The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-249

Application of a STUDENT WITH A DISABILITY, by his 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brain 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 denied in part her request for pendency services for the 2023-24 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.

Briefly, in a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and requested tuition funding and reimbursement for the student's attendance at the International Academy for the Brain (iBrain) (see Parent Ex. A). The parent requested pendency for the student pursuant to a May 26, 2023 IHO decision regarding the 2022-23 school year and asserted that the student's pendency should include funding for the cost of private transportation and 1:1 nursing services (id. at pp. 1-2; see Parent Ex. B).

An impartial hearing convened on August 21, 2023 and concluded on October 24, 2023 after six days of proceedings (Tr. pp. 1-274). In an interim decision dated October 6, 2023, the IHO granted the parent's request for a pendency order and found that the student's pendency placement consisted of district funding for the cost of the student's 12-month tuition at iBrain from the date of the July 5, 2023 due process complaint notice for the duration of the proceeding (Interim IHO Decision at pp. 4-7).[1] Although the parent asserted in the due process complaint notice that the student's pendency placement arose from a May 26, 2023 IHO Decision issued in a prior proceeding, the IHO found that a superseding decision of a State Review Officer which upheld the prior IHO Decision controlled the student's pendency (Interim IHO Decision at pp. 3-4; see Parent Exs. A; B; Application of a Student with a Disability, Appeal No. 23-131). The IHO's interim decision directed the district to fund tuition at iBrain during the 2023-24 school year as part of pendency, but did not include funding for private transportation and 1:1 nursing services (Interim IHO Decision at pp. 6-7). The IHO specifically noted that the parent was seeking funding through pendency for services, which were not included in the prior IHO decision or the State level review, and that allowing pendency based on the parent's request would circumvent the prior findings and permit the parent to "do whatever the Parent wishes at the District's expense" (id. at p. 6).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer, and the parent's reply thereto is also presumed and, therefore, the detailed allegations and arguments will not be recited. The dispute on appeal is centered around whether the IHO erred in failing to order funding for the cost of private transportation and 1:1 nursing services as part of the student's pendency placement.

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.

---

[1] On October 24, 2023, the parents requested that this matter be withdrawn without prejudice and the IHO issued a termination order on October 25, 2023.

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).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (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. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 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 [OSEP 2007]).

VI. Discussion

In the due process complaint notice, the parent requested pendency asserting it arose from a May 26, 2023 IHO decision and that it should include the cost of private transportation and 1:1 nursing services, as well as tuition at iBrain (see Parent Exs. A; B). During the pendency hearing, the parties discussed that while the district agreed that the May 26, 2023 IHO decision could represent the student's pendency program, the ordering clause in the decision was controlling and it included only tuition at iBrain, omitting the cost of private transportation and 1:1 nursing services

(see Tr. pp. 26-50, 58-68). According to the IHO, shortly after the first pendency hearing date, the district alerted the IHO to the issuance of a State-level appeal of the May 2023 IHO decision, which upheld the decision and explained the reasoning for ordering tuition reimbursement for iBrain but declined to order the district to fund the cost of private transportation and 1:1 nursing services (Tr. pp. 58-68; IHO Ex. I; IHO Decision at pp. 3-6).

On appeal, the parent continues to assert that the program set forth in the May 26, 2023 IHO decision and the August 22, 2023 SRO decision, which upheld the prior IHO decision constitutes the student's pendency placement for the present matter. Nonetheless, the parent asserts that the student's pendency program should also include the cost of private transportation and 1:1 nursing services under various theories; principally, the parent asserts that the student needs special transportation to attend school and requires a 1:1 nurse to do so safely (Req. for Rev. ¶ 18-39; Reply ¶¶ 8-13).[2]

While it is understandable that a party may not want pendency in an outdated placement that likely is no longer appropriate to address the student's current needs, the creation of an "appropriateness" standard for pendency would require making findings as to the substantive adequacy the student's special education programing rather than implementing an automatic injunction, which is not supported by the IDEA. In fact, it runs afoul of the principle that "[w]hether the district has failed to provide a child's pendency entitlements is "evaluated independently" from the parents' claim as to the inadequacy of the IEP "because pendency placement and appropriate placement are separate and distinct concepts" (J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 642 [S.D.N.Y. 2011], quoting Mackey, 386 F.3d at 162, and O'Shea, 353 F.Supp.2d at 459).

The parent's reasoning for requesting services as part of the student's pendency placement that were not ordered in the May 26, 2023 IHO decision, establishing pendency, or the subsequent SRO decision upholding it are not consistent with the law and State regulations concerning pendency placements for students with disabilities during due process hearings. Here, the student's pendency placement was established by the IHO decision finding in favor of the parents that the unilateral placement at iBrain was appropriate followed by the SRO decision upholding that decision and finding that the parent had only asked for tuition at iBrain as relief and that, accordingly, the IHO did not err in granting that relief (Parent Ex. B; IHO Ex. I).

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

[2] The parent submits additional evidence to show that the student required 1:1 nursing services; however, this is an appeal regarding pendency and, accordingly, these documents are not relevant or necessary for a determination in this matter and will not be considered on appeal. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

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]).

The parents have not presented a valid basis for variance from the services set forth in those decisions, which provided only tuition reimbursement and funding at iBrain and explicitly excluded funding for the cost of private transportation and 1:1 nursing services.

As the district points out, to the extent the parent argues that iBrain is the "operative placement"; this argument fails under Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 529 (2d Cir. 2020). Applying the rationale set forth in Ventura de Paulino, courts have explicitly rejected reliance on the operative placement to find that a unilaterally chosen nonpublic school constitutes pendency absent an agreement between the parents and the district (Araujo v New York City Dep't of Educ., 2020 WL 5701828, at *3 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [S.D.N.Y. Nov. 2, 2020], citing Ventura de Paulino, 959 F.35 at 536).[3] Here there is no assertion that such an agreement exists.

It may be that the parent will prevail in an impartial hearing and obtain funding and/or reimbursement for the full costs of the student's attendance at iBrain for the 2023-24 school year, including funding for the cost of private transportation and 1:1 nursing services, but the parent cannot expect that full funding as a matter of pendency.[4]

---

[3]The Second Circuit has further explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

[4] It may be that this matter has already come to a conclusion as the hearing record includes an Order of Termination dated October 25, 2023 reflecting the parent's withdrawal and dismissal without prejudice of the matter (IHO Order of Termination). However, in pleadings the parent asserts that a claim for the student's 2023-24 school year has already been recommenced (Reply ¶ 7).

VII. Conclusion

For the reasons set forth above, the evidence in the hearing record supports the IHO's determination that the May 26, 2023 findings of fact as affirmed by the SRO set forth the student's pendency placement in this matter and the IHO's pendency determination is affirmed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 10, 2024

____
STEVEN KROLAK
STATE REVIEW OFFICER