The University of the State of New York

The State Education Department
State Review Officer

No. 07-125

Application of the BOARD OF EDUCATION OF THE TUXEDO UNION FREE 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:
Shaw, Perelson, May & Lambert, LLP, attorney for petitioner, Jeffrey J. Schiro, Esq., of counsel

Davis and Davis Attorneys at Law, attorney for respondents, Charles G. Davis, Esq., of counsel

DECISION

Petitioner, the Board of Education, appeals 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 the pendency placement for respondents' daughter during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2006-07 school year. The impartial hearing officer found that the student's pendency placement consisted of the educational program and services set forth in the student's October 3, 2006 individualized education program (IEP). The appeal must be sustained in part.

The hearing record is sparse with regard to the student's educational history. Petitioner's Committee on Preschool Special Education (CPSE) identified the student as a preschool student with a disability, and in an IEP for the 2006-07 school year dated October 3, 2006, the CPSE recommended that the student receive special education in a 6:1+2 special class (Pet. Ex. B at pp. 1-2). According to petitioner, the CPSE also supplemented the student's preschool program by recommending a special education itinerant teacher (SEIT), a teaching assistant and related services including occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent training (Pet. ¶ 7; Pet. Ex. B at pp. 1-3). The October 2006 IEP indicated that the student was eligible for extended school year (ESY) services (Pet. Ex. B at p. 1). The October 2006 IEP also noted that the student required services on Saturdays because her service providers observed that it takes more time to focus the student and engage her in tasks on Mondays (id. at p. 2). The student's eligibility for special education and related services is not in dispute in this appeal (see 8 NYCRR 200.1[zz]).

In a due process complaint notice dated May 7, 2007, respondents alleged, among other things, that the student attended the CPSE's recommended preschool from September 2006 until December 2006, which used applied behavioral analysis (ABA) therapy (Pet. Ex. A at pp. 5-6). Respondents described several reasons why they were dissatisfied with the recommended program during fall 2006, and they alleged that the October 2006 IEP was substantively inappropriate, that the preschool failed to comply with the IEP and that the student did not make progress (id. at p. 6). After the conclusion of the holiday break in December 2006, they enrolled the student in a full-day, integrated, sensory-based learning program located in New Jersey, which they contend is an appropriate available alternative placement (id. at pp. 10-11). Respondents seek reimbursement for the cost of tuition at the private school in New Jersey for a portion of the 2006-07 school year (id. at pp. 3, 10).

On August 7, 2007, petitioner's Committee on Special Education (CSE) convened to transition the student from the CPSE to the CSE and to develop an IEP for the student for the 2007-08 school year (Pet. Ex. D at p. 1). The CSE recommended classifying the student as having multiple disabilities and recommended placement in an 8:1+2 special class at a Board of Cooperative Educational Services (BOCES) facility with related services of speech-language therapy, OT and PT (Pet. Ex. D).[1]

In an application dated August 21, 2007, respondents sought an interim determination of the student's pendency placement from the impartial hearing officer (Pet. Ex. C). Respondents asserted that they were entitled to continuation of the student's PT, OT, speech-language therapy, SEIT and "other related services" for the duration of the impartial hearing and subsequent appeals (id. at p. 3). In an interim determination dated September 21, 2007, the impartial hearing officer described the services set forth in the October 2006 IEP and found that it constituted the last agreed upon IEP at the time the proceeding was commenced (IHO Decision at p. 3).[2] The impartial hearing officer noted that school districts have some flexibility with regard to the location at which pendency services must be provided, and directed petitioner to provide "the educational program and related services . . . at an appropriate location," and noted that such location may include a particular BOCES facility (id. at p. 4). The impartial hearing officer stated that "some" of the educational components and related services listed in the October 2006 IEP were listed as being provided at the student's home or at alternate locations, and he directed petitioner to provide "any and all such programs and services" at the same location in which they had been provided (id.).

Petitioner appeals, contending that the impartial hearing officer erred in ordering petitioner to provide the student's home-based or alternate location-based services to the student "at home." Petitioner acknowledges that some of the student's services were provided at home when the student was in preschool, but asserts that home-based services would bolster an inappropriate current private placement by respondents. Petitioner also argues that the educational program it offered to the student for the 2007-08 school year via the August 1, 2007 IEP would result in more

[1] The impartial hearing officer states that respondents were also dissatisfied with the recommendation of the August 7, 2007 CSE (IHO Decision at p. 3); however, the hearing record does not contain information regarding any claims filed after the May 7, 2007 due process complaint notice (Pet. Ex. A).

[2] Petitioner asserts that the interim pendency determination was not received by the parties until copies were transmitted via electronic mail on October 9, 2007 (Pet. Ex. F at p. 1; see Pet. ¶ 14 at n.2).

instruction and services than the private placement secured by respondents. Petitioner further contends that providing the student with services at home poses a significant financial hardship on petitioner.[3] Respondents were granted their request for an extension of time in which to serve their answer to the petition for review until December 10, 2007; however, an answer has not been filed (see 8 NYCRR 279.5, 279.10[e]). Notwithstanding respondents' failure to answer, I am required to examine the entire hearing record and make an independent decision based on the entire hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

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]; Educ. Law §§ 4404[4], 4410[7][c]). 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 the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 95-16). Furthermore, the pendency provisions of the Commissioner's Regulations do not require that a student who has been identified as a preschool student with a disability must remain in a preschool program for which he or she is no longer eligible pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).

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 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,

[3] The hearing record is unclear with regard to where the student is currently attending school and what special education services she is receiving.

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]).

In this case, I note that petitioner has agreed to provide the student with the related services that are listed in the October 2006 IEP as the student's pendency and does not challenge the impartial hearing officer's decision in that regard (Pet. ¶ 16).[4] The only issue raised in the petition for review is the location at which a portion of the student's pendency program should be implemented. With regard to petitioner's argument that providing the student with "home-based services would only serve to bolster an inappropriate private placement," I find this argument is unpersuasive with regard to pendency because, in essence, it prematurely addresses the merits of respondents' claims for tuition reimbursement rather than the issue of the student's pendency placement. The likelihood of respondents' success on the merits is not relevant to the issue of pendency (Zvi D., 694 F.2d at 905). A student's pendency placement is not necessarily the placement that will ultimately be decided to be the appropriate placement after a hearing on the merits, since pendency placement and appropriate placement are separate and distinct concepts (Mackey, 386 F.3d at 160 [2d Cir. 2004]; Application of the Bd. of Educ., Appeal No. 05-006). The issue of whether respondents' unilateral placement is appropriate is a matter that the parties must address on the merits of respondents' tuition reimbursement claim.

With regard to the location(s) at which petitioner must offer the student's pendency program, I note that the impartial hearing officer's decision inconsistently directed petitioner to "implement the educational program and related services . . . at an appropriate location" while also ordering petitioner, without specificity, to implement "some of the educational components and related services" that were provided at home or at alternate locations to be provided in the same location where they had been provided (IHO Decision at p. 4).

As noted above, in the absence of an agreement with the parents, a school district may not change a student's then current educational placement until the proceedings are finally concluded (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]). However, whether a student's educational program is reflective of special education needs that are uniquely tied to a specific site or location is a distinct question (see Application of a Child with a Disability, Appeal No. 07-061). In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) specifically addressed the question of what constitutes a change in educational placement and opined that consideration should be given to whether a change in educational placement has occurred on a case-by-case basis, as it is a very fact specific inquiry (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" (id.). OSEP set forth the

[4] Under the IDEA, a school district is not required "to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that [school district] made [free appropriate public education (FAPE)] available to the child and the parents elected to place the child in a private school or facility" but may be required to reimburse the parents if it is determined that the school district failed to offer a FAPE" (34 C.F.R. § 300.148[a], [c]). Although unclear in this case, it appears that petitioner agreed to provide the student with related services.

following factors to be considered in determining whether a change in educational placement has occurred:

> whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements

(Letter to Fisher, 21 IDELR 992).

A determination regarding whether a change in location would constitute an impermissible modification of the student's pendency placement must be supported by evidence in the record (see Application of a Child with a Disability, Appeal No. 01-003). An impartial hearing officer must ensure that there is an adequate record upon which to premise his or her decision and permit meaningful review of the issues (Application of the Bd. of Educ., Appeal No. 04-017; Application of a Child with a Disability, Appeal No. 02-003; Application of the Bd. of Educ., Appeal No. 01-087). The Commissioner's Regulations provide that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination." (8 NYCRR 200.5[i][4][ii]).

In this case, no hearing was held on the issue of pendency and the impartial hearing officer noted that he made his pendency determination based on a "limited record" (IHO Decision at p. 3). The October 2006 IEP indicates that the student's OT, PT and speech-language therapy were offered in multiple locations such as the student's home, a therapy room and an "office" (Pet. Ex. B at pp. 1-2); however, there is no basis in the hearing record for determining whether the services can be provided at new locations taking into consideration the criteria articulated by OSEP (see Letter to Fisher, 21 IDELR 992). Furthermore, the teaching assistant and SEIT services were provided to the student in a "flexible setting" and the hearing record does not clarify what "flexible setting" means (Pet. Ex. B at pp. 1-2). I also note that with regard to the student's ESY services, the location of the student's special education and related services are different for reasons that are not apparent in the hearing record (id. at p. 3). Based upon the scarcity of information relevant to the parties' dispute, I find that the hearing record is not adequate to conduct a meaningful review of whether changing the location of the student's SEIT services, teaching assistant, OT, PT, and speech-language therapy would substantially or materially alter the student's educational program (see Letter to Fisher, 21 IDELR 992; Application of a Child with a Disability, Appeal No. 01-003). I also find that the impartial hearing officer's orders are inconsistent and unclear pertaining to the location of the delivery of the pendency services to the student such that his decision must be annulled (Application of the Dept. of Educ., Appeal No. 06-002). Accordingly, I will annul the impartial hearing officer's decision and remand this matter to the impartial hearing officer for a pendency decision based upon development of an adequate record regarding the location of the pendency services and whether petitioner's proposed change in the location of the student's pendency services listed on the October 2006 IEP would constitute a change in the student's educational placement.

With regard to the adequacy of the record, I further note that the hearing record contains no explanation whatsoever for the inordinate delay in conducting the impartial hearing. While respondents' due process complaint notice is dated May 7, 2007, it appears that in the ensuing five months, the case did not proceed further than prehearing conferences and the issuance of the interim determination (Pet. Exs. A at p. 3; H). I caution the impartial hearing officer to comply with the Commissioner's Regulations with regard to granting extensions and rendering a timely final decision in the case (8 NYCRR 200.5[j][3][xiii], [5]).

I have considered petitioner's remaining contentions, including the contention regarding its financial burdens, and find them unpersuasive.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's interim determination dated September 21, 2007 is annulled and

IT IS FURTHER ORDERED that this matter shall be remanded to the impartial hearing officer who shall, unless the parties agree to an alternative pendency placement, convene the impartial hearing, develop a hearing record regarding the need to implement the student's pendency placement at a specific site or location, and render a decision within 15 calendar days of receipt of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the interim decision dated September 21, 2007 is not available, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
January 9, 2008

PAUL F. KELLY
STATE REVIEW OFFICER