



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-029

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

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 parent) appeals from the decision of an impartial hearing officer (IHO) which ordered respondent (the district) to provide compensatory educational services only to address lapses in pendency services that occurred during the 2021-22 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

The parties' familiarity with this matter is presumed and, therefore, the facts, procedural history, and the IHO's decision will not be recited in detail. According to the parent, a CSE convened on October 14, 2021, to formulate an IEP for the student (see Parent Ex. S at p. 6).¹ The parents disagreed with the timing of and recommendations contained in the October 2021 IEP, and in a due process complaint notice, dated March 10, 2022, and amended due process complaint notice, dated May 27, 2022, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year on procedural and substantive grounds,

¹ The October 14, 2021 IEP was not entered as an exhibit in the hearing record.

including that the CSE failed to hold a CSE meeting prior to the 2021-22 school year and that the October 2021 IEP was predetermined, failed to include recommendations for applied behavior analysis (ABA) and 1:1 instruction, and was based on inadequate evaluative information (see Parent Exs. A, S).²

On April 15, 2022, the parties agreed that the student's stay-put placement during the pendency of the proceedings consisted of the student's placement at the Reece School, along with related services to be provided at the Reece School including one 30-minute session per week of individual speech-language therapy, three 30-minute sessions per week of physical therapy (PT) (two individual and one group), two 30-minute sessions per week of occupational therapy (OT) (in a ratio of 1:1 and 1:2), and one 30-minute session per week of individual counseling (Parent Ex. R).³ In addition, as part of the student's pendency placement, the parties agreed that the district would directly fund 20 hours per week of ABA services, 4 hours per month of ABA supervision, and 4 hours per month of parent counseling and training (id. at p. 2).

The parties participated in two prehearing conferences before the Office of Administrative Trials and Hearings (OATH) on April 21, 2022 and July 1, 2022 (Apr. 21, 2022 Tr. pp. 1-31; July 1, 2022 Tr. pp. 1-32), as well as two status conferences on July 14, 2022 and October 25, 2022 (July 14, 2022 Tr. pp. 1-7; Oct. 25, 2022 Tr. pp. 1-12).⁴ An impartial hearing convened and was completed on November 28, 2022 (Nov. 28, 2022 Tr. pp. 1-105). In a decision dated January 11, 2023, the IHO determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 school year, and that the student was entitled to compensatory tutoring services to remedy the denial of a FAPE, as well as compensatory pendency services to remedy lapses in the delivery of the student's pendency services from the date of the March 10, 2022 due process complaint notice through the end of the 2021-22 school year (IHO Decision at pp. 5-6, 8-9).⁵ With respect to compensatory pendency services, the IHO specifically awarded compensatory pendency services that "the student was entitled to receive under the Pendency Agreement dated April 15, 2022 but did not receive throughout the 2021-2022 school year" and ordered the district to provide the parent documentation regarding the number of hours of pendency services that the district had "provided and/or funded" from the date of the due process complaint notice through the date of the IHO's decision and create "a compensatory bank for the Student for a total number of hours equal to the difference between the pendency mandate and the services provided and/or funded" (id. at p. 9).

² The student has been the subject of at least two prior administrative proceedings involving the 2017-18, 2018-19, 2019-20, and 2020-21 school years (see Parent Exs. E-F).

³ The Reece School has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The transcript of the proceedings was not consecutively paginated. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

⁵ The IHO's January 11, 2023 decision was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-14).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parent's appeal is that the IHO erred in limiting the award for compensatory pendency services to the 2021-22 school year. The parent requests that the order be modified to provide for compensatory pendency services for lapses that occurred from the date that the due process complaint notice was filed and continuing through the date of this decision. In its answer, the district agrees that the IHO erred in limiting the award of compensatory pendency services to the end of the 2021-22 school year and that the student was entitled to compensatory pendency services from the date of the due process complaint notice through the date of this decision.

V. Applicable Standards

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]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; 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. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 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., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 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. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; 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, 753, 756 [2d Cir. 1980]; 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).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a

compensatory remedy (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

VI. Discussion

Here, neither party challenges the IHO's findings that the district failed to offer the student a FAPE for the 2021-22 school year, that the student was entitled to compensatory tutoring services to remedy the denial of a FAPE for the 2021-22 school year, or that the student is entitled to compensatory pendency services to make up for services that the district failed to fund or provide in accordance with the parties' April 2022 pendency agreement. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Further, a review of the allegations in the parent's request for review, together with the district's answer thereto, reveals that the parties agree that the IHO improperly limited the award of compensatory pendency services to make-up for services missed during the 2021-22 school year and that the award should be extended to encompass missed services from the date of the due process complaint notice to the date of this decision.

VII. Conclusion

Given the parties' respective positions, the necessary inquiry is at an end and no further analysis of issues is required.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated, January 11, 2023, is modified by reversing that portion which limited the award of compensatory pendency services to services that the student did not receive under pendency during the 2021-22 school year; and

IT IS FURTHER ORDERED that the district shall fund compensatory pendency services to make up for any services the student missed but was entitled to receive under pendency between the date of the due process complaint notice and the date of this decision in accordance with the parameters set forth in the IHO Decision.

Dated: Albany, New York
October 2, 2023

STEVEN KROLAK
STATE REVIEW OFFICER