The University of the State of New York

The State Education Department
State Review Officer
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No. 13-003

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from that portion of an interim decision of an impartial hearing officer (IHO) that ordered the district to pay for the costs of the student's pendency placement at the P'TACH program as of the first day of the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student has been found eligible for special education and related services as a student with a learning disability (Parent Ex. B at p. 2). On June 21, 2011, the CSE met to develop an IEP for the student for the 2011-12 school year (Parent Ex. A at p. 4). Respondents (the parents) rejected the recommendations of the CSE and unilaterally placed the student in P'TACH and requested an impartial hearing seeking tuition reimbursement and related expenses for the 2011-12 school year (id.). By decision dated August 30, 2012, an IHO awarded the parents tuition reimbursement for the non-religious portion of the student's education as well as for the costs of related services and transportation (id. at pp. 15-16). The August 30, 2012 IHO decision was not appealed and the student has apparently remained at P'TACH since then (Tr. p. 14; Parent Exs. A; B; D).

On May 22, 2012, the CSE apparently convened for the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. B at p. 2). The CSE recommended continuation of the student's classification as learning disabled and recommended placement in a 15:1 special class in a community school (id.; Tr. pp. 16, 37). The parents contend that they never received a final notice of recommendation (FNR) from the district (Parent Ex. B at p. 3; Tr. pp. 15, 36). By letter dated August 16, 2012, the parents rejected the program recommended by the May 2012 CSE and notified the district of their intention to unilaterally place the student in P'TACH and to seek tuition reimbursement and related expenses for the 2012-13 school year (Parent Ex. D at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated November 13, 2012, the parents requested an impartial hearing (Parent Ex. B). The parents alleged a variety of errors, with respect both to the development of the May 2012 IEP and the substance of the IEP, that they alleged constituted a failure to offer the student a FAPE (id. at pp. 2-3).[1] The parents also asserted that their unilateral placement of the student at P'TACH was appropriate, and requested reimbursement for the costs of the student's tuition and related services provided at P'TACH, and transportation to P'TACH (id. at p. 4).[2]

B. Impartial Hearing Officer Decision

On November 29, 2012, a prehearing conference was held to determine the student's pendency placement and other issues (IHO Decision at p. 2; Tr. pp. 1-47). In an interim order on pendency dated December 3, 2012, the IHO noted that the parties were in agreement that, based upon an unappealed IHO decision dated August 30, 2012, the student's pendency placement was P'TACH (IHO Decision at p. 2; Tr. pp. 13-14). However, the IHO noted that the parties disputed whether the district was obligated to pay the student's non-religious portion of tuition, which included related services, and to provide transportation beginning on the first day of school or upon the parents' filing of a due process complaint notice (IHO Decision at p. 2; Tr. pp. 14-15, 17-18). The IHO found that "pendency should be from the start of the 2012/2013 school year as [P'TACH] is the student's last agreed upon placement" (IHO Decision at p. 3; Tr. p. 19).

IV. Appeal for State-Level Review

The district appeals from the IHO's order on pendency, conceding that the student's pendency placement is at P'TACH, but challenging the IHO's determination to the extent that the IHO found that its financial obligation began on the first day of school as opposed to the date of

[1] The parents also "reserve[d] the right" to challenge various aspects of the student's specific public school placement, as they had not received notification thereof at the time they filed their due process complaint notice (Parent Ex. B at p. 3).

[2] During the prehearing conference, the IHO confirmed that the district was then providing the student with door-to-door transportation and that the related services provided by P'TACH were included in the cost of the student's tuition (Tr. pp. 20-24).

filing of the due process complaint notice. The parents submitted a letter to this office indicating that they did not oppose the district's position on appeal.

V. Applicable Standards—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 CFR 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. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). 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] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student remain in a particular site or location (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156, at *20 [2d Cir. Apr. 2, 2014]; 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]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), 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. Arlington Cent. Sch. Dist. 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 United States 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, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed IHO'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).

VI. Discussion

The parties agree that the student's then-current placement is P'TACH by virtue of an unappealed IHO Decision dated August 30, 2012, which ordered the district to pay the non-religious portion of the student's tuition at P'TACH, as well as the costs of the student's related services and transportation (Parent Ex. A at p. 15). The only dispute in this matter is when the district's obligation to pay began. The district argues that its obligation to pay according to the pendency provision of the IDEA began when the parents filed their due process complaint notice. The parents do not oppose the district's position on appeal, but argued before the IHO that the district's obligation to pay for the costs of the student's stay-put placement began "as of the date of the last Hearing Officer's decision" (Parent Ex. E at p. 3).

After reviewing the record, I find that the district is correct in its contention that the IHO erred in determining that the district was responsible for the cost of the student's attendance at P'TACH for the period from the beginning of the 2012-13 school year until the filing of the due process complaint notice pursuant to the stay-put provision of the IDEA. Recently, the Second Circuit noted that "the IDEA's pendency provision entitles a disabled child to 'remain in [his] then-current educational placement' while the administrative and judicial proceedings . . . are pending" (T.M. v. Cornwall Cent. School Dist., 2014 WL 1303156, at *2 [2d Cir. Apr. 2, 2014], quoting 20 U.S.C § 1415[j]; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *6 [S.D.N.Y. Dec. 23, 2013]; K.L. v. Warwick Valley Cent. Sch. Dist., 2013 WL 4766339, at *2 & n.4 [S.D.N.Y. Sept. 5, 2013]). The Court also found that districts are required to implement a student's pendency placement "until the relevant administrative and judicial proceedings are complete," providing further support for the conclusion that a student's entitlement to his or her stay-put placement does not arise upon a parent's expressions of disagreement with a program but is triggered only upon the formal commencement of administrative due process proceedings, which in this case is the filing of the due process complaint notice (T.M., 2014 WL 1303156, at *20; see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] ["a stay-put placement is effective from the date a student requests an administrative due process hearing"]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]; Application of the Dep't of Educ., Appeal No. 14-044; Application of the Dep't of Educ., Appeal No. 13-230).

On August 16, 2012, the parents notified the district that they were rejecting the recommendation of the May 2012 CSE and also of their intention to enroll the student at P'TACH for the 2012-13 school year at public expense (Parent Ex. D at pp. 1-2). However, the parents did not initiate administrative due process proceedings until the filing of their due process complaint notice with the district on November 15, 2012 (Parent Ex. B at pp. 5-6).

The IHO's findings that pendency at P'TACH began on the first day of school because it was the student's last agreed upon placement and further that the district had notice that the parents would invoke pendency when they rejected the IEP three months before they requested a due process hearing would improperly impose a perpetual obligation on the district to annually fund the student's placement regardless of whether an impartial hearing was requested (see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable to the merits of a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 366 [S.D.N.Y.2009]; Application of the Dep't of Educ., Appeal No. 14-044; Application of the Dep't of Educ., Appeal No. 13-230).

As stated by the Ninth Circuit, "[the stay-put provision] does not guarantee a child the right to remain in any particular institution once proceedings have concluded[, and] . . . the stay-put order will lapse however the litigation concludes" (Marcus I. v. Dep't of Educ., 434 Fed. App'x 600, 602 [9th Cir. 2011]; Application of the Dep't of Educ., Appeal No. 13-230). Thus, if the parents wished to take full advantage of their right to public funding of the costs of the student's attendance at P'TACH in accordance with the pendency provision beginning with the first day of school, they were required to file a due process complaint notice before the student began attending P'TACH during the 2012-13 school year, and the IDEA's stay-put provision does not provide a basis for recovery of tuition costs at P'TACH for a time when there was no pending proceeding. To hold otherwise would incentivize delaying the filing of a due process complaint notice until after the start of the school year, which would be at odds with the IDEA's statutory purpose of encouraging parents and districts to work together to meet the educational needs of disabled children and failing that, rely on thorough administrative due process hearing procedures with stringent deadlines (i.e., 45 days) to expediently resolve the remaining issues. The interpretation relied upon by the IHO also suffers from a serious flaw in that, when read in conjunction with the two-year limitations period for commencing due process proceedings set forth in the IDEA and State law, this interpretation would allow the stay-put provision to be manipulated to evade moving forward to addressing the merits of the case and incentivize parents to wait to file for due process, knowing that a district would ultimately be forced to pay unapproved nonpublic school tuition by

Lastly, the parents' reliance below on Application of a Child with a Disability (Appeal No. 01-013) is misplaced. In that case, the student was the subject of two separate due process proceedings that were pending continuously from November 1998 through the 2000-01 school year. The SRO's pendency determination in that appeal was wholly consistent with the requirement that a student remain in his or her then current educational placement during the pendency of any proceedings (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 3, 2012 is modified, by reversing those portions which determined that the district was obligated to pay for the costs of the student's tuition at P'TACH for the portion of the 2012-13 school year preceding the filing of the parents' due process complaint notice.

Dated: **Albany, New York**
June 4 , 2014

JUSTYN P. BATES
STATE REVIEW OFFICER