The University of the State of New York

The State Education Department
State Review Officer

No. 08-009

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 student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Emily R. Goldman, Esq., of counsel

Mayerson & Associates, attorney for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner, a school district, appeals pursuant to section 8 NYCRR 279.10(d) of the State regulations, from an interim decision of an impartial hearing officer determining the pendency placement for respondents' son during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2007-08 school year. The impartial hearing officer found that the student's pendency placement included 20 hours per week of direct applied behavioral analysis (ABA) services, up to ten hours per week of supervisory and parent training services, and 1:1 speech-language therapy two times per week for 60 minutes. The appeal must be dismissed.

When the impartial hearing officer's interim decision was rendered in January 2008, an impartial hearing on the merits had been convened, and the issue of pendency was addressed upon the submission of the parties' arguments, written briefs and documentary evidence (Dist. Ex. 1; Parent Ex. I; IHO Decision at p. 2). Petitioner's Committee on Special Education (CSE) had recommended that for the 2007-08 school year, the student attend an 8:1+1 general education class in petitioner's school with special education teacher support services; however, the parties disputed the extent to which the student should receive related services (Parent Exs. A at pp. 2-4; C at pp. 1, 12, 14). The student's prior educational history is discussed in Application of a Child with a Disability, Appeal No. 06-063 (2005-06 school year proceeding), and will not be repeated here in detail. The student's eligibility for special education services as a student with autism is not in dispute in this appeal (Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][i]; 8 NYCRR 200.1[zz][6]).

During prior due process proceedings in which respondents challenged the recommended individualized educational program (IEP) for the student's 2005-06 school year (see Application of a Child with a Disability, Appeal No. 06-063), the CSE reconvened on July 31, 2006 to develop an IEP for the 2006-07 school year (Parent Ex. I at pp. 15, 26). Respondents challenged the resultant IEP for the 2006-07 school year (id. at p. 10). On August 8, 2007, the impartial hearing officer (Hearing Officer I) in the 2006-07 proceeding found that, among other things, petitioner had failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year and that respondents were entitled to reimbursement for several related services (id. at pp. 20-24). With regard to the 2006-07 school year, Hearing Officer I ordered petitioner to reimburse respondents "a maximum of 20 hours per week of ABA services, which includes the hours provided in school . . . and the hours per month of supervision (approximately 8-10) . . ." (id. at p. 24). According to Hearing Officer I, "[t]hese hours also include[d] the time spent on parent training and counseling" (id.). Hearing Officer I also ordered petitioner to "reimburse, or continue to pay by [related service authorization], for two hours of 1:1 speech services per week" (id.). Neither party appealed the decision of Hearing Officer I regarding the student's 2006-07 IEP (Tr. pp. 11, 21; Pet. ¶ 14).

Prior to the conclusion of the impartial hearing regarding the student's 2006-07 IEP, petitioner's CSE convened on July 30, 2007 to develop the student's IEP for the 2007-08 school year (Parent Ex. C). In a due process complaint notice dated August 22, 2007, respondents challenged the CSE's recommendations in the student's 2007-08 IEP, and requested that petitioner provide pendency pursuant to the terms of an impartial hearing officer's decision dated September 21, 2005 (Parent Ex. A at p. 2).

At the impartial hearing in the instant case, respondents noted that after the due process complaint notice was filed, the time in which to appeal Hearing Officer I's decision elapsed without action by petitioner, and therefore, they asserted that Hearing Officer I's August 8, 2007 decision became the student's pendency placement (Tr. p. 24). Petitioner did not object to respondents' amendment of their request for pendency services consistent with Hearing Officer I's August 2007 decision (Tr. pp. 24-25). Petitioner argued that the student's pendency placement is based upon the decision in the 2005-06 school year proceeding, and in the alternative, argued that Hearing Officer I's decision was the basis of the student's pendency placement (Tr. pp. 8, 24-25). The parties disputed whether the eight to ten hours of supervision services were included within the 20 hours of ABA services awarded by Hearing Officer I, or whether the supervision hours were awarded in addition to the 20 hours of ABA services (Tr. p. 8).

In a decision rendered on January 9, 2008, the impartial hearing officer (Hearing Officer II), found that the student's pendency placement stemmed from Hearing Officer I's August 2007 determination resolving the parties' dispute over the student's services for the 2006-07 school year (IHO Decision at p. 2). Hearing Officer II determined that petitioner must provide the student with pendency services, including 20 hours per week of direct ABA services, 10 hours per week of "supervisory/parent training and supervision," and 1:1 speech-language therapy at a separate location two times per week for 60 minutes (id.).

Petitioner appeals, contending that Hearing Officer II erred and should have determined that the decision in 2005-06 school year proceeding should control as the student's pendency placement in the instant proceeding. Petitioner asserts that Hearing Officer II's conclusion is

prohibited by the findings in a State Review Officer decision, federal and State regulations. Among several alternative arguments, petitioner asserts that the student has no pendency placement, or that his pendency placement is the first school-aged IEP the student received. Petitioner also alleges that Hearing Officer II exceeded the number of hours of related services awarded by Hearing Officer I. Respondents' request for an extension of time in which to serve their answer to the petition for review was granted; 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]). 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

> 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, the Office of Special Education Programs of the United States Department of Education (OSEP) issued an interpretation of the above referenced regulation in a September 4, 2007 letter (Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Parent Ex. I at pp. 30-31). 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, 49 IDELR 197). OSEP 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.). Citing the finality provisions of the federal regulations (see 34 C.F.R. § 300.514[a]), OSEP 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" (id.). In such cases, the first-tier impartial hearing officer's final decision on the merits, "as implemented, becomes the child's current educational placement" (id.). OSEP 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.). Accordingly, electing not to appeal a decision of an impartial hearing officer to a State Review Officer renders a first-tier decision final and binding upon the parties under the finality provisions of federal regulations, and unless the parties otherwise agree, establishes the student's educational placement during the pendency of a subsequent due process proceeding (34 C.F.R. § 300.514[a]; Letter to

Hampden, 49 IDELR 197; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).[1]

Turning first to petitioner's argument that the decision in the 2005-06 school year proceeding is determinative of the student's pendency placement in this case, I note that the 2005-06 school year proceeding adjudicated respondents' reimbursement claims with regard to the 2005-06 school year; however, the decision did not address any disputes arising out of the 2006-07 or 2007-08 school years (see Application of a Child with a Disability, Appeal No. 06-063). Subsequent to the events underlying the decision in 2005-06 school year proceeding, the parties convened for the student's annual CSE review for the 2006-07 school year on July 31, 2006, developed a new IEP for the student, resolved their disputes over the 2006-07 IEP through an impartial hearing, and chose not to appeal any aspect of Hearing Officer I's determination therein (Tr. pp. 11, 21; Parent Ex. I at pp. 10, 15, 24; see Pet. ¶ 14). I find that these events, all of which postdate the events underlying the 2005-06 school year proceeding, are controlling with respect to determination of the student's "then-current educational placement" (20 U.S.C. § 1415[j]; Educ. Law § 4404[4][a]; see 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]; Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906).

To the extent that petitioner alternatively argues that the student does not have a pendency placement or that his pendency placement "emanates" from his first school-aged IEP, petitioner did not identify any specific facts related to these arguments at the impartial hearing, and no determination was made by the impartial hearing officer with respect to these issues. Instead, petitioner addresses these points for the first time on appeal (Pet. ¶¶ 9, 47-49). I find that these arguments, and any relevant evidence, were not raised at the impartial hearing prior to this interlocutory appeal, and therefore these arguments are not properly before me (see Application of the Bd. of Educ., Appeal No. 07-031; Application of the Bd. of Educ., Appeal No. 06-110; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 04-100). In light of the foregoing, I concur with Hearing Officer II that the unappealed August 2007 determination of Hearing Officer I established the student's entitlement to pendency services for purposes of the instant due process proceeding.

With regard to petitioner's argument that Hearing Officer II exceeded the relief awarded in Hearing Officer I's August 2007 decision, I find no reason to disturb the conclusion reached by Hearing Officer II that the eight to ten hours of supervision and parent training and counseling were awarded in addition to the 20 hours of ABA services provided to the student (Parent Ex. I at p. 24). While the decretal paragraph of Hearing Officer I's decision with regard to ABA services, standing alone, could be open to more that one interpretation (id.), the preceding page unambiguously states that it was appropriate to award ABA services to respondents, "as a transition service, a maximum of 5-7 hours at school coupled with about twice as many hours at home" (id.

[1] Petitioner asserts that a State Review Officer has not issued any decisions that base a pendency placement determination upon an impartial hearing officer's decision subsequent to the decision in Application of a Child with a Disability, Appeal No. 06-131 (Pet. ¶ 29). However, I note that shortly before the petition for review in the instant case was filed, two decisions were issued in which pendency placements were established through unappealed decisions of impartial hearing officers (see Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

at p. 23).[2] These provisions of Hearing Officer I's decision, when read together, result in a total award of ABA services with an upper range of 21 hours per week before any supervision or parent training and counseling services are considered. As noted previously, petitioner did not appeal this award, and thus it became final and binding upon the parties (34 C.F.R. § 300.514[a]; Letter to Hampden, 49 IDELR 197). Accordingly, I find that, for purposes of pendency in the instant proceeding, Hearing Officer II correctly directed petitioner to provide respondents with eight to ten hours of supervisory and parent training and counseling in addition to the 20 hours of direct ABA services for the student set forth in the decretal paragraph (Parent Ex. I at p. 24).

I have considered petitioner's remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 19, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[2] I note that Hearing Officer I provided additional guidance to the parties, stating that two hours of supervision of the student's ABA services were "reasonable" (Parent Ex. I at p. 23).