The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-045

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioner, Elisa Hyman, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) 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 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 2010-11 school year. The impartial hearing officer determined that the student's pendency (stay put) placement was established pursuant to the student's November 4, 2010 individualized education program (IEP) (Interim IHO Decision at pp. 5-6). The appeal must be sustained.

At the time of the impartial hearing, the student was attending a daycare facility and received "five hours of home-based instruction on site" provided by the district at the facility (Pet. ¶¶ 20-22; see Parent Ex. A at p. 1).[1] 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. I at p. 1; see also 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[1] An impartial hearing did not take place in this matter. However, the impartial hearing officer accepted documentary evidence and written briefs from both parties upon which he based his interim decision regarding pendency (Interim IHO Decision at p. 9).

November 2010 Individualized Education Program

On November 4, 2010, the Committee on Special Education (CSE) convened for a requested review to consider the student's educational program for the 2010-11 school year (Parent Ex. I at pp. 1-2). The November 2010 CSE classified the student as a student with autism and recommended changing the student's program from a "special class in a specialized school" to "defer to CBST" (id. at pp. 1-2).[2] The November 2010 IEP contained recommended interim services to be provided to the student while the CBST located a State-approved nonpublic school for the student to attend (id. at pp. 1-2, 15). The recommended interim services consisted of home instruction with ten periods of direct instruction special education teacher support services (SETSS) in a separate location, and related services (id.). The November 2010 IEP also noted that the CSE recommended terminating the student's crisis paraprofessional and school health services (id. at p. 2). The November 2010 IEP further recommended a 12-month school year (id. at p. 1).

Due Process Complaint Notice

The parent filed a due process complaint notice dated January 26, 2011, wherein she 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. A at pp. 1-11). Among other things, the parent alleged that the district had failed to implement the interim services set forth on the student's November 2010 IEP while the district looked for an appropriate State-approved nonpublic school (id. at pp. 7-10). The parent requested an "immediate, emergency order for pendency and interim placement" that would provide: 10 hours per week of individual instruction by a private provider; related services as set forth on the student's most recent IEP; transportation; 12-month services; and home instruction or a "private alternative" funded by the district (id. at p. 9).

Impartial hearing Officer Decision

The impartial hearing officer rendered an interim decision dated March 14, 2011 (Interim IHO Decision at p. 7). The impartial hearing officer noted that the district's counsel could not attend a hearing date in February 2011, and therefore, he directed the parties to argue their positions with respect to the student's pendency placement by written motion (id. at pp. 1-2; see IHO Exs. I-III).

The impartial hearing officer stated in his interim decision that both parties identified the November 2010 IEP as the student's "last agreed upon IEP" (Interim IHO Decision at p. 5). He further determined that a prior interim decision, impartial hearing officer's decision, and stipulation of settlement did not "impact or influence" the student's pendency placement (id.). Therefore, the impartial hearing officer determined that the student's pendency placement consisted of the services listed on the November 2010 IEP, none of which the student was receiving (id. at p. 6). Specifically, he ordered that the student's pendency placement consist of:

[2] The parent's due process complaint notice states that "CBST" refers to the district's central based support team (Parent Ex. A at p. 7).

> Home Instruction until the [CBST] is able to place the student in a private special education school; 10 hours of direct instruction with a Special Education Teacher ("SETTS"); counseling twice a week for thirty minutes individually (2x30x1) and counseling twice a week for thirty minutes in a group of two students (2x30x2); occupational therapy three times a week for thirty minutes individually (3x30x1); and speech and language therapy once a week for thirty minutes in a group of three (1x30x3) and three times per week for thirty minutes individually (30x30x1)

(id.).

The impartial hearing officer also ordered the district to provide transportation for the student to and from the location of the services, and ordered the district to arrange for the pendency services to be implemented at the student's daycare placement or another location selected by the parent within five business days of the order (Interim IHO Decision at p. 7).

Appeal for State-Level Review and Partial Settlement

This appeal by the parent ensued. The parent argues, among other things, that the impartial hearing officer erred in failing to conduct a pendency hearing and in basing his decision upon factual assertions in the district's submissions that were not supported by sworn statements or documentary evidence. The parent next argues that the impartial hearing officer erred in determining that the parent agreed that the program contained in the November 2010 IEP constituted the last agreed upon IEP because she asserted in her motion papers that the student's pendency consisted of ten hours per week of applied behavior analysis (ABA) SETSS pursuant to an April 24, 2008 statement of agreement and order by an impartial hearing officer that had not been appealed (see Parent Ex. C; IHO Ex. II at pp. 4, 8). For relief, the parent seeks a determination that the student's pendency placement consists of ten hours per week of "1:1 ABA SETSS at a rate not to exceed $150 per hour" because: the unappealed April 24, 2008 statement of agreement and order contained those services, among others; it is permissible for the parent to seek less than all of the services the pendency placement offers; and the district later consented to modify the student's pendency placement to provide those services at the rate of $150 per hour.

During the course of this proceeding, the parties reached a partial settlement wherein they resolved most of the issues that were raised in the parent's petition (Pet. ¶¶ 28-35; Answer ¶¶ 42-43; Reply ¶¶ 14-20). In its answer, the district agrees that the April 24, 2008 statement of agreement and order forms the basis of the student's pendency, joins with the parent's request that the impartial hearing officer's interim decision be vacated, and seeks a determination that the student's pendency placement consists of ten hours per week of 1:1 ABA SETSS (Answer ¶¶ 49-51, 57).[3] However, the district maintains that the parent's request that those services be provided at a rate not to exceed $150 per hour is not appropriate because the April 24, 2008 statement of

[3] In its answer, the district states that because it agrees that the interim decision should be vacated, the parent's claim that the impartial hearing officer erred in failing to conduct a pendency hearing is "moot" (Answer ¶ 57). The parent submitted a reply asserting that the matter was not moot (Reply ¶ 22; see 8 NYCRR 279.6). In light of the fact that both parties request that the impartial hearing officer's interim decision be vacated and seek an order establishing the student's pendency placement, I further find that there is a sufficient basis in this instance upon which to render a determination regarding the student's pendency placement and there is no need to conduct further hearings on this issue.

agreement and order is silent as to the hourly rate and the district has not consented to any change in the student's pendency in the present litigation (id. at ¶ 51; see Parent Ex. C at pp. 3-5). Accordingly, the district contends that the district's standard SETSS rate applies ($41.98 per hour), but as the district offered the rate of $125 per hour during settlement discussions, it maintains that offer during the instant appeal (Answer ¶ 51, p. 16).[4]

Applicable Standards – Pendency

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], 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

[4] The district's ad damnum or "Wherefore" clause in its answer appears to contain a typographical error in the amount of $150 per hour, insofar as the district argued throughout the remainder of its pleading that the figure should not exceed $125 per hour (Answer p. 16).

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).

Discussion

Hourly Rate

In the instant matter, the parties agree that the entirety of the student's pendency placement in the present matter consists solely of ten hours per week of home-based 1:1 ABA SETSS arising from the unappealed April 24, 2008 statement of agreement and order. On appeal, the parties disagree only as to the hourly rate to be provided for those services. The April 24, 2008 statement of agreement and order does not specify an hourly rate, and merely orders the district to "provide the mandated services on the March 28, 2007 IEP including 10 hours of at-home ABA-SETSS" (Parent Ex. C at p. 5). The hearing record does not contain a copy of the March 28, 2007 IEP.

As a threshold matter, I agree with the district's contention that the district's consent to the rate of $150 per hour contained in a prior impartial hearing officer's interim decision dated January 14, 2009, does not affect the student's pendency in the present proceeding (Parent Ex. D at p. 5). Nonetheless, I find the remainder of the district's argument unpersuasive because the district has little choice regarding whether it must provide the student's pendency placement under the circumstances presented herein (see New York City Dept. of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010] [noting that "[s]tay put" is mandatory, not discretionary]; Application of the Dep't of Educ., Appeal No. 10-112; Application of the Dep't of Educ., Appeal No. 10-107; Application of a Student with a Disability, Appeal No. 10-064). Here, it was the district's obligation to provide the ten hours per week of home-based 1:1 ABA SETSS to the student and the district had the option to do so itself at a rate and with a provider of its choice. In this instance, the district elected to pursue allowing the parent to identify a provider of her own choosing, but then undertook a negotiation with the parent over the rate at which the parent would be reimbursed.[5] The fact that the parties reached an impasse over the reimbursement rate for the parent's preferred provider did not release the district of its obligation to put the student's pendency

[5] While district retains the responsibility to provide the student with his pendency placement, there was nothing improper in its attempt to work cooperatively with the parent for the provision of these services.

placement into effect.[6] In the absence of any argument or evidence that the parent's identified rate is excessive, and given that the parent has the ability to locate an acceptable provider, I find no basis to deny the relief requested by the parent in the form of a rate not to exceed $150 per hour in favor of the lower rate preferred by the district (see Pet. ¶¶ 14, 34, 68, 74; Pet. Ex. 1 at pp. 8, 15). Accordingly, the order below will reflect the parent's requested rate of $150 per hour.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's interim decision dated March 14, 2011 is annulled, and

IT IS FURTHER ORDERED, that unless the parties otherwise agree, the student's pendency placement is as follows: ten hours per week of home-based 1:1 ABA SETSS at a rate not to exceed $150 per hour.

Dated: **Albany, New York**
July 25, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

[6] At this point, the district's obligation to provide the student with his pendency placement arose nearly six moths ago (Parent Ex. A).