The University of the State of New York

The State Education Department
State Review Officer
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No. 09-076

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, G. Christopher Harriss, Esq., of counsel

Greenberg Traurig, LLP, attorneys for respondent, Caroline J. Heller, Esq., of counsel

Advocates for Children, attorneys for respondent, Matthew Lenaghan, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the State Regulations, from an interim decision of an impartial hearing officer which determined respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2008-09 school year. The impartial hearing officer found that the student's pendency placement was at the Rebecca School and directed the district to reimburse the parent for that placement pursuant to pendency during the 2008-09 school year. The appeal must be dismissed.

The student's educational history was discussed in Application of a Child with a Disability, Appeal No. 07-038 (July 2007 Decision) and will not be discussed herein in detail. The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The 2007 Decision addressed the parent's claim for tuition reimbursement for the Rebecca School for the 2006-07 school year and noted that the parent succeeded in meeting the first two Burlington/Carter criteria, but that equitable considerations did not favor the parent (Application of a Child with a Disability, Appeal No. 07-038; see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). The parent subsequently appealed the July 2007 Decision to federal District Court in October 2007 (N.R. v. Dep't of Educ., 2009 WL 874061,

at *5 (S.D.N.Y. March 31, 2009]; see also IHO Ex. I). The student attended the Rebecca School for the 2006-07, 2007-08, and 2008-09 school years (Application of a Child with a Disability, Appeal No. 07-038; Parent Exs. G; I; K at pp. 1-2; M). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

With regard to the 2007-08 school year, the hearing record shows that the parties executed a stipulation of settlement in which the district agreed to pay certain costs related to tuition and related services at the Rebecca School and the parent agreed to discontinue and waive any claims against the district arising out of the 2007-08 school year; however, the stipulation also indicated that the parties may not rely upon the provisions therein to establish the "current educational placement" for the student (Parent Ex. K pp. 1-3, 5).

On September 15, 2008, the parent filed a due process complaint notice challenging the district's recommended placement for the student for the 2008-09 school year and sought tuition reimbursement for the Rebecca School for the 2008-09 school year, including summer 2008 (Pet. Ex. 1). The parent amended her due process complaint notice on October 7, 2008 by alleging, among other things, that the student's individualized education program (IEP) recommended by the Committee on Special Education (CSE) for the 2008-09 school year was inappropriate for the student (Parent Ex. A).

On March 31, 2009, the District Court rendered a decision in the parent's appeal from the July 2007 Decision (N.R., 2009 WL 874061). The District Court determined that equitable considerations weighed in favor of the parent in her 2006-07 tuition reimbursement claim (N.R., 2009 WL 874061, at *6-*8).

The impartial hearing in the instant proceeding convened on April 6, 2009, during which the parent requested an order from the impartial hearing officer establishing the student's pendency placement (Tr. pp. 105-06). The impartial hearing officer considered written arguments submitted by the parties with respect to the student's pendency placement (IHO Decision at p. 2; Dist. Letter to IHO dated April7, 2009; Parent Mot. to Dismiss).[1]

In an interim decision dated June 3, 2009, the impartial hearing officer determined that the district's argument that the issue of the student's pendency was beyond the scope of the impartial hearing and its alternative argument that the student was not entitled to pendency until April 6, 2006, were without merit (IHO Decision at pp. 2-3). The impartial hearing officer also noted that both the March 2009 decision issued by the District Court and the July 2007 Decision found that the Rebecca School was an appropriate placement for the student (id. at p. 2). The impartial hearing officer relied upon the District Court decision, the July 2007 Decision, and federal and State pendency provisions to conclude that district must pay the student's pendency placement costs for the student's enrollment at the Rebecca School for the 2008-09 school year until the conclusion of the proceeding, including costs incurred during summer 2008 (id. at p. 3).

[1] The parties' underlying motion papers considered by the impartial hearing officer were not identified with exhibit numbers.

The district appeals, contending that the impartial hearing officer erred by awarding the student pendency relief on a retroactive basis. The district alleges that the student's entitlement to a pendency placement at the Rebecca School did not arise until after the District Court rendered its decision in March 2009.[2] In the alternative, the district argues that the impartial hearing officer erred by awarding pendency relief for the time period prior to September 15, 2008, when the parent filed her due process complaint notice with respect to the 2008-09 school year. The district further asserts that it would be inequitable to allow the parent to recover tuition reimbursement prior to a determination on the merits of her claims.

In her answer, the parent alleges that she informed the impartial hearing officer that the student was entitled to pendency at the Rebecca School at the earliest opportunity after the District Court rendered its decision in March 2009, which was when the impartial hearing convened in April 2009. The parent also asserts that the impartial hearing officer's interim decision should be upheld because retroactive payment for a pendency placement has been deemed appropriate in certain cases.

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. 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 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

[2] The district also argues that the parent failed to "invoke" the student's pendency rights until after the District Court rendered its decision.

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]). Moreover, 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). In addition, 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 instant case, I note that the facts underlying the parties' dispute are not in dispute and the parties agree that, by virtue of pendency, the student is currently entitled to receive special education and related services at the Rebecca School. The parties' dispute is limited to the issue of whether the impartial hearing officer properly awarded tuition reimbursement for the portion of the 2008-09 school year that had elapsed prior to issuance of the District Court's March 2009 order awarding the parent tuition reimbursement for the 2006-07 school year. I have reviewed the hearing record and, due to several factors present in this case that are further described below, I find that the parent is entitled to reimbursement for the costs of the student's special education and related services at the Rebecca School for the 2008-09 school year by virtue of pendency.

First, I note that in the July 2007 Decision there was a State-level agreement with the parent that the district failed to offer the student a free appropriate public education (FAPE) and that the private services selected by the parent were appropriate, although the parent was thereafter precluded from receiving relief with respect to her 2006-07 tuition reimbursement claim on equitable grounds (Application of a Child with a Disability, Appeal No. 07-038; see 34 C.F.R. § 300.518[d]). However, the District Court overturned the administrative determination with

respect to equitable considerations and awarded tuition reimbursement to the parent, a decision which the district now concedes it did not appeal (N.R., 2009 WL 874061, at *6-*8; Pet. ¶ 26).

Next, although the district asserts that the student was not entitled to special education services at the Rebecca School under pendency until after the District Court rendered its decision (Pet. ¶ 31), the district acknowledges that that the Second Circuit has held that, in some circumstances, a parent may be awarded tuition reimbursement retroactively pursuant to pendency (see Mackey, 386 F.3d at 159, 164-65).[3] I do not agree with the district's assertion that the rationale applied in Mackey is limited exclusively to circumstances in which there has been an untimely administrative decision (see id. at 159). Citing Burlington, the Court in Mackey relied upon its equitable authority and determined that when fashioning relief, parents may be awarded retroactive reimbursement because they "were due reimbursement that had been denied them by the simple passage of time, not because they were not entitled, under the IDEA, to the relief they sought" (id. at 165; Burlington, 471 U.S. at 374; see Board of Educ. v. O'Shea, 353 F. Supp. 2d 449, 457-58 [S.D.N.Y. 2005]). Under the circumstances of this case, but for the denial of tuition reimbursement in July 2007 and the passage of time that elapsed while the parent ultimately secured the relief she sought in District Court, the parties would have concluded that the student's "then current placement" after July 2007 was the Rebecca School while the parent pursued her claims for tuition reimbursement for the 2007-08 and 2008-09 school years.

I will turn next to the district's assertion that it would be inequitable in this case to award tuition reimbursement to the parent retroactively because, among other things, the impartial hearing officer was responsible for the delay in reaching the merits of the issues raised. Relevant equitable considerations may be taken in to account in fashioning appropriate relief under the IDEA (20 U.S.C. § 1415[i][2][C][iii]; Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2494 n.11 [2009] [holding that hearing officers as well as courts may award reimbursement under § 1415[i][2][C][iii]]; Burlington, 471 U.S. at 369; Mackey, 386 F.3d at 165; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]; O'Shea, 353 F. Supp. 2d at 459). In this case, I note that the parent filed a due process complaint notice in September 2008, but the impartial hearing did not convene for nearly seven months until April 2009 (Tr. p. 1; Pet. Ex. 1).[4] However, the hearing record shows that the delay was also attributable in part to the district, which consented to adjournments for settlement until January or February 2009 and had consented to at least one additional adjournment of the impartial hearing thereafter (Tr. pp. 99, 249-50; see IHO

[3] The district alleges that the Second Circuit's language in Schutz requires the parent to succeed in a prior tuition reimbursement claim and obtain an order of reimbursement; and that the parent in this case is therefore not entitled to reimbursement under pendency for the time prior to obtaining tuition reimbursement relief on the merits (Schutz, 290 F.3d at 484). However, I find that the district's literal application of the language in Schutz to the circumstances of this case is unpersuasive, especially in light of the Court's recognition in Mackey of the very same language in Schutz while awarding that parent retroactive reimbursement pursuant to pendency (Mackey, 386 F.3d at 163, 166-67 citing Schutz, 290 F.3d at 484).

[4] I note that no written responses of the impartial hearing officer to extension requests are included in the hearing record as required by State regulation (8 NYCRR 200.5[j][5][iv]). I caution the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

Decision at p. 2). After the impartial hearing convened in April 2009, the impartial hearing officer noted that the parent had complied with procedures for participating in the impartial hearing, but that the district had not fully complied with a subpoena issued in November 2008 (Tr. pp. 67, 74-75, 80, 90, 92, 97; Parent Ex. O). I also note that the student has attended the Rebecca School since the 2006-07 school year and the parent continued pursuing her tuition reimbursement claim in a proceeding pending in District Court during summer 2008 (Parent Exs. G; I; K at pp. 1-2; M; see N.R., 2009 WL 874061).

In view of the forgoing circumstances in which: (1) the parent previously established in the July 2007 Decision that the Rebecca School was an appropriate placement for the student;(2) the parent ultimately obtained tuition reimbursement for the 2006-07 school year; and (3) the parent complied with the impartial hearing procedures up until the time of the impartial hearing officer's interim decision and some delay in conducting the hearing was attributable to the district, I find that the impartial hearing officer granted appropriate relief by awarding the parent tuition reimbursement on a pendency basis for the 2008-09 school year.[5]

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 27, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

[5] I note that the 2008-09 school year has now concluded and, as a result, it appears that the parent has been awarded most, if not all, of the relief she requested in her amended due process complaint notice pursuant to pendency (Parent Ex. A at p. 3).