The University of the State of New York

The State Education Department
State Review Officer
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No. 14-024

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:
Cuddy Law Firm, PC, attorneys for petitioner, Kerry McGrath, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) 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 (IHO) determining petitioner's (parent's) son's pendency (stay-put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2013-14 school year. The IHO determined that a July 2011 individualized education program (IEP) established the student' pendency placement. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision, and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As relevant to the instant case, the parent previously initiated an impartial due process proceeding on or about September 28, 2012, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Supp. Ex. 1 at p. 1).[1]

[1] Pursuant to State practice regulations, the parties submitted the stipulation of settlement regarding the 2012-13 school year as additional documentary evidence (see 8 NYCRR 279.10[b]). For the sake of clarity, the stipulation

During that impartial hearing, an IHO (Hearing Officer 1) issued an interim decision, dated December 14, 2012 (December 2012 interim decision), which directed the district, for purposes of pendency, to pay for the student's placement in a "state approved non-public school in an 8:1:2 or 8:1:1 or 6:1:1 program" for students with autism (IHO Ex. 1, Att. 1).[2] According to the December 2012 interim decision, if a "seat in a school" was not obtained by December 21st, "then a seat in a non-approved non-public school setting" must be obtained with the "same program as previously stated" (id.). In addition, the December 2012 interim decision directed the district to provide the parent with related services' authorizations (RSAs) to obtain speech-language therapy, occupational therapy (OT), and physical therapy (PT) in the same frequency and duration as recommended in the "last agreed upon IEP" dated July 2011 (id.; see IHO Ex. 1, Att. 2 at pp. 1, 9).[3] The December 2012 interim decision also directed the district to pay for special education itinerant teacher (SEIT) services (five hours per week) as set forth in the same July 2011 IEP (see IHO Ex. 1, Att. 1; see also IHO Ex. 1, Att. 2 at pp. 1, 7). Unable to locate a seat for the student in a State-approved, nonpublic school, a seat was then located in a non-approved, nonpublic school—the Manhattan Children's Center (MCC)—consistent with the December 2012 interim decision(see IHO Ex. 1 at pp. 1-2; see also IHO Ex. 1, Att. 1).

On January 14, 2013, the Hearing Officer 1 issued a final decision and order (January 2013 decision), which the parent appealed for further administrative review (see IHO Ex. 1 at p. 2; see also IHO Ex. 1, Att. 3). However, by stipulation of settlement dated April 10, 2013, the parties resolved all matters related to the 2012-13 school year, and the parent withdrew the appeal of the Hearing Officer 1's January 2013 decision by letter dated April 12, 2013 (see Supp. Ex. at pp. 1-5; see also IHO Ex. 1, Att. 4). In resolving the case, the parties agreed that the stipulation of settlement superseded the Hearing Officer 1's January 2013 decision and the appeal of that decision "for all purposes;" the parties further agreed that neither the stipulation of settlement nor the Hearing Officer 1's January 2013 decision established that the student's educational placement or program at MCC was, or comprised "in whole or in part," the student's educational program for "purposes of 'pendency' or 'stay put'" pursuant to the IDEA (Supp. Ex. 1 at pp. 2, 4).

On or about September 27, 2013, the parent initiated the instant impartial due process proceedings, and by letter motion dated November 5, 2013, requested an "immediate" interim decision allowing the student to "remain at his current placement at [MCC]" where he attended a "5:1:2 class" (IHO Ex. 1 at p. 1). The parents also indicated that the student received the following related services: two 30-minute sessions per week of individual OT; one 30-minute session per week of OT in a small group; three 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of speech-language therapy in a small group (id.).

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of settlement has been incorporated into the hearing record in this appeal and will be referred to as Supplemental Exhibit 1 in this decision (Supp. Ex. 1).

[2] The IHO exhibit included three typewritten pages and four additional documents—identified as "Attachment 1," "Attachment 2," "Attachment 3," and "Attachment 4"—which will be referred to in citations as IHO Exhibit 1, Attachment 1 (IHO Ex. 1, Att. 1).

[3] According to the July 2011 IEP, the Committee on Preschool Special Education (CPSE) recommended the following related services: two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy (see IHO Ex. 1, Att. 2 at p. 9).

In addition, the parent indicated that the student was "mandated" to receive "five hours" of applied behavioral analysis (ABA) services per week (id.). The parent also asserted that the student was entitled to remain in his current educational placement during the pendency of the litigation, and the December 2012 interim decision constituted the "last unappealed decision in this case" (id. at pp. 1-2).

A. Impartial Hearing Officer Decision

On November 27, 2013, the parties proceeded to an impartial hearing with regard to the student's pendency placement (see Tr. at pp. 1-23). By interim order (corrected) dated January 6, 2014, the IHO in instant case found that the student's July 2011 IEP—as the "last agreed upon and implemented IEP," recommending an 8:1+2 special class placement—established the student's pendency placement (see IHO Interim Decision at pp. 2-3). Contrary to the parent's arguments, the IHO indicated that even if MCC could reasonably constitute the "operative placement functioning at the time of the filing of the [due process] [c]omplaint [notice]" under Mackey v. Arlington Central School District, 386 F. 2d 618, 625 (2d Cir. 2004), the student's placement at MCC arose from a "pendency agreement in an earlier litigation," which was subsequently settled (id. at p. 3). The IHO further indicated that a pendency placement may not arise from an agreement "connected to earlier litigation" if that placement was "understood to constitute a temporary placement" (id.; internal citations omitted). In this case, the IHO concluded that whereas here, the "parties' agreement refer[red] only to the period of time during the prior litigation," such placement was temporary and did not form the basis for a later pendency placement (id. at p. 3). As such, the IHO found that the student's pendency placement was based upon the July 2011 IEP, which provided for an 8:1+2 special class placement (id.).[4]

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in concluding that the December 2012 interim decision was a temporary agreement or settlement agreement pertaining only to the 2012-13 school year, and as such, could not form the basis for the student's pendency placement in the instant impartial due process proceedings. The parent also argues that the IHO misapplied legal authority to support the conclusion that MCC was not the student's pendency placement, and further, the IHO erred in finding that MCC was not the student's current educational placement as the operative placement actually functioning at the time the parent invoked the student's right to stay put.[5]

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[4] The parties agreed at the impartial hearing that the student was entitled to five hours per week of SEIT services, as noted in the July 2011 IEP, as part of the student's pendency placement (see Tr. pp. 6-7).

[5] The parent submitted a memorandum of law in support of the petition, and attached additional documentary evidence to the memorandum of law for consideration upon review (see Parent Mem. of Law Exs. 2-5). Initially, the district objects to the consideration of all of the parent's additional evidence, but alternatively objects to the consideration of just two of the exhibits (Answer ¶¶ 19-28). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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). A review of the additional documentary evidence reveals that while the subsequent e-mail correspondence and an affidavit were

In an answer, the district argues to uphold the IHO's interim order on pendency, dated January 6, 2014, in its entirety.

V. Applicable Standards

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 CFR 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 & 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

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not available at the time of the impartial hearing, the documents are not necessary to render a decision in this case, and therefore, neither will not be considered (see Parent Mem. of Law Exs. 3-4). Also, the remaining two documents, although available at the time of the impartial hearing, were not submitted as evidence; as such, I decline to accept and consider them on appeal as they are also not necessary to render a determination (see Parent Mem. of Law Exs. 1, 4). Moreover, to the extent that the parent incorporated additional arguments or raised additional issues in the accompanying memorandum of law but did not articulate the same in the petition, the district correctly argues in the answer that such arguments or issues may not be considered because a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 08-053). In addition, the petition in this case was only seven pages in length, which provided the parent with ample opportunity and space within which to assert any additional arguments or raise additional issues (see Application of a Student with a Disability, Appeal No. 12-016).

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 IHO'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).

VI. Discussion

First, the parent argues that the IHO erred in concluding that the December 2012 interim decision—as a temporary agreement or settlement agreement related solely to the 2012-13 school year—could not form the basis for the student's pendency placement in the instant impartial due process proceedings. The parent argues that as the last, unappealed IHO decision, the December 2012 interim decision may be relied upon for the purpose of establishing the student's pendency placement at MCC. The district rejects the parent's contentions. As discussed more fully below, the parent's arguments are not persuasive and must be dismissed.

In this case, it is undisputed that at the time it was issued, the parties relied upon the December 2012 interim decision as authority for the student's pendency placement during the administrative proceedings related to the 2012-13 school year. Therefore, the IDEA and State and federal regulations obligated the district to continue to fund the student's pendency placement as set forth in the December 2012 interim decision only through the conclusion of any administrative and/or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also M.R. v. Ridley Sch. Dist., 2014 WL 657343, *10-*11 [3d Cir. Feb. 20, 2014] [finding that a district's obligation to maintain and fund a student's pendency placement remained in effect "through the final resolution of the dispute"]). However, when such proceedings concluded, pendency rights, and the district's obligation under them to maintain a student in his or her pendency placement, terminated, and such termination was not dependent upon a finding that the district offered the student a FAPE (see Mackey, 386 F.3d at 161; Marcus I. v. Dep't of Educ., 2011 WL 1979502, at *1 [9th Cir. May 23, 2011] [explaining that stay put provision 20 U.S.C. § 1415[j] is designed to allow a student to remain in an educational institution pending litigation, but does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]). The pendency provisions do not confer upon an administrative hearing officer the power to extend an interim pendency determination beyond the conclusion of the proceedings

which gave rise to the stay put right. Based upon the foregoing, the student's right to remain in the pendency placement under the December 2012 interim decision during the administrative proceedings related to the 2012-13 school year lapsed once those proceedings concluded pursuant to the stipulation of settlement, dated April 10, 2013, which resolved any and all issues related to the 2012-13 school year (see Supp. Ex. 1 at pp. 2, 4). Therefore, the IHO correctly concluded that the December 2012 interim decision, as a temporary order pertaining to the 2012-13 school year, did not establish the student's pendency placement for the administrative proceedings related to the 2013-14 school year.

In addition, even assuming, as the parent argues without any citations to authority, that the December 2012 interim decision could be construed as an agreement between the parent and the State—as courts have deemed an unappealed IHO's decision on the merits of the case—to change the student's "then-current educational placement" for the purpose of pendency (see Student X, 2008 WL 4890440 at *23; see also Mackey, 386 F.3d 158, 163; Letter to Hampden, 49 IDELR 197 [OSEP 2007]), the stipulation of settlement between the parties in this case supersedes the December 2012 interim decision and the language within it clearly and unambiguously declared that MCC was not, in whole or in part, the student's educational program for "purposes of 'pendency' or 'stay put'" pursuant to the IDEA (Supp. Ex. 1 at pp. 2, 4).

Next, the parent contends that the IHO misapplied legal authority to support the conclusion that MCC was not the student's pendency placement, and further, the IHO erred in finding that MCC was not the student's current educational placement as the operative placement actually functioning at the time the parent invoked the student's right to stay put. The Second Circuit has described three variations on the definition 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; or (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163; see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 [6th Cir. 1990]; T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *4 [S.D.N.Y. Aug. 7, 2012]; Application of a Student with a Disability, Appeal No. 09-125; 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). However, circuit courts discussing the "operative placement" principle have noted that it applies to the IEP functioning at the time pendency was invoked or to the operative placement functioning "before any IEP has been implemented" (Drinker, 78 F.3d at 867 [emphasis added], quoting Thomas, 918 F.2d at 626; see Mackey, 386 F.3d at 163). The principle does not apply to MCC in this case insofar as there has been no decision by the district to place the student there pursuant to an IEP and there has been no determination by an IHO, SRO, or court that may be looked to in order to support the conclusion that MCC has become the student's pendency placement. Furthermore, as explained above, the hearing record reflects that the July 2011 IEP was the last agreed upon and implemented IEP, and, therefore, this is not one of those instances in which pendency has been invoked before any IEP has been implemented for the student.

The parent's argument concerning reliance upon the December 2012 interim decision as an unappealed order from which pendency now flows because it was shifted to MCC is unavailing. The authority suggesting support for that proposition is the U.S. Department of Education's (USDOE) guidance in Letter to Hampden (49 IDELR 197 [OSEP 2007]). However, the USDOE reached that conclusion based upon the fact tjat that the first tier hearing resulted in unappealed

final decision on the merits that agreed with the parents (id.), which is in sharp contrast to the facts presented here in which Hearing Officer 1's December 2012 interim decision was nonfinal, not a merits decision, and not based upon an evidentiary hearing in which the Hearing Officer 1 examined MCC and rendered a substantive determination that it was an appropriate educational placement for the student. Moreover, this matter is further distinguishable from Letter to Hampden because the first tier decision was in fact appealed and the subsequent settlement agreement finally resolving the merits of that proceeding specifically excluded MCC as the pendency placement as discussed above. Accordingly, the parent does not prevail in her stay put arguments in this instance.

VII. Conclusion

In summary, a review of the evidence in the hearing record supports the IHO's determination that the student's July 2011 IEP, as the last agreed upon and implemented IEP, established the student's pendency placement for the administrative proceedings related to the 2013-14 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER