



UNITED STATES DEPARTMENT OF EDUCATION OFFICE
OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

OCT 18 2012

Steven L. Goldstein
Attorney at Law
111 John Street, Suite 800
New York, New York 10038

Dear Mr. Goldstein:

This is in response to your January 24, 2012 letter to me requesting clarification from the Office of Special Education Programs (OSEP) regarding the maintenance of current educational placement provision in Part B of the Individuals with Disabilities Education Act (IDEA).

In your correspondence, you allege that during the pendency of a due process complaint where the parent invokes his or her right in the impartial hearing request to have the student at issue remain in his or her pendency placement (i.e., the current educational placement), the New York City Department of Education (NYCDOE) does not advise the parent as to whether NYCDOE agrees with the parents' assertion of what constitutes the current educational placement and does not advise as to whether NYCDOE plans to maintain that placement. You allege that in cases where NYCDOE agrees with the parent regarding the student's pendency placement, NYCDOE will not maintain the current educational placement absent a written order from an impartial hearing officer (IHO). You also allege that in some cases where NYCDOE goes before the IHO and agrees with the parents regarding the student's current educational placement, NYCDOE awaits an IHO's explicit order before it will provide the child with the services indicated in the student's current individualized education program (IEP), or in the most recent order of an administrative hearing officer or judge that was not appealed. Your letter does not raise issues regarding pendency and disciplinary removals.

Therefore, you ask that OSEP issue a letter stating that:

- (1) in instances in which the student's parents commence an impartial hearing and invoke their right to have the student remain in his then-current placement, the school district must immediately advise the parents whether it agrees regarding the identity of the then-current placement and must notify the parents of the district's position in its response to the impartial hearing request; and
- (2) when pendency (current educational placement) is uncontested, the district must immediately honor the student's right to stay-put by providing the student with the placement as set forth in the last-agreed-upon IEP (or in an administrative order or judicial decision that was not appealed) and may not insist on an appearance before, and an order from, an IHO before acting to provide the student

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with what the school district agrees the student is entitled to receive under the IDEA's pendency provision.

Under the IDEA, each State and its public agencies must ensure that a free appropriate public education (FAPE) is made available to eligible children with disabilities, and that the rights and protections in IDEA are extended to those children and their parents. 34 CFR §§300.101(a), 300.100 and 300.201. The procedural rights and protections include dispute resolution mechanisms such as the filing of a State complaint, mediation, and the filing of a due process complaint to request a hearing, and to appeal a final hearing decision to the State educational agency (SEA), if applicable, or to an appropriate State or Federal court. 34 CFR §§300.151-300.153, 300.506, and 300.507-300.516. The maintenance of current educational placement provision ("stay-put") prohibits unilateral changes to a student's placement during the pendency of certain proceedings. 20 U.S.C. 1415(j) and 34 CFR §300.518.

In general, the IDEA presumes that the child's current educational placement is the last agreed-upon placement where the child must remain until the completion of administrative and judicial proceedings, unless the public agency and the parents agree to some other placement. The IDEA regulation provides in relevant part:

- (a) Except as provided in 34 CFR §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 CFR §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement ...
- (d) If the hearing officer in a due process hearing conducted by the SEA or 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 34 CFR §300.518(a).

34 CFR § 300.518(a) and (d).

Under certain circumstances, judicial enforcement of the current placement also may be an appropriate mechanism. As one court noted, the IDEA's pendency or stay-put provision functions as "an automatic preliminary injunction," creating "an absolute rule in favor of the status quo." Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982).

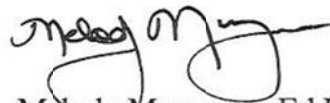
The IDEA and its implementing regulations do not specify a specific timeframe or specific process for identifying a school district's agreement or disagreement regarding what constitutes the current educational placement. However, in OSEP's opinion, where a parent files a request for a due process hearing in which the current educational placement is one of the issues or is the sole issue in dispute, and the parent invokes the stay-put or pendency provision, it is appropriate for an IHO to make the initial determination as to what constitutes the child's current educational placement. Moreover, where the child's current educational placement is not in dispute, a school district should implement the stay put provision automatically since it is not necessary to await an appearance before, and decision by, an IHO.

Where the current educational placement is not in dispute and parents believe that the school district's delay or failure to maintain the current educational placement amounts to a denial of FADE, parents may use appropriate dispute resolution mechanisms or judicial enforcement to maintain their child's current educational placement. It is important to note, however, that a determination of which mechanism, and whether judicial enforcement, is appropriate will depend on various factors including the facts and circumstances of the particular dispute.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact Frank Miller at 202-245-7065 or by email at Frank.E.Miller@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melody Musgrove', with a long horizontal flourish extending to the right.

Melody Musgrove, Ed.D.

Director

Office of Special Education Programs

cc: State Director of Special Education