



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-290

**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:**

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 here.

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 an October 20, 2022 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 nursing services (*id.* at pp. 1-2; *see* Parent Ex. L).<sup>1</sup>

An impartial hearing convened on September 13, 2023 and concluded on November 6, 2023, after seven days of proceedings (Tr. pp. 1-165). In an interim decision dated October 31, 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 tuition at iBrain and the cost of private special transportation from the date of the July 5, 2023 due process complaint notice for the duration of the proceeding (Interim IHO Decision). Although the parent asserted in the due process complaint notice that the student's pendency placement arose from a findings of fact and decision dated October 20, 2022 and included tuition at iBrain and both private special transportation and nursing services, the IHO's interim decision directed the district to fund the student's placement at iBrain and the cost of special transportation as part of pendency, and the decision did not include funding for private nursing services (*id.* at pp. 2-3; *see* Parent Ex. A).

#### **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 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* 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]).<sup>2</sup> 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.

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<sup>1</sup> The hearing record also includes an amended due process complaint notice dated October 26, 2023. That document does not bear an exhibit identification. The amended due process complaint notice makes a functionally identical request for pendency as that found in the initial due process complaint notice (*see* Parent Ex. A).

<sup>2</sup> 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

In the due process complaint notice, the parent requested pendency asserting it arose from an October 20, 2022 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; L). During the impartial hearing, the parties discussed that while the district agreed that the October 20, 2022 IHO decision could represent the student's pendency program, the ordering clause in the decision was controlling and it included only tuition at iBrain and funding for private special transportation, omitting the cost of private 1:1 nursing services (see Tr. pp. 6-13, 34-53, 74-88, 134, 150-57). The parties also discussed the fact that the parent had appealed the October 20, 2022 IHO decision to an SRO, arguing that the decision should have included funding for the private nursing services, however the appeal was dismissed for untimely filing by the SRO (Tr. pp. 34-41; see Application of a Student with a Disability, Appeal No. 22-157).

On appeal, the parent continues to assert that the program set forth in the October 20, 2022 IHO decision constitutes the student's pendency placement for the present matter, and the district agrees (see Req. for Rev. ¶¶ 11, 22-25; Answer ¶¶ 9, 13). On appeal, the parent concedes that the October 20, 2022 IHO decision did not specifically award funding for nursing services, that 1:1 nursing services are not covered by iBrain's tuition contract and that the IHO's interim order on pendency herein also did not order funding for nursing services (see Req. for Rev. ¶¶ 22-25). Nonetheless, the parent asserts that the student's pendency program should also include the cost of 1:1 nursing services under various theories; principally, the parent asserts that 1:1 nursing is "integral" to the student's program, that the IEP at issue in the parent's case in chief provides 1:1 nursing, and that the student received 1:1 nursing during the 2022-23 school year and continues to need 1:1 nursing services (Req. for Rev. ¶¶ 23, 24, 27, 30).<sup>3</sup>

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 of the student's special education programming 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 October 20, 2022 IHO decision establishing pendency, or the

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<sup>3</sup> In a reply to the district's answer, the parent also asserts that the IHO who issued the October 20, 2022 decision "assumed that 1:1 nursing was included" with the iBrain tuition contract and "clearly wanted" to fund the student's entire placement for the 2022-23 school year (Reply ¶ 10). However, the October 20, 2022 decision itself suggests otherwise as that IHO did not specifically order funding for 1:1 nursing but did separately order transportation funding, and the exhibit index that is attached to the October 20, 2022 IHO decision reflects that a private transportation contract was a part of that hearing record, but the exhibit index does not list a contract for private nursing services (see Parent Ex. L at pp. 13-16).

subsequent SRO decision that did not alter 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 October 20, 2022 IHO decision finding in favor of the parents that the unilateral placement at iBrain was appropriate and ordered only tuition at iBrain and funding for private transportation as relief and that, accordingly, the IHO in this matter did not err in finding that the student's pendency in this proceeding consisted of funding for both tuition at iBrain and special transportation but not for 1:1 nursing services (Parent Ex. L; IHO Interim Order).

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]).

The parent has not presented a valid basis for variance from the services set forth in the October 20, 2022 IHO decision, which provided only tuition funding at iBrain and funding for private transportation and did not include funding for the cost of private 1:1 nursing services (see Parent Ex. L).

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.3d at 536).<sup>4</sup> Here, there is no assertion that such an agreement exists between the parent and district.

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<sup>4</sup>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

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 the cost of 1:1 nursing services, but the parent cannot expect to receive funding for the student's 1:1 nursing services under pendency.

## **VII. Conclusion**

For the reasons set forth above, the evidence in the hearing record supports the IHO's determination that the October 20, 2022 findings of fact, which were also left undisturbed by the SRO in a prior appeal decided on timeliness grounds, 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 29, 2024**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**

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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.).