The University of the State of New York

The State Education Department
State Review Officer

No. 08-126

Application of the BOARD OF EDUCATION OF THE GRAND ISLAND CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Goldstein, Ackerhalt & Pletcher, LLP, attorneys for petitioner, Arthur H. Ackerhalt, Esq. and Jay C. Pletcher, Esq., of counsel

Law Offices of H. Jeffrey Marcus, P.C., attorneys for respondent, H. Jeffrey Marcus, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to 8 NYCRR 279.10(d) of the State regulations from an interim decision of an impartial hearing officer regarding respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2008-09 school year. The parent cross-appeals from the same interim decision. The appeal must be sustained in part. The cross-appeal must be sustained in part.

The impartial hearing officer's interim decision rendered on September 30, 2008, which is the subject of this appeal, is limited specifically to the issue of the student's pendency placement during the parent's due process proceeding challenging the appropriateness of an individualized education program (IEP) developed by the district's Committee on Special Education (CSE) on August 5, 2008 for the student's 2008-09 school year (IHO Decision at pp. 2-3). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).[1]

[1] According to correspondence received by the Office of State Review from the district's attorney dated December 1, 2008, pursuant to an agreement between the parties, the student is receiving home instruction during the pendency of the instant appeal.

On May 31, 2006, the CSE convened and developed an IEP for the student recommending a special class in a 15:1 setting; resource room in a 5:1 setting; related services consisting of counseling services, once per week for 30 minutes per session in a 1:1 setting, and speech-language therapy, twice per week for 30 minutes per session in a 5:1 setting; and a testing accommodation of extended time (1.5) on tests (IHO Ex. A at Ex. A at pp. 1-2).[2] The May 31, 2006 IEP indicated a projected start date of May 31, 2006 and an end date of May 31, 2007 (id. at p. 1). The CSE noted that the student "continues to demonstrate some significant behavioral/emotional issues that impact on his daily performance," including threatening his peers, disrespecting adults, and engaging in physical fights with other students (id. at p. 4).

On January 24, 2007, the CSE reconvened and developed an IEP for the remainder of the student's fifth grade school year of 2006-07 (IHO Ex. A at Ex. C). The CSE continued to find the student eligible for special education services as a student with an emotional disturbance, recommended consultant teacher services on a daily basis in a 1:1 setting, continued counseling services and extended testing time from the May 31, 2006 IEP, eliminated speech-language therapy, and added a personal aide throughout the school day (id. at pp. 1-2).

On May 3, 2007, the CSE reconvened and developed another IEP addressing the student's 2006-07 school year (IHO Ex. A at Ex. E). The May 3, 2007 IEP continued consultant teacher services, the provision of a personal aide, counseling services, and extended testing time (1.5) through June 21, 2007, and added crisis counseling as needed in a 1:1 setting through June 21, 2007 (id. at pp. 1-2). The CSE also recommended extended school year (ESY) services extending from July 2, 2007 through August 10, 2007, including a 6:1+1 special Board of Cooperative Educational Services (BOCES) class, and counseling services once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 5:1 setting (id. at p. 2). The CSE noted that the student's "aggressive behavior prevents him from fully participating in the regular education classroom. Despite having an Aide in and out of the classroom, [the student] continues to assault students as well as verbally harass students with racial, foul, and/or derogatory language" (id.). The CSE commented that it considered other educational options for the student, including a special class in a 15:1+1 setting and a special BOCES placement in an 8:1 setting with a counseling component, but rejected these options because the parent opposed sending the student to a program located outside of "his attendance area" or district of residence (id. at p. 5).

On July 30, 2007,[3] the CSE reconvened and developed an IEP to address the student's sixth grade school year of 2007-08 (IHO Ex. A at Ex. G). The CSE recommended a 6:1+1 self-contained special BOCES class, counseling services once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 5:1 setting, crisis counseling as needed in a 1:1 setting, and extended testing time (1.5) (id. at pp. 1-2). The IEP indicated effective dates of September 5, 2007 to May 3, 2008 (id. at p. 1). The July 30, 2007 IEP contained identical comments regarding the student's behavior to those that were contained in the May 3, 2007 IEP (compare IHO Ex. A at Ex. E at p. 2, with IHO Ex. A at Ex. G at p. 2), and further stated:

[2] The May 31, 2006 CSE recommended resource room, counseling and speech-language therapy starting May 31, 2006 and ending June 22, 2006 (IHO Ex. A at Ex. A at p. 1).

[3] The parent asserts that the date of the CSE meeting was August 5, 2007 (IHO Ex. B at ¶ 11); however, the IEP reflects a date of July 30, 2007 (IHO Ex. A at Ex. G at p. 1).

> After considerable discussion and careful consideration of [the student's] needs and the family's concerns, the CSE recommends that the student be placed in a 6:1:1 therapeutic program with a mental health and family participation component. However, if the parents would prefer, the CSE would support a self-contained 6:1:1 day school, behaviorally-focused placement that does not contain a mental health and family participation component.

(IHO Ex. A at Ex. G at p. 2).

Prior to the implementation of the July 30, 2007 IEP, the parent removed the student from the district and enrolled him in a private school located in another district (the second district), where he remained for the 2007-08 school year (IHO Ex. B at ¶ 11). On October 12, 2007, a CSE in the second district convened and developed an individualized education services program (IESP), which recommended a 6:1+1 self-contained special BOCES class, counseling services once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group setting, and extended testing time (1.5) (IHO Ex. A at Ex. H at pp. 1-2). On March 27, 2008, while the student was still enrolled in his sixth grade private school placement, the CSE in the second district reconvened and developed an IESP for the student recommending counseling once every two weeks for 30 minutes per session in a 1:1 setting and continuing his extended time for tests (1.5) (IHO Ex. A at Ex. I at pp. 1-2). The March 27, 2008 IESP indicated effective dates of September 8, 2008 to June 25, 2009 (id. at p. 1). The student remained in his private school placement and continued to receive counseling services pursuant to the March 27, 2008 IESP until June 16, 2008, when he was expelled from the private school placement for disciplinary reasons (IHO Ex. A at Ex. J at p. 1).

The parent subsequently decided to re-enroll the student in the district, and on August 5, 2008, the district CSE reconvened to develop an IEP for the student's 2008-09 school year (IHO Ex. A at Ex. K). The CSE recommended a 6:1+1 self-contained special BOCES class, counseling services once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 5:1 setting, crisis counseling as needed in a 1:1 setting, and extended testing time (1.5) (id. at pp. 1-2).

By due process complaint notice dated September 3, 2008, the parent, through his attorney, requested an impartial hearing to contest the CSE's August 5, 2008 IEP (IHO Ex. C at Ex. H). In his complaint, the parent asserted that the March 27, 2008 "IEP" was the last agreed upon IEP, and maintained that the program recommended in that IEP should constitute the student's pendency placement while the administrative proceeding of the CSE's August 5, 2008 IEP is being adjudicated (id. at p. 2).

On September 4, 2008, the district, through its attorney, responded to the due process complaint notice, contending that the 6:1+1 BOCES special class recommended in the July 30, 2007 IEP should constitute the student's pendency placement (IHO Ex. C at Ex. I at p. 1).

On October 8, 2008, the parent's attorney filed a second due process complaint notice, asserting additional procedural and substantive allegations with respect to the August 5, 2008 IEP (Answer at Ex. 2 at pp. 3-4). With regard to pendency, the parent repeated his assertion that the March 27, 2008 "IEP" was the last agreed upon IEP, and hence should be the student's pendency

placement, and added an alternative assertion, that the January 24, 2007 IEP should be considered the student's pendency placement (id. at p. 4).

With respect to the pendency issue, the documentary record indicates that no hearing was conducted; rather, the pendency issue was decided entirely on written arguments and six exhibits (IHO Exs. "A"-"F") admitted into the record by the impartial hearing officer (see Dist. Amended Cert. of Record at ¶¶ 2-3; see also IHO Decision at p. 1). In his interim decision dated September 30, 2008, the impartial hearing officer determined that the May 3, 2007 IEP constituted the student's pendency placement because it was the student's most recently implemented IEP (IHO Decision at pp. 4-5, 7). He noted that the effective dates of the IEP were May 3, 2007 to June 21, 2007, while the student was still enrolled in the district; however, the impartial hearing officer added that the ESY services recommended in the May 3, 2007 IEP, which was effective from July 2, 2007 to August 10, 2007, could not constitute the pendency placement because the student was removed from the district prior to the ESY program's implementation (id. at p. 5). The impartial hearing officer also reasoned: (1) that the March 27, 2008 IESP was not the student's pendency placement because it was not the student's most recently implemented IEP prior to the filing of the parent's due process complaint notice, it was not the operative placement actually functioning at the time that pendency was invoked, and it was not the placement at the time of the previously implemented IEP (id. at p. 3); (2) that the January 24, 2007 IEP was not the student's pendency placement because it was not the student's most recently implemented IEP (id. at pp. 3-4); (3) that the July 30, 2007 IEP was not the student's pendency placement because the parent removed the student from the district and placed him in private school prior to that IEP's implementation (id. at pp. 5-6); and (4) that the August 5, 2008 IEP was not the student's pendency placement because it was never implemented and therefore never served as the basis for any services provided to the student (id. at p. 6).

The district appeals from the impartial hearing officer's interim decision, and seeks an order from a State Review Officer annulling the impartial hearing officer's September 30, 2008 interim decision and determining that the 6:1+1 BOCES special class placement recommended in the July 30, 2007 IEP is the student's pendency placement. The district argues: (1) that the impartial hearing officer erroneously determined pendency to depend upon the last implemented IEP, rather than the last agreed upon IEP, and (2) that the last agreed upon IEP is the July 30, 2007 IEP, developed just prior to the student's removal from public school, which was not appealed by the parent.

The parent answers, countering that the district's assertion that the July 30, 2007 IEP is the student's pendency placement is without merit because the parent rejected this IEP and enrolled the student in a private school placement. The parent also cross-appeals the impartial hearing officer's determination that the May 3, 2007 IEP constituted the student's pendency placement as erroneous, and seeks an order from a State Review Officer annulling the September 30, 2008 interim decision and determining that the March 27, 2008 "IEP," or, alternatively, the January 24, 2007 IEP constitutes the student's pendency placement.

The district answers the cross-appeal, alleging: (1) that the March 27, 2008 "IEP" referenced by the parent does not exist; (2) that the March 27, 2008 IESP does not constitute the student's pendency placement because it only addressed the provision of related services; (3) that the parent's argument that the January 24, 2007 IEP was the last agreed upon placement is without merit because the parent never challenged the July 30, 2007 IEP by filing a due process complaint

notice, which triggers the pendency issue; and (4) that the parent should not be permitted to introduce documentation outside of the documentary record, specifically, an affidavit from the parent dated September 11, 2008 (see Answer Ex. 1) and the purported March 27, 2008 IEP (see Answer Ex. 4). The district requests an order from a State Review Officer annulling the impartial hearing officer's September 30, 2008 interim decision and determining that the 6:1+1 BOCES special class recommended in the July 30, 2007 IEP constitutes the student's pendency placement, or, alternatively, holding both the appeal and the cross-appeal in abeyance and remanding the case back to the impartial hearing officer to develop a complete record.

At the outset, I will address the district's objection to the introduction of the parent's affidavit dated September 11, 2008 and the purported March 27, 2008 IEP. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-107;[4] Application of the Dep't of Educ., Appeal No. 08-061; Application of the Dep't of Educ., Appeal No. 08-044; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Dep't of Educ., Appeal No. 07-140; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of the Bd. of Educ., Appeal No. 07-005; Application of a Child with a Disability, Appeal No. 06-058; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of a Child with a Disability, Appeal No. 05-020; Application of the Bd. of Educ., Appeal No. 04-068). In the instant matter, I note that both the parent's affidavit (see IHO Ex. B) and the purported March 27, 2008 IEP (see IHO Ex. C at Ex. F) are already included in the documentary record developed by the impartial hearing officer, and therefore, I will consider them in this appeal.

I now turn to the issue of the student's pendency placement. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) 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 also 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]; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-107; 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

[4] The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

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. 08-130; 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 Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-107; 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. 08-130; 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]).

In most cases, the pendency placement will be the last unchallenged IEP (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696-97 [S.D.N.Y. 2006]; see Application of a Child with a Disability, Appeal No. 07-063; Application of the Bd. of Educ., Appeal No. 07-009; Application of a Child with a Disability, Appeal No. 06-116; Application of a Child with a Disability, Appeal No. 06-062). 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. 08-130; 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).

The Second Circuit has proffered three possible definitions of "then current educational placement": (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990] [emphasis added]; see also Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006). In the case at bar, the impartial hearing officer determined that the May 3, 2007 IEP constituted the student's pendency placement because it was the student's most recently implemented IEP (IHO Decision at pp. 4-5, 7). Although the parent denies the district's allegation that he never challenged the July 30, 2007 IEP (Answer at ¶ 4; see IHO Ex. B at ¶ 11), he also "[a]dmits that the parents did not request a hearing to challenge the July 30, 2007 CSE recommendations, but notes that the parents did in fact disagree with those recommendations" (Answer at ¶ 20). There is no evidence contained in the documentary record indicating that the parent ever formally challenged the July 30, 2007 IEP before removing the student to a private placement for the 2007-08 school year. Because the documentary record lacks any evidence demonstrating the parent's objection to the July 30, 2007 IEP, or any invocation of due process pertaining to that IEP, I conclude that the parent agreed to that program, at least pending its implementation (see Application of a Student with a Disability, Appeal No. 08-050), and that the July 30, 2007 IEP superseded the May 3, 2007 IEP. Having so found, I must also conclude that the impartial hearing officer's determination that the May 3, 2007 IEP constituted the student's pendency placement is not supported by the documentary record.

However, in his cross-appeal, the parent alleges that "[a]t some point between March 27, 2008 and the time of the hearing request, the [district] CSE" reconvened and developed an IEP for the student "which is identical in content to the March [27] 2008 IE[S]P developed and issued by the [other district's CSE]" recommending counseling once every two weeks for 30 minutes per session in a 1:1 setting and continuing his extended time for tests (1.5) (Answer at ¶ 58; compare IHO Ex. A at Ex. I at pp. 1-2, with IHO Ex. C at Ex. F at pp. 1-2). The district, however, refutes this allegation, contending (1) that the March 27, 2008 IEP allegedly developed by the district does not exist, and (2) that although a CSE in the second district did meet on March 27, 2008 and developed an IESP recommending services for the student while he was attending his private school placement (see IHO Ex. A at Ex. I [emphasis added]), when the district attempted to print this IESP, "as a result of a computer malfunction, the first page was misprinted to read as if it were a [district] 'IEP'" (Pet'r Mem. in Ans. to Resp't Cross-Appeal at p. 2; compare IHO Ex. A at Ex. I at p. 1, with IHO Ex. C at Ex. F at p. 1).

A determination regarding whether or not a CSE in the district generated an IEP on March 27, 2008, and, if so, whether such IEP constituted the last unchallenged placement for the purpose of determining the student's pendency placement must be supported by evidence in the record (see Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 01-003). An impartial hearing officer must ensure that there is an adequate record upon which to premise his or her decision and permit meaningful review of the issues (Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 04-017; Application of a Child with a Disability, Appeal No. 02-003; Application of the Bd. of Educ., Appeal No. 01-087). State regulations provide that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]).

In this case, as previously noted, no hearing was conducted; instead, only a prehearing conference and informal oral argument session were conducted prior to the impartial hearing officer rendering his September 30, 2008 interim decision (IHO Decision at p. 1). Moreover, I conclude that the documentary record is not adequate to conduct a meaningful review of whether or not a CSE in the district generated an IEP on March 27, 2008, and, if so, whether such IEP constituted the last unchallenged placement for the purpose of determining the student's pendency placement. Accordingly, I will annul the impartial hearing officer's interim decision and remand this matter to the impartial hearing officer for a pendency decision based upon development of an adequate record regarding the alleged existence of a district-generated IEP developed on March 27, 2008 and, if it is found to exist, whether such IEP constituted the last unchallenged placement for the purpose of determining the student's pendency placement (see J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000] [purpose of an adversarial hearing is to resolve disputed issues of fact]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *4 [D.Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-094; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 05-064; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 01-024).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's interim decision dated September 30, 2008 is annulled; and

IT IS FURTHER ORDERED that this matter shall be remanded to the impartial hearing officer who shall, unless the parties agree to an alternative pendency placement, convene an impartial hearing, develop a hearing record regarding the alleged existence of a district-generated IEP developed on March 27, 2008 and, if it is found to exist, whether such IEP constituted the last unchallenged placement for the purpose of determining the student's pendency placement, and render a decision within 30 calendar days of receipt of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the interim decision dated September 30, 2008 is not available, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
December 31, 2008

PAUL F. KELLY
STATE REVIEW OFFICER