The University of the State of New York

The State Education Department
State Review Officer
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No. 10-083

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 student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Susan Luger Associates, Inc., attorney for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim order on pendency directing that the district fund a 1:1 health paraprofessional for the student pending completion of a due process hearing challenging the appropriateness of the district's recommended educational program for the student for the 2010-11 school year (IHO Interim Order on Pendency at pp. 2-3; Tr. p. 26). The appeal must be sustained.

The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

On May 25, 2010, the Committee on Special Education (CSE) met for the student's annual review (Parent Ex. E at pp. 1-2). The CSE determined that the student continued to be eligible for special education programs and services as a student with a disability and was eligible for extended year services (ESY) (id. at p. 1). As set forth in the resulting individualized education program (IEP) the CSE recommended placement in a 12:1:4 special class with related services provided at a separate location consisting of four 30-minute sessions per week of individual occupational therapy (OT), four 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per

week of speech-language therapy in a group of three (id. at p. 17). In addition, the CSE recommended that the student be provided with a full-time 1:1 health paraprofessional (id.).

The parents, through their advocate, filed a due process complaint notice dated June 28, 2010 wherein they claimed that the May 25, 2010 IEP failed to offer the student a free appropriate public education (FAPE)[1] and requested, among other things, tuition reimbursement for the Rebecca School and reimbursement for the cost of related services for the 2010-11 school year (Parent Ex. A at pp. 1, 6-7). Pertinent to this appeal of the impartial hearing officer's interim order on pendency, the parents also requested a pendency determination ordering that the student's pendency program consist of all of the related services listed on the student's April 29, 2009 IEP, including a full time health services paraprofessional (id. at p. 5).

The impartial hearing convened on July 20, 2010 and the impartial hearing officer rendered an interim order on pendency dated July 28, 2010 (IHO Interim Order on Pendency at pp. 2-3; Tr. p. 26). In her decision, the impartial hearing officer addressed only the narrow question posed to her by the parents at the hearing: whether the district had to immediately fund a 1:1 health paraprofessional to aid the student while the student attended the Rebecca School (the parents' unilateral placement) during the pendency of the hearing (id. at p. 2; Tr. pp. 6-7). The impartial hearing officer noted a March 8, 2010 stipulation (see Parent Ex. C) settling an earlier matter concerning the 2009-10 school year, which provided, in part, for a related service authorization (RSA) for the parents to obtain a health paraprofessional, but also contained a provision that prohibited the use of the settlement for the purposes of future pendency determinations (IHO Interim Order on Pendency at p. 2). Although the impartial hearing officer found that "the parent[s] cannot prevail under the pendency provisions of the Individuals with Disabilities Act (IDEA)," she nonetheless ordered the district to provide the service. In making her decision, the impartial hearing officer noted that the most recent IEP for the student, dated May 25, 2010, included a full-time health paraprofessional; that the student's multiple serious medical conditions required a 1:1 health paraprofessional; and that depriving the student of a 1:1 health paraprofessional would interfere with and perhaps preclude the student from attending school during the hearing, depriving him of his right to an education (id. at pp. 2-3).

In an appeal, the district asserts that the impartial hearing officer improperly ordered the district to fund the student's 1:1 paraprofessional during the pendency of the hearing. The district contends, among other things, that the impartial hearing officer properly found that the student was not entitled to a 1:1 paraprofessional under pendency, and that the impartial hearing officer's alternative basis for ordering the services is not provided for under the IDEA. The district contends that the law does not permit the parents, though well intentioned, to unilaterally select preferred interim services for the student.

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[1] The term "free appropriate public education" means special education and related services that
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

Specifically, the district argues that pursuant to federal regulations at 34 C.F.R. 300.148(a) it is not required to pay for the costs of education, including related services, of a student with a disability at a private placement unless it can be shown that the district did not make a FAPE available to the student, which, prior to the conclusion of the hearing, has not been shown. The impartial hearing officer, the district contends, does not have the generalized authority to award the interim relief sought by the parents outside of his or her authority under pendency.

In their answer the parents argue, among other things, that the impartial hearing officer's order was not based on the student's right to a pendency placement, but was based in equity on the student's need for the health paraprofessional to attend school and because that need was specified in his current IEP. The parents further argue (without expounding) that the impartial hearing officer had the authority to order the district to provide the health paraprofessional under 20 USC § 1415(i)(2)(C)(iii) and 20 USC § 1439(a)(1) and the decision in Forest Grove v. T.A. (129 S. Ct. 2484, 2494 n.11 [2009])[2].

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 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. of Poughkeepsie City Sch. Dist. 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 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 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.

[2] The parents also contend that the district's argument that federal regulations do not require the district to provide related services to a student in a private placement where it has offered a FAPE to the student was not raised at the hearing and is unpreserved. In a reply, the district denies the parents' assertion but further contends that even if not raised below, a district may properly assert a defense for the first time on appeal before a State Review Officer. I find that this issue is beyond the scope of a pendency determination and need not be addressed based upon the finding herein.

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 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 impartial hearing officer'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). In addition, if "a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents" for purposes of establishing the student's current educational placement (34 C.F.R. § 300.518[d]; see 8 NYCRR 200.5[m][2]; Schutz, 290 F.3d at 482).

Turning to the case at bar, I will now consider whether the impartial hearing officer erred in issuing the July 28, 2010 interim order on pendency directing that the district fund a 1:1 health paraprofessional for the student pending completion of the due process hearing challenging the appropriateness of the district's recommended educational program for the student for the 2010-11 school year. I note that the parents did not request a determination from the impartial hearing officer regarding the student's complete educational placement during the pendency of the matter; they only requested an order that the district provide a full time 1:1 health paraprofessional to be employed at the Rebecca School, the parents' unilateral placement, during pendency (Tr. pp. 6-7).

Both State and federal laws and regulations allow parents and school districts to make agreements regarding a student's pendency placement during the adjudication of an IDEA claim (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4][a]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]). In cases involving stipulations between parents and boards of education, the determinative issue when deciding whether a stipulation becomes the basis for a student's pendency placement is whether the stipulation was explicitly limited to a specific school year or definite time period (Zvi D., 694 F.2d at 907-908; Evans v. Bd. of Educ., 921 F. Supp. 1184 [S.D.N.Y. 1996]; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 03-028; Application of the Bd. of Educ., Appeal No. 02-061; see Mayo

v. Baltimore City Pub. Schs., 40 F. Supp. 2d 331, 334 [D.Md. 1999] (finding that a student did not have a "then-current educational placement" at a unilateral placement where a series of settlement stipulations provided tuition reimbursement for that placement, but did not provide that the settlements would constitute the student's "then current educational placement").

Upon review of the stipulation of settlement and discontinuance that concluded the dispute between the parties over the student's educational program for the 2009-10 school year, I note that by the terms of the stipulation the district agreed to, among other things, provide the parents with an RSA to obtain a health paraprofessional (Parent Ex. C at p. 1). The terms of the stipulation also specify that the stipulation would not become the student's "current educational placement" such that it could be the basis for a future pendency determination (id. at p. 5). I concur with the impartial hearing officer's determination that the stipulation, in sufficiently clear terms, disallows its use for purposes of future pendency (see IHO Interim Order on Pendency at p. 2; Parent Ex. C at p. 5). Accordingly, I find that the impartial hearing officer properly determined that, as a matter of pendency, the district was not required to provide the student with a full-time 1:1 health paraprofessional during the pendency of the matter (IHO Interim Order on Pendency at p. 2). I further find that the portion of the impartial hearing officer's interim order on pendency directing the district to fund the student's 1:1 paraprofessional pending conclusion of the impartial hearing is inconsistent with federal and State law (see 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]).[3]

The parents also argue that the interim order on pendency was "on its face … an equitable order, not an order on pendency" and, therefore, the interim order cannot be appealed because 8 NYCRR 279.10(d) prevents the appeal of interim orders with the exception of pendency determinations. I find the parents' argument unpersuasive given that on its face the interim order is a pendency determination, being titled as such, as well as being a pendency determination in its effect because it orders services during the pendency of the matter (IHO Interim Order on Pendency at p. 3; see Application of the Bd. of Educ., Appeal No. 09-023).

[3] A related question raised by the parties is whether the impartial hearing officer had the authority to order the district to provide the services outside of the pendency provisions of the IDEA. Given that this is an appeal of a pendency determination, I need not decide the issue. However I will briefly discuss the issue in light of the extent to which the issue was pleaded. The district contends that, pursuant to 34 C.F.R. 300.148(a), an impartial hearing officer does not have the generalized authority to award the interim relief sought by the parents outside of his or her authority under pendency while the parents argue that the impartial hearing officer has the statutory equitable authority to order interim relief derived from 20 U.S.C. §§ 1415(i)(2)C(iii) and 1439(a)(1). Both 20 U.S.C. § 1415(i)(2)C(iii) and § 1439(a)(1) stand for the proposition that a court reviewing a determination of an impartial hearing officer after an impartial hearing must base its decision on the administrative record and upon "the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (id. [emphasis added]). The parents also appear to assert that the recent decision in Forest Grove gives an impartial hearing officer the authority to provide the health paraprofessional as interim relief, but the note cited by the parents only states that an impartial hearing officer share's the court's power to order tuition reimbursement (Forest Grove, 129 S.Ct. at 2494 n11). Given the existence of the pendency provisions in the law which both create and limit an impartial hearing officer's authority to make pendency determinations, it is difficult to see how the bases put forth by the parents endow an impartial hearing officer with the power to order interim relief solely on the basis of equity prior to the close of an impartial hearing wherein all parties have been able to present evidence to prove their case.

I have examined the parties' remaining contentions and find that they either lack merit or that it is unnecessary for me to address them in light of the determination made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled.

Dated: **Albany, New York**
October 27, 2010

FRANK MUÑOZ
STATE REVIEW OFFICER