The University of the State of New York

The State Education Department
State Review Officer

No. 07-134

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 child with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

Mayerson & Associates, attorney for respondents, Gary S. Mayerson, 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 determining respondents' daughter's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2007-08 school year. The impartial hearing officer found that the student's pendency placement was established by a prior impartial hearing officer's March 2007 decision. The appeal must be dismissed.

Preliminarily, I will address a procedural issue. Respondents attach to their answer 14 exhibits (Answer Exs. A-N). In its reply, petitioner objects to respondents' attempt to introduce these documents (Reply ¶¶ 1-6). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). Here, I find that the exhibits are not necessary for my review and I therefore decline to accept them.

The student is classified as having autism (Parent Br. Ex. D;[1] see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). On September 1, 2006, respondents requested an impartial hearing seeking, among other things, reimbursement for the 12-month educational program they had developed for their daughter for the 2006-07 school year. The impartial hearing officer in that matter rendered a decision on March 15, 2007 ordering petitioner to reimburse respondents, through summer 2007, for private services obtained unilaterally. On June 25, 2007, the Committee on Special Education (CSE) met to develop the student's individualized education program (IEP) for the 2007-08 school year (Parent Br. Ex. D). The IEP developed as a result of that meeting recommended that the student be placed in a 6:1+1 special class in a specialized school with related services (id. at p. 1). On August 31, 2007, respondents filed a due process complaint notice challenging the program recommended for their daughter for the 2007-08 school year (Parent Br. Ex. B). In their due process complaint notice, respondents invoked pendency asserting that their daughter's pendency placement, during the current proceedings, is determined by the prior

The impartial hearing on the issue of pendency, which is the subject of this appeal, took place on October 15, 2007. The impartial hearing officer rendered an interim decision on November 7, 2007. He found that pendency is determined by the prior impartial hearing officer's March 2007 decision (IHO Decision at p. 3). In his November 2007 interim decision, the impartial hearing officer noted that the relevant regulations and commentary were ambiguous (id. at p. 2). The impartial hearing officer further indicated that he found the September 2007 letter of the acting director of the Office of Special Education Programs (OSEP) of the United States Education Department "persuasive on the notion that an unappealed first tier hearing officer's decision does constitute pendency" (id. at p. 3).

Petitioner appeals from the November 2007 impartial hearing officer's interim decision, contending that pendency cannot arise from the prior impartial hearing officer's decision, that the student does not have a current educational placement for pendency purposes and that the student should be treated as an initial applicant to public school. Respondents argue that a final and "non-appealable" decision from an impartial hearing officer becomes the then current educational placement for pendency purposes.[2]

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 (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 "intended to maintain some stability and continuity in a child's school placement during the pendency of

[1] Respondents' brief dated October 18, 2007 from the impartial hearing below is identified in the hearing record as "Petitioners' Brief on 'Burden' and Pendency."

[2] Respondents ask that I recuse myself. I have considered their request and find no basis in law or fact for recusal and I find that I am able to impartially render a decision (see 8 NYCRR 279.1).

review proceedings" (Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [D.C.N.Y. 1985]; see Honig v. Doe, 484 U.S. 305, 323 [1987] [finding that Congress intended to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school"]). 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 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).

As noted in Application of a Child with a Disability, Appeal No. 06-131, in a two-tiered state, such as New York, a student's pendency placement can be changed when a State Review Officer agrees with the student's parents that a change in placement is appropriate (34 C.F.R. § 300.518[d]). The Analysis of Comments and Changes accompanying the new regulations state:

> [T]he Act's pendency provision that when a hearing officer's decision is in agreement with the parent that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parent for purposes of determining the child's current placement during subsequent appeals. See, e.g., Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 372 (1985); Susquenita School District v. Raelee S., 96 F.3d 78, 84 (3rd Cir. 1996); Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990). To clarify that new Sec. 300.518(d)… does not apply to a first-tier due process hearing decision in a State that has two tiers of administrative review, but only to a State-level hearing officer's decision in a one-tier system or State review official's decision in a two-tier system that is in favor of a parent's proposed placement, we are removing the reference to "local agency" in new Sec. 300.518(d). This change is made to align the regulation more closely with case law.

(Child's Status During Proceedings, 71 Fed. Reg. 46710 [Aug. 14, 2006]; see 34 C.F.R. § 300.518[d]).

Subsequent to the issuance of the decision in Application of a Child with a Disability, Appeal No. 06-131, OSEP issued an interpretation of the above referenced regulation in a September 4, 2007 letter (Letter to Hampden, ___ IDELR ____, 108 LRP 2225 [OSEP 2007]; Parent Br. Ex. E). OSEP is the agency charged with the principal responsibility for administering the IDEA (20 U.S.C. § 1402[a]). Substantial deference must be given to a federal agency's interpretation of its own regulations; the interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation" (Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 [1994] [internal citations omitted]; see Stinson v. U.S., 508 U.S. 36, 43-45 [1993] [includes agency's interpretive commentaries]; see, e.g., Honig, 484 U.S. at 325 n.8 [1988][where the IDEA was ambiguous, Court deferred to agency's interpretation in an OSEP policy letter, which comported with the purpose of the Act]; Hooks v. Clark Co. Sch. Dist., 228 F.3d 1036, 1040 [9th Cir. 2000] [defers to agency interpretation of the IDEA in OSEP policy letter]; D.P. v. School Bd. of Broward Co. Fla., 360 F. Supp. 2d 1294, 1298 [S.D. Fla. 2005] [defers to agency interpretation of the IDEA]; Raymond S. v. Ramirez, 918 F. Supp. 1280, 1292-93 [N.D. Iowa

1996] [defers to agency interpretation of the IDEA]). An administrative body or reviewing court's task is not to decide which among several competing interpretations best serves the regulatory purpose; it must defer to the agency's interpretation unless "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency]'s intent at the time of the regulation's promulgation" (Thomas, 512 U.S. at 512).

OSEP issued the September 4, 2007 letter in response to a request to clarify the interpretation of the newly enacted federal regulation set forth in 34 C.F.R. § 300.518(d) (Letter to Hampden, ___ IDELR ____, 108 LRP 2225 [OSEP 2007]). The OSEP letter noted that the relevant pendency provisions did not address a situation in a two-tier due process system, such as New York, in which a local agency did not appeal the first-tier impartial hearing officer's decision on the merits that was favorable to the parent (id. at p. 2). Citing the finality provisions of the federal regulations (see 34 C.F.R. § 300.514[a]), the OSEP letter then clarified that in a two-tier due process system, such as New York, a first-tier impartial hearing officer's "unappealed decision is final, and must be implemented. That final decision on the merits, as implemented, becomes the child's current educational placement" (id. at pp. 1-2). The OSEP letter further indicated that the same result would occur if the first-tier impartial hearing officer's decision on the merits favored the local agency and the parent did not appeal; that is, the unappealed first-tier impartial hearing officer's decision becomes the child's current educational placement for purposes of pendency (id. at p. 2).

The prior impartial hearing officer's March 2007 decision on the merits was not appealed. Respondents filed their due process hearing request in this proceeding on August 31, 2007. Given the September 4, 2007 OSEP letter, I agree with the impartial hearing officer in this matter and find that the prior unappealed impartial hearing officer's March 2007 decision, as implemented, is the student's current educational placement for pendency purposes in this proceeding.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 11, 2008

PAUL F. KELLY
STATE REVIEW OFFICER