The University of the State of New York

The State Education Department
State Review Officer
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No. 09-125

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Anton Papakhin, P.C., attorneys for petitioner, Anton Papakhin, Esq., of counsel.

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

DECISION

Petitioner (the parent) appeals pursuant to section 8 NYCRR 279.10(d) of the State regulations from an interim decision of an impartial hearing officer determining the student'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 2009-10 school year. The appeal must be sustained in part.

The student's eligibility for special education programs and 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]).

On April 7, 2009, the Committee on Preschool Special Education (CPSE) met for the student's annual review (Parent Ex. C). The CPSE determined that the student continued to be eligible for special education programs and services as a preschool student with a disability and recommended placement in an 8:1+2 special class with related services provided at a separate location consisting of three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 1, 5, 23). In addition to this in-school program, the April 7, 2009 individualized education program (IEP) provided that the student receive services at home consisting of five hours per week (one hour per day) of instruction by a special education itinerant teacher (SEIT), one 60-minute session per week of OT, and four 45-minute sessions per week of speech-language therapy (id. at p. 1; Tr. p. 8). The April 7, 2009 IEP also provided that the student's IEP would be initiated on April 7, 2009 and would extend for

the duration of the student's eligibility for preschool special education services (Parent Ex. C at p. 2).

In anticipation of the student's transition from the jurisdiction of the CPSE[1] to the Committee on Special Education (CSE)[2] because the student would be turning five years old during summer 2009 and therefore no longer eligible for CPSE services, the CSE convened on April 6, 2009, and reconvened on May 4, 2009, to develop the student's school age kindergarten program for the 2009-10 school year (Parent Ex. B at p. 1).[3] The student was determined to be eligible to receive special education programs and services as a student with autism and the resultant IEP recommended that the student be placed in a 6:1+1 special class (id.). The May 4, 2009 IEP also recommended that the student receive speech-language therapy, OT, and PT (id. at pp. 2, 4, 7, 8). The parties agree that in accordance with the May 2009 IEP, the student was to receive five 30-minute sessions per week of individual speech-language therapy and four 30-minute sessions per week of individual OT in-school (Pet. ¶ 14; Answer ¶ 19).[4] The May 2009 IEP provided that the student's kindergarten program would begin on September 8, 2009 and continue until May 4, 2010 (id. at p. 2). The May 2009 IEP did not recommend any home-based services.

The district issued a Final Notice of Recommendation (FNR) to the parent dated May 28, 2009 (Dist. Ex. 1 at p. 2). The district informed the parent that the CSE had determined that the student was eligible for special education programs and services as a student with autism; that it had recommended a special class in a specialized school with a student-to-staff ratio of 6:1+1, as well as related services of individual speech-language therapy, individual OT, and individual PT; and identified a recommended school where the May 2009 IEP would be implemented (id.). The district advised the parent that if she agreed to these recommendations and wished to have the specified services provided to the student, she should "sign the bottom of [the] form" and return it to the district (id.). The parent signed and dated the bottom of the district's FNR June 5, 2009, checked the box on the form indicating that she "agree[d] to the recommended services and school," and returned it to the district (id. at p. 3).

The parent, through her advocate, filed a due process complaint notice dated August 17, 2009 (Parent Ex. A). In her petition, the parent seeks "an order directing [the district] to amend the student's April 6 and the May 4, 2009 IEP to provide continuation of the *home-based services* recommended under the April 7, 2009 CPSE IEP" (emphasis added) (Pet. ¶ 16). The parent stated in her due process complaint notice that she agreed with the CSE's classification of autism and its program recommendation for a 6:1+1 class (Parent Ex. A at p. 2). The parent also acknowledged that she had received a letter from the district "on or about May 28, 2009," offering a specific district school, that she had "observed the program and agreed that it could provide her son with

[1] See 8 NYCRR 200.1(mm), 200.3(a)(2).

[2] See 8 NYCRR 200.1(zz), 200.3(a)(1); see also 8 NYCRR 200.3(c).

[3] The May 2009 IEP as submitted into evidence appears to be incomplete.

[4] I also note that the parent indicates that the CSE recommended that the student receive two 30-minute sessions per week of PT (Parent Ex. A at pp. 1-2; Pet. ¶ 14).

an appropriate education during the school day," and that she had "accepted the recommended program" (id.).

The due process complaint notice also included a request that the impartial hearing officer issue a pendency order directing the district to provide the student with the home-based services that were recommended on the student's preschool IEP dated April 7, 2009, specifically, SEITS for five hours, individual speech-language therapy four times per week for 45 minutes, and individual OT once per week for 60 minutes (Parent Ex. A at p. 2).

The impartial hearing began on August 25, 2009 and the impartial hearing officer rendered an interim order on pendency dated September 21, 2009 (IHO Decision at p. 4). In her decision, the impartial hearing officer stated that the inquiry "focuse[d]" on identifying the student's "'then current placement' at the initiation of the proceeding" and that the "then current placement" was to "'generally to be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]'" (id. at p. 3, citations omitted). The impartial hearing officer then found that the April 7, 2009 IEP, which had been prepared by the CPSE, "although technically" the student's "'most recent IEP'" was not the student's then current placement "when the impartial hearing proceeding was initiated on August 17, 2009" (id. at p. 4, citation omitted). In particular, the impartial hearing officer found that the April 7, 2009 CPSE IEP that had recommended home-based services in conjunction with a school program "was no longer in effect" as of June 5, 2009, because the parent had "formally accepted" the district's recommended school age program at that time (id.). The impartial hearing officer concluded that as of June 5, 2009, the recommendations of the April 6, 2009 CSE IEP constituted the student's then current placement (id.).[5] Because that April 6, 2009 CSE IEP did not include home-based services, the impartial hearing officer found that the student was not eligible for such services pursuant to pendency (id.).

The parent appeals. The parent contends that since she filed her due process complaint notice on August 17, 2009,[6] prior to the implementation of the May 4, 2009 CSE IEP, which was allegedly implemented on September 8, 2009, the previous "agreed upon" IEP recommended by the CPSE and dated April 7, 2009 was the pendency IEP and that pursuant to pendency the student had a right to the continuation of the student's home-based services that were provided under that IEP. The parent also asserts that the student enrolled in the district's recommended day kindergarten program on September 8, 2009, because the student had aged out of his preschool program and would no longer be able to attend his preschool day program. The parent requests that a State Review Officer "reverse and nullify" the impartial hearing officer's interim pendency order.

The district answered the parent's petition, asserting that the parent is requesting a "hybrid pendency placement" consisting of a 6:1+1 kindergarten class and home-based services that the student has never been placed or participated in. The district also asserts that the student's current day special class kindergarten program and related services is the student's pendency placement in

[5] While the impartial hearing officer refers to this IEP as "the April 6, 2009" IEP, I note that the hearing record indicates that the CSE reconvened on May 4, 2009 and made certain changes to the April 6, 2009 IEP (see Parent Ex. B at pp. 1, 2, 4, 7, 8).

[6] The parent erroneously states in her petition that her due process complaint notice was dated "August 25, 2009" (Pet. ¶ 29). However, the hearing record shows that the complaint was dated August 17, 2009 (Parent Ex. A).

that the parent's enrollment of the student in that day program constituted her agreement to the program recommended by the district in the May 2009 CSE IEP.

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 a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16). Furthermore, the pendency provisions of the State 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 (Application of the Bd. of Educ., Appeal No. 07-125; 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 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).

The Second Circuit has proffered three possible definitions of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990] [emphasis added]; see Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006).

Turning to the case at bar, since September 8, 2009, the student has been attending a day kindergarten special class at a district school (Pet. ¶¶ 21, 46; Answer ¶ 26; see Parent Ex. B at pp. 1, 2). The hearing record reflects that the district offered the day kindergarten special class program to the student at the April 6 and/or May 4, 2009 CSE meetings; the parent agreed to this day program; and at the impartial hearing, the parent did not object to the student's continued receipt of this program or assert that the student's continued receipt of this program was inconsistent with the student's pendency placement (Tr. p. 10; Dist. Ex. 1 at p. 2; Parent Exs. A at p. 2; B at pp. 1, 2). As indicated above, the special education programs and services recommended in the student's April 7, 2009 CPSE IEP consisted of a combination of center-based and home-based services (Parent Ex. C at pp. 1, 23). The hearing record reflects that the April 7, 2009 CPSE IEP was the last implemented non-disputed IEP. The hearing record further reflects that subsequent to the April 7, 2009 CPSE IEP, the parent agreed with the May 4, 2009 CSE's recommendation to change the center-based program from the preschool setting to a kindergarten setting (Parent Ex. A at p. 2). The parties are not prohibited from agreeing to changes in a student's pendency placement (see 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518[a]). The hearing record reflects that the parent also agreed to accept the provision of some of the student's related services at the kindergarten setting, and again, such an agreement between the parties is permissible to alter pendency (id.). However, the hearing record does not support the conclusion that the student should be precluded from obtaining the services under the April 7, 2009 CPSE IEP that were not altered by agreement subsequent to the filing of the parent's due process complaint notice. I do not find persuasive the parent's argument that she is entitled, in essence, to maintain related services and support services identified in both the CPSE and CSE IEPs concurrently. It is not persuasive because such an alteration of the student's current educational placement is not based on an agreement with the district. Moreover, it would significantly increase the level of services the student would receive, which would be inconsistent with the principle behind pendency of

maintaining the "status quo." I therefore find that the student's pendency placement includes the district's recommended day kindergarten special class and the related services provided at the kindergarten site (i.e. 2.5 hours weekly of individual speech-language therapy, 2 hours weekly of individual OT, and one hour weekly of PT). In addition, the pendency program also includes the following services to be provided at the student's home unless the parties otherwise agree: five hours of SEIT services (one hour per day), two hours weekly of individual speech-language therapy, and 30 minutes weekly of individual OT.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that she determined that the student's pendency program did not include home-based services, and

IT IS FURTHER ORDERED, unless the parties otherwise agree**,** that the student's pendency program is as follows: the student's current kindergarten special class, and the related services provided at the district kindergarten site which are 2.5 hours weekly of individual speech-language therapy, 2 hours weekly of individual OT, and one hour weekly of PT; in addition, the pendency program also shall include the following services to be provided at the student's home, unless the parties otherwise agree: five hours of SEIT services (one hour per day), two hours weekly of individual speech-language therapy, and 30 minutes weekly of individual OT.

Dated: **Albany, New York**
December 23, 2009

PAUL F. KELLY
STATE REVIEW OFFICER