STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Trumbull Board of Education

Appearing on behalf of the Student:	Attorney Jennifer Laviano The Law Offices of Jennifer Laviano, LLC 76 Route 37 South Sherman, CT 06784
Appearing on behalf of the Board:	Attorney Marsha Belman Moses Berchem Moses P.C. 75 Broad Street Milford, CT 06460
Appearing before:	Melinda A. Powell, Esq.

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Hearing Officer has jurisdiction over the due process complaint?

2. If so, was the Student offered FAPE for the 2017-2018 school year pursuant to the February 2017 IEP?

3. What is the stay put placement of the student during the pendency of this proceeding?

PROCEDURAL HISTORY:

The Student initiated this special education due process matter on December 1, 2017. The Hearing Officer was appointed on December 4, 2017. A Prehearing Conference was convened on December 22, 2017. The Parent sought a stay put order during the pendency of the process, and a hearing date was set for January 16, 2018 to address arguments on stay put.

In addition, the Board filed a Motion to Dismiss, asserting collateral estoppel, and the Parent filed an Objection. The Hearing Officer denied the Motion to Dismiss without prejudice.

The Parties argued their positions on stay put, and the Hearing Officer issued an oral decision at the hearing. That decision is memorialized below.

Shortly thereafter, the Parent emailed the Hearing Officer stating that the Student had been placed by the Parent and a settlement agreement would be executed. The Parties emailed the Hearing Officer on March 2, and requested a dismissal and that the Final Decision include the orders on the motion to dismiss and stay put.

MOTION TO DISMISS:

The Board moved to dismiss the due process complaint on the basis of collateral estoppel, arguing that the complaint challenged a November 2017 IEP which was developed as a result of Final Decision and Order 17-0342. The Parent argued that the instant complaint was a challenge to a February 2017 IEP, which was not the subject of the prior due process hearing. The Hearing Officer granted the motion as to the November 2017 IEP, adopting the reasoning of Hearing Officer Mangs's decision in Final Decision and Order 04-083 (October 31, 2004).

The Hearing Officer denied the motion without prejudice as to the Parent's challenge to the February 2017 IEP. There was insufficient information and evidence submitted which would have satisfied the elements of collateral estoppel. The prior record (or relevant portions) of the prior proceeding had not been submitted, and there was a factual dispute over certain evidence that was admitted or excluded in the prior proceeding. There was also a factual dispute as to whether there had been a change in circumstances which would have provided an exception to a strict application of any preclusion doctrine. Therefore, the Hearing Officer had jurisdiction over the complaint.

STAY PUT:

The IDEA includes an automatic injunction provision to maintain the status quo during administrative and judicial proceedings. The stay-put provision of the IDEA provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). The purpose of the provision is "to maintain the educational status quo while the parties' dispute is being resolved." *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist*., 752 F.3d 145, 152 (2d Cir. 2014). "It therefore requires a school district to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete." *Id.* at 171. *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 452 (2d Cir. 2015).

Most commonly, once a proceeding commences, a student's pendency placement can be changed in one of two ways: (1) by agreement between the parties, or (2) by a state-level administrative (i.e., SRO) decision that agrees with the student's parents that a change in placement was appropriate citing, (20 U.S.C. § 1415(j); 34 CFR 300.518(a), (d); see *Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz* , 290 F.3d 476, 484-85 (2d Cir. 2002); *A.W. v Bd. of Educ. Wallkill Cent. Sch. Dist*., 2015 WL 3397936, at *6 (N.D.N.Y. May 26, 2015); *New York City Dep't of Educ. v. S.S.*, 2010 WL 983719, at *1 (S.D.N.Y. Mar. 17, 2010); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ*., 86 F. Supp. 2d 354, 366 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2d Cir. 2002). *Board of Education of the Ryden Central School District*, New York State Educational Agency Case No. 17-058 (August 23, 2017), 117 LRP 43956. If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement. *Id.*

There is an additional circumstance that can change a student's stay put from the last agreed upon IEP to another placement: a final decision by a hearing officer. A prior, unappealed IHO 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). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings." *N.Y.C. Dep't of Educ. v. S.S.*, No. 09 Civ. 810(CM), 2010 WL 983719, at *1 (S.D.N.Y. Mar. 17, 2010).

In *Letter to Hampden*, OSERS opined that the pendency analysis is the same whether the student or the school district prevails at due process, and the provisions of the regulations which speak to pendency during appeals do not apply when there is an unappealed final decision:

> However, neither of these provisions address a situation in a state that has a two-tier due process system, in which a local agency does not appeal a first-tier due process officer's decision on the merits that is favorable to the parent. Under 34 CFR Sec. 300.514(a), an unappealed decision is final, and must be implemented. The final decision on the merits, as implemented, becomes the child's current educational placement.
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> In a single-tier system, the result of the initial hearing must be treated as the child's current educational placement, pending any judicial appeals by either party. *If there are no appeals, the child's placement remains in accordance with the hearing officer's decision.*
>
> *The same decision rules apply if it is the local agency requesting the change in placement*. If the hearing officer agrees with the local agency, in a two-tier system, and the parent does not appeal the decision, the placement is that determined by the hearing decision.

[Emphasis added.] (Id., p. 2).

A parent may avoid what is believed to be an erroneous hearing officer decision by appealing the hearing officer's decision. *Bd. of Educ. v. Schutz*, 137 F. Supp. 2d 83, 89, (N.D.N.Y 2001) (“When a final administrative decision has been rendered, a dissatisfied party then has the right to bring a civil action in either federal or state court.” *citing*, 20 U.S.C. § 1415(i)(2)). Therefore, an appeal is the only option to avoid the new “status quo”, during the time immediately following the decision. The reason is obvious—due process proceedings and final decisions rendered by hearing officers (to which Congress has conferred the primary duty of deciding special education disputes) have legal consequences that cannot be avoided simply by filing serial due process complaints.

At the time that this due process complaint was filed, there was an unappealed final decision by Hearing Officer Rosado. Therefore, the placement ordered in that final decision is the Student's stay put for this proceeding.

ORDERS

1. The Student's stay put placement is Best Academy per Final Decision and Order 17-0342.

2. In light of the reported settlement and withdrawal, the matter is DISMISSED.