The University of the State of New York

The State Education Department
State Review Officer
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No. 24-378

Application of the BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF MIDDLETOWN for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Steven L. Banks, Esq.

Harter Secrest & Emery LLP, attorneys for respondent, by Kenneth W. Africano, 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 district) 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 respondent's (the parent's) son's pendency placement during a due process proceeding challenging the district's determination that the student's age rendered him ineligible for special education and related services for the 2024-25 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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible but is, in any event, unnecessary as the parties agree that the student's last implemented IEP was dated April 25, 2023, and the appeal is limited to pendency.

A. Due Process Complaint Notice

In a due process complaint notice dated July 25, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Due Process Compl. Not. at p. 2). Specifically, the parent asserted that the student had regressed during the COVID-19 pandemic and she had requested that the CSE continue to recommend special education and related services for the student through the end of the school year in which he turned 22 years old (id.). The parent further contended that she disagreed with the CSE's determination that the student had aged out of eligibility for special education services on June 21, 2024 (id.). As relief, the parent requested that the student "remain in school" through the end of the 2024-25 school year (id. at p. 3).

The district submitted a due process response wherein the district asserted that in accordance with State law, the student's entitlement to a free appropriate public education (FAPE) ended at the conclusion of the 2023-24 school year during which the student turned 21 years old.

B. Impartial Hearing Officer Decision

On August 13, 2024, the parent requested an order on pendency and submitted a motion with exhibits on August 16, 2024 (Interim IHO Decision at p. 1; see Tr. pp. 4-5).[1] The district filed a memorandum in opposition to the parent's motion for a pendency order on August 22, 2024 (Mem. in Opp'n to Mot. for Pendency at p. 5).[2] The parties convened on August 27, 2024, for a hearing on pendency (Tr. pp. 1-28).[3] Both parties gave arguments in support of their respective positions on pendency (Tr. pp. 5-22). The IHO stated that she had read the parties' motion papers and she then discussed why the district's motion to dismiss should be considered separately from the parent's motion for pendency (Tr. pp. 22-25). The IHO further stated that she was going to "rule that pendency should be in place for the duration of th[e] hearing" and she would put her decision in writing (Tr. pp 25-26).

In an interim decision on pendency dated August 29, 2024, the IHO found that pendency consisted of those services asserted by the parent in her motion papers, which were based on the last agreed upon IEP dated April 25, 2023 (Interim IHO Decision at pp. 2, 4). The IHO considered the district's argument that the student was not entitled to pendency because he had aged out of eligibility for special education, and found that the student's eligibility was the subject of the parent's due process complaint notice (id. at p. 4). The IHO further found that the district's

[1] The parent's memorandum in support of motion for pendency order was not dated.

[2] The district's memorandum was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Mem. in Opp'n to Mot. for Pendency at pp. 1-5).

[3] No documentary evidence was offered or admitted into evidence during the August 27, 2024 pendency hearing. The parent's motion papers included an undated memorandum in support of her motion for a pendency order, and four exhibits consisting of an April 11, 2024 Student Exit Summary (Ex. A at pp. 6-14), an August 4, 2023 notice of Board of Education review for special education and an April 25, 2023 IEP (Ex. B at pp. 16-33), a 2024-25 school year calendar (Ex. C at p. 35), and a June 21, 2024 prior written notice indicating that the student would age out in June 2024 and receive a Skills and Achievement Commencement Credential (Ex. D at pp. 37-38).

arguments were "more appropriate in a motion to dismiss (which [wa]s forthcoming) or w[ould] be litigated in a hearing" (id.). The IHO also noted that one of the cases cited by the district on eligibility, "still provided the [s]tudent with pendency at the last placement, until the matter was ultimately dismissed" (id.; see Tobuck v. Banks, 2024 WL 1349693, at *4 [S.D.N.Y. Mar. 29, 2024]). The IHO then determined that the student was "still entitled to pendency while th[e] issue [wa]s litigated," which consisted of a 6:1+3.5 special class at the Center for Discovery (Interim IHO Decision at pp. 4, 5).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in granting a pendency order for the student who was 21 years old, and therefore no longer entitled to receive services from the district or other benefits provided for under the IDEA and Article 89 of the Education Law. The district further argues that the IHO erred in granting the student pendency and only determining the identification of the student's then-current educational placement without considering the student's age or lack of entitlement to a FAPE. As relief, the district seeks reversal of the IHO's interim decision on pendency.

In an answer, the parent responds to the district's claims with general denials.[4]

In a reply to the parent's answer, the district requested that the answer not be considered for failure to comply with the practice regulations. The district further objected to the parent's additional evidence annexed to her memorandum of law.[5]

[4] The parent mainly responded to the district's arguments related to the merits of the parent's underlying claims. The parent also attached the IHO's September 19, 2024 order denying the district's motion to dismiss as an exhibit to the answer. The parent also filed a memorandum of law in opposition to the school district's appeal from the pendency order which was 13 pages in length and included an additional 84-page exhibit. State regulation provides that "the request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length; the memorandum of law in support of a request for review, answer, or answer with cross-appeal shall not exceed 30 pages in length," and furthermore that "[t]he memorandum of law shall include a table of contents" (8 NYCRR 279.8[b], [d]). There is publicly available guidance published by the Office of State Review that assists parties in complying with Part 279 that reiterates the requirements of the regulations (https://www.sro.nysed.gov/book/overview-part-279-revised-effective-january-1-2017). After filing the answer with the Office of State Review on September 30, 2024, the parent subsequently filed a verification and affidavit of service on October 8, 2024.

[5] By letter dated October 8, 2024 and filed with the Office of State Review, the parent submitted a verification and requested that it be accepted. In addition, the parent noted the district's objections to her additional evidence and stated that "[t]wo of those documents should have been included in the record submitted with the appeal," without identifying the two documents. The parent further asserted that her additional evidence should be considered for "good cause" shown. However, good cause is not the standard for consideration of additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal

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]).[6] 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

No. 04-068). Moreover, there is no provision in the practice regulations that permits a party to serve and file an untimely verification in an attempt to rectify a failure to properly verify the pleading in the first instance, and the parent is cautioned that future noncompliance with the practice regulations could result in the rejection of a pleading. Moreover, as noted above, the parent's additional evidence relates to the merits of the parent's claims, which are not properly before me on an appeal from an interim order on pendency. It appears that the IHO denied the district's motion to dismiss, thus the parent can pursue properly admitting these documents as evidence in the impartial hearing before the IHO.

[6] 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).

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

Upon careful review of the proceedings, transcript and motion practice before the IHO, I find that in a well-reasoned decision, the IHO correctly determined that the student was entitled to pendency.

Although the district argued that the student's right to a FAPE was inextricably linked to his right to pendency, it is well-settled that a student is entitled to remain in his or her stay-put placement during the pendency of a proceeding, this statutory protection is similar to preliminary injunctive relief to protect the student while the proceedings are pending and is distinct from the ultimate relief available to a parent through the due process proceedings (20 U.S.C. § 1415 [j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Thus, the IHO properly determined that the student's right to pendency should be considered separately from the district's motion to dismiss (Interim IHO Decision at pp. 4-5; see Tr. pp. 22-26).

The IHO correctly set forth that the ultimate issue in the underlying matter was whether or not the student was entitled to receive special education and related services until he turns 22 years old. The Second Circuit has held that Connecticut's state-administered, publicly funded adult education programs constituted "public education" under the IDEA, and thus, ending an entitlement to a FAPE for individuals who were eligible for special education and between the ages of 21 and 22 violated the IDEA (A.R., 5 F.4th at 163-67). This holding has yet to be extended to New York. Although a State court has distinguished New York's education law from Connecticut's law (see Katonah-Lewisboro Union Free Sch. Dist. v. New York State Educ. Dep't,

83 Misc.3d 529, 532-33 [Sup. Ct. Albany County 2024]), this State also funds and administers adult education programs in a manner similar to those in Connecticut (see, e.g., Educ. Law §§ 3602[11]; 4604; 8 NYCRR 100.7; 157.1; 164.2; see also Office of Counsel's Formal Opinion No. 242 [July 2023], available at https://www.counsel.nysed.gov/sites/counsel/files/242.pdf). In a letter dated June 27, 2024, and addressed to parents of students with disabilities, NYSED's Office of Special Education advised parents of the formal opinion of NYSED's Counsel and of the decision in the Katonah-Lewisboro case. The Office of Special Education further advised parents that NYSED was appealing the decision and that it had no effect on the opinion of Counsel. Thus, it remains the position of NYSED that "federal law requires districts in New York State to provide special education and related services to resident students with disabilities until the day before the student's 22nd birthday" (see "Provision of Special Education Programs and Related Services to Students with Disabilities Under the Age of 22," at p. 1, Office of Special Educ. [June 2024]).

According to the parties' motion papers, by prior written notice dated June 21, 2024, the district notified the parent that the student would age out of the program in June 2024 and graduate with a Skills and Achievement Commencement Credential (Mot. in Supp. of Pendency Order Ex. D at p. 1). The parent disagreed with the district's action and filed a due process complaint notice on July 25, 2024. There does not appear to be a dispute that the last IEP implemented for the student was the April 25, 2023. In addition, the district almost exclusively relies solely on State law and cases that predate A.R. in its arguments against pendency. With regard to the only case cited that post-dated A.R., the IHO correctly noted that the student in that matter was entitled to pendency (Tobuck, 2024 WL 1349693, at *4 [adopting the SRO's holding that the student "was not entitled to any further relief under the IDEA except pursuant to pendency"]). Lastly, the district does not grapple at all with the position stated by NYSED. Based on the foregoing, there is no basis to disturb the IHO's interim decision on pendency.

VII. Conclusion

In summary, the student is entitled to pendency from the date of the filing of the due process complaint notice through his 22nd birthday or the length of the proceedings, whichever occurs first.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 30, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER