The University of the State of New York

The State Education Department
State Review Officer
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No. 23-145

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Kimberly C. Tavares, Esq., attorney for petitioners

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their son's pendency placement during a due process proceeding challenging the appropriateness of the respondent's (the district's) recommended educational program for the student for the 2022-23 school year. The appeal must be dismissed.

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 detailed facts and procedural history of the case and the IHO's decision will not be recited here. The parents contend that the CSE failed to convene to formulate an IEP for the student for the 2022-23 school year (see generally Parent Ex. A). The parents notified the district of their intent to unilaterally place the student at the New Hampton School (New Hampton) (see id. at p. 3). In a due process complaint notice, dated November 18, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see id.).

An impartial hearing convened on December 23, 2022 and continued through June 7, 2023 after seven days of proceedings, including dates devoted to, among other things, identifying the student's stay-put placement during the pendency of the proceedings (Tr. pp. 1-41).

While this matter was pending, on April 7, 2023, the IHO issued a decision in a separate administrative proceeding involving the student's 2021-22 school year (2021-22 proceeding) (see Parent Ex. B). In the 2021-22 proceeding, the IHO ordered the district to directly fund the student's tuition at New Hampton for the 2021-22 school year (id. at p. 10).

In an amended due process complaint notice dated May 5, 2023 the parents requested a pendency placement for the student at New Hampton based on the April 7, 2023 IHO decision (Amended Due Process Compl. Not. at pp. 3-4).

In an interim decision dated June 7, 2023, the IHO found that New Hampton would be deemed the student's pendency placement as of April 7, 2023, the date of the unappealed IHO decision (Interim IHO Decision at p. 3; see Parent Ex. B).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer thereto and the parents' reply is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The sole question to be addressed in this matter is whether the IHO erred in making the effective date of the student's pendency placement at New Hampton retroactive to the date of the April 7, 2023 unappealed IHO decision rather than to the date of the filing of the parents' initial due process complaint notice on November 18, 2022.

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for 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]).[1] 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.

[1] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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 (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & 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).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, 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 (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, 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).

VI. Discussion—Pendency

Turning to the crux of the parents' appeal, the parties agree that, as a result of the issuance of the April 7, 2023 IHO decision in the 2021-22 proceeding, New Hampton became the student's

educational placement for the purposes of pendency (Req. for Rev. at pp. 2-3; Answer ¶ 6). However, the question in this matter is whether the IHO erred in denying the parents' request for a finding that New Hampton retroactively became the student's pendency placement as of November 18, 2022, the date of the parents' filing of the due process complaint notice for the student's 2022-23 school year.

The parent argues that pendency attached when the parent filed the due process complaint notice on November 18, 2022 and that there was no pendency changing event given that the student attended New Hampton for both the 2021-22 and 2022-23 school years. As noted above, the pendency inquiry focuses on identifying the student's then-current educational placement, which "typically refers to the child's last agreed-upon educational program before the parent requested a due process hearing to challenge the child's IEP" (Ventura de Paulino, 959 F.3d at 532 [emphasis added]). There is no question that the filing of a due process complaint notice triggers pendency (see E. Lyme, 790 F.3d at 456). However, as of the date of the parent's November 18, 2022 due process complaint notice, notwithstanding that the student was attending the unilateral placement, this was without the district's consent and there was no agreement by the parties and no IHO or SRO decision that New Hampton was appropriate (Ventura de Paulino, 959 F.3d at 532 [noting that "implicit in the concept of 'educational placement' in the stay-put provision (i.e., a pendency placement) is the idea that the parents and the school district must agree either expressly or as impliedly by law to a child's educational program"]). Accordingly, as of that date, the student's pendency placement may have been some other placement, perhaps based on a last agreed-upon IEP; however, the hearing record is not developed on that question. In any event, prior to the issuance of the IHO decision in the 2021-22 proceeding, the parents' counsel indicated that the student was not attending a pendency placement and did not need a determination from the IHO on the question of pendency (Tr. pp. 2, 17). Thereafter, the IHO issued the April 7, 2023 decision arising from the 2021-22 proceeding (Parent Ex. B).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). Thus, it has been held that a district would not be responsible for funding a student's tuition for the time period between the start of the student's school year through the date of the pendency changing event (i.e., the unappealed IHO decision or SRO decision in favor of the parent) until the parent prevailed on the merits of the due process complaint notice (Murphy, 86 F. Supp. 2d at 367). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if an administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; S.H.W. v. New York City Dep't of Educ., 2023 WL 2753165, at *8 [S.D.N.Y. Mar. 31, 2023]; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

Here, the April 7, 2023 IHO decision therefore constituted a pendency changing event which would apply "only on a going-forward basis" as the IHO correctly determined (S.S., 2010 WL 983719, at *1). During the impartial hearing, the IHO related that she had recently conducted legal research and came to understand that the change in pendency applied "going forward" and "not retroactive to the date of [the] due process complaint" (Tr. pp. 36-37). The IHO acknowledged authority providing that a delayed decision would allow an IHO to equitably consider a pendency placement to be retroactive to an earlier date, but the IHO stated her understanding that such would apply if a proceeding was "unduly delayed" such as if "a hearing officer [was not] appointed . . . to a case several months as opposed to two days" (Tr. pp. 37-38). Moreover, with respect to the question of whether the IHO, on equitable grounds, could retroactively adjust a student's pendency placement when a State-level administrative decision in a parent's favor was not issued in a timely manner as allowed by Mackey, 386 F.3d at 164-66, and Arlington, 421 F. Supp. 2d at 701, and extended to an untimely IHO decision via S.H.W., 2023 WL 2753165, at *8, the parents do not assert that the April 7, 2023 IHO decision was untimely.

The IHO's decision is consistent with the authority cited above and the parents have not cited a persuasive basis for departing from that decision. Accordingly, I decline to disturb the IHO's interim decision, dated June 7, 2023, identifying New Hampton as the student's pendency in the present matter as of April 7, 2023, the date of the unappealed IHO decision arising from the 2021-22 proceeding. While the parents are not entitled to the costs of the student's tuition at New Hampton from the time of the filing of the November 18, 2022 due process complaint notice to the date of the April 7, 2023 IHO decision pursuant to pendency, they "may obtain retroactive reimbursement for [their] expenses" if it is determined that the district failed to offer the student a FAPE, New Hampton is an appropriate unilateral placement, and equitable considerations weigh in favor of an award of reimbursement (see Ventura de Paulino, 959 F.3d at 536).

VII. Conclusion

For the reasons set forth above, the evidence in the hearing record supports the IHO's finding that the IHO decision dated April 7, 2023 formed the basis for the student's pendency as of the date of that decision and not retroactively to the date of the November 18, 2022 due process complaint notice.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 5, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER