the district has had any obligation to otherwise fund the student's placement at NPS, which is a necessary predicate to imposing a continued obligation on the district to fund a pendency placement (Tr. pp. 41, 45-47, 54-55; see Dist. Ex. 1 at pp. 1-2; Parent Exs. A at pp. 15, 17; B at pp. 11-13; C at pp. 2-5, 9-17, 21-23, 28-29; D at pp. 2-4; F at pp. 1-2; Answer ¶ 69; see generally In the Matter of L.S., 57 IDELR 107 [N.J. Super. Ct. App. Div. Aug. 26, 2011] [finding that a district's responsibility to fund a student's residential placement turned on whether the residential placement—where a noneducational agency had placed the student—was "educationally necessary" for the student to receive a FAPE]). Indeed, the student's current federal litigation seeks to hold the district responsible for the costs of the student's placement at NPS for the 2010-11 school year (Parent Ex. C at pp. 21-23, 28-29; see Pet. at p.13, n.6). In addition, given that the Mental Health Court exercises continuing jurisdiction over the student's placement at NPS, regularly monitors the student's progress at NPS through appearances before the Court, and has the power to transfer the student back to a correctional facility, the evidence weighs heavily against a finding that NPS constitutes an educational placement for the purposes of a pendency inquiry. Therefore, the impartial hearing officer's interim decision finding that NPS constitutes the student's pendency placement must be annulled.

Preliminary Injunction

Notwithstanding the determination above, I must also note that administrative hearing officers—such as State Review Officers and impartial hearing officers—lack the plenary equitable authority necessary to grant relief in the form of a temporary restraining order or preliminary injunction (Application of the Bd. of Educ., Appeal No. 11-004). Thus, to the extent that the impartial hearing officer determined that the student was entitled to remain at NPS as her pendency placement based upon equitable grounds, the determination must be annulled.

The IDEA and its implementing regulations explicitly grant administrative hearing officers the power to resolve placement disputes, including the provision for automatic injunction in the stay put/pendency context (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Additionally, in the context of an interim alternative educational setting wherein an impartial hearing officer may order a change in placement of a child with a disability to an "appropriate" interim alternative educational setting for not more than 45 school days if the impartial hearing officer determines that maintaining the current placement "is substantially likely to result in injury to the child or to others" (20 U.S.C. § 1415[k][3][B][[i] and [ii][II]; 34 C.F.R. § 300.532[b] [2][ii]). However, these statutory and regulatory provisions do not confer broad equitable authority to impose provisional remedies such as a preliminary mandatory injunction changing a student's then-current education placement, particularly where, as here, there is an absence of documentary or testimonial evidence upon which to predicate relief. I note that the aspects of the State Administrative Procedure Act (SAPA) relating to administrative adjudicatory hearing procedures do not confer a

---

pp. 2-3). The impartial hearing officer, however, did not engage in any analysis of the student's then current educational placement at the commencement of the due process proceedings (see id.).

general power to administrative hearing officers to employ provisional remedies (see SAPA §§ 301-307).[9] Additionally, examples of the use of limited provisional remedies in the administrative context have been supported by explicit statutory or regulatory authority (see, e.g., Civ. Serv. § 209-a[4][d] [authorizing the court to provide provisional relief during administrative hearings]; 6 NYCRR 620.2, 622.10-622.14 [authorizing and setting forth procedures for summary abatement and summary suspension orders issued by the Department of Environmental Conservation]; see additionally New York State Pub. Employment Relations Bd. v. City of Troy, 164 Misc.2d 9, 12-13 [Sup. Ct. Alb. County 1995] [describing how Civ. Serv. § 209-a(4)(d) was utilized to obtain injunctive relief from the court]; Ten Mile River Holding, Ltd. v. Jorling, 150 A.D.2d 927, 928 [3rd Dep't 1989] [describing explicit regulatory procedures for seeking a summary order from an administrative law judge enjoining a mining operation]).

Although the Supreme Court's decision in Forest Grove interpreting 20 U.S.C. § 1415[i][2][C][iii] may be viewed as possible support for the proposition that an administrative officer may issue a preliminary injunction as equitable relief, I note that issue before the Forest Grove Court involved an administrative officer's authority in fashioning appropriate equitable relief after a final determination that the district failed to offer the student a FAPE (Forest Grove, 129 S.Ct. at 2494 n11). No authority has been cited for the proposition that the statute conferred upon administrative hearing officers the extraordinary powers of provisional remedies such as a temporary restraining order or a preliminary injunction, which have traditionally been the province of the judiciary (see Honig v. Doe, 484 US 305, 327 [1988] [discussing the equitable power of district courts in IDEA cases]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 384-86 [N.D.N.Y. 2001] [issuing a preliminary injunction conferring a placement for a student who was over the age of twenty-one during the pendency of an administrative hearing]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 357 [S.D.N.Y., 2000] [holding that parents seeking to invoke the stay-put provision of the IDEA need not exhaust their administrative remedies first because were exhaustion required, it would defeat the purpose behind the stay-put provision, which determines the child's interim placement during the pendency of administrative proceedings]; Mayo v. Baltimore City Pub. Schs., 40 F. Supp. 2d 331, 334 [D.Md. 1999] [noting that in the absence of a viable stay put placement or an administrative hearing officer's decision, a parent who is likely to prevail may attempt to obtain a preliminary injunction from the Court]; Mediplex of Massachusetts, Inc. v. Shalala, 39 F. Supp. 2d 88, 94 [D. Mass. 1999] [explaining that the District Court considers injunctions while administrative review is pending after determining that administrative law judge lacked the power to issue a stay]; Jacobsen v Dist. of Columbia Bd. of Educ., 564 F. Supp 166, 170-171 [D.C.D.C 1983] [holding that a District Court has the power to prevent abuse of the administrative process with matters such as dilatory tactics] see also Cosgrove, 175 F. Supp. 2d at 384, citing Honig, 484 US at 327 [holding that the requirement to exhaust administrative remedies does not apply where the moving party demonstrates that the administrative process would be futile or inadequate]).

[9] I also note that SAPA does not literally apply to impartial hearings; however, it has been looked upon for guidance in procedural matters (Application of a Child with a Disability, Appeal No. 01-052).

Conclusion

Upon review of the evidence and due consideration of the parties' arguments, I find that the impartial hearing officer erred in concluding that NPS constituted the student's pendency placement.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision, dated July 27, 2011, determining that NPS constituted the student's pendency placement is hereby annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision, dated July 27, 2011, determining that the student was equitably entitled to remain at NPS as her pendency placement is hereby annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision, dated July 27, 2011, ordering the district to fund the student's pendency placement at NPS is hereby annulled.

Dated: **Albany, New York**
October 31, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER