The University of the State of New York

The State Education Department
State Review Officer

No. 08-107

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination by a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Skyer, Castro, Foley and Gersten, attorneys for petitioner, Diana Gersten, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from an interim decision of an impartial hearing officer regarding her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2008-09 school year. The appeal must be dismissed.

An impartial hearing conducted on August 22, 2008[1] was specifically limited to the parent's request for the issuance of an order determining the student's placement and program during the pendency of the administrative proceeding challenging the appropriateness of an individualized education program (IEP) developed by the Committee on Special Education (CSE) for the student on April 8, 2008 (Tr. p. 12; IHO Decision at p. 2; see IHO Ex. 1 at pp. 4-5). The impartial hearing officer's interim decision rendered on August 27, 2008, which is the subject of this appeal, is limited specifically to the issue of the student's pendency placement (id.).

Although "clinically observed to be high-functioning in terms of his academic performance," the student has a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Dist. Ex. 10 at p. 4; Parent Ex. A at p. 3; IHO Ex. 1 at p. 1). The student presents with an array of developmental delays "that hinder his ability to function in the

[1] The impartial hearing officer interchangeably refers to the date of the impartial hearing as August 20, 2008 and August 22, 2008 on page two of his decision (IHO Decision at p. 2). However, it is clear from the hearing record that the impartial hearing took place on August 22, 2008 (Tr. p. 1).

classroom," including delayed social-emotional development, demonstrated by his "inability to communicate and interact appropriately … with his peers without highly individualized facilitation of an adult;" deficits in pragmatic language; attending difficulties, demonstrated by his "struggles to remain on task;" sensory processing delays, evidenced by his sensitivity to external stimuli; and a tendency to be "easily overwhelmed by noise and visual input" (Dist. Ex. 10 at pp. 4-8; Parent Ex. A at pp. 3-5, 7-9; IHO Ex. 1 at pp. 1-2).

On January 15, 2008,[2] the Committee on Preschool Special Education (CPSE) met, determined the student was eligible for special education services as a preschool student with a disability, and developed an IEP for the student (Dist. Ex. 10). The CPSE was comprised of a district representative, a special education teacher, an additional parent member, a special education itinerant teacher (SEIT), and the student's mother (id. at p. 2). The CPSE recommended the student's placement in a special class at YAI Gramercy School (Gramercy) in an 8:1+2 setting, five hours per day, five days per week (id. at p. 1). The CPSE also recommended related services of individual counseling three times per week for 60 minutes per session at a separate location, individual occupational therapy (OT) five times per week for 60 minutes per session and twice per week for 30 minutes per session at a separate location, individual physical therapy (PT) once per week for 60 minutes per session and twice per week for 30 minutes per session at a separate location, and individual speech-language therapy twice per week for 60 minutes per session and twice per week for 30 minutes per session at a separate location (id. at p. 43). The CPSE also recommended an air-conditioned lift bus (id. at p. 1). The January 15, 2008 IEP indicated that the recommended programs and services would be implemented from January 15, 2008 through January 15, 2009 (id. at p. 2).

In preparation for the student's transition from preschool to grade school, the CSE met on April 8, 2008 to develop a special education program for him during the 2008-09 school year (IHO Ex. 1 at p. 2). The CSE determined that the student was eligible for special education services as a student with a speech or language impairment (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]), and recommended a special class in a community school (IHO Ex. 1 at p. 2). The April 8, 2008 IEP developed by the CSE is not part of the hearing record.

On June 16, 2008,[3] the CPSE reconvened to recommend special education programs and services for the student for summer 2008, with a district representative, a special education teacher, an additional parent member, a speech-language pathologist, and the student's mother in attendance (Parent Ex. A at pp. 1-2). The CPSE recommended 20 hours per week of SEIT services and related services of individual counseling three times per week for 60 minutes per session, individual OT five times per week for 60 minutes per session, individual PT three times per week for 60 minutes per session, and individual speech-language therapy three times per week for 60 minutes per session (id. at p. 23). The SEIT and related services were to be provided by "YAI Lifestart" and district providers (id. at p. 1). The provision for an air-conditioned lift bus was stricken from the June 16, 2008 IEP (id.). The June 16, 2008 IEP indicated that services were to begin on June 23, 2008 and conclude on August 31, 2008 (id. at p. 2).

[2] The date of this CPSE meeting is incorrectly referred to in the impartial hearing officer's decision as "January 12, 2008" (IHO Decision at p. 2).

[3] The date of this IEP is incorrectly referenced throughout the impartial hearing officer's decision as "June 6, 2008" (see IHO Decision at pp. 2-3, 8-10).

By due process complaint notice dated July 15, 2008, the parent, through her attorney, requested an impartial hearing to contest the CSE's April 8, 2008 IEP (IHO Ex. 1). In her complaint, she asserted that the CPSE's June 16, 2008 IEP was the last agreed upon IEP created on the student's behalf, and maintained that the program recommended in that IEP should constitute her son's pendency placement while the administrative appeal of the CSE's April 8, 2008 IEP is being adjudicated (id. at pp. 2, 4-5).[4]

On August 22, 2008, an impartial hearing was held for the purposes of determining the student's placement and program during the pendency of the administrative proceeding (IHO Decision at p. 2). The hearing consisted of oral argument between the parent's attorney and the district representative, and no witness testimony was taken (Tr. pp. 4-35). In his interim decision dated August 27, 2008, the impartial hearing officer determined that the student was entitled to a pendency program (IHO Decision at p. 8). He also determined that for the purposes of the pendency provisions of the Individuals with Disabilities Education Act (IDEA), the student's "then current educational placement" was the program and services that were recommended on the January 15, 2008 IEP, and not the June 16, 2008 IEP (id. at pp. 8-10). He opined that the modification made to the January 15, 2008 IEP by the June 16, 2008 CPSE "was for Summer School only" and "was not intended to establish a new or different special education program for [the] Student for the remaining portion of [the] Student's eligibility as a pre-school student – i.e., until August 30, 2008" (id. at p. 9). Consequently, he determined that the special education program recommended on the January 15, 2008 IEP constituted the student's pendency program (id. at p. 11).

The parent appeals from the impartial hearing officer's interim decision, and seeks an order from a State Review Officer directing the district to fund the program recommended on the June 16, 2008 IEP as the student's pendency placement. The parent alleges that the impartial hearing officer's determination was erroneous because: (1) the June 16, 2008 IEP is the last agreed upon and most recent IEP for the student, and qualifies as his "then-current educational placement" pursuant to the pendency provisions of 20 U.S.C. § 1415(j); (2) State regulations at 8 NYCRR 200.5(j)(5)(v) requires the impartial hearing officer to make a determination based solely on the hearing record; however, in the instant case, the impartial hearing officer erred because he assumed facts neither in evidence nor supported by the hearing record; and (3) the impartial hearing officer's determination deprives the student of the program and related services he requires according to the last agreed upon IEP of June 16, 2008, thereby conflicting with the IDEA's goal of protecting students with disabilities from unnecessary transitions and losses of services during the review process. In support of her petition for review, the parent's counsel requests that a State Review Officer consider two affidavits appended thereto, one from the student's mother and one from the student's speech-language pathologist at Gramercy, neither of whom were produced as witnesses during the impartial hearing.[5]

[4] Neither the April 8, 2008 CSE meeting, nor the April 8, 2008 IEP are the subjects of the instant appeal. I also note that the parties did not include the April 8, 2008 IEP in the hearing record. Consequently, I need not further address these issues.

[5] The parent's attorney refers to these affidavits as "Appeal Ex. aa" and "Appeal Ex. bb," respectively (see Pet. ¶ 31).

The district answers, maintaining that the impartial hearing officer properly found that the January 15, 2008 IEP constitutes the proper pendency placement for the student because if the last agreed upon placement is a temporary placement, as the June 16, 2008 IEP was, then it cannot constitute a student's "then current educational placement" for pendency purposes. The district further contends that under 8 NYCRR 279.10(b), the affidavits attached to the parent's petition for review should be precluded from consideration on appeal because their content could have been offered at the time of the impartial hearing and their content is not necessary in order to render a decision.

At the outset, I will address a procedural issue, namely, the district's objection under 8 NYCRR 279.10(b) to the parent's attachment to her petition of two affidavits. 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 hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 08-061; Application of the Dep't of Educ., Appeal No. 08-044; Application of the Dep't of Educ., Appeal No. 08-037; 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 Dep't of Educ., Appeal No. 07-140; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of the Bd. of Educ., Appeal No. 07-005; Application of a Child with a Disability, Appeal No. 06-058; 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 a Child with a Disability, Appeal No. 05-020; Application of the Bd. of Educ., Appeal No. 04-068). In the instant matter, the parent's attorney could have offered testimony from both the student's mother and speech-language pathologist at the impartial hearing, but elected not to do so. Additionally, the content of said affidavits is not necessary in order to render a decision. Finally, accepting these affidavits into evidence would effectively deprive the district of its right to cross-examine the affiants, thereby compromising its due process rights (see 8 NYCRR 200.5[j][3][xii]; 34 C.F.R. § 300.512[a][2]; Application of a Child with a Disability, Appeal No. 04-071). Accordingly, in the exercise of my discretion, I decline to consider the affidavits in reaching a determination.

I now turn to the issue of the student's pendency placement. 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 also Student X v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 88163, 108 LRP 62802 (E.D.N.Y. Oct. 30, 2008); 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 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 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 U.S. Dist. LEXIS 88163, 108 LRP 62802; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; 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).

For the purpose of determining the student's "then current placement" under the IDEA's pendency provision, the critical inquiry in the case is whether the June 16, 2008 IEP was a modification, for a limited period of time, of the January 15, 2008 IEP. The hearing record supports the impartial hearing officer's determination that the June 16, 2008 IEP represented the district's modification of the January 15 2008 IEP for the purpose of serving as the student's special education program for the duration of the summer months preceding the start of the 2008-09 school year. The Second Circuit has proffered three possible definitions 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; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990] [emphasis added]; see also Application of the Bd. of Educ., Appeal No. 05-006). The hearing record contains evidence consistent with the impartial hearing officer's determination that the June 16, 2008 IEP was designed by the CPSE to address only the student's summer 2008 program (Parent Ex. A at pp. 2, 22; see IHO Decision at p. 9). The hearing record reveals that the June 16, 2008 CPSE convened approximately three months prior to it relinquishing jurisdiction to the CSE due to the student becoming school age. Additionally, the June 16, 2008 IEP indicated that the

recommendations contained in the IEP were to be implemented only from June 23, 2008 through August 31, 2008 (Parent Ex. A at p. 2), and the CPSE noted on the June 16, 2008 IEP that "After discussion with parent and reading all documents we determined that for the summer months [the student] will benefit from a SEIT with related services to carry over his learned skills" (id. at p. 22).

The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability (Honig, 484 U.S. 305). The provision "protect[s] the educational status quo of the student while the parents and the school fight out the legalities of the placement. The provision is student focused, not school district or parent focused" (Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 391 [N.D.N.Y. 2001]). The preservation of the status quo guarantees that the student remains in the last placement that the parent and the district agreed to be appropriate (see Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 10 [1st Cir. 1999]; Sanford Sch. Comm. v. Mr. and Mrs. L, 2001 WL 103544, at *9 [D. Me. Feb. 1, 2001]). However, in the instant matter, the hearing record contains no indication that the parties contemplated the June 16, 2008 IEP to extend beyond summer 2008 (see Verhoeven, 207 F.3d at 1, 9-11 [noting the policy behind the IDEA's pendency provision supports an interpretation of "current educational placement" that excludes temporary placements]; Leonard v. McKenzie, 869 F.2d 1558, 1564 [D.C. Cir. 1989] [finding that the student's private school placement, originally contemplated to last only one year, did not constitute his "current educational placement" for pendency purposes once that year ended]; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Therefore, maintaining the student in the educational program recommended in the June 16, 2008 IEP would effectively compromise the student's educational status quo, rather than preserve it, thereby frustrating the very purpose of the pendency provision. Accordingly, I decline to do so.

The parent maintains on appeal that the impartial hearing officer's interim pendency determination deprives the student of the program and related services he requires to receive a FAPE according to the last agreed upon IEP of June 16, 2008. However, the issue of whether the January 15 2008 IEP offered the student a free appropriate public education (FAPE) is not before me. The matter before me is pendency. I do note, however, that the services afforded under the January 15, 2008 IEP as pendency are similar to what the parent seeks as pendency services via the June 16, 2008 IEP. For example, although the January 15, 2008 IEP did not recommend SEIT services, and recommended three sessions of PT for 120 minutes per week in an individual setting, instead of the three sessions for 180 minutes per week in an individual setting that was recommended in the June 16, 2008 IEP, in every other aspect, the January 15, 2008 IEP recommended that the student receive either the same or higher frequencies and amounts of related services than what was recommended on the June 16, 2008 IEP (compare Dist. Ex. 10 at pp. 1, 43, with Parent Ex. A at pp. 1, 23). For example, both the January 15 and June 16, 2008 IEPs recommend that the student receive three sessions of counseling services, totaling 180 minutes per week in an individual setting; with respect to speech-language therapy, both IEPs recommended that the student receive 180 minutes per week in an individual setting, but the January 15, 2008 IEP recommended four sessions while the June 16, 2008 IEP recommended three; and the January 15, 2008 IEP surpasses the June 16, 2008 IEP in the frequency and amount of OT recommended (seven sessions per week for 360 minutes in an individual setting as compared to five sessions per week for 300 minutes in an individual setting) (compare Dist. Ex. 10 at p. 43, with Parent Ex. A at p. 23).

The parent also argues that the impartial hearing officer erroneously assumed facts neither in evidence nor supported by the hearing record, namely, that the June 16, 2008 IEP was a "temporary" program, developed solely because the student's placement at Gramercy was not available during the summer months; and that an 8:1+2 placement would inevitably be available for the student during the 2008-09 school year, thereby rendering the twenty hours of SEIT services recommended by the June 16,2008 IEP "unreasonable" (IHO Decision at p. 10). The hearing record upon which the impartial hearing officer based his decision is notably sparse. It consists of 36 pages of transcript of oral argument between the parent's attorney and the district representative, but contains no witness testimony (Tr. pp. 1-26). The hearing record also contains four documentary exhibits: the student's IEPs dated January 15, 2008 (Dist. Ex. 10) and June 16, 2008 (Parent Ex. A); an August, 1995 memorandum from the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) (Parent Ex. B);[6] and the parent's due process complaint notice dated July 15, 2008 (IHO Ex. 1).[7]

Referencing the June 16, 2008 IEP in his interim decision, the impartial hearing officer stated "I have presumed, therefore, that [the] Student's placement at YAI Gramercy was not available to [the] Student during the summer months, making the [CPSE's] concern that [the] Student benefit from a SEIT to carry over his learned skills [sic] [u]nderstandable" (IHO Decision at p. 9). Referencing the amount of SEIT services recommended in the June 16, 2008 IEP, the impartial hearing officer opined "While twenty hours of SEIT services might be considered appropriate for [the] Student if an 8:1+2 program was unavailable to the Student, certainly an 8:1+2 program will be available from September 2008 on, making the provision to the Student of twenty hours of SEIT services during the regular school year unreasonable" (id. at p. 10). The impartial hearing officer provides no citations to the hearing record to support either of these assumptions.

State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]; see Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-028; Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 07-130; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-090; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-099; Application of the Bd. of Educ.,

[6] This memorandum has no bearing on the issues before me on appeal in the instant matter, and I need not reference it further.

[7] According to the hearing record, a total of 12 exhibits were admitted into evidence at the impartial hearing on August 20, 2008 (see Tr. pp. 2-3, 7-11, 27-28; IHO Decision at pp. 13-14). However, the only exhibits accepted by the impartial hearing officer, and upon which his August 27, 2008 interim decision is based, are those four enumerated above. I note further that neither of the parties appealed this aspect of the impartial hearing officer's interim decision, rendering that portion of his interim decision final and binding on the parties (34 C.F.R. § 300.514; 8 NYCRR 200.5[k]; Application of a Student with a Disability, Appeal No. 08-073; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Appeal No. 05-007; Application of the Dep't of Educ., Appeal No. 04-017; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of the Bd. of Educ., Appeal No. 99-65; Application of a Child with a Disability, Appeal No. 98-55; Application of a Child with a Disability, Appeal No. 96-30).

I concur with the parent's argument that there is no factual support in the hearing record for either of the impartial hearing officer's assumptions referenced above (see Application of the Bd. of Educ., Appeal No. 07-005). An impartial hearing officer must confine his analysis to the evidence contained in the hearing record (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with State regulations and cite to relevant facts in the hearing record (see Application of a Student with a Disability, Appeal No. 08-064; Application of a Student with a Disability, Appeal No. 08-043; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-028; Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 07-090). However, as discussed above, the impartial hearing officer's pendency determination is supported by the hearing record; therefore, I will not annul his decision based on the two erroneous assumptions contained in his decision.

For the reasons set forth above, I find that the impartial hearing officer's determination that the January 15, 2008 IEP constitutes the student's then current placement for the purposes of the pendency provisions under 20 U.S.C. § 1415(j) and Education Law §§ 4404(4) and 4410(7)(c) to be consistent with the evidence contained in the hearing record. Therefore, I find no need to modify the impartial hearing officer's interim order on pendency.

In light of the forgoing, the parent'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.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 17, 2008

PAUL F. KELLY
STATE REVIEW OFFICER