

PENDENCY (A.K.A. “STAY PUT”)

An Important Right of Special Education Students



By: Lynn M. Brown, Esq.



One of a special education student’s most important rights is that of pendency (a.k.a. “stay put”), which permits a student to stay in his last agreed- upon placement and/or continue to receive the last agreed-upon services while any challenge to a proposed Individualized Education Plan (or “IEP”) is pending. “Pendency” is not automatic, and, accordingly, parents should explicitly invoke their child’s right to pendency in cases where a school district seeks to change a child’s placement and/or services to those that are not acceptable to the parents.

School districts are required to provide special education students with a free, appropriate public education, known as “FAPE.” In connection with that obligation, school districts, through their Committees on Special Education (“CSE”), determine a child’s placement, i.e., where a child will be going to school and the type of classroom in which the child will be educated (e.g., a classroom with typical students, or a classroom composed of certain number of special education students, a teacher, and one or more aides). In addition, the CSE determines what services are to be provided to the child (e.g., speech therapy, occupational therapy, physical therapy, counseling, assistive technology, etc.) and how often those services will be provided. This determination is done annually (typically in the spring) for the next school year.

Although the parents of a child are themselves members of the CSE, it is not uncommon for parents and the remaining members of the CSE (who are all associated with the school district) to disagree on either the proposed placement and/or services, and for a parent to want the placement and/or services in the most recent agreed-upon IEP to continue into the next school year. When this happens, the CSE can “outvote” the parent member and attempt to change the student’s IEP to reflect the changes the school district wants. A parent, however, can at least postpone that result by invoking pendency.

In order to invoke pendency, a parent must not merely disagree with the CSE; he or she must go further, and actually seek a due process hearing before an independent hearing officer appointed by the State. In connection with any such hearing request, the parent’s position would be that the challenged action by the CSE (whether it be the change in placement or the removal of certain services from a child’s IEP) is a denial of FAPE. At the same time, the parent must also explicitly invoke pendency, which prevents the CSE from implementing the new IEP, and keeps the most recent agreed-upon IEP (i.e., the last IEP that was in effect and implemented before the dispute occurred) in effect. Pendency will apply through the resolution of the impartial hearing and any appeals, preventing the school district from depriving the child of the services or changing a placement over the parent’s objections. Of course, if the parent prevails in establishing that the change in placement or service is a denial of FAPE, the school district may not make the changes it sought, but either way, the child has had the benefit of the placement/services set forth in the last agreed-upon IEP during the period of the dispute.

About the Author

Lynn M. Brown is Of Counsel to Meyer Suozzi, practicing in the Litigation & Dispute Resolution Department. Ms. Brown is a founding member of the firm’s Education Law practice, an outgrowth of her own experiences as the parent of a special-needs child. She routinely appears before the Committees on Special Education of numerous Long Island school districts, and in connection with impartial (due process) hearings, securing timely educational evaluations, services and accommodations for learning-disabled children under federal and state law. Ms. Brown also appears on behalf of students in connection with disciplinary matters, including long and short-term suspensions. Ms. Brown frequently gives presentations to parent and professional groups, including PTAs, regarding the rights of children with disabilities.

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