



The University of the State of New York

The State Education Department State Review Officer

No. 07-095

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 Board of Education of the Southold Union Free School District

Appearances:

Ingerman Smith, L.L.P., attorney for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioner 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 regarding her daughter's pendency placement during a due process proceeding challenging the appropriateness of respondent's recommended educational program for the student for the 2007-08 school year. The impartial hearing officer denied petitioner's request for an order determining that the student was entitled to pendency services at a private school for summer 2007. The appeal must be dismissed.

At the time of the impartial hearing officer's interim decision rendered in June 2007, an impartial hearing on the merits had not been held and the issue of pendency was addressed upon the submission of the parties' arguments and documentary evidence (IHO Decision at p. 2). As of the date of petitioner's due process complaint notice, the student was attending a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (IHO Ex. 1 at p. 1; see 8 NYCRR 200.1[d]; 200.7).¹ The student's prior educational history is discussed in Application of a Child with a Disability, Appeal No. 04-082, and will not be repeated here in detail. The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (IHO Exs. 2; 3; see 8 NYCRR 200.1[zz][6]).

¹ The impartial hearing officer lists six documents upon which she based her determination (IHO Decision at p. 2). Although they are not identified by exhibit numbers, I will refer to them in the same order as IHO Exs. 1-6 in this decision.

The student's individualized education program (IEP), dated April 26, 2006, indicates that the student is ineligible for extended school year (ESY) services (IHO Ex. 2 at p. 1). However, the April 2006 IEP states that petitioner requested that the student be permitted to attend the private school's five week summer program, and the CSE agreed to provide the student with this service as an academic intervention services (AIS) student (id. at p. 5; see IHO Ex. 6 at pp. 1-2). The student attended the private school's summer program in 2006 (IHO Ex. 6 at p. 3). In August 2006, petitioner filed a due process complaint notice and an impartial hearing (Hearing I) was conducted (id. at p. 1). In January 2007, the impartial hearing officer in Hearing I issued an interim decision (January 2007 interim decision) determining that the student's educational placement for pendency purposes was the resource room 5:1 program set forth in an IEP dated May 11, 2005 and constituted the student's pendency placement for the 2006-07 school year (IHO Ex. 6). The impartial hearing officer's pendency order did not indicate that the student's pendency placement included ESY services (id.).^{2, 3}

In the dispute underlying this proceeding, petitioner alleges, among other things, that at its June 2007 Committee on Special Education (CSE) meeting, respondent improperly determined that the student was not eligible for ESY services for summer 2007 (IHO Ex. 1 at p. 2).⁴ Petitioner sought an interim order directing respondent to provide the student with the summer program at the private school pursuant to the April 2006 IEP (id. at pp. 4-5), or, in the alternative, reimbursement for the student's attendance, housing and transportation costs associated with the private school's summer 2007 program.

In an interim decision dated June 28, 2007, the impartial hearing officer (Impartial Hearing Officer II) determined that the pendency issue raised by petitioner had been previously raised and decided during Hearing I (IHO Decision at p. 3). Impartial Hearing Officer II concluded that the issue had previously been decided in respondent's favor, and consequently she denied petitioner's pendency request (id. at pp. 3-4).

Petitioner appeals the interim decision rendered by Impartial Hearing Officer II, and asserts that Impartial Hearing Officer II erred in relying on the January 2007 interim decision because the January 2007 interim decision determined the limited issue of the student's pendency placement for the 10-month 2006-07 school year and did not address whether the student should receive summer services with regard to pendency. Petitioner also argues that the student should have been provided with the private school's summer program, respondent should be directed to provide the student with compensatory services, and respondent should be directed to schedule annual reviews with sufficient time to consider eligibility for ESY services, particularly for those students having a history of receiving summer services.

In its answer, respondent contends that petitioner's appeal of Impartial Hearing Officer II's interim decision has been rendered moot because the student did not actually attend the summer

² The May 11, 2005 IEP was not made a part of the hearing record.

³ Petitioner has not appealed the interim decision in Hearing I, nor does the record reveal the outcome of that proceeding.

⁴ I note, however, that petitioner makes an affirmative allegation on appeal to the contrary, leaving open the nature of petitioner's underlying claim (Pet. ¶ 64).

2007 program at the private school. Respondent also asserts that Impartial Hearing Officer II correctly determined that the issue was previously decided in Hearing I.

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]). 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 [3d Cir. 1996]; Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297 [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 students with disabilities from school (Honig v. Doe, 484 U.S. 305, 323 [1987]). It 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 the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (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. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). 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 child'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]; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]; Drinker, 78 F.3d at 867 [last functioning IEP]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 [9th Cir. 1987]). 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, at 1189 n.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]).

When the instant due process proceeding was commenced in June 2007, respondent had been directed to provide services in accordance with the January 2007 interim decision issued in Hearing I (IHO Exs. 1; 6). Although petitioner asserts that the January 2007 interim decision may be read as resolving the student's pendency placement only for the 10-month 2006-07 school year, that decision resolving pendency characterized the student's placement at the private school as "clearly temporary for the summer of 2006" (IHO Ex. 6 at p. 13). Under these circumstances, I cannot conclude that petitioner's narrow interpretation of the January 2007 interim decision is correct or that petitioner has raised any other reason to disturb Impartial Hearing Officer II's

interim decision. Furthermore, petitioner has not directly appealed the January 2007 interim decision or raised the issue in an appeal from a final decision rendered in Hearing I (see 8 NYCRR 279.10[d]), thus placing the issue outside the scope of the instant appeal.

With respect to petitioner's remaining contentions, I note that this determination does not finally resolve the underlying issues, preclude her from seeking ESY services to prevent substantial regression, or preclude petitioner from asserting a claim for additional services if it is determined that the student should have been recommended for ESY services. This is particularly noteworthy because petitioner's challenge to the proposed IEP for 2007-08 school year has not been finally determined by Impartial Hearing Officer II, nor has the final outcome of Hearing I been identified by the parties.

Lastly, the services to be provided to the student during the summer appear to be a recurring issue of concern for this student. In the event this issue arises in the future, it may be beneficial, and therefore I encourage the parties, to cooperate and convene a CSE meeting earlier in the school year for the purpose of considering ESY issues.

In light of the forgoing, petitioner's appeal must be dismissed. I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
September 19, 2007

PAUL F. KELLY
STATE REVIEW OFFICER