The University of the State of New York

The State Education Department
State Review Officer
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No. 11-158

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, attorneys for petitioner, Jessica C. Darpino, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondent, Samantha Bernstein, 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 respondent's (the parent's) son's pendency (stay put) placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2011-12 school year. The impartial hearing officer found that the student's pendency placement was at a public school district that the student previously attended during the 2010-11 school year as a resident (former district). The appeal must be sustained in part.

Background

At the time of the impartial hearing, the student was attending the former district (Tr. p. 37, 56-57). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (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 student attended the former district from the 2005-06 school year until the end of the 2010-11 school year as a resident (Tr. p. 15; Parent Ex. B at p. 3).[1] It appears that the parent moved at the end of the 2010-

[1] The hearing record indicated that the student's attendance during 2010-11 school year concluded on the 22nd or 24th of June 2011 (Tr. p. 48).

11 school year, but for reasons not clear from the hearing record, the student continued to receive special education services from the former district during July and August 2011 pursuant to the student's May 6, 2011 IEP (see Tr. p. 33; Parent's Memorandum of Law, p. 4, n.2). The hearing record reflects that thereafter the student continued to attend the former district for the 2011-12 school year (Tr. p. 37; 56-57).

During the 2010-11 school year, while the student was attending the former district, the Committee on Special Education (CSE) convened on May 6, 2011 for an annual review of the student's educational program (Parent Ex. B at p. 1). The resultant May 6, 2011 IEP reflects that the CSE continued the student's classification as a student with autism (id.). The CSE recommended an extended school year, a special class with a 6:1+3 student to teacher ratio, occupational therapy (OT) ("small group") one time per six day cycle for thirty minutes,[2] speech language therapy (individual) daily for thirty minutes, and OT (individual) two times per six day cycle for thirty minutes (id.).[3]

According to the hearing record, in a letter dated April 21, 2011, the student's mother wrote to a Chairperson of the CSE for the district, indicating that the student and parent currently resided in the former district, where the student attended school (Parent Ex. D). The student's parent advised that they would be moving to the district after the end of the school year, that the student had received a diagnosis of autism, and that copies of evaluations would be provided separately (id.). In addition, the student's mother provided consent for other testing and evaluation (id.). The parent requested a CSE meeting to discuss the student's educational needs and options for the next school year (id.).

According to the hearing record, the parent did not receive a response to the April 21, 2011 letter and a second letter was sent by the parent in August 2011 (Parent Ex. F at p. 2).

On August 15, 2011, a comparable service plan meeting was held by the district. Attendees at the meeting included a district psychologist, district social worker, a district special education teacher for part of the meeting and the student's mother (Tr. p. 64; Parent Ex. F at p. 2). In a document dated August 15, 2011 authorizing the provision of comparable services,[4] the district indicated that the CSE determined as a result of the information provided from the student's last special education program and consultation with the parent, that a special class with a 6:1+1 student to teacher ratio in a special school with related services of OT and speech-language therapy were comparable to those that the student received in the previous school district and provided the student with authorization to attend a special education program as a comparable service (Parent Ex. C). The hearing record also indicates that the district advised the parent of the particular school

[2] Instead of a fixed Monday through Friday schedule, the student's school had a day one through six cycle; for example, where the student receives two individual and one small group for OT, that is three times per six day cycle (Tr. p. 58).

[3] The hearing record reflects that for the extended school year between July 1, 2011 and August 11, 2011, the May 2011 CSE recommended speech-language therapy (individual) two times per week for thirty minutes and OT (individual) two times per week for thirty minutes (Parent Ex. B at p. 1).

[4] The document is used for students entering the district public school system from a special education program outside the district (Parent Ex. C).

and classroom to which the student had been assigned for purposes of implementing the comparable service plan (Parent Ex. G).[5]

Due Process Complaint Notice

In a due process complaint notice dated September 19, 2011, the student's parent asserted that the district engaged in particular procedural and substantive violations of the IDEA and State regulations and thereby failed to offer the student a free and appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A).[6] In addition, the parent invoked the student's pendency rights (id.).

Impartial Hearing Officer Decision

An impartial hearing convened on October 5, 2011 for the purpose of determining the student's pendency placement (Tr. pp. 1-85). In an interim decision dated October 24, 2011, the impartial hearing officer found that the student's last agreed upon placement[7] for the purposes of pendency was the special education program at the former district where the student previously resided, including its extended school day (IHO Decision at p. 6). The impartial hearing officer found that the comparable service program and the program at the former district "differ[ed] in many ways, from the number of paras in the room, to the very existence of the extended school day program," and a "'reverse mainstreaming'" program (id. at p. 4). The impartial hearing officer concluded that the district program was not comparable to the former district program and that because the district's program was contested, it could not constitute the pendency placement (id. at pp. 4-5). The impartial hearing officer found that while it appeared from the evidence presented at the hearing that the extended school day was not specifically listed on the IEP, that the extended school day was "the program that all had in mind and was agreed upon" (id. at p. 5). Regarding the district's argument that it was not reasonable to expect the district to send an incoming student outside the district to receive a pendency placement, and that the reasonable implementation of pendency was the district's program, the impartial hearing officer found that the hypothetical situation cited by the district where the district would be required to transport a student to a pendency placement in Buffalo, was not before the impartial hearing officer as the former district at issue was nearby, which meant that pendency needed to be implemented by having the student remain in the current program which the student had been attending based upon the last agreed upon IEP (id. at pp. 5-6). The impartial hearing officer ordered that the district fund the tuition for the student to continue to attend the special education program at the former district where the student had previously resided, including related services, the extended school day, and appropriate transportation (id. at p. 6).

[5] Parent Exhibit C is the same as Parent Exhibit G except that Exhibit G has the name, address and classroom of the assigned school indicated with a phone number (see Parent Exs. C, G).

[6] Given the interlocutory posture of this case at this juncture, a detailed recitation of the parent's' claims on the merits is unnecessary.

[7] The impartial hearing officer did not indicate the date of the IEP from which he determined the pendency placement arose, but it is clear from the hearing record that the impartial hearing officer's decision refers to the student's May 6, 2011 IEP for the 2011-12 school year (see, e.g., Parent Ex. A at p. 2; Parent Ex. B).

Appeal for State-Level Review

The district appeals and asserts that the impartial hearing officer's finding misapplied the legal standards in determining the student's pendency placement. The district specifically asserts that when a parent transfers a student's school district, federal and state regulations and statutes require that a comparable service plan be developed, that the district created a comparable service plan that was comparable to the IEP provided by the former district and utilized the student's IEP to the extent possible. The district further asserts that the law does not require a new district to fund the services in an old district, rather that the new district must provide an interim plan that applies the old IEP to the extent possible. In the alternative, the district asserts that should it be determined on appeal that the district's comparable service plan was not sufficiently comparable to the former district's IEP, as a matter of pendency, the appropriate remedy would be modification of the district comparable service plan, not funding of the student's attendance at the former district during the pendency of the proceedings. Also, the district asserts that the impartial hearing officer ignored the significance and consequences of the parent's move from one school district to another in his decision and that when a parent moves a student from one jurisdiction to another and then sues the district because of dissatisfaction with the comparative service plan, the comparative service plan becomes the pendency placement during the pendency of the proceedings. The district also asserts that the impartial hearing officer incorrectly determined that the district comparable service plan was invalid because it did not include a mainstreaming plan or an after school program as the after school program and reverse mainstreaming were not part of the student's IEP and thus the district was not required to include them as part of the comparable service plan. Other assertions by the district include that the authorities cited by the impartial hearing officer in support of his position do not relate to interim comparable placements for students who transfer from another school district, but rather to pendency placements for non-transfer students who were already serviced by a district. The district attaches to the petition the student's new IEP dated November 23, 2011 as additional evidence for consideration on appeal. As relief, the district requests that the impartial hearing officer's interim decision be vacated and a finding that the district's comparable service plan was appropriate, or in the alternative an order that the district develop a different comparable service plan.

In an answer, the parent admits some and denies some of the district's allegations. The parent asserts that the impartial hearing officer's order should be upheld and that the student was entitled to remain at the former district where he previously resided as his pendency placement. Specific assertions include, among other things, that the district's comparable service recommendations were not appropriate for the student and resulted in a denial of a FAPE; that under the district's plan the student would lose adult support in school, reverse mainstreaming and extended school day services. The parent attaches to the answer the district's response to the parent's September 19, 2011 due process complaint notice as additional evidence for consideration on appeal.

Applicable Standards

Additional Documentary Evidence

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). In reviewing the document submitted by the district with the petition, I find that it is not necessary to render a decision, and therefore, it will not be considered. In reviewing the document submitted by the parent with the answer, I find that the document could have been offered at the time of the impartial hearing and is not necessary to render a decision in this matter, and therefore, it will not be considered.

Pendency

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).

Discussion

I will now consider the district's assertion that the impartial hearing officer misapplied the legal standard in determining that pendency must be implemented as described in the student's "last agreed upon IEP," at the former district (see IHO Decision at p. 6). First, I note that the pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents, 629 F.2d at 751), and find that the pendency provision, under the facts of the instant case, does not mean that the student should remain at the former district. Upon review, I find that the impartial hearing officer failed to take into consideration federal and State regulations that apply to the facts of this case where a student transfers from one school district to another school district within the same state (see 34 CFR § 300.323[e]; 8 NYCRR 200.4[e][8][i]). Where a student with a disability has an IEP in effect in a public agency, transfers to another public agency in the same State, and enrolls in the new school within the same school year, the new agency must provide "comparable services" to those services described in the student's IEP from the prior public agency (id.). Those comparable services must be provided until the new public agency either adopts the IEP from the previous public agency or develops, adopts and implements a new IEP (34 CFR § 300.323[e][1], [2]; 8 NYCRR 200.4[e][8][i]). "Comparable services" means services that are "'similar'" or "'equivalent'" to those described in the student's IEP from the previous public agency (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]; see Sterling v. Washoe County School District, 2008 WL 4865570, at *5 [D. Nevada Nov. 10, 2008]). In addition, if a student with a disability moves to a new school district within the same state and the parents and the new school district are unable to agree on an interim placement, as in this case, the new school district must implement the old IEP "to the extent possible" until a new IEP is developed and implemented, and if implementation of the old IEP is not possible, the new district must provide services that approximate the old IEP as closely as possible (Letter to Campbell, 213 IDELR 265 [OSEP 1989]; see Ms. S. v. Vashon Island School District, 337 F. 3d 1115, 1133-34 [9th Cir. 2003];). Moreover, although the purpose of pendency is to preserve the status quo, "when a student transfers educational jurisdictions, the status quo no longer exists" (Vashon Island School District, 337 F. 3d at 1133]). As noted above, the pendency provision prevents schools from altering the status quo and "strip[s] schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. at 323), but in this case it is the parent, not the district, who precipitated the change

in the student's schooling that resulted in an alteration of the status quo. Accordingly, the impartial hearing officer's decision obligating the district to return the student to his previous school district to effectuate a pendency placement must be annulled.

Turning next to whether the district offered the student an appropriate comparable service plan for the pendency of these proceedings, I have reviewed the program offered by the former district. The hearing record reflects that the student attended a special class, designated with a 6:1+3 student-to-teacher ratio, which consisted of six students, one teacher, a teaching assistant and two aides (Tr. pp. 37-38; Parent Ex. B at p. 1). The class began at about 8:15 a.m. and ended at 2:50 p.m. each day (Tr. p. 38). In addition to the school day, an extended school day was offered and had been in place for five or six years, and the purpose of the extended school day was to allow the students in special classes meaningful participation in an after school program (Tr. p. 38; Parent Ex. E). The hearing record also reflects that an after school program was offered for the regular education students and that the intent was to provide the same opportunity for the special education students (Tr. pp. 38, 50-51). The program was offered four days a week (Monday, Tuesday, Thursday and Friday), for an hour from 3:00 p.m. to 4:00 p.m. (Tr. pp. 39, 51). The total number of students varied as parents registered the students ahead of time for the days that they wanted the student to attend, and supervision was at least 2:1 (Tr. p. 39). Regarding opportunities for mainstreaming during the school day, the hearing record reflects that the school was a public school and the special class was located within an integrated building (Tr. pp. 39-40). In addition, the hearing record describes a "reverse mainstreaming program" whereby the fifth graders in general education volunteered their time in special classes on a daily basis (Tr. p. 40, 52; Parent Ex. B at p. 12). The hearing record reflects that reverse mainstreaming was contemplated at the May 6, 2011 CSE meeting as part of the student's program (Tr. pp. 40-41; Parent Ex. B at p. 12). In addition, the hearing record reflects that regular education students came to the extended school day program, but not as regularly as during the school day (Tr. p. 42). Regarding related services, the student received individual speech and language therapy daily (thirty minute sessions); small group occupational therapy once every six days (thirty minute sessions); and individual OT, twice in a six day cycle (thirty minute sessions) (Tr. p. 42; Parent Ex. B at p. 1). In addition, the school had incorporated speech and language services into the extended school day so that a speech therapist pushed into the extended school day classroom (Tr. p. 43). The after school sessions focused more on social skills and the sessions during the school day were more individualized (id.). The hearing record reflects that attendance at the former district allowed the student to also attend the extended school day program (Tr. pp. 46-47).

Next I will review the comparable service program offered by the district. According to the district school psychologist, during the summer of 2011, her responsibilities included evaluating students, conferencing cases, and comparable service plans (Tr. pp. 62-63). The hearing record reflects that a meeting was held on August 16, 2011 and that the purpose of the meeting was to create a comparable service plan based on the student's last school IEP in order to find a school in the district for the student (Tr. p. 64). At the meeting, the student's May 2011 IEP was reviewed and discussed with the parent (Tr. p. 65). Thereafter, the district recommended a special class with a 6:1+1 student to teacher ratio in a special school (Tr. p. 65; Parent Ex. C). The district psychologist testified that a 6:1+3 program was considered but that from reviewing the student's IEP, it did not seem that the student needed more than one paraprofessional in the room (Tr. p. 76, 84). The district psychologist testified that it was comparable to the student's 6:1+3 class because it was still a small student-teacher ratio (Tr. p. 84). The district also recommended

OT and speech-language therapy (Tr. pp. 65-66; Parent Ex. C). Regarding OT the district recommended one time a week in a small group (thirty minutes) and regarding speech-language therapy, the district psychologist indicated that the document included a clerical error, recommending once a week (thirty minutes), and it should have been five times a week (Tr. pp. 67, 78; see Parent Ex. C). In addition, OT was recommended individually two times a week (thirty minutes) (Tr. p. 68; Parent Ex. C). The district psychologist further testified that the May 2011 IEP did not provide for after school or extended day services, that such services were discussed at the meeting and that the student's parent was advised that provision of such depended upon the individual school (Tr. pp. 69-70). In addition, the district psychologist testified that mainstreaming was not considered for the student (Tr. p. 77).

In conclusion, a review of the hearing record reflects that the district did not offer a comparable service plan, based upon a finding that the 6:1+1 special class is not '"similar"' or '"equivalent"' to the 6:1+3 special class described in the student's IEP from the previous public agency, which offered additional supports in the classroom (see IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]; see also Sterling, 2008 WL 4865570, at *5).[8] Although I find that the district did not offer a comparable service plan, I further find that the impartial hearing officer erred in directing the district to fund the student's attendance at the former district as a pendency placement; instead, the district is required to offer a comparable service plan (see 34 CFR § 300.323[e][1], [2]; 8 NYCRR 200.4[e][8][i]; M.K. v. Roselle Park Bd. of Educ., 2006 WL 3193915, at *11 [D.N.J. Oct. 31, 2006]). In order to offer the student a comparable service plan, upon review of the hearing record, I find that for purposes of the student's pendency placement, the 6:1+1 special class will be comparable with the additional provision that the student be assigned the services of a 2:1 paraprofessional. I find that the related services offered are comparable based upon review of the hearing record (see Tr. pp. 65-66, 67-68; Parent Exs. B, C, G). Regarding mainstreaming, I note that the "reverse mainstreaming" program of the former district is a program described in the student's IEP as a program that is "unique" to the former district (see Parent Ex. B at p. 12) and find that the district is not required to offer an identical program (see 34 CFR § 300.323[e]; 8 NYCRR 200.4[e][8][i]); however, to the extent that it is possible, the district shall provide the student with the opportunity to interact with nondisabled peers to the maximum extent appropriate (see P. v. Newington Bd. of Educ., 546 F.3d 111, 112, 120-21 [2d Cir. 2008]; see Letter to Cambell 213 IDELR 265 [noting that to the extent that implementation of the old IEP is impossible, the new district must provide services that approximate, as closely as possible, the old IEP]). I further find that an appropriate placement for the student would be in a special class located in a district school that would provide mainstreaming opportunities. As was the case in the former district, during the pendency of these proceedings, the student shall be provided a reasonable opportunity to access extended day or extracurricular programs to the extent that they are available to students in the district (disabled or not) and shall not be excluded from such programs solely on the basis of his disability.

[8] I note that this decision is for pendency placement purposes only and does not reflect a current determination of the student's present levels of performance or whether a different type of special education services may be appropriate for the student for the 2011-12 school year. Such matters must be left to the merits portion of the impartial hearing.

Conclusion

In summary, the district did not offer a comparable service plan; however, the impartial hearing officer erred in directing the district to fund the student's placement at the prior district school. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's interim decision dated October 24, 2011 which directed the district to fund the student's placement at the former district is annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with a 2:1 shared paraprofessional as part of his comparable services plan during the pendency of these proceedings.

Dated: **Albany, New York**
December 23, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER