The University of the State of New York

The State Education Department
State Review Officer
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No. 10-110

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, Tracy Siligmueller, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Christina D. Thivierge, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer determining respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2010-11 school year. The impartial hearing officer found that the student's pendency placement was at Manhattan Children's Center (MCC) (IHO Decision at p. 2). 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]).

A brief review of a prior dispute between the parties reflects that, in a due process complaint notice dated November 9, 2007, the student's parents, represented by counsel, asserted that the district denied the student a free appropriate public education (FAPE) for the 2007-08 school year and summer 2008 (Pet. Ex. 1). In a decision dated August 18, 2008, the impartial hearing officer found in favor of the parents and ordered the district to reimburse them for tuition at the David Gregory School (David Gregory) for the 2007-08 school year and summer 2008; 10 hours per week of home-based applied behavior analysis (ABA) therapy; two hours per week of parent ABA training; three 45-minute sessions per week of individual speech-language therapy

and two 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. B at p. 11).

In an amended due process complaint notice dated February 25, 2009, the student's parents, represented by counsel, asserted that the district denied the student a FAPE for the 2008-09 school year and summer 2009 (Pet. ¶ 7). The parents requested tuition reimbursement for David Gregory and continuation of the home-based ABA therapy, ABA parent training, speech-language therapy and OT that were ordered by the August 18, 2008 impartial hearing officer decision (id.). The parties entered into a settlement agreement and the parents withdrew the February 25, 2009 due process complaint notice (id.).

In a July 6, 2009 due process complaint notice, the student's parents, represented by counsel, asserted that the district denied the student a FAPE for the 12-month 2009-10 school year, requested funding for MCC and the following "out of school" services: 10 hours per week of ABA; two hours per week of ABA supervision; two hours per week of parent training; three 45-minute sessions per week of individual speech-language therapy; and two 30-minute sessions per week of individual OT (Pet. ¶ 8; Answer ¶ 6). In December 2009, the parties entered into a settlement agreement and the parents withdrew their July 6, 2009 due process complaint notice (Pet. Ex. 3; Pet. ¶ 8; Answer ¶ 6).[1] As part of the settlement agreement, the district agreed to assume responsibility for the tuition and costs for the student to attend MCC as well as the aforementioned "out of school" services (Pet. Ex. 3 at p. 1).

A fourth due process complaint notice dated July 2, 2010 was filed by the parents in the instant case (Parent Ex. A). In their due process complaint notice, the parents asserted that the district denied the student a FAPE for the 12-month 2010-11 school year (Parent Ex. A at p. 2). As relief, the parents requested that the district fund the student's placement at MCC, after-school services consisting of 10 hours per week of individual ABA, two hours per week of ABA supervision, two hours per week of parent training, individual speech-language therapy three times per week for 45 minute sessions and OT two times per week for thirty minute sessions (id. at pp. 2, 4). In addition, the parents sought an interim decision directing that, for purposes of pendency, the student "continue to receive the services included as his last agreed upon placement" pursuant to an unappealed impartial hearing officer decision dated August 18, 2008 (id. at p. 2).

An impartial hearing convened on August 2, 2010, during which the issue of pendency was addressed upon submission of the parties' arguments and documentary evidence (Tr. pp. 1-19). At the impartial hearing, the parents asserted that pendency arose from an August 18, 2008 impartial hearing officer decision and further asserted that the student "changed schools," and that the student's current school, MCC, was "similar" to the school that the student attended at the time of the August 18, 2008 impartial hearing officer decision (Tr. pp. 3-6). "It's a one to one ABA school. It's just David Gregory is in New Jersey, and … [MCC], is in Manhattan" (Tr. pp. 5-6). While the district agreed that the August 18, 2008 decision constituted a basis for establishing the student's pendency placement, the district asserted that David Gregory and MCC constituted different placements and that the parents elected to move the student to MCC without the agreement of the

[1] The student's father signed the settlement agreement on November 23, 2009 and the representative for the district signed the agreement on December 8, 2009 (Pet. Ex. 3 at p. 7). The settlement agreement will be referenced herein as the December 2009 settlement agreement.

district and, therefore, the district was not obligated to pay for the costs of MCC during the pendency of the proceeding (Tr. pp. 6, 8).

In an interim decision dated October 13, 2010, the impartial hearing officer found that the "last agreed upon placement of the parties" arose from the district's "agreement and actions" evinced during the previous school year by paying for tuition and services at MCC pursuant to a settlement agreement (IHO Decision at p. 2). The impartial hearing officer found that "the district adopted the change [in schools] and indeed apparently further evidenced that adoption by paying for the tuition and services during the last school year" (id.). The impartial hearing officer further found that, because the district allegedly paid for tuition and services at MCC and failed to challenge the parent's change in placement from David Gregory to MCC, the district was now "estopped" from arguing that the student's pendency placement during the instant litigation should not include MCC (id.).

The district appeals the impartial hearing officer's interim decision and asserts that the student's pendency arises from an August 18, 2008 impartial hearing officer decision, which ordered that the district fund the student's placement at David Gregory as well as ABA and related services, and that the impartial hearing officer improperly relied on a settlement agreement from a previous school year to establish that the district agreed that the student's pendency placement included tuition at MCC. In addition, the district asserts that there is no information in the hearing record as to why the parents discontinued the student's attendance at David Gregory and enrolled him at MCC; that there is no means of determining whether the parents' placement of the student at David Gregory became unavailable for reasons beyond the parents' control; and that the parents failed to meet their burden of proving that MCC was substantially similar to David Gregory. In addition, the district asserts that the impartial hearing officer improperly awarded the parents relief that they did not properly request. The district asserts that in the July 2, 2010 due process complaint notice, the parents did not allege that the student's pendency placement should include MCC and that at the pendency hearing, they did not request that the pendency placement include MCC. Moreover, the district asserts that it was not until the parents' August 9, 2010 memorandum of law that the parents alleged that the pendency placement should include placement at MCC, and that therefore the impartial hearing officer erred in awarding the parents relief that they did not properly raise. As relief, the district requests that the portion of the impartial hearing officer's pendency order providing that the pendency placement include tuition at MCC be vacated.

In their answer, the parents deny many of the allegations raised by the district, but agree with the district that the student's right to pendency services is based on the August 18, 2008 impartial hearing officer decision. In addition, the parents assert that they were not required to request a pendency hearing or outline the pendency terms in their request for a due process hearing and that pendency is an "automatic preliminary injunction." Moreover, the parents assert that the district failed to state during oral argument what constitutes the student's pendency. In addition, the parents assert that the district applied the wrong standard for determining whether there had been a change of placement; that the correct standard is whether the change in location would substantially or materially alter the child's educational program; and that the change of location of the placement did not constitute a change of placement as contemplated by the Individuals with Disabilities Education Act (IDEA). Moreover, the parents assert that the district erroneously contended that the impartial hearing officer relied on a settlement agreement to determine pendency.

In a reply, the assertions by the district include that an exhibit attached by the parents to their answer (see Answer Ex. 4) (a printout from the MCC website) should not be considered on appeal because it was available at the time of the pendency hearing to support the assertion that MCC and David Gregory were substantially similar.

The 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]).

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 individualized education program (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 *20 [E.D.N.Y. Oct. 30, 2008]; 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).

Initially, I find the district's assertion that the impartial hearing officer erred in finding that MCC constituted the student's pendency placement because the parents did not properly raise the issue in their July 2, 2010 due process complaint notice unpersuasive. It is well-established that a student must 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]; and that, moreover, pendency has the effect of an automatic injunction (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; 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]). While the IDEA does not preclude a parent from addressing pendency in a due process complaint notice in addition to the merits of the underlying claim, the IDEA does not require a parent to set forth an anticipated dispute with regard to pendency in a due process complaint notice (see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).[2] Moreover, upon review of the parents' July 2010 due process complaint notice, I find that the issue of the student's pendency was raised therein (see Parent Ex. A).

I will next consider the district's assertion that there is not a basis for pendency for the student at MCC for the 2010-11 school year as a result of the December 2009 stipulation of settlement entered into by the parties (see Pet. Ex. 3). In cases involving stipulations between parents and boards of education, the determinative issue when deciding whether a stipulation becomes the basis for a student's pendency placement is whether the stipulation was explicitly limited to a specific school year or definite time period (Zvi D., 694 F.2d at 907-908; Evans, 921 F. Supp. at 1184). In Zvi D., the Second Circuit determined that the agreement expressly limited the time period the school district had agreed to pay tuition and as such the private school was not the student's pendency placement (Zvi D., 694 F.2d at 907-08; see Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 9-10 [1st Cir. 1999]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2002 WL 818008, at *4-*5 [N.D. Ill. 2002]; Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331, 334 [D. Md. 1999]; see also Application of a Student with a Disability, Appeal No. 10-002; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 03-028; Application of the Bd. of Educ., Appeal No. 02-061; Application of a Child with a Disability, Appeal No. 98-25).

In the instant case, a review of the settlement agreement at issue reflects that the parties' stipulation was intended to settle their differences with respect to the 2009-10 school year (Pet. Ex. 3). The stipulation explicitly provided that it "shall not be relied upon by any party to indicate, establish or support the position that [MCC] is, or should be considered as, the 'then current placement' for the 2010-11 school year or any subsequent school year" (id. at ¶ 16). The settlement agreement also expressly provided that such stipulation or the district's agreement to reimburse the parent for the student's tuition at MCC for the 2009-10 school year shall not constitute an agreement by the parties that MCC constitutes an appropriate placement (id. at ¶ 15). The settlement agreement also provided that it represented the entire agreement between the parties and could not be modified except by a "written, signed agreement between the parties" (id. at ¶

[2] The filing of a due process complaint notice gives rise to a student's right to a pendency placement (see 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 also (34 C.F.R. Parts 300 and 301, Analysis of Comments and Changes, 71 Fed. Reg. 46710 [2006]) ("a child's right to remain in the current educational placement attaches when a due process complaint is filed").

21). Under the circumstances, I find that the settlement agreement was limited to the 2009-10 school year under the express provisions of the stipulation. Accordingly, the December 2009 settlement agreement does not constitute a basis upon which to conclude that MCC is the "'then current placement'" for the 2010-11 school year for purposes of making a pendency determination. Moreover, I find that the district's payment of tuition at MCC during the 2009-10 school year pursuant to the December 2009 settlement agreement without challenging the change effectuated by the parents of the student's school from David Gregory to MCC prior to its settlement with the parents does not "estop" the district from asserting that MCC is not the student's pendency placement. Such a finding would be contrary to the terms of the settlement agreement and inconsistent with one of the main policies behind the IDEA, which is to encourage the prompt resolution of disagreements about the education of children so that such children will not be harmed by long delays before being placed in appropriate educational settings (see 121 Cong. Rec. 37416 [1975] [remarks of Senator Williams]). "[T]he IDEA's carefully structured procedure for administrative remedies, [is] a mechanism that encourages parents to seek relief at the time that a deficiency occurs and that allows the educational system to bring its expertise to bear in correcting its own mistakes" (Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2001]). Moreover, in amending the IDEA in 2004, Congress made a finding that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways" (20 U.S.C. § 1400 [c][8]) and federal and State regulations provide such opportunity for resolution to the parties (see 34 C.F.R. § 300.510[a][2]; 8 NYCRR 200.5[j][2]).

Next, I will consider the parties' arguments regarding whether the relocation of the student from David Gregory to MCC by the parents also constitutes a change in the student's educational placement for purposes of pendency (see 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, 756 [2d Cir. 1980]; see also Application of a Student with a Disability, Appeal No. 08-050; Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 02-031.

Under the IDEA, the pendency provision does not automatically require that a student must remain in a particular site or location (see Malcolm X Pub. Sch. 79, 629 F.2d 751, 756 [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). Courts have held that if a student's then current educational placement becomes unavailable, a district is required to provide a "similar" educational placement (Knight v. District of Columbia, 877 F.2d 1025, 1028 [D.C. Cir 1989]; McKenzie v. Smith, 771 F.2d 1527, 1533 & n.13 [D.C. Cir. 1985]; see also Wagner, 335 F.3d at 301-02 [holding that it is not appropriate to direct a district to provide an "alternative placement" if the task at hand is to identify a student's then current educational placement]). Other courts have stated that a change in educational placement has been defined as a "fundamental change in, or elimination of, a basic element of the educational program" (see Sherri A.D. v. Kirby, 975 F.2d 193, 206 (5th Cir. 1992); see also Erickson v. Albuquerque Public Schools, 199 F.3d 1116, 1121 (10th Cir. 1999).

In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) specifically addressed the question of what constitutes a change in educational placement and opined that consideration should be given to whether a change in educational placement has occurred on a case-by-case basis, as it is a very fact specific inquiry (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" (id.). OSEP set forth the following factors to be considered in determining whether a change in educational placement has occurred:

> whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements

(Letter to Fisher, 21 IDELR 992). The "then-current educational placement" more generally refers to the educational program, which is a point along the continuum of placement options and, in many instances, does not refer to a particular institution or building where the program is implemented (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; L.M. v. Pinellas County Sch. Bd., 2010 WL 1439103, at *1-*2 [M.D. Fla. Aug. 11, 2010]).[3]

A determination regarding whether a change in location would constitute an impermissible modification of the student's pendency placement must be supported by evidence in the record (see Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 01-003). An impartial hearing officer must ensure that there is an adequate record upon which to premise his or her decision and permit meaningful review of the issues (Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 04-017; Application of a Child with a Disability, Appeal No. 02-003; Application of the Bd. of Educ., Appeal No. 01-087). The Commissioner's Regulations provide that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[i][4][ii]).

In this case, the impartial hearing officer made his pendency determination based on a limited record (see Tr. pp. 1-19; Parent Exs. A; B; C). Based upon the scarcity of information relevant to the parties' dispute, I find that the hearing record is not adequate to conduct a meaningful review of whether the change in location of the student's school from David Gregory to MCC substantially or materially altered the student's educational program (see Letter to Fisher, 21 IDELR 992; Application of a Student with a Disability, Appeal No. 08-050; Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 03-028; Application

[3] I note that the purpose of the pendency provision is to provide consistency in the education of a student with a disability and to remove the "unilateral authority" of the school districts "to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [1987] and that the IDEA is silent as to whether a unilateral change in educational placement by the parents may constitute a student's pendency placement.

of a Child with a Disability, Appeal No. 02-031; Application of a Child with a Disability, Appeal No. 01-003). Accordingly, I will annul the impartial hearing officer's decision and remand this matter to the impartial hearing officer for a redetermination of the student's pendency placement based upon development of an adequate record regarding whether the parents' change of the location of the student's school that was indicated in the August 18, 2008 impartial hearing officer decision constitutes a change in the student's educational placement.

I have considered the parties' remaining contentions, including the assertion by the district that an exhibit attached by the parents to their answer should not be considered on appeal, and find that it is unnecessary to address them in light of my decision herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's interim decision dated October 13, 2010 is annulled; and

IT IS FURTHER ORDERED that this matter shall be remanded to the same impartial hearing officer who shall, unless the parties agree to an alternative pendency placement, convene the impartial hearing, and upon submission of sufficient evidence by the parties, render a determination as to the student's pendency placement within 30 days of receipt of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the interim decision dated October 13, 2010 is not available, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
December 08, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER