The University of the State of New York

The State Education Department
State Review Officer
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No. 10-107

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, Karyn Thompson, Esq., of counsel

Mayerson and Associates, attorney for respondent, Gary S. Mayerson, 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 decision of an impartial hearing officer determining respondents' (the parents') daughter's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2010-11 school year. The impartial hearing officer found that the student's pendency placement was the program identified in an October 7, 2008, findings of fact and decision of an impartial hearing officer (IHO Decision at pp. 2-3; Parent Ex. C). The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Manhattan Children's Center (MCC) and receiving afterschool 1:1 home and community-based applied behavior analysis (ABA) services, speech-language therapy, occupational therapy (OT), physical therapy (PT) and the student's parents received parent training (Tr. pp. 46-48, 53, 57-58, 68). MCC has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see Parent Ex. D at p. 1; Pet. ¶ 3; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The parents filed a due process complaint notice dated June 30, 2010 and an amended due process complaint notice dated August 2, 2010 (Parent Exs. A; D). In the amended due process

complaint notice, the parents alleged a number of procedural and substantive violations and claimed that the district failed to provide the student with a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. D at pp. 2-9). The parents stated that the district should provide the student with pendency services in accordance with an impartial hearing officer's decision dated October 7, 2008 that was rendered in favor of the parents (id. at p. 2). The parents noted that the impartial hearing officer's decision was appealed by the district and was upheld by a State Review Officer and had now become "final and non-appealable" (id.; see Application of the Dep't of Educ., Appeal No. 08-134). Under pendency, the parents maintained that the student should receive up to 5 hours per week of speech-language therapy, up to 50 hours per week of 1:1 ABA services (including the costs of MCC and home-based services), and up to 3 hours per month of parent training and service coordination (id.).

An impartial hearing convened on August 9, 2010 and continued on September 7, 2010, during which the parties addressed the issue of the student's educational placement during the pendency of the proceeding (Tr. pp. 1, 31; IHO Interim Decision at p. 2). At the impartial hearing the parents presented three witnesses to describe the student's current educational program and argued that the student's current program was substantially similar to the student's last agreed upon placement (Tr. pp. 11, 37, 79, 108). In an interim decision dated September 28, 2010, the impartial hearing officer determined that the student's "last agreed upon" placement was identified in an October 7, 2008, findings of fact and decision of an impartial hearing officer (IHO Interim Decision at p. 3; see Parent Ex. C). The impartial hearing officer also determined that the "MCC program is clearly a school-type program" and that it was "dissimilar to home-based ABA instruction to such a degree that [she] [was] unable to find that MCC [wa]s a component of [the student's] pendency placement" (id.). The impartial hearing officer found that because the program she had determined to be the student's pendency placement specified that the student receive "up to 50 hours of ABA therapy per week exclusive of all work performed on weekends and holidays," the district was required to fund the 20 hours of 1:1 home-based ABA services that the student was receiving at the time of the impartial hearing (id. at pp. 3-4).[1] The impartial hearing officer ordered that the district fund 20 hours per week of 1:1 ABA services exclusive of all work performed on weekends and holidays; 5 hours per week of speech-language therapy; 1.5 hours per week of PT and 3 hours per week of parent training exclusive of all work performed on weekends and holidays (id. at p. 4).

This appeal by the district ensued. Both parties agree that the October 2008 impartial hearing officer's decision is the basis for the student's pendency placement. The district argues that the parents have altered the "status quo" by unilaterally removing the student from the 1:1 home-based ABA program that was set forth in the October 2008 impartial hearing officer's decision and enrolling the student in the school-based program at MCC. The district does not appeal the portion of the impartial hearing officer's interim decision regarding related services in the form of speech-language therapy, PT, and parent training because those services "mirror" the related services in the October 2008 impartial hearing officer's decision. However, the district argues that the impartial hearing officer erred in ordering the district to fund 20 hours of 1:1 ABA

[1] The impartial hearing officer noted the parents' argument that MCC was an appropriate placement for the student at the time of the impartial hearing, but declined to address it because it was an argument more appropriately addressed during the "hearing on the merits" (IHO Interim Order at p. 3).

services because the home-based ABA services the student receives supplement the student's primary special education program at MCC. The district contends that the October 2008 decision that establishes the basis for the student's pendency placement provided for home-based 1:1 ABA services as the student's primary program and that it is inappropriate to order the district to fund a portion of the 1:1 ABA services during pendency as a "related service" because such an order changes the status quo and is inconsistent with federal and State law.

The parents answer, noting that they do not dispute any part of the impartial hearing officer's interim decision, including that part which denied the parents' request to fund the student's tuition at MCC. The parents argue that the student's current educational program, while extended to include a new venue for services (MCC), was nonetheless "substantially similar" to the educational program contained in the October 2008 decision. Among other things, the parents argue the addition of MCC did not substantially or materially alter the student's educational program or negate her other pendency placement, including her 1:1 ABA services. Lastly, the parents argue that the 20 hours of 1:1 ABA is not a "new discreet part" of the student's program, and cannot be characterized as a related service but is instead merely a continuation of an identical service that was provided for via the October 2008 decision that forms the basis of the student's pendency.

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. 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).

Turning to the parties' contentions in this case, I am not persuaded by the district's argument that the impartial hearing officer erred in ordering the district to fund 20 hours of 1:1 ABA services under the pendency provisions due to the fact that the parents changed the status quo and that the order "conflates the student's special education program with her related services." The 20 hours per week of home and community-based 1:1 ABA services that the student currently receives is unchanged, except for the reduction in total hours, from the 1:1 ABA services that were provided for in the October 2008 impartial hearing officer decision (Tr. pp. 85, 89, 107). The fact that the student also attends MCC does not convert the 20 hours of home and community-based ABA services from special education into a "related service."

The district's argument is also unpersuasive because in order to comply with its obligations under pendency, "the public agency must provide those special education and related services that are not in dispute between the parent and the public agency" (see 34 C.F.R. § 300.518[c]; Application of the Dep't of Educ., Appeal No. 10-112; Application of a Student with a Disability, Appeal No. 10-064). The district has not provided a sufficient legal basis for its argument that the impartial hearing officer erred in ordering the district to fund 20 hours per week of 1:1 ABA services and that the parents must accept either all or none of the student's services as set forth in the unappealed October 2008 decision (see J.H. v. Los Angeles United Sch. Dist., 2010 WL 1261544, at *5-6 [C.D. Cal. Mar. 29, 2010]; Application of the Bd. of Educ., Appeal No. 10-112; Application of a Student with a Disability, Appeal No. 08-050 [ordering the district to fund a portion of a student's then current placement under pendency because the student's withdrawal from a private school "only frustrates a portion of his then-existing placement"]). Additionally, I note that while the impartial hearing is pending, the parents are responsible for the provision of the student's program at MCC and are no longer, by virtue of pendency, seeking to obtain any services from the district in addition to those listed in the October 2008 impartial hearing officer

decision. I find that the parents' position is consistent with the principle behind pendency of maintaining the student's status quo,[2] especially in a circumstance in which the parents are, as a result, seeking less than was recommended (see Application of a Student with a Disability, Appeal No. 09-125 [denying certain services sought by a parent for pendency, which constituted a significant increase in the level of services that the student would have received at district expense]; Application of a Student with a Disability, Appeal No. 08-050 [denying that part of a parent's request for a pendency decision that would significantly increase the amount of private tutoring provided for in a student's pendency placement]; see also Mackey, 386 F.3d at 163). Based on the foregoing, I find that the district failed to establish that it was not obligated to fund 20 hours per week of 1:1 ABA services exclusive of all work performed on weekends and holidays as ordered by the impartial hearing officer (IHO Interim Decision at p. 4). Accordingly, I find no reason to disturb the impartial hearing officer's interim decision.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 23, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER

[2] I note that the purpose of the pendency provision is to provide consistency in the education of a student with a disability and to remove the "unilateral authority" of the school districts " to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [1987]), and that the IDEA's pendency provisions are silent as to whether a change in educational placement by the parents may constitute a student's pendency placement.