The University of the State of New York

The State Education Department
State Review Officer
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No. 09-028

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Springville-Griffith Institute Central School District

Appearances:
Hodgson Russ LLP, attorneys for respondent, Ryan Everhart, Esq., of counsel

DECISION

Petitioners (the parents) appeal pursuant to section 8 NYCRR 279.10(d) of the State Regulations from an interim decision of an impartial hearing officer determining their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2008-09 school year. The impartial hearing officer determined that the student's pendency placement was established by an unappealed decision issued in a prior administrative appeal (see Application of the Bd. of Educ., Appeal No. 07-007). The district cross-appeals from the impartial hearing officer's determination that the student's 2008-09 individualized education program (IEP) did not constitute the student's pendency placement. The appeal must be sustained. The cross-appeal must be dismissed.

Preliminarily, I will address a procedural issue. The parents request that I recuse myself from deciding this matter. The district takes no position on the parents' recusal request. Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Having given the parents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR 279.1 do not require recusal in this instance. In accordance with the forgoing, the parents' recusal request is denied (see Application of the Bd. of Educ., Appeal No. 07-092).

Many of the facts underlying the pendency claims of the instant case are not in dispute. At the time the parents filed their due process complaint notice in this case in November 2008,

the student was eligible for special education and related services as a student with autism (IHO Exs. I; IV at p. 7; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student has been the subject of eight previous appeals from impartial hearing officer determinations (Application of a Student with a Disability, Appeal No. 08-001; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 05-059; Application of a Child with a Disability, Appeal No. 04-105; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-011; Application of a Child with a Disability, Appeal No. 03-050; Application of the Bd. of Educ., Appeal No. 02-070).

In their due process complaint notice dated November 17, 2008, the parents asserted, in addition to their claims on the merits, that the district should implement the student's pendency placement based upon his IEP for the 2003-04 school year as modified by subsequent agreements for the purposes of pendency (IHO Ex. I at p. 13). In a telephonic prehearing conference held on December 30, 2008, the impartial hearing officer directed the parties to submit simultaneous written statements and supporting documentation regarding the student's pendency placement (Tr. pp. 5-6, 8-9, 16-17, 19, 42). The parents asserted that the student should receive as his pendency placement special education instruction in a 12:1+1 integrated setting for 270 minutes five times per week; individual speech-language therapy for 30 minutes four times per week; group speech-language therapy for 30 minutes one time per week; group counseling for 30 minutes one time per week; individual Orton-Gillingham reading instruction for 30 minutes five times per week; occupational therapy (OT); vision therapy services; and curb-to-curb transportation (id.). The parents also alleged that the district was not implementing the student's behavioral intervention plan (BIP), a communication notebook, and other modifications as part of the student's pendency placement (id.). The parents indicated that they had commenced impartial hearings since the 2003-04 school year to challenge each of the district's proposed special education programs and contended that the student was entitled to the pendency services described above (IHO Exs. I at p. 5; VI at pp. 1-2). The parents asserted that they sought judicial review of the administrative determinations issued in March 2007 in Application of the Bd. of Educ., Appeal No. 07-007 (March 2007 Decision) and in March 2008 in Application of a Student with a Disability, Appeal No. 08-001 (March 2008 Decision) in the U.S. District Court for the Western District of New York (District Court) and that the student was entitled to pendency because both District Court cases were still pending there (IHO Exs. I at p. 5; VI at pp. 1-2).[1]

The district acknowledged that overlapping administrative hearings resulted in the student remaining in a pendency placement for many years based in part upon his 2003-04 IEP and that the student continued in this placement until approximately November 12, 2008 (IHO Exs. IV at pp. 2-3, 18; V at p. 3). The district thereafter began to implement the student's 2008-09 IEP, which indicated that the student would receive five 120-minute resource room sessions per week in a 5:1 group, a self-contained language arts class five times per week for 40 minutes in a 15:1 group, individual speech-language therapy for 30 minutes three times per week, group speech-language therapy for 30 minutes two times per week, indirect OT consultation services

[1] The March 2007 Decision related to challenges arising out of the 2005-06 school year and the March 2008 Decision related to challenges arising out of the 2006-07 school year (see Application of a Student with a Disability, Appeal No. 08-001; Application of the Bd. of Educ., Appeal No. 07-007).

for 30 minutes once per month, curb-to-curb transportation, and other accommodations (IHO Exs. IV at pp. 2, 7-16; V at p. 3). The district opposed the parents' position on pendency and asserted that the student's 2008-09 IEP formed the basis of the student's pendency placement at the time the parents initiated the instant case on November 17, 2008 (IHO Ex. IV at pp. 1-2). In its written submission, the district noted that the parents had filed an appeal of the March 2008 Decision in the District Court in July 2008, but that the parents had failed to timely serve any papers upon the district in that action within 120 days (IHO Ex. IV at pp. 3, 18).[2] The district concluded that the parents had abandoned the federal action and that the student's right to continue in his prior pendency placement based upon the 2003-04 IEP ended because no other proceedings had been commenced (id.).

In an interim decision dated February 8, 2009, the impartial hearing officer determined that neither party correctly identified the student's pendency placement (IHO Decision at p. 6). The impartial hearing officer found that in September 2008 the district agreed not to implement the student's 2008-09 IEP and confirmed that the student's prior pendency placement would be implemented (id. at pp. 6-7). The impartial hearing officer determined that the district failed to provide prior written notice to the parents before changing the student's placement to the 2008-09 IEP and rejected the district's arguments that the 2008-09 IEP was the student's pendency placement (id. at p. 7).

The impartial hearing officer also determined that the student's placement as described in the 2003-04 IEP and thereafter modified by the parties' agreements, did not constitute the student's pendency placement (IHO Decision at p. 8). The impartial hearing officer also determined that the March 2008 Decision did not establish the student's pendency placement because it had been appealed to the District Court and the action was still pending (id. at pp. 8-10). With regard to the March 2007 Decision, the impartial hearing officer found that the student's mother had appealed the decision to federal court without naming the district as a party, but she found no evidence that the action was still pending (id. at p. 10). Therefore, the impartial hearing officer concluded that the March 2007 Decision constituted an unappealed administrative decision that became final and binding upon the district 30 days after it was issued (id.). The impartial hearing officer directed the district to implement the student's placement as identified in the March 2007 Decision as the student's pendency placement for the instant proceedings.[3]

The parents appeal, contending that the impartial hearing officer erred in determining that the March 2007 Decision established the student's pendency placement.[4] The parents argue that

[2] The district indicated that the student had previously been entitled to pendency placement by virtue of an impartial hearing that was being conducted at the same time that the parents filed a federal court action seeking review of the March 2007 Decision and, therefore, pendency was not in dispute during the administrative proceedings (IHO Ex. IV at p. 3).

[3] The impartial hearing officer noted that the March 2006 IEP was determined to be appropriate in the March 2007 Decision and offered to clarify her interim order if the parties provided her with a copy of the March 2006 IEP (IHO Decision at pp. 10-11).

[4] The parents also allege that the IHO erred in determining that the March 2007 Decision became final 30 days after it was issued.

the district was aware that the student's mother had filed appeals regarding the March 2007 Decision and the March 2008 Decision in the District Court and that the impartial hearing officer exceeded her jurisdiction in determining that the federal action with respect to the March 2007 Decision was no longer pending and did not provide a basis for continuing the student's pendency placement. The parents also seek an order finding, among other things, that: (1) the student has been denied a free appropriate public education (FAPE) because he has been improperly removed from his pendency placement; (2) the district failed to provide the parents with prior written notice; (3) the impartial hearing officer's interim determination should be annulled; (4) the impartial hearing officer is in "gross dereliction of her administrative duties" by delaying the interim decision; and (5) the student's pendency placement should continue as described in the 2003-04 IEP as amended by subsequent agreements to provide OT and vision therapy.

In its answer, the district denies most of the parents' allegations. The district acknowledges that the student's placement was switched to the 2008-09 IEP from his prior pendency placement until the "time for service expired" in the parents' appeal of the March 2008 Decision.[5] The district also cross-appeals the impartial hearing officer's determination that the student's 2008-09 IEP did not constitute the student's pendency placement. For relief, the district urges denial of the parents' claims and an order establishing the 2008-09 IEP as the student's pendency placement.

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]; 34 C.F.R. § 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

[5] The district acknowledges on appeal that it was informally aware of the federal Court action involving the March 2007 Decision, but alleges that that is not a party and has not been served with process in that case.

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]). Furthermore, a prior unappealed impartial hearing officer'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). Moreover, if "a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents" for purposes of establishing the student's current educational placement (34 C.F.R. 300.518[d]; see 8 NYCRR 200.5[m][2]; Schutz, 290 F.3d at 482).

Turning to the issue of the appropriate pendency placement for the student in this case, the parties do not dispute that a student may continue to receive special education services by virtue of pendency while a parent seeks judicial review of an administrative determination upholding the district's proposed placement (see Schutz, 290 F.3d at 484). As further described below, I find that the student is entitled to the pendency placement in accordance with his 2003-04 IEP as amended by the parties' subsequent agreements. The district conceded that the student actually remained in the pendency placement for six years until November 2008 (IHO Ex. V at p. 3). The parents initiated an impartial hearing in February 2007 and a subsequent appeal that resulted in the March 2008 Decision (Application of a Student with a Disability, Appeal No. 08-001). In July 2008, the student's mother filed a complaint in the District Court (2008 Complaint) naming, among others, the district as a defendant and seeking judicial review of the March 2008 Decision, a partial copy of which is contained in the hearing record in the form of a two-page

excerpt (IHO Ex. IX).[6] In August 2008, the district agreed to "continue [the student's] pendency program" (IHO Ex. VI at p. 29). The hearing record also contains a "Notice of Electronic Filing" showing activity on November 21, 2008 with respect to the 2008 Complaint including directions to serve the defendants (id.). Although the district argued before the impartial hearing officer that Notice of Electronic Filing, by itself, did not clearly identify the nature of the action or the parties, I find that the Notice of Electronic Filing, when read together with the excerpt from the 2008 Complaint, sufficiently demonstrates that the student's mother had named the district in an action seeking judicial review of the March 2008 decision and the action was still pending in the District Court (IHO Exs. IV at pp. 4, 29; IX). Moreover, the impartial hearing officer also correctly concluded that evidence showed that the action with regard to the 2008 Complaint was still pending in the District Court (IHO Decision at p. 10). The administrative proceedings identified in the 2008 Complaint were initiated by the parent in February 2007, reviewed in the March 2008 Decision, and are currently the subject of a civil action before the District Court (IHO Ex. IX; see Application of a Student with a Disability, Appeal No. 08-001). Accordingly, the student is entitled to continue with the education and related services set forth in his 2003-04 IEP as modified by the parties' subsequent agreements and the impartial hearing officer's interim decision must be annulled.

I have examined the parties' remaining contentions and find they are either premature or that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's interim decision dated February 8, 2009 is annulled; and

IT IS FURTHER ORDERED that the district provide as the student's pendency placement, the education and related services set forth in his 2003-04 IEP as modified by the parties' subsequent agreements.

Dated: **Albany, New York**
April 20, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

[6] I note that the impartial hearing officer requested that the parents provide her with a copy of the summons and complaint in each federal action; however, it is unclear why the entire documents were not supplied for the hearing record (IHO Ex. X).