The University of the State of New York

The State Education Department
State Review Officer
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No. 12-187

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the XXXXXXXXXXXXXXXXXXXX

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondents, Neelanjan Choudhury, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, petitioners (the parents) appeal from an interim decision of an impartial hearing officer (IHO) which determined the student's pendency placement during an impartial hearing challenging the appropriateness of respondent's (the district's) recommended educational program for the 2010-11 and 2011-12 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). With regard to interim decisions of an IHO, "[a]ppeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to … Education Law [§4404].

III. Facts and Procedural History

As relevant to the issues on this appeal, a subcommittee of the CSE convened on April 8, 2010 for an annual review of the student's program and to create the student's IEP for the 2010-11 school year (Dist. Ex. 11). The April 2010 CSE subcommittee determined that the student continued to be eligible for special education and related services as a student with an other health-impairment, and recommended placement of the student in a 12:1+1 special class for English, mathematics, science and social studies, and that she receive a resource room period five times per week in a 5:1 ratio (id. at p. 1).[1] In addition, the April 2010 CSE subcommittee recommended the provision of an individual aide to accompany the student in all academic subjects, as well as six 30-minute sessions of individual counseling per year (id. at p. 2). The

[1] The student's eligibility for special education and related services as a student with an other health-impairment is not a matter in dispute on appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1 [zz][10]).

April 2010 CSE subcommittee also developed measurable postsecondary goals for the student in the areas of education/training, employment and independent living skills (id. at p. 6).

On February 27, 2011, a subcommittee of the CSE convened to discuss the parents' concerns with respect to transition planning for the student (Tr. pp. 288-89; Dist. Ex. 14). According to the hearing record, the parents raised concerns regarding the sufficiency of the transition planning for the student and whether the student's program would prepare the student following her graduation (Tr. p. 289).

On July 26, 2011, a subcommittee of the CSE convened for an annual review of the student's program and to develop the student's IEP for the 2011-12 school year (Dist. Ex. 13). For the 2011-12 school year, the July 2011 CSE subcommittee recommended that the student attend five resource room periods per week, and that she be enrolled in a 12:1+1 special class for mathematics, English, science and social studies (id. at pp. 1, 11, 14).[2] Additionally, the July 2011 CSE subcommittee recommended that the student participate in the School to Work program, two times per week on an individual basis (id. at pp. 1, 11, 13). The July 2011 CSE subcommittee also recommended related services for the student, which included the provision of an aide on an individual basis to accompany the student in all academic subjects, in addition to six 30-minute sessions of individual counseling per year (id. at pp. 1, 11). The July 2011 CSE subcommittee also developed measurable postsecondary goals for the student, and prepared a coordinated set of transition activities for her to facilitate the student's movement from school to post-school activities in the areas of instruction, related services, community experiences, development of employment and other post-school adult living objectives, acquisition of daily living skills, and the results of the student's functional vocational assessment (id. at pp. 9, 13-14).

A. Due Process Complaint Notice

By due process complaint notice dated April 24, 2012, the parents alleged that the district failed to address the student's unique needs and prepare her for further education, employment and independent living (IHO Ex. I at p. 2). Specifically, the parents alleged that the district did not provide the student with nor did it implement an appropriate transition plan for the 2010-11 and 2011-12 school years (id.). Although they did not specify the IEP to which each of the following claims related, the parents made the following assertions: (1) the district failed to develop an appropriate program and provide appropriate services for the student that address her deficits in social and independent living skills; (2) the district failed to provide and implement an appropriate academic program and services, and that evaluative testing "clearly indicated that intervention was needed and [the] district failed to act; (3) the district failed to provide the student with assistive technology as indicated by the student's IEP; (4) the district failed to provide the student with counseling in accordance with the July 2011 IEP (id.)

As a remedy, the parents requested relief in the form of payment for the cost of the student's attendance at the Vocational Independence Program offered by the New York Institute

[2] The July 2011 IEP is inconsistent with respect to whether the July 2011 CSE subcommittee recommended the placement of the student in a12:1+1 special class for only social studies or for each of her academic subjects including, mathematics, English and science (compare Dist. Ex. 13 at pp. 1, 11, with Dist. Ex. 13 at p. 14).

of Technology (NYIT) for the 2012-13 and 2013-14 school years to be provided at public expense (IHO Ex. I at p. 2). The parents also requested that the district evaluate the student at the end of the 2013-14 school year to determine if was necessary for her to continue her attendance at NYIT for an additional school year (id.). They also asserted the student's right to pendency (id.).

B. Impartial Hearing Officer Decision

On June 19, 2012, an impartial hearing convened, followed by five additional days of testimony (Tr. pp. 1-991).[3] By interim decision dated August 30, 2012, the IHO determined that the 2011-12 IEP implemented at the district high school constituted the student's pendency placement (Interim IHO Decision at p. 4). Under the circumstances, the IHO directed the district to provide the student with the program and services as set forth in the July 2011 IEP, although the student graduated in June 2012 (id.).

IV. Appeal for State-Level Review

The parents appeal, and seek to overturn the IHO's interim decision regarding pendency. The parents contend that they invoked the student's right to pendency, as a mechanism to prevent the student from graduating from the district high school. The parents allege that they made statements during the impartial hearing that they did not want the student to graduate and, at the same time, that it was improper for the district return the student to 12th grade in the district high school. For relief, the parents request an order directing the district to pay the cost of the student's attendance at NYIT for the 2012-13 school year because the case was still in progress, pendency was not ordered and the student was graduated.

In an answer, the district denies the parents' material allegations supporting their request for relief. The district requests that the parents' petition be dismissed. The district offered to maintain the last agreed upon placement during the pendency of the proceedings, notwithstanding her graduation from high school; however, the district argues that the student is not entitled to a pendency placement at NYIT.

V. Applicable Standards -Pendency

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

[3] The hearing record did not include a final decision on the merits, and the parties have not since advised whether a final decision on the merits was reached by the IHO.

While a due process proceeding under the IDEA is pending, 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 CFR 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 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 IHO'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).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

In this case, the evidence in the hearing record supports the IHO's conclusion that the program set forth in the student's July 2011 IEP constituted the then-current educational placement for the purposes of pendency (Tr. p. 268; Dist. Ex. 13). In this case, there is no dispute between the parties that at the time the parents filed the due process complaint notice the student was receiving services pursuant to the July 2011 IEP (Dist. Ex. 13; IHO Ex. I; see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). As the Second Circuit has explained regarding the term "current educational placement" in Mackey

> "our sister circuits have interpreted the term to mean: (1) 'typically the placement described in the child's most recently implemented IEP,' Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 1180 [9th Cir. 2002]; (2) 'the operative placement actually functioning at the time ... when the stay put provision of the IDEA was invoked,' Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 [3d Cir. 1996]; and (3) '[the placement at the time of] the previously implemented IEP,' Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]"

Mackey, 386 F.3d at 163). Here, none of these tests support the parents' request for pendency at NYIT, especially since the district had never placed the student there, nor had any administrative or judicial tribunal previously directed the student be placed there pursuant to a final order that properly formed the basis for a pendency placement. Recently the Third Circuit explained that

> "[w]here the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play. Raelee S., 96 F.3d at 83. In such circumstances, the parents will

> be responsible for the costs of the child's new placement—at least initially"

(M.R. v. Ridley Sch. Dist., 2014 WL 657343, at *4 [3d Cir. Feb. 20, 2014]). That is the case here where it is the parents that sought to change the student's placement to NYIT pursuant to pendency, not the district. There is no basis to support the parents' request that the student's enrollment at NYIT for the 2012-13 and 2013-14 school years constitutes the student's pendency, particularly, given that the student had never enrolled there at the time of the impartial hearing. NYIT is not the student's pendency placement and the IHO's order cannot be disturbed under these circumstances.

Lastly, I note that although the student has graduated from high school, the district offered to maintain pendency under the July 2011 IEP; however, it appears that the parents were unwilling to avail themselves of that opportunity, believing it inappropriate. While the parents may understandably espouse that point of view, believing it to be the best outcome for their daughter in these circumstances, I note that the district took the position that the student's graduation had no bearing on her right to pendency, which it remained willing to implement in this matter. This was a generous interpretation of the parents' request on the part of the district, especially since I find nowhere in their complaint, their statements during the hearing or their petition for review any notion that the student had failed to earn regular diploma that was issued by the district. Instead the parents appear to claim that the programming while she attended high school was inappropriate and only later asserted during the hearing that they did not want her to graduate (Tr. p. 886). It seems less likely that they were challenging the diploma itself where they sought compensatory education at a post-secondary institution, which suggests that they were challenging the adequacy of services provided to the student while she was in high school rather than actually challenging whether she had earned a regular diploma (see R.Y. v. Hawaii, 2010 WL 558552 at *6-*7 [D.Hawaii, Feb. 17, 2010] [Noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]). The district could have attempted to argue that the student had no pendency placement at all, and that there was only a compensatory education claim to resolve, but it did not. However for purposes of this decision regarding pendency, I have given the parents, appearing pro se, the benefit of the doubt that they are in fact asserting that the student failed meet the requirements to earn a diploma. Thus to the extent that that the parties and the IHO collectively treated the student has having a pendency entitlement, albeit not agreeing on which placement, I hold that the IHO's interim decision was correct (Cronin v. Bd. of Educ. of the East Ramapo Cent. Sch. Dist., 689 F. Supp. 197 [S.D.N.Y. May 23, 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]).

VII. Conclusion

In accordance with the discussion above, the student is entitled to pendency as set forth in the July 2011 IEP for the period commencing with the filing of the due process complaint notice though the end of these proceedings.

I have considered the parties' remaining contentions and find that there is no basis to address them in an interim appeal.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 11, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER