The University of the State of New York

The State Education Department
State Review Officer
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No. 24-182

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:
Law Offices of Leonard Ledereich, attorneys for petitioner, by Pearl Ledereich

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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, 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 her daughter'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 who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

Given the procedural posture of this matter and the presumption that the parties' are familiar with the facts and procedural history of the case and the IHO's decision will, the student's educational history will not be discussed in detail. Briefly, in November 2020, a CSE convened, determined that the student, who was attending a nonpublic school, was eligible for special education as a student with a speech-or language impairment, and recommended that she receive special education teacher support services (SETSS), individual speech-language therapy, individual occupational therapy (OT), and individual and group counseling services (Parent Ex. B at pp. 1, 10).[1]

In a due process complaint notice, dated November 13, 2023, the parent alleged that the district failed "to develop and implement an appropriate program of services for the 23-24 school year," which resulted in a denial of FAPE (Parent Ex. A at p. 1).[2] The parent further asserted that the district had not yet provided the student with the previously mandated SETSS for the 2023-24 school year (id.at p. 2). Additionally, the parent requested that the IHO issue an order of pendency to compel the district to implement the student's "current educational placement" for the pendency of the litigation. (id.). The parent's pendency request indicated that the student's program under pendency was based on the student's November 30, 2020 IESP, which the parent asserted consisted of five hours per week of SETSS; two 30-minute sessions per week of speech-language therapy ; three 30-minute sessions per week of OT; and two 30-minute sessions per week of counseling (id.).

The district executed a pendency implementation form on November 15, 2023 agreeing that the basis for the student's pendency was the November 30, 2020 IESP and further indicating that the student's weekly services under pendency would be five 60-minute sessions of direct SETSS, two 30-minute sessions of individual speech-language therapy, one 30-minute session of group counseling, one 30-minute session of individual counseling, and three 30-minute sessions of individual OT (Nov. 15, 2023 Pendency Implementation Form).

The parties appeared at a prehearing conference on December 13, 2023, at which time the parent's advocate requested a hearing on the issue of pendency and the matter was adjourned (Tr. pp. 1-5). Subsequently, the hearing on pendency commenced on December 14, 2023, concluding on January 29, 2024, after three days of hearings.[3] At the December 14, 2023 hearing counsel for

[1] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), a issue arising solely within this district that has been discussed in numerous State level review decisions (see e.g. Application of the Dep't of Educ., Appeal No. 20-125; Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056).

[2] The parent's lay advocate, who appeared at the pendency hearings on behalf of the parent, signed the request for review indicating she was affiliated with the law office which drafted the due process complaint notice for the parent in this matter (see Req. for Rev. at p. 7; Tr. pp. 1-17, 21-41; Parent Ex. A).

[3] The IHO decision indicates that the hearing was held on January 5, 2024; however, the transcripts reflect that the hearing on pendency took place over several days finally concluding on January 29, 2024 (Tr. pp. 6-41). Additional hearings were held on March 8, 2024 and March 28, 2024, prior to the IHO's issuance of the interim decision on pendency; however, the parent's advocate did not appear at those hearings and the substance of the

the district indicated that the district agreed to the parent's request for pendency as made in the due process complaint notice and referenced the November 15, 2023 pendency implementation form; however, the parent's lay advocate requested an order of pendency and the IHO allowed the pendency hearing to proceed because the parent did not yet have an order on pendency (Tr. pp. 9-11). After the November 2020 IESP was admitted into evidence, counsel for the district read the services recommended in the IESP into the hearing record and noted that they were the same as what the district agreed to on the pendency implementation form (Tr. p. 14). The parent's advocate appeared to agree with what was read into the hearing record (Tr. p. 15).[4, 5]

In an interim decision on pendency, dated March 28, 2024, the IHO granted the parent's request for a pendency order and found that the student's pendency program was based on the November 2020 IESP and the IHO further determined that the student's pendency program consisted of five periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group counseling, one 30-minute session per week of individual counseling, and three 30-minute sessions per week of individual OT (Interim IHO Decision at p. 4).[6] The IHO further noted that she "declined[d] to order the services at a specific rate" and ordered the district to provide the student with the identified pendency services for the entire period of this matter, retroactive to the filing of the due process complaint notice on November 13, 2023 (id.at pp. 4-5).

IV. Appeal for State-Level Review

The parent appeals. The parent requests modification of the IHO's order to include a provision that the district's pendency obligations are not capped at any rate. In its answer, the district seeks dismissal of the parent's appeal as having no merit. The parent further clarified her position in reply, wherein, she states she is seeking "pendency to be implemented by the [district] at whatever cost necessary" (Reply ¶ 5).

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

parties' dispute as to pendency was not addressed at those hearings (Tr. pp. 42-50). There was also a January 4, 2023 hearing date; however that may have been an error on the IHO's part as neither party appeared on that date and at the prior hearing date the IHO had adjourned the matter to January 5, 2023 (Tr. pp. 16, 18-19).

[4] During the hearing a typographical error in the due process complaint notice was discovered and the parties agreed to use the recommended services in the November 2020 IESP as the basis for the pendency order (Tr. pp. 14-15).

[5] At the January 29, 2024 hearing, the parties' were given the opportunity to submit a memorandum in support of their respective positions (Tr. pp. 37-39); however, the hearing record did not include a memorandum by either party and the district's certification of the hearing record specifically indicated that briefs were not submitted.

[6] The IHO mistakenly referred to the student's November 30, 2020 IESP as an IEP in her interim decision (compare Parent Ex. B at p. 1, with Interim IHO Decision at p. 3).

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]).[7] 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

[7] 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).

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

A. Pendency

As an initial matter, there is no disagreement between the parties as to the student's pendency services (compare Req for Rev. ¶ 1, with Answer ¶ 8; see Parent Ex. B at p. 10). The parties agree that the November 2020 IESP is the basis for the student's services during the pendency of this proceeding (id.). Consequently, neither party appeals from the IHO's interim decision on pendency to that extent that it directs the district "to provide" services consistent with the November 2020 IESP for the pendency of this matter (Interim IHO Decision at pp. 4-5).

After review of the parties arguments on appeal, there was no further directive required by the IHO as the school district is required to implement the pendency services, as detailed in the IHO's decision (T.M., 752 F.3d at 171; IHO Decision pp.4-5).

Initially, the present appeal appears to be an attempt by the parent to dictate the manner in which the district implements the pendency program before the district has been given the opportunity to do so. The issue is not properly before this tribunal, as the IHO has only addressed the student's educational placement during pendency and not implementation of that program (see Interim IHO Decision). Additionally, the parent has explicitly stated on appeal that she is not seeking "an order for any specific provider or providers to implement pendency" and that she recognizes "any adjudication of services provided or not provided under pendency would be adjudicated in a full hearing" (Reply at ¶ 2).

To the extent the parent is attempting to direct the manner in which the district implements pendency, the Second Circuit has held that the district has "preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program" and it is up to the district and not the parent to decide how a student's pendency program is implemented, provided that the district does so in good faith (Ventura de Paulino, 959 F.3d at 534; see T.M., 752 F.3d at 171). The evidence in the hearing record does not support the parent's position that the pendency order is deficient as the parties agree on the student's pendency program and the hearing record does not include evidence of bad faith. Therefore, the parent has not stated a colorable issue of law or fact for which relief can be awarded (see E. Lyme Bd. of Educ., 440 F3d. at 456 [parents are only entitled relief for services actually obtained]).

Furthermore, there is no indication in the hearing record showing that the district has refused to pay for any services owed under pendency or that the student was at risk of losing her 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]). At the same time, when the district has failed to implement pendency with respect to a pendency implementation agreement or contract, parents have not been shy about seeking enforcement in a court of competent jurisdiction when the district has delayed in meeting its agreed upon pendency obligations (M.F. v. New York City Dep't of Educ., 2024 WL 729208, at *2 [S.D.N.Y. Feb. 22, 2024]). Neither situation presents itself here.

Addressing the specific arguments raised by the parent, at the hearing, the parent's advocate argued that the district "d[id] not plan on implementing pendency services at a rate above 125 [dollars per hour]," further requesting that the IHO "order the [d]istrict not to attach a capped rate on pendency" (Tr. pp. 27-28). The IHO questioned whether she could put a rate on pendency and asked for the parent's advocate to provide case law for her position, which the advocate indicated she would submit (Tr. pp. 28-29). At the next hearing date, the parent's advocate submitted two SRO decisions, which she contended supported her position (Tr. pp. 35-39; Parent Exs. C; D). However, review of those decisions shows that in those matters, although the parents had requested a specific rate for pendency services, the district was instead ordered to deliver services under pendency and no rate was set (Parent Exs. C; D). In this matter, the IHO followed the same path as was followed in the matters the parent presented and directed the district to provide the student with the services she was due pursuant to pendency (see Interim IHO Decision).

As a final note, similar to one of the matters raised by the parent at the hearing, in this matter the parent has alleged in her due process complaint notice that the district has not implemented the student's educational programming for the 2023-24 school year; accordingly, if the parent's allegations are true, there would be reason for the parent to question whether the district could follow through on its obligation to deliver the same services through pendency. However, in the event that happens, the parent may seek compensatory education for any services missed during the pendency of the proceeding. 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 (E. Lyme, 790 F.3d at 456 [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]). As compensatory education is an equitable remedy, it may be appropriate to order the district to fund compensatory services to be delivered by private providers if necessary and take into account the rates for such services based upon evidence in the hearing record, but it was appropriate for the IHO to first require the district, as the regulated local educational agency, to provide the services rather than outsource the student's special education to nonpublic schools or other business entities. The anticipatory speculation of

the district's failure to implement pendency does not require the IHO to specify the student's pendency placement with alternative features of relief (i.e., by specifying that the district must fund services through private providers).

The parent's appeal is without merit and must be dismissed.

VII. Conclusion

Given the parties' agreement that the student's pendency program includes five periods per week of SETSS, two 30-minute sessions per week of speech-language therapy, one 30-minute session per week of group counseling, one 30-minute session per week of individual counseling, and three 30-minute sessions per week of individual OT sessions, and as the IHO directed the district to provide this program to the student during the pendency of this proceeding, there is no further relief that may be granted, the necessary inquiry is at an end and no further analysis of issues is required.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER