The University of the State of New York

The State Education Department
State Review Officer
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No. 10-112

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, Jessica C. Darpino, 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') daughter's pendency placement during a due process proceeding challenging the appropriateness of the district'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 the program identified in the student's March 28, 2008 individualized education program (IEP). The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Brooklyn Autism Center (BAC) and receiving home and community-based applied behavior analysis (ABA) services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Ex. B at p. 7). BAC 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). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see Dist. Ex. 2 at p. 1; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

A brief review of the educational history of the student reflects that the Committee on Preschool Special Education (CPSE) convened on March 28, 2008 to review the student's educational program (Parent Ex. C at pp. 1-2). The resultant March 2008 IEP reflects that the CPSE classified the student as a preschool student with a disability and recommended a special class in a private preschool program with a 9:1+3 staffing ratio and a 1:1 management paraprofessional for five days per week, ten hours of special education itinerant teacher (SEIT) services per week, two 60-minute sessions of speech-language therapy per week, three 30-minute sessions of 1:1 speech-language therapy per week, two 30-minute sessions of 1:1 OT per week,

and two 30-minute sessions of 1:1 PT per week, all as part of a 12-month school year (id. at pp. 1, 2, 15).

The CPSE again convened to review the student's educational program on October 27, 2008 (Dist. Ex. 3 at pp. 1-2). The October 2008 CPSE continued the student's classification as a preschool student with a disability (id. at p. 1). It recommended a special class in a private preschool program with a 6:1+3 staffing ratio for five days per week, ten hours of SEIT services per week, two 60-minute sessions of 1:1 speech-language therapy per week, two 30-minute sessions of 1:1 speech-language therapy per week, two 30-minute sessions of 1:1 OT per week, and two 30-minute sessions of 1:1 PT per week, all as part of a 12-month school year (id. at pp. 1, 2, 15).

On April 3, 2009, the Committee on Special Education (CSE) convened to review the student's educational program (Dist. Ex. 2 at pp. 1-2). The resultant April 2009 IEP reflects that the CSE determined that the student was eligible for special education and related services as a student with autism and recommended a special class in a specialized public school with a 6:1+1 staffing ratio as part of a 12-month school year (id. at p. 1). Related service recommendations included three 30-minute sessions per week of 1:1 speech-language therapy, three 30-minute sessions per week of 1:1 OT, and two 30-minute sessions per week of 1:1 PT (id. at p. 22).

The student attended BAC for a portion of the 2008-09 school year (Dist. Ex. 1 at p. 1).[1] The parents filed an amended due process complaint notice dated July 27, 2009 to adjudicate issues including pendency and reimbursement relating to a portion of the 2008-09 school year and the 2009-10 school year (id.). The parents alleged a number of procedural and substantive violations that the student's October 2008 and April 2009 IEPs failed to offer the student a free appropriate public education (FAPE) (id. at pp. 2-6). According to the district, that matter was settled pursuant to a stipulation of settlement (Pet. ¶ 10).

The parents filed a due process complaint notice dated July 1, 2010 and an amended due process complaint notice dated August 16, 2010 (Parent Exs. A-B). In the amended due process complaint notice, the parents alleged a number of procedural and substantive violations that the district failed to provide the student with a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. B at pp. 1-7). The parents stated that they invoked the student's pendency entitlements according to the last agreed-upon March 2008 IEP (id. at p. 2). The parents maintained that the student's pendency entitlements included SEIT and related services, but they did not state that they were seeking placement in the 9:1+3 classroom setting that was recommended in the March 2008 IEP, or in the student's current placement at BAC (id.; see Pet. ¶¶ 13, 23). The relief sought by the parents included reimbursement for the costs of the student's tuition and placement at BAC for the 2010-11 school year; transportation to and from school; ten hours per week of home and community-based 1:1 ABA services; three hours per week of 1:1 speech-language therapy; one hour per week of 1:1 OT; one hour per week of 1:1 PT; and an assistive technology evaluation and, if recommended, an assistive technology device, all as part of a 52-week program including weekends and holidays (Parent Ex. B at p. 7).

An impartial hearing convened on August 6, 2010 and August 20, 2010 during which the parties addressed the issue of the student's educational placement during the pendency of the proceeding (IHO Decision at p. 1). In an interim decision dated October 4, 2010, the impartial

[1] The exact dates of the student's attendance at BAC are not clear from the hearing record.

hearing officer determined that the student's "last agreed upon" placement was identified in the student's March 2008 IEP (id.). The impartial hearing officer rejected the district's argument that the student's subsequent April 2009 IEP was the student's last agreed upon placement, and she found that the mere passage of time did not negate the status of the March 2008 IEP as the student's last agreed upon placement (id.). The impartial hearing officer further determined that although the student had aged out of preschool services, she was not a student seeking an initial placement within the public school system and her disputed school age IEP, the April 2009 IEP, was not converted into an agreed upon placement for pendency purposes (id. at p. 2). The impartial hearing officer ordered that the district fund ten hours per week of home/community-based 1:1 SEIT services, two 60-minute sessions per week of home-based 1:1 speech and language therapy, three 30-minutes sessions per week of 1:1 speech and language therapy, two 30 minute sessions of 1:1 OT, and two 30-minute sessions per week of PT (id.). The impartial hearing officer ordered that the district was obligated to provide the student's pendency services on a 12-month basis effective July 2, 2010 (id.).

This appeal by the district ensued. The district argues, among other things, that SEIT services are not available as a pendency placement because the student is school aged; the parents are improperly attempting to "carve out" a pendency placement arising from part of a preschool program in which the student no longer participates; and that the student's current program is not substantially similar to the program recommended in the student's March 2008 IEP and, therefore, pendency should not rest in the March 2008 IEP. The district alleges that the impartial hearing officer erroneously awarded SEIT, speech-language therapy, PT, and OT services as the current pendency placement for the student. Specifically, the district alleges that the student's March 2008 IEP recommended a preschool program with a 9:1+3 ratio and a 1:1 management paraprofessional in conjunction with ten hours per week of SEIT and other related services, and to allow for the related services component of the March 2008 IEP which were specifically tailored to supplement the specific preschool placement to be a pendency placement is inappropriate. The district also alleges that it is disingenuous that the parents are requesting pendency in the March 2008 IEP as the last agreed-upon IEP since the parents requested to meet with the CSE to review that IEP.

The district requests that the impartial hearing officer's October 4, 2010 pendency decision be annulled in its entirety, and a determination that pendency does not lie in the student's March 2008 IEP created by the CPSE (Pet. ¶ 6). Although at the impartial hearing the district argued that pendency should lie either with no program or that it should arise from the student's school aged program (Tr. pp. 21-23; Pet. ¶ 20), the district alleges only that the impartial hearing officer erred and did not articulate on appeal which IEP or set of agreed upon services, if any, the district is obligated to provide to the student pursuant to pendency.

The parents did not file a response to the district's petition.

As an initial matter, I note that the district has attached an exhibit to its petition which was not admitted into evidence during the pendency hearing in August 2010 (Pet. ¶ 11; Pet. Ex. 1; see IHO Decision at p. 3). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-

080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). This evidence could have been offered at the time of the impartial hearing in August 2010, and it is not necessary in order to render a decision on pendency under the circumstances of this case and, therefore, I will not consider it.

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]). 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).

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 this case, as more fully described below, I find that the student's March 2008 IEP is the last agreed upon placement and constitutes the student's pendency placement. First, the district affirmatively asserted during the impartial hearing that the student did not attend a school-aged placement offered by the district (Tr. pp. 21-22) and, therefore, the April 2009 IEP proposed by the district does not serve as the student's pendency placement in this case (Schutz, 290 F.3d at 483; New York City Dept. of Educ. v. S.S., 2010 WL 983719, at *9 [S.D.N.Y. Mar. 17, 2010]). It is clear from the hearing record that the student's subsequent October 2008 and April 2009 IEPs were in dispute (see Dist. Ex. 1). Additionally, there is no basis in the hearing record to conclude that the student's March 2008 IEP ceased to be the last agreed upon placement merely because the parents may have requested a review of the student's educational program, which review occurred approximately seven months after the March 2008 IEP was created (Dist. Ex. 3).

I am also not persuaded by the district's argument that the student is not entitled to receive SEIT services under the pendency provisions due to the fact that the student has reached school age (see Application of a Student with a Disability, Appeal No. 09-125). State regulations pertaining to educational programs for preschool students with disabilities state that

> preschool students with disabilities who are receiving special education programs or services pursuant to section 4410 of the Education Law shall remain in the then current education placement of such preschool student until all such proceedings have been completed, except as otherwise provided in section 200.5(m) of this Part. Nothing in this subparagraph shall require that a student with a disability remain in a preschool program for which he or she is no longer eligible pursuant to section 4410 of the Education Law during the pendency of any proceeding brought pursuant to this Part

8 NYCRR 200.16(h)(3)(i). Pursuant to the regulation, the student in this matter is not required to remain in a preschool program now that she is no longer a preschool student with a disability, and the district is required to implement the educational placement in the March 2008 IEP developed by the CPSE (Letter to Harris, 20 IDELR 1225 [OSEP 1993]). Accordingly, I find that there is no reason to disturb the impartial hearing officer's determination that the student's pendency placement includes the SEIT services recommended in the student's March 2008 IEP.

The district also argues that the impartial hearing officer erred in directing the district to provide the student with the SEIT and related services because they were recommended for the student only in conjunction with the student's placement in a 9:1+3 preschool program and a 1:1 management paraprofessional. The district contends that the placement recommended in the March 2008 IEP was a "dual recommendation," and that it would be "inappropriate" under the facts of this case to allow the parent to accept the related services portions of the student's March 2008 IEP because related services were "specifically tailored" to supplement the recommended 9:1+3 program and the parents have unilaterally placed the student at BAC. The district's argument is unpersuasive because in order to comply with its obligations under pendency, "the public agency

must provide those special education and related services that are not in dispute between the parent and the public agency" (see 34 C.F.R. § 300.518[c]; Application of a Student with a Disability, Appeal No. 10-064). The district has not provided a sufficient legal basis for its argument that the parents must accept either all or none of the student's previously agreed upon special education and related services identified in the March 2008 IEP (see J.H. v. Los Angeles United Sch. Dist., 2010 WL 1261544, at *5-6 [C.D. Cal. Mar. 29, 2010]). Additionally, I note that while the impartial hearing is pending, the parents are responsible for the provision of the center-based aspects of the student's program and are not, by virtue of pendency, seeking to obtain any services from the district in addition to those listed in the March 2008 IEP. I find that the parent's request is consistent with the principal behind pendency of maintaining the student's status quo,[2] especially in a circumstance in which the parents are, as a result, seeking less than was recommended (see Application of a Student with a Disability, Appeal No. 09-125 [denying certain services sought by a parent for pendency, which constituted a significant increase in the level of services that the student would have received at district expense]; Mackey, 386 F.3d at 163). Based on the foregoing, I find that the district failed to establish that it was not obligated to provide the student's SEIT, speech-language therapy, PT, and OT services listed in the March 2008 IEP and the impartial hearing officer appropriately directed the district to provide the student with SEIT and related services.

I have considered the district's remaining contentions, including its contention that the student's current program is not substantially similar to the program recommended in the student's March 2008 IEP,[3] and find that I need not reach them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 13, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER

[2] 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's pendency provisions are silent as to whether a change in educational placement by the parents may constitute a student's pendency placement.

[3] I note that the parents are not asking for reimbursement for BAC pursuant to pendency (J.H., 2010 WL 1261544, at *2, *5-6).