



The University of the State of New York

The State Education Department State Review Officer

No. 07-140

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

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

Mayerson & Associates, attorney for respondent, Randi M. Rothberg, Esq., of counsel

DECISION

Petitioner 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 determining respondent's son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational programs for the student for the 2007-08 school year and summer 2008. The impartial hearing officer found that, for pendency purposes, the student's current educational placement was established by a prior unappealed impartial hearing officer's June 2007 decision. The appeal must be dismissed.

Preliminarily, I will address a procedural issue. Respondent attached ten exhibits to her answer (Answer Exs. A-J). In its reply, petitioner objects to respondent's attempt to introduce these documents (Reply ¶¶ 1-6). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). Here, I find that the exhibits are not necessary for my review and I therefore decline to accept them.

At the commencement of the impartial hearing on October 29, 2007, the student was attending the Rebecca School where respondent had unilaterally enrolled him during the prior school year (2006-07) (see Tr. pp. 5-6; Parent Ex. A at pp. A2-A3; B at pp. B3, B13-B14). The

Commissioner of Education has not approved the Rebecca School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services and classification as a student with autism are not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

By decision dated June 15, 2007, a prior impartial hearing officer determined on the merits that petitioner conceded that it had denied respondent's son a free appropriate public education (FAPE) for the 2006-07 school year, that respondent sustained her burden to establish that the services obtained for her son during the 2006-07 school year were appropriate, and that petitioner also conceded that no equitable considerations existed to militate against respondent's requests (Parent Ex. B at pp. B12-B14). Neither party appealed from the June 15, 2007 decision.

On September 11, 2007, respondent requested an impartial due process hearing alleging that petitioner failed to offer her son a FAPE for the 2007-08 school year, including summer 2008, and sought, among other things, reimbursement for the costs of her son's tuition expenses at the Rebecca School for the 2007-08 school year and for summer 2008 (Parent Ex. A at pp. A1-A4; see Parent Ex. C). Respondent's letter included a request for pendency pursuant to the prior impartial hearing officer's June 15, 2007 decision, which respondent noted was final and non-appealable (id. at p. A2).

At the impartial hearing, on October 29, 2007, the parties addressed the issue of the student's pendency placement during the instant proceedings (Tr. p. 3). Respondent argued that the student's pendency placement arose from the prior impartial hearing officer's June 15, 2007 decision, which was final and non-appealable (Tr. pp. 3-8). Petitioner contended that based upon the newly enacted federal regulations, a student's pendency placement could not originate from an impartial hearing officer's decision because in a two-tier system of review, such as in New York, the impartial hearing officer's decision did not constitute an agreement between the state agency and the parent for the purposes of pendency (Tr. pp. 8-13, 14-15; see 34 C.F.R. § 300.518[a-d]). In addition to the arguments at the impartial hearing, the parties also submitted post-hearing briefs for the impartial hearing officer's consideration (Tr. pp. 19-22; Dist. Post-Hr'g Br. at pp. 1-9; Parent Post-Hr'g Br. at pp. 1-6).

By decision dated November 20, 2007, the impartial hearing officer rendered an interim decision on pendency (IHO Decision at pp. 3-11). In his decision, the impartial hearing officer found that the prior impartial hearing officer's June 15, 2007 decision established the student's pendency placement for the current proceedings (id. at p. 11). The impartial hearing officer examined and analyzed the arguments set forth by the parties, State pendency statutes, State and federal regulations relevant to pendency, previous State Review Officer decisions, relevant case law, and a recently issued September 4, 2007 letter from the Office of Special Education Programs of the United States Department of Education (OSEP) (id. at pp. 3-11).

On appeal, petitioner contends that the impartial hearing officer erroneously concluded that the prior impartial hearing officer's June 15, 2007 decision established the student's pendency placement for the current proceedings. Petitioner asserts that such a conclusion is prohibited by findings of State Review Officer decisions, federal regulations and State regulations. In addition, petitioner alleges that because the student has no last agreed-upon individualized education

program (IEP), he has no appropriate pendency placement. As a result, petitioner alleges that the student should be treated as an initial applicant to public school.

In her answer, respondent asserts that an unappealed impartial hearing officer's decision is final and enforceable for pendency purposes in a two-tiered review state, such as New York. Respondent seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss petitioner's appeal.¹

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]). 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 (Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859 [3d Cir. 1996]). The purpose of the pendency provision is "intended to maintain some stability and continuity in a child's school placement during the pendency of review proceedings" (Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [D.C.N.Y. 1985]; see Honig v. Doe, 484 U.S. 305, 323 [1987] [finding that Congress intended to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school"]). 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).

As noted in Application of a Child with a Disability, Appeal No. 06-131, in a two-tiered state, such as New York, a student's pendency placement can be changed when a State Review Officer agrees with the student's parents that a change in placement is appropriate (34 C.F.R. § 300.518[d]). The Analysis of Comments and Changes accompanying the new regulations sets forth the following:

[T]he Act's pendency provision that when a hearing officer's decision is in agreement with the parent that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parent for purposes of determining the child's current placement during subsequent appeals. See, e.g., Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 372 (1985); Susquenita School District v. Raelee S., 96 F.3d 78, 84 (3rd Cir. 1996); Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990). To clarify that new Sec. 300.518(d) . . . does not apply to a first-tier due process hearing decision in a State that has two tiers of administrative review, but only to a State-level hearing officer's decision in a one-tier system or State review

¹ Respondent asks that I recuse myself. I have considered the request and find no basis in law or fact for recusal and I find that I am able to impartially render a decision (see 8 NYCRR 279.1).

official's decision in a two-tier system that is in favor of a parent's proposed placement, we are removing the reference to "local agency" in new Sec. 300.518(d). This change is made to align the regulation more closely with case law.

(Child's Status During Proceedings, 71 Fed. Reg. 46710 [Aug. 14, 2006]; see 34 C.F.R. § 300.518[d]).

Subsequent to the issuance of the decision in Application of a Child with a Disability, Appeal No. 06-131, OSEP issued an interpretation of the above referenced regulation in a September 4, 2007 letter (Letter to Hampden, ___ IDELR ___, 108 LRP 2225 [OSEP 2007]; Parent Post-Hr'g Br. Ex. 2). OSEP is the agency charged with the principal responsibility for administering the IDEA (20 U.S.C. § 1402[a]). Substantial deference must be given to a federal agency's interpretation of its own regulations; the interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation" (Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 [1994] [internal citations omitted]; see Stinson v. U.S., 508 U.S. 36, 43-45 [1993] [includes agency's interpretive commentaries]; see, e.g., Honig, 484 U.S. at 325 n.8 [1988][where the IDEA was ambiguous, Court deferred to agency's interpretation in an OSEP policy letter, which comported with the purpose of the Act]; Hooks v. Clark Co. Sch. Dist., 228 F.3d 1036, 1040 [9th Cir. 2000] [defers to agency interpretation of the IDEA in OSEP policy letter]; D.P. v. School Bd. of Broward Co. Fla., 360 F. Supp. 2d 1294, 1298 [S.D. Fla. 2005] [defers to agency interpretation of the IDEA]; Raymond S. v. Ramirez, 918 F. Supp. 1280, 1292-93 [N.D. Iowa 1996] [defers to agency interpretation of the IDEA]). An administrative body or reviewing court's task is not to decide which among several competing interpretations best serves the regulatory purpose; it must defer to the agency's interpretation unless "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency]'s intent at the time of the regulation's promulgation" (Thomas, 512 U.S. at 512).

OSEP issued the September 4, 2007 letter in response to a request to clarify the interpretation of the newly enacted federal regulation set forth in 34 C.F.R. § 300.518(d) (Letter to Hampden, ___ IDELR ___, 108 LRP 2225 [OSEP 2007]). The OSEP letter noted that the relevant pendency provisions did not address a situation in a two-tier due process system, such as New York, in which a local agency did not appeal the first-tier impartial hearing officer's decision on the merits that was favorable to the parent (id. at p. 2). Citing the finality provisions of the federal regulations (see 34 C.F.R. § 300.514[a]), the OSEP letter then clarified that in a two-tier due process system, such as New York, a first-tier impartial hearing officer's "unappealed decision is final, and must be implemented. That final decision on the merits, as implemented, becomes the child's current educational placement" (id. at pp. 1-2). The OSEP letter further indicated that the same result would occur if the first-tier impartial hearing officer's decision on the merits favored the local agency and the parent did not appeal; that is, the unappealed first-tier impartial hearing officer's decision becomes the child's current educational placement for purposes of pendency (id. at p. 2).

After carefully reviewing the entire hearing record and the arguments set forth by the parties, I find that the impartial hearing officer, in a thorough decision, correctly held that that the prior impartial hearing officer's unappealed June 15, 2007 decision establishes the student's pendency placement for the current proceedings (IHO Decision at pp. 3-11). The decision shows

that the impartial hearing officer considered the legal arguments and exhibits submitted by both parties; that he analyzed the relevant State statutory provision, federal and State regulations, case law, and State Review Officer decisions; and that he properly afforded substantial deference to the September 4, 2007 OSEP letter interpreting its own regulations. In short, based upon my review of the entire hearing record and given the September 4, 2007 OSEP letter, I find that the pendency hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 11, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**