The University of the State of New York

The State Education Department
State Review Officer
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No. 23-264

Application of a STUDENT WITH A DISABILITY, by her 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:
Brain Injury Rights Groups, Ltd., attorneys for petitioner, by Zack Zylstra, 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. 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) declining to determine their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student 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

Due to the procedural nature of this matter and as the parties' familiarity with this proceeding is presumed, the facts and procedural history of this case will not be recited in detail.

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 (see generally Due Proc. Compl. Not.). The parent requested pendency for the student pursuant to a June 2, 2023 IHO decision addressing the 2021-22 and 2022-23 school years (id. at pp. 1-2).

After a prehearing conference was held on August 11, 2023, an impartial hearing convened on September 14, 2023 before the Office of Administrative Trials and Hearings (OATH) (Tr. pp.

1-24; Tr. pp. 25-47). On the September 14, 2023 hearing date, the attorney for the parents requested a determination on the student's pendency placement from the IHO, who then questioned parents' attorney as to whether the student was receiving services at iBrain and was receiving transportation services, before indicating that the IHO did not want to hold a separate pendency hearing in this matter and that any pendency arguments could be made during the hearing on the merits (Tr. pp. 29-31). An additional hearing date took place on October 13, 2023 (Tr. pp 48-193).[1]

On October 19, 2023, the district sent the parents a pendency implementation form in which the district indicated that the basis for pendency was a June 2, 2023 IHO decision and that pendency consisted of tuition at iBrain for the 12-month school year, 1:1 nursing services, paraprofessional services, transportation services, and transportation nursing services (Reply Ex. A).

IV. Appeal for State-Level Review

The parents submit a request for review in which they appeal from the IHO declining to issue an interim decision on pendency, the district submits an answer, and the parents submit a reply to the district's answer.[2] The dispute on appeal is limited to whether the IHO erred in not issuing an interim decision on pendency in this matter.

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.

[1] The hearing record for this appeal does not contain any parent or district exhibits although the October 13, 2023 transcript indicates that exhibits were entered into evidence (Tr. pp. 60-72, 109, 130, 177-79). Some documents were submitted as "Supplemental Documents," including the July 2023 due process complaint notice. It appears that to the extent the hearing record could be considered incomplete, this reflects the IHO's reluctance to provide a certified record or evidence where there was no pendency order or final decision issued, as memorialized in an email exchange between the IHO and a liaison from the impartial hearing office that took place on October 26, October 31, and November 3, 2023 and is included as a supplemental document. As a result of the exchange, the impartial hearing liaison noted in the final email in the thread "that this email thread will be submitted in lieu of the exhibits, proposed subpoena, brief, etc. in this case." However, in this instance, the parents appeal from the IHO's declination to issue an interim decision on pendency, and upon review of the hearing record, the IHO declined to address pendency separately during the September 14, 2023 hearing date; accordingly, an argument could be made that the hearing record need only include documentation up to that point of the proceeding (see 8 NYCRR 279.9[d] [Where a party has appealed an interim decision of an impartial hearing officer according to the provisions of subdivision (d) of section 279.10 of this Part, the board of education shall include in the record transmitted to the Office of State Review copies of the entire record . . . developed as of the date of the interim decision"]).

[2] Both the parents and district submit additional evidence on appeal, which evidence is accepted for completion of the limited hearing record in this matter (Answer Exs. A; B; Reply Exs. A; B; C).

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]).[3] 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 (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

[3] 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).

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

Initially, the parents requested pendency in their due process complaint notice (Due Proc. Compl. Not. at pp. 1-2). As part of that request, the parents correctly noted that the district is required to implement pendency "without the necessity of any application, motion, or other showing" (id. at p. 2). The parents then indicated that "[i]n the event, however, the [district] fails to automatically implement [the student's] pendency and insists upon the issuance of an Interim Order from the [IHO], we respectfully request an immediate pendency hearing" (id.). In addition, the parent asserted that the student's pendency placement was based on a June 2, 2023 IHO decision from a prior proceeding, which directed the district to pay the costs of the student's tuition, related services, and special transportation at iBrain for the 2021-22 and 2022-23 school years (id.).

At the September 14, 2023 hearing date, the parents' attorney requested a decision establishing the student's pendency placement (Tr. p. 30). The IHO inquired as to whether the student was currently receiving services at iBrain and transportation and the parents' attorney responded affirmatively to both questions (Tr. p. 30). The IHO indicated that he did not like to separate pendency from the substantive hearing but that should the parents still wish to raise issues related to pendency, the parents could raise them at the hearing on the merits (Tr. p. 30-31). The IHO also encouraged the parties to work out the student's pendency placement prior to his issuance of a final decision (Tr. p. 31).

The district then sent the parents a pendency implementation from dated October 19, 2023, in which the district indicated that the basis for pendency was the June 2, 2023 IHO decision (Reply Ex. A).

In the request for review, the parents assert that pendency is an automatic right and "any delay in the issuance of an Order of Pendency causes harm to the Student for which the pendency is sought" (Req. for Rev. ¶12). However, the parents' main assertion on appeal is that the October 19, 2023 pendency implementation form was insufficient, with the parents asserting that "[a]nything less than an IHO-issued Order of Pendency paves the way for non-compliance by the [district], which severely and negatively impacts [the student's] access to academic instruction and related services, including nursing services and special transportation services" (id. at ¶14).[4] As the pendency implementation form was not an IHO decision, the issue on appeal is not an allegedly incorrect or insufficient pendency decision by the IHO but rather an alleged failure to issue one in

[4] In the request for review the parent indicated that the student could be missing nursing services due to a lack of pendency; however, at the impartial hearing the parent indicated that they were not seeking funding for 1:1 nursing services because the student was no longer receiving nursing services (Tr. p. 5).

the first instance. Accordingly, the appeal will be treated as one complaining of the IHO's failure to issue a decision on pendency.

In an answer, the district argues that the IHO correctly did not issue an interim decision on pendency and that the matter is now moot. To this point, the district asserts that there is a parallel federal district court case involving this student and submits the parents' complaint in that action as additional evidence, which shows that the parent brought an action in district court seeking a determination that the June 2, 2023 IHO decision constitutes the student's pendency placement for the duration of this proceeding involving the 2023-24 school year (see Answer Ex. A). Additionally, the district submits a declaration that was submitted to the district court to show that the district was complying with its pendency obligations for this student (Answer Ex. B at ¶9).

In a reply, the parents concede that the October 2019 pendency implementation form was not a determination or decision by the IHO. However, the parents assert that the matter is not moot and continue to argue that that the pendency implementation form is not enforceable to the same extent as a pendency decision issued by an IHO and further argue that the declaration submitted by the district demonstrates that the district has failed to fund the student's transportation as required.

Here, the hearing record demonstrates that there is no dispute as to what the student's pendency placement consists of, as both the parents and district agree that the basis for pendency is the June 2, 2023 IHO decision. Additionally, the district has been willing to implement pendency and has submitted documents showing it has been doing so. As there is no dispute as to what pendency is, the IHO was correct to not issue an interim decision on pendency as it would have been a waste of limited judicial resources. In particular, while the parents argue that the district's pendency implementation form does not carry the same weight as an IHO decision, the parents do not point to any specific need for an IHO decision on pendency in this proceeding. Rather, the parents only raise speculative issues related to "enforcement" and concerns that the student's transportation costs had not yet been fully paid; however, an order establishing the student's pendency placement based on the June 2, 2023 IHO decision would not address these assertions and any such order is unnecessary as the automatic injunction pursuant to the statute has been in place and there is no indication that the district disputes the contours of its pendency obligations.

While the parents claim that the declaration submitted by the district demonstrates that the payments related to the student's pendency did not include transportation costs, there is no evidence that the district has refused to pay for the student's transportation and the district is generally afforded some leeway in managing its own process with respect to the timing of payments related to pendency. There is no indication in the hearing record or the documentation submitted by the parents showing that the district has refused to pay for any services owed under pendency, or for special transportation services, or that the student was at risk of losing his placement due to the district's failure to pay. As the Second Circuit has indicated recently, school districts may implement basic budgetary oversight measures when funding pendency placements and sprinting to obtain injunctive orders is not permissible because parents are not entitled to payments with such immediacy that it would frustrate the fiscal policies of participating states (Mendez v. Banks, 65 F.4th 56, 63 [2d Cir. 2023]; Landsman v. Banks, 2023 WL 4867399, at *3 [S.D.N.Y. July 31, 2023]). Similarly, prematurely seeking intervention from the IHO in pendency matters should be

discouraged, where, as here, no actual dispute over pendency exists and the district has not failed to comply with its pendency obligations.

Moreover, in a recent decision, a federal district court has determined that parents are not entitled to a pendency determination when pendency is not contested by the district (Grullon v. Banks, 2023 WL 6929542 at *3-5 [S.D.N.Y. October 19, 2023]). The Court in that case specifically found that where the district had agreed iBrain was the student's pendency placement, the issue of pendency was moot because the relief sought was already provided (id. at *3-4). Further, the District Court held that even when pendency payments were outstanding, when there was no evidence that the district was contesting the pendency placement or that the student would lose the placement at iBrain, the claim was not ripe unless and until the district violated its legal obligations (id. at *4-5). Moreover, the District Court held that the "automatic injunction" triggered under the stay-put provision is not a mechanism for a parent to obtain a court order to require the district "to acknowledge a pendency determination" (id. at *5).

As such, the hearing record supports the IHO's decision to not issue an interim decision on pendency and the parents are not entitled to an interim decision as to pendency in this matter based on the above.

VII. Conclusion

The parents' request for an interim decision on pendency is denied.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 2, 2024

STEVEN KROLAK
STATE REVIEW OFFICER