



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-061

### **Application of THE BOARD OF EDUCATION OF THE MEXICO ACADEMY AND 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:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorney for petitioner, Susan T. Johns, Esq., of counsel

Law Office of Andrew K. Cuddy, attorney for respondents, Andrew K. Cuddy, Esq., of counsel

#### **DECISION**

Petitioner, the Board of Education of the Mexico Academy and Central School District, appeals pursuant to section 279.10[d] of the Regulations of the Commissioner of Education from an impartial hearing officer's May 3, 2007 interim decision determining the student's pendency placement for the duration of a due process proceeding in which respondents challenge the appropriateness of the program recommended by petitioner's Committee on Special Education (CSE) for the student for the 2006-07 school year. The impartial hearing officer found that the student's pendency placement was the placement established pursuant to the May 2006 individualized education program (IEP). The appeal must be sustained. The cross-appeal must be sustained in part.

At the time of the commencement of the impartial hearing in April 2007, the student was 17 years old, residing at home, and not receiving special education services (Tr. pp. 14-15, 56, 59, 218). His classification and eligibility for special education services as a student with autism are not in dispute in this appeal (Tr. p. 176; Dist. Ex. 1 at p. 1; see 8 NYCRR 200.1[zz][1]).

The student has been diagnosed as having autism and is reportedly moderately retarded (Tr. p. 15). The student reportedly engages in a variety of inappropriate behaviors that interfere with his ability to interact with others in a safe and appropriate manner (Dist. Ex. 28 at p. 3). He has also reportedly exhibited tantrum behavior, at which time, the student has demonstrated maladaptive behaviors, including aggression, self-injurious behavior, property destruction and elopement (id.). At 22 months of age, while living with his family in Germany, the student was

diagnosed as having a speech-language impairment (Dist. Ex. 49 at p. 2). In 1992, the student returned to Central New York, and was placed in Jowonio, a "special services preschool setting" (id.). While a part-time student at Jowonio, he was diagnosed as having autism at which point he became a full-time student in the program (id.). He has been attending school in petitioner's district since kindergarten (id.).

On May 28, 2003, petitioner's CSE convened for the student's annual review and to develop a program for the 2003-04 school year (Dist. Ex. 13). The May 2003 IEP stated that due to the student's inability to communicate his needs and wants, he was frequently aggressive to staff and on occasion, toward his fellow students (id. at p. 11). The May 2003 CSE recommended placement in a Board of Educational Cooperative Services (BOCES) 12:1+4 special class with a 1:1 aide (id. at p. 2). Related service recommendations included two 30-minute sessions of adaptive physical education (APE) in a group per week, one 30-minute session of occupational therapy (OT) in a group per week, three 30-minute sessions of speech-language therapy in a group per week and two weekly 30-minute 1:1 sessions of speech-language therapy (id. at pp. 2-3).<sup>1</sup> The student was also deemed eligible for extended school year (ESY) services (id. at pp. 3, 12).

Petitioner's CSE reconvened on April 21, 2004 for the student's annual review and to develop his program for the 2004-05 school year (Dist. Ex. 15). For the 2004-05 school year, the April 2004 CSE recommended placement in a 12:1+4 BOCES special class with a 1:1 aide (id. at p. 1). Related service recommendations consisted of two weekly 40-minute sessions of APE in a group of three, one 1:1 30-minute session of OT per week, three weekly 30-minute sessions of speech-language therapy in a group of three, as well as two weekly 1:1 30-minute sessions of speech-language therapy (id.). The resultant IEP also provided for transportation on a mini bus with an aide (id.). In addition, the student was found to be eligible for ESY services (id.). With respect to the student's management needs, the April 2004 IEP noted that although the student's aggression had decreased significantly since the previous school year, he still had the potential to become aggressive and often sought out sensory stimulation to meet his needs (id. at p. 5).

On September 24, 2004, petitioner's CSE Chairperson met with respondents, and the student's related service providers to discuss his increasingly unpredictable and aggressive behavior (Dist. Ex. 21 at p. 1). Meeting participants agreed, pursuant to respondents' request, that a residential placement was appropriate to meet the student's special education needs at that time (Tr. p. 484; Dist. Ex. 21 at p. 1). On September 30, 2004, a sub-CSE meeting convened to amend the student's IEP to reflect the changes to his program discussed during the September 24, 2004 meeting (Dist. Exs. 21 at p. 1; 22 at p. 1). Meeting notes indicated that the student's special education services would be changed from a 12:1+4 program in a BOCES setting to homebound instruction, while a residential placement was explored (id. at p. 4). For the interim period, the September 2004 sub-CSE proposed itinerant teacher services as well as five individual 30-minute sessions of home-based speech-language therapy per week (id. at pp. 1, 4). During fall 2004, the CSE Chairperson contacted a number of residential placements in the hopes of locating a residential program for the student (Dist. Ex. 30). In December 2004, the student was accepted

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<sup>1</sup> The May 2003 IEP does not indicate the size of the group in which he received his related services (Dist. Ex. 13).

into a 12:1+4 special ungraded class at the Maryhaven Center of Hope (Maryhaven), a residential program located in Port Jefferson, New York (Dist. Ex. 31).

On January 4, 2005, petitioner's CSE convened to amend the student's IEP to reflect the residential placement that had been secured for him at Maryhaven (Dist. Ex. 32 at pp. 1, 5). Related service recommendations were comprised of one 1:1 30-minute session of OT per week to be delivered at BOCES as well as five 1:1 30-minute sessions of speech-language therapy per week (*id.* at p. 1). The student remained at Maryhaven until June 2005, when respondents removed him and placed him at Tradewinds Education Center (Tradewinds) in Utica, New York (Tr. pp. 485-86; Dist. Ex. 35). Although the student was successful at Maryhaven, respondents reportedly decided to move their son to Tradewinds, because its location was closer to home (Tr. pp. 490-91). On June 20, 2005, petitioner's CSE convened to reflect the student's change in placement, conduct an annual review and formulate his program for the 2005-06 school year (Dist. Ex. 36). The resultant IEP stated that for the 2005-06 school year, the student would be placed in 6:1+3.5 special residential class at Tradewinds (*id.* at p. 1). He was considered eligible for ESY services (*id.*). Related service recommendations included two 1:1 30-minute sessions of OT per week, three 30-minute 1:1 sessions of speech-language therapy per week, as well as two weekly 30-minute sessions of speech-language therapy in a group of five (*id.*). In fall 2005, respondents grew increasingly concerned about their son's behaviors and requested an emergency CSE meeting to discuss the appropriateness of his placement at Tradewinds (*see* Tr. p. 487; Dist. Ex. 38). In October 2005, Tradewinds recommended that the student be discharged from the facility, in light of his "extremely violent and aggressive behaviors and the significant differences in treatment philosophies that exist between [respondents] and the Tradewinds program" (Dist. Ex. 41 at p. 3). The student remained at Tradewinds until May 2006 until another placement was secured (Tr. p. 488).

On May 16, 2006, petitioner's CSE convened for a reevaluation review of the student's program (Dist. Ex. 53). Meeting notes stated that the meeting was held at the request of Tradewinds staff to discuss discharging the student from the program and to determine the next step in finding another residential setting (*id.* at p. 8). The May 2006 CSE recommended a ten-month residential placement at Tradewinds in a 12:1+4 special class (*id.* at p. 6). Related service recommendations included two 1:1 30-minute sessions of OT per week, three 30-minute 1:1 sessions of speech-language therapy per week, as well as two 30-minute sessions of speech-language therapy in a group of five per week (*id.*). On May 25, 2006, the student was accepted at the Anderson School (Anderson), located in Staatsburg, New York (Dist. Ex. 54).<sup>2</sup>

On June 19, 2006, petitioner's CSE convened for a requested review of the student's program for the 2006-07 school year (Dist. Ex. 56). Meeting notes stated that the meeting was held at the request of the CSE Chairperson to review the student's program and services listed on the IEP and to adjust his program (*id.* at p. 8). The June 2006 CSE proposed a 12-month residential placement at Anderson in a 6:1+3 special class (*id.* at p. 3). Related service recommendations consisted of one 1:1 30-minute session of OT per week, one 1:1 30-minute session of speech-language therapy per week, in addition to one 30-minute session of speech-language therapy per

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<sup>2</sup> The Commissioner of Education has approved Anderson as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

week in a group of five (*id.* at p. 4). The record does not indicate whether respondents disagreed with this IEP at the time of the June 2006 CSE meeting. On June 28, 2006, respondents enrolled the student at Anderson (Tr. p. 75).

On September 8, 2006, a CSE meeting took place at Anderson (Dist. Ex. 59). Respondents, Anderson staff members and the student's related service providers were in attendance and the CSE Chairperson participated via telephone (*id.* at p. 2). The September 2006 CSE continued the student's program proposed in the June 2006 IEP, but added one weekly 30-minute session of OT in a group of five (*id.* at p. 8). The resultant IEP noted that medication was recommended to address the student's compulsive behaviors (Tr. p. 26; Dist. Ex. 59 at p. 3). The record does not indicate whether respondents objected to the resultant IEP at the time of the September 2006 CSE meeting.

During fall 2006, the student's violent behaviors reportedly increased (Tr. p. 194). In December 2006, concerned that his medication's side effects caused their son's erratic behavior, respondents withdrew their consent to medicate him and asked Anderson staff to decrease the student's medication (Tr. p. 195; Dist. Ex. 66 at p. 2). By letter dated December 14, 2006 to the Executive Director at Anderson, the student's physician requested that the student be tapered off the medications, noting that his behavior became increasingly violent while taking medication (Dist. Ex. 62 at pp. 2-3). By letter dated December 14, 2006, to the CSE Chairperson, Anderson's IEP Coordinator recommended that the student be referred to an alternate placement (Dist. Ex. 63). The IEP Coordinator explained that Anderson had "exhausted all its options, by way of supports," and further stated that staff agreed that the student's educational and behavioral needs could not be met at Anderson (*id.*). By letter dated December 29, 2006 to the CSE Chairperson, Anderson's IEP Coordinator stated that Anderson would keep the student at the facility while petitioner sought an alternative placement (Dist. Ex. 66). On or about January 7, 2006, respondents removed their son from Anderson (Tr. p. 218; see Dist. Ex. 68).

On January 12, 2007, pursuant to Anderson's request, petitioner's CSE reconvened for a review of the student's program (Dist. Ex. 69). Meeting notes indicated that the purpose of the meeting was to consider a more structured setting for the student (*id.* at p. 9). The January 2007 IEP noted that his behaviors increased during the summer (*id.* at p. 4). According to the January 2007 IEP, the student's behaviors decreased when medication was introduced; however, respondents requested that their son's medications be tapered, which reportedly exacerbated his aggressive behaviors (*id.*). Although meeting participants concurred that Anderson was no longer appropriate to meet the student's educational needs, Anderson staff was willing to maintain his program until other arrangements were made (Tr. pp. 40-41, 60, 92; Dist. Ex. 69 at p. 9). Anderson staff also indicated that extra supports would be implemented, in the event that the student returned to that setting (Tr. p. 209). Although the student's father agreed with the January 2007 CSE's recommendation to locate another residential placement for his son, respondents did not want their son to return to Anderson (Tr. pp. 96, 206, 246, 257-58).<sup>3</sup>

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<sup>3</sup> During the period of January 2007 through April 2007, petitioner's CSE Chairperson contacted a number of residential placements in an attempt to locate an appropriate placement for the student (Dist. Exs. 70; 72). At the time of the impartial hearing in April 2007, petitioner's CSE had yet to secure a placement for the student (Tr. pp. 105-07, 127).

By due process complaint notice dated February 14, 2007, respondents commenced an impartial hearing, wherein they asserted that petitioner failed to offer their son a free appropriate public education (FAPE) during the 2006-07 school year (Dist. Ex. 1).

Over a three-day period beginning on April 25, 2007, an impartial hearing convened. At the impartial hearing, petitioner asserted that Anderson was the student's pendency placement, noting that Anderson was the operative placement six months prior to respondents' request for an impartial hearing (Tr. p. 137). Respondents contended that the student's residential placement was not necessarily a component of his pendency placement; rather, pendency was comprised of the related services provided by the student's IEP (Tr. pp. 136-37).<sup>4</sup> On the second day of testimony, the impartial hearing officer rendered a decision with respect to the student's pendency placement (Tr. pp. 317-20). By decision dated May 3, 2007, the impartial hearing officer concluded that Tradewinds, the student's placement as set forth in the May 2006 IEP, constituted his pendency placement (IHO Decision at p. 1).

This appeal ensued pursuant to 8 NYCRR 279.10[d]. Petitioner contends that the impartial hearing officer erred in finding that Tradewinds was the student's pendency placement. Petitioner further asserts that Anderson constitutes the student's pendency placement, because respondents agreed with the recommendation to place their son there until at least December 2006.

Respondents submitted an answer and cross-appealed the impartial hearing officer's determination, requesting that petitioner's appeal be dismissed. Respondents also assert that the impartial hearing officer erred in finding that Tradewinds was the student's pendency placement. Further, respondents argue that the impartial hearing officer erred by ordering a specific facility as the student's pendency placement, and contend that he should have ordered a structured residential placement capable of implementing the last unchallenged IEP.

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 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]; 34 C.F.R. § 300.518; Education Law § 4404[4]). Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Drinker v. Colonial Sch. Dist., 78 F.3d 859 [3d Cir. 1996]; Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297 [4th Cir. 2003]). 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 students with disabilities from school (Honig v. Doe, 484 U.S. 305, 323 [1987]). It 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 the Bd. of Educ. of the Monroe-Woodbury Cent. Sch. Dist., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 95-16).

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<sup>4</sup> Respondents' counsel did not identify the IEP to which he was referring.

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (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. of Arlington Cent. Sch. Dist., 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. of the Shenendehowa Cent. Sch. Dist., Appeal No. 00-073). It may or may not turn out to be the same placement that is determined to be the appropriate educational placement for the child after the conclusion of a hearing on the merits of the recommended program for that year. The U.S. Department 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 [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelle, 96 F.3d 78, 83 [3d Cir. 1996]; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]; Drinker, 78 F.3d at 867 [last functioning IEP]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 [9th Cir. 1987]). 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 supercede the prior unchallenged IEP as the then current placement (Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F.Supp. 1184, at 1189, fn. 3 [S.D.N.Y. 1996]; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 137 F.Supp.2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002] cert. denied 123 S.Ct. 1284 [2003]).

As a threshold matter, I must consider which IEP is in dispute. By motion to dismiss dated March 1, 2007, petitioner challenged the sufficiency of respondents' due process complaint notice (Dist. Ex. 2 at p. 1; Pet. ¶ 22).<sup>5</sup> In a decision dated March 9, 2007, the impartial hearing officer ruled that the propriety of the two IEPs developed and offered during the 2006-07 school year were sufficiently noticed (Dist. Ex. 3 at p. 7). However, I note that petitioner's CSE developed three IEPs that pertain to the 2006-07 school year, and the impartial hearing officer failed to specify which two of the three IEPs to which he refers (*id.*). During the impartial hearing, the impartial hearing officer opted to give "an expansive reading to the complaint and suggest that the parent is contesting as far back as the June [2006] IEP" (Tr. p. 318). As detailed below, I decline to do so here (Tr. p. 318). A party may not have a due process hearing until the party or the attorney representing the party, files a due process complaint notice that meets the requirements of 20 U.S.C. § 1415[b][7][A][ii] (20 U.S.C. 1415[b][7][B]). Moreover, under the new amendments to the IDEA, which became effective July 1, 2005, (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. §§ 1400-1482]), the party requesting an impartial hearing may not raise issues at the impartial due process hearing that were not raised in his original due process complaint unless the original complaint is amended prior to the impartial hearing by permission of the impartial hearing officer not later than five days before the due process hearing occurs (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). The Senate Report pertaining to this new amendment to the IDEA noted that although a due process complaint notice need not "reach the level of specificity and detail of a pleading or complaint filed in a court of law, "the purpose of the sufficiency requirement is ...to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-

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<sup>5</sup> Petitioner's motion to dismiss respondents' due process complaint notice is not contained in the record.

185, "Notice of Complaint," [November 3, 2003]; Application of a Child with a Disability, Appeal No. 06-065). Petitioner contends that respondents are challenging the January 2007 IEP. As explained in greater detail below, I concur. A review of respondents' due process complaint notice reveals that they did not specify which IEP they were challenging (Dist. Ex. 1). Having reviewed the record, I note that the January 2007 IEP superseded the IEP developed as a result of the September 2006 CSE meeting, as well as the June 2006 IEP. Petitioner also correctly maintains that respondents implicitly identified the January 2007 IEP as the challenged IEP, in light of their contention that petitioner's CSE inappropriately placed the student at Anderson after Anderson informed the CSE that its program was not appropriate for him (Dist. Ex. 2 at p. 1). Additionally, during the impartial hearing, counsel for respondents stated that his clients were challenging the CSE's recommendation that the student continue at Anderson as set forth in the January 2007 IEP (Tr. p. 89). The record also demonstrates that respondents did not object to the CSE's recommendations during the June 2006 CSE meeting or during the September 2006 CSE meeting, nor were any objections raised with respect to the June 2006 IEP during the period of June 2006 through September 2006 (Tr. p. 299; Dist. Exs. 56; 59). Moreover, the student's father testified that he expressed his disagreement with the recommendation contained in the January 2007 IEP, by filing his impartial hearing request shortly after the January 2007 CSE meeting (Tr. pp. 264-65). Under the circumstances presented herein, the record demonstrates that the January 2007 IEP was in dispute during the April 2007 impartial hearing.

Next, I will consider how the student's pendency placement was created. The impartial hearing officer concluded that pendency was established by the May 2006 IEP, which recommended that the student be placed in a ten-month residential program at Tradewinds (IHO Decision at p. 1; Tr. p. 318; Dist. Ex. 53). I disagree. Both parties are correct that the impartial hearing officer erred in finding that the May 2006 IEP created the student's pendency placement. As set forth in greater detail below, the record establishes that the September 2006 IEP set forth the student's last agreed upon educational placement. First, the record shows that on February 14, 2007, respondents requested an impartial hearing (Dist. Ex. 1). The record further reveals that the student was receiving special education services pursuant to the September 2006 IEP, until January 2007, when respondents removed him from Anderson (Tr. p. 218). Thus, the September 2006 IEP had already been implemented for months prior to that time and prior to respondents' February 2007 impartial hearing request. I further note that respondents did not challenge the September 2006 IEP prior to its implementation. On the contrary, the record demonstrates that they did not object to their son attending Anderson during the period of June 2006 through September 2006, and raised the issue concerning the student's medication in December 2006 (Tr. p. 299; Dist. Ex. 66 at p. 2). Respondents acknowledged that the student "was pleased upon returning to Anderson" (Dist. Ex. 59 at p. 22). In addition, the record indicates that respondents understand their due process rights, having previously initiated a request for a due process hearing which resulted in a consent decree (Parent Ex. P-I[6]). I also note that in spite of the parties' mutual agreement that Anderson is no longer an appropriate setting to meet the student's special education needs, Anderson agreed to continue his program, with additional supports until a more appropriate setting is secured (Tr. pp. 40-41, 60, 92, 96, 205-06, 209). The record reflects that at the time of the impartial hearing, petitioner was paying Anderson to reserve a spot for the student; therefore, an open space remained for him, and the record demonstrates that Anderson staff would have implemented the September 2006 IEP with the additional necessary supports in order to keep him as safe as possible (Tr. pp. 147, 362). Based on the foregoing, I find that the September 2006 IEP

constitutes the student's pendency placement and petitioner made arrangements to implement that placement at Anderson.

I will now address respondents' cross-appeal. The crux of respondents' contention is that the impartial hearing officer should have ordered a structured residential placement capable of implementing the last unchallenged IEP, without specifying a school, so that respondents could enroll the student at a school of their choosing. I disagree. Under the circumstances presented herein, the pendency argument advocated by respondents would not further the purpose of the pendency provisions of the IDEA, which protect a student with a disability from an unwarranted unilateral removal by the district. Instead, respondents' construction of the pendency provisions would further disrupt the continuity of the student's last agreed upon placement, which is exactly what the pendency provisions were designed to prevent (see Application of a Child with a Disability, Appeal No. 04-011). In the instant matter, respondents have chosen to unilaterally remove their son from Anderson, and a review of the record indicates that his special education needs were uniquely tied to Anderson in September 2006. Consequently, a decision to offer the student special education and related services in an unspecified program, where he has never been placed, would contravene the statutory pendency mandate by transforming a tool for preserving the status quo into an implement for change (Wagner, 335 F. 3d at 302). Accordingly, I find that the student's pendency placement during the course of these proceedings is the placement established by the September 2006 IEP.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled in its entirety.

**IT IS FURTHER ORDERED** that the student's pendency placement shall be the educational placement described above, unless the parties otherwise agree to an alternative placement.

**Dated:** Albany, New York  
July 25, 2007

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**