The University of the State of New York

The State Education Department
State Review Officer

No. 07-063

Application of a CHILD WITH A DISABILITY, by her 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:
Educational Advocacy Service, attorney for petitioner, Anton Papkhin, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which determined that the educational program respondent's Committee on Special Education (CSE) recommended for his daughter on November 21, 2006 for the 2006-07 school year was not appropriate, but denied petitioner's request to determine that the student's pendency placement and program is the placement and program set forth in the student's individualized education plan (IEP) developed on June 7, 2006. The appeal must be sustained.

At the commencement of the impartial hearing on April 26, 2007, the student was 19 years old and attending the Judge Rotenberg Educational Center (JRC) (Tr. p. 4; Pet. ¶ 2).[1] The student's eligibility for special education programs and services and classification as a student with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

According to the hearing record, respondent's CSE convened on June 7, 2006 to conduct the student's annual review and to develop her IEP for the 2006-07 school year (Tr. p. 4; Pet. ¶ 14). Prior to and at the time of the CSE meeting, the student attended JRC for residential treatment and received court authorized aversive behavioral interventions as part of her treatment plan (Tr. pp. 4-5; Pet. ¶¶ 10-13). After conducting a Functional Behavior Assessment (FBA) of the student, the CSE recommended continued placement at JRC and the implementation of a Behavior Intervention Plan (BIP), which included the use of court authorized aversive behavioral interventions to "treat her major inappropriate behavior" (Tr. pp. 4-5, 7-8; Pet. ¶¶ 13-15). The

[1] Initially, I note that neither party submitted documentary evidence into the record at the impartial hearing (see Tr. p. 2). As such, I must rely upon the information contained in the pleadings and in the transcript.

student's parents attended the CSE meeting and agreed with the recommendations contained in the 2006-07 IEP, including the BIP and use of court authorized aversive behavior interventions (Tr. p. 5; Pet. ¶ 15).

On November 21, 2006, respondent's CSE convened to "reconsider" the student's 2006-07 IEP despite objections from petitioner (Tr. p. 5). The CSE removed the use of aversive behavioral interventions from the student's IEP, purportedly in response to changes in the Regulations of the Commissioner of Education (see 8 NYCRR 200.22), which took effect on June 23, 2006, subsequent to the development of the student's 2006-07 IEP on June 7, 2006 (Tr. pp. 5-6, 8; Pet. ¶¶ 22-23; see 8 NYCRR 200.22). Petitioner requested an impartial hearing to challenge the appropriateness of the November 21, 2006 IEP (Tr. pp. 6, 12-13, 21-22).

At the impartial hearing, petitioner's attorney argued that the student was entitled to remain in her "current educational placement including the use of specialized instructions and related services . . . including the use of aversive behavior interventions" under pendency and as recommended in the student's June 7, 2006 IEP (Tr. pp. 8-9, 25-27).[2]

The impartial hearing officer, by decision dated May 8, 2007, determined that the November 21, 2006 IEP was not appropriate because petitioner established that respondent's CSE "failed to follow the procedural requirements of Section 200.22" (IHO Decision at p. 5). The impartial hearing officer remanded the matter to respondent's CSE to conduct an FBA and to submit an application to determine whether a child-specific exception was warranted pursuant to 8 NYCRR 200.22 (id.).

The impartial hearing officer then addressed petitioner's request that the student remain in her then-current educational placement, including the implementation of the BIP and the use of aversive behavioral interventions, as set forth in the student's June 7, 2006 IEP (IHO Decision at p. 5). The impartial hearing officer determined that petitioner failed to sustain his burden to establish that she had "authority to order [respondent] to continue to provide the aversive interventions as part of [the student's] pendency placement" because she interpreted 8 NYCRR 200.22 to prohibit the use of aversive behavioral interventions and to render the use of aversive behavioral interventions as "unlawful" (id.).

On appeal, petitioner contends that the impartial hearing officer erred in her determination regarding the student's pendency placement. Petitioner asserts that his daughter is entitled to receive the educational programs and services, including the implementation of the BIP and the aversive behavioral interventions, as set forth in her last agreed upon IEP, dated June 7, 2006.

Respondent did not serve an answer to petitioner's appeal. However, respondent sent a letter to the Office of State Review, dated July 18, 2007, asserting that petitioner's appeal was no longer within a State Review Officer's jurisdiction because as of March 2007, the student was no longer a resident of respondent's district. Petitioner's counsel replied via letter dated July 26, 2007, contending that the student remained a resident of respondent's district and that to date, respondent "has yet to issue a written determination" of the student's residency "that complies with the

[2] Respondent conceded that the CSE failed to follow the procedures required by 8 NYCRR 200.22 and thus, the November 21, 2006 IEP failed to offer the student a free appropriate public education (FAPE) (Tr. pp. 18-19).

requirement of 8 NYCRR § 100.2(y)" (Pet'r Letter, dated July 26, 2007). In addition, petitioner's attorney noted although respondent failed to provide proper written notice of the student's residency determination, petitioner intended to appeal to the Commissioner of Education pursuant to the appropriate procedures and regulations (id.).

First, I will address respondent's claim that a State Review Officer no longer has jurisdiction to consider petitioner's appeal because the student's residency within respondent's district terminated as of March 2007. Based upon the information provided by both parties, I find that at this time, the issue of the student's residency has not yet concluded in a final determination by the Commissioner. As such, I will consider petitioner's appeal.

The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; see 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996][citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 300-03 [4th Cir. 2003]). 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 [1988]). It does not mean that a student must remain in a particular site or location, or at a particular grade level (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980], cert. denied, 449 U.S. 1078 [1981]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 99-90; 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 (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. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 357-61 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-011; Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073; Application of the Bd. of Educ., Appeal No. 97-82). It may or may not turn out to be the same placement that is determined to be the appropriate educational placement for the child after the conclusion of a hearing on the merits of the recommended program for that year. The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean the current education and related services provided in accordance with a [student's] most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Mackey v. Bd. of Educ., 386 F.3d 158, 160-01, 163-66 [2d Cir. 2004][citing Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Drinker, 78 F.3d at 867 [last functioning IEP]; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cr. 1990]). In most cases, the pendency placement will be the last unchallenged IEP

(Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696-97 [S.D.N.Y. 2006]). 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 v. Bd. of Educ., 921 F. Supp. 1184, 1189 fn.3 [S.D.N.Y. 1996]; 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]). Federal regulations on pendency specify that "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement" (34 C.F.R. § 300.518[a]).

Focusing on the inquiry stated above, the hearing record establishes that at the time petitioner requested a due process hearing to challenge the November 21, 2006 IEP, the student's June 7, 2006 IEP constituted her last agreed upon IEP. In addition, the record establishes that the student's June 7, 2006 IEP included a BIP that used aversive behavioral interventions as part of the student's treatment plan while she attended JRC. I find that neither the record nor the plain language of 8 NYCRR 200.22 provide a basis upon which to alter the implementation of the student's last agreed upon IEP as her pendency placement, including the BIP and the use of aversive behavioral interventions, as recommended in the June 7, 2006 IEP (see Tr. pp. 1-33; 8 NYCRR 200.22).[3] Moreover, I find no reason to disturb the longstanding and well-settled legal precedent with respect to the determination of what constitutes a student's pendency placement. Therefore, unless the parties otherwise agree, the special education programs and services set forth in the student's June 7, 2006 IEP, including the BIP and use of aversive behavioral interventions, constitutes her pendency placement as the last agreed upon IEP and the student's then-current placement at the time petitioner requested an impartial hearing.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it failed to find that the student's pendency placement and program is the placement and program set forth in the student's June 7, 2006 IEP.

Dated: **Albany, New York**
August 23, 2007

PAUL F. KELLY
STATE REVIEW OFFICER

[3] I also note that in this case, petitioner and his daughter are plaintiffs in a federal complaint challenging the newly enacted regulations (Pet. ¶¶ 18-20). A preliminary injunction resulted, which enjoined the enforcement of 8 NYCRR 200.22(e)(1)(ii) and (f)(4) as to the plaintiffs in that federal action (Pet. ¶¶ 19-20; see Tr. pp. 26-31).