The University of the State of New York

The State Education Department
State Review Officer
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No. 24-437

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, Esq.

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 from the decision of an impartial hearing officer (IHO) issued after remand that the parent's son's pendency required the respondent (the district) to reimburse the transportation costs only for the days the student attended the International Academy for the Brain (iBrain) for the 2022-23 school year. The appeal must be dismissed.

II. Facts and Procedural History

The student in this matter has been the subject of prior impartial hearings and administrative appeals, related to the 2017-18, 2018-19, 2019-20, 2020-21, and 2021-22 school years (see Application of a Student with a Disability Appeal No. 22-064; Application of the Dep't of Educ., Appeal No. 21-079; Application of the Dep't of Educ., Appeal No. 20-041; Application of a Student with a Disability, Appeal No. 20-038). The student's family also joined with 17 other families of children at iBrain and commenced an action in the United States District Court Southern District of New York seeking enforcement of administrative orders as they related to the students' respective pendency placements and, as further described below, the District Court remanded matter regarding this student to an IHO for further proceedings (Donahue et al. v. Banks,

2023 WL 6386014 [S.D.N.Y. September 30, 2023]; see IHO Ex. VII). This State-level appeal arises from an IHO's decision issued upon remand. The detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in Application of a Student with a Disability, Appeal No. 23-103, which addressed the parties dispute over the 2022-23 school year. Accordingly, the parties' familiarity with this matter is presumed, and given that the remand was limited to question of whether the September 26, 2022 pendency order's direction that the district shall fund the student's transportation costs restricted the district's obligation only to the days that the student physically attended iBrain for the 2022-23 school year, the student's educational history and the procedural history of this matter will not be recited here in detail except as relevant to the instant appeal.[1]

Briefly, a March 17, 2022 CSE found the student continued to be eligible for special education as a student with a traumatic brain injury and proposed public programming in a March 2022 IEP, but the parent rejected the IEP and unilaterally placed the student at iBrain for the 2022-23 school year (see Dist. Ex. 1 at pp. 1, 2, 60; Parent Ex. C).[2] Regarding special education transportation, on June 16, 2022, the parent executed a "School Transportation Annual Service Agreement" (transportation agreement) with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the transportation of the student to and from the student's home and iBrain for the entire 2022-23 school year (Parent Ex. D).

In a due process complaint notice dated July 6, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2022-23 school year (Parent Ex. A). Among other relief, the parent sought an order directing the district to directly pay the costs of the student's tuition at iBrain, related services, and special transportation services (id.).

A. September 26, 2022 Interim Decision and Subsequent Proceedings

In an interim decision dated September 26, 2022, an IHO (IHO I) directed that "pending resolution… and retroactive to July 6, 2022… the [district] shall fund [s]tudent's… door-to-door special transportation to and from [s]tudent's home and iBrain…" (IHO Ex. VIII at p. 2). As described above, the Parent joined with 17 other iBrain families several weeks later in October 2022 to commence an action to enforce the student's pendency (Donahue, 2023 WL 6386014; see IHO Ex. VII). An impartial hearing convened on October 11, 2022 and concluded on February 22, 2023 after seven days of proceedings (Tr. pp. 97-349). In a decision dated May 3, 2023, IHO I determined that the district failed to meet its burden that it offered the student a FAPE for the

[1] The parties also initiated due process litigation regarding the 2023-24 school year (Application of a Student with a Disability, Appeal No. 23-224).

[2] For reasons that are unclear, the district's separately identified exhibits were re-marked upon remand and merged into a single IHO Exhibit I, and the parent's exhibits were similarly re-marked and merged into a single IHO Exhibit II, but in this decision I have referenced the nearly 30 separate documents and audio exhibits as they were originally separately marked as parent and district exhibits as entered into evidence during the impartial hearing that was conducted over the course of 2022 and 2023. Upon remand, two memoranda of law were added to the administrative hearing record, and while they were marked for administrative purposes as District Exhibit 1 and Parent Exhibit A, no additional evidentiary documents were otherwise marked as district or parent exhibits. When necessary, I will reference these two documents as "Remand Exhibit 1" and "Remand Exhibit A."

2023 school year (IHO Ex. VI at p. 5). Among other things, IHO I ordered the district to fund the student's costs at iBrain including tuition, an individual paraprofessional and transportation costs "limited to when the student used such transportation during the school year" (id.).

The parent thereafter appealed for State-level review and the district cross-appealed the final May 2023 decision before the Office of State Review (OSR) (Application of a Student with a Disability, Appeal No. 23-103; see IHO Ex. VI at p. 5). The parties did not challenge the IHO's September 2022 interim decision or advance any arguments regarding pendency to the SRO. On August 21, 2023, the SRO reversed that portion of IHO I's decision finding that the district failed to offer the student a FAPE for the 2022-23 school year along with reversing the order directing the district to fund the student's unilateral placement at iBrain including tuition, an individual paraprofessional and transportation costs (IHO Ex. VI at p. 24). The parent sought judicial review of the SRO's August 21, 2023 decision in the United States District Court for the Southern District of New York; however, that action was voluntarily dismissed with prejudice in July 2024 (Answer Ex. 1).

On September 30, 2023, the District Court in the Donahue action found that the IHO I's interim decision dated September 26, 2022 was "unclear as to whether [it] require[d] the DOE to reimburse transportation costs only for days attended or for the full transportation contract regardless of actual attendance" and noted as other courts have, that "IHOs are plainly in the best position to interpret their own orders," and if unclear to the IHO I that "further factfinding may be warranted" (Donahue, 2023 WL 6386014, at *12). Accordingly, the District Court remanded the issue to the IHO I as she was the IHO who issued the September 26, 2022 interim decision (id.).

III. Remanded IHO Proceeding

For reasons unclear, a different IHO with the Office of Administrative Trials and Hearings (IHO II) was appointed upon remand to address the concerns raised by District Court. On August 13, 2024, the parties appeared before IHO II to argue the remand of the case (August 13, 2024 Tr. at pp. 1-19). Neither party offered addition documentary evidence or testimony, and provided only briefs to IHO II (IHO Decision at p. 5. On August 27, 2024, IHO II issued a decision rejecting the parent's arguments as being more relevant to a merits determination as opposed IHO I's September 2022 interim decision that addressed the district's pendency obligations (IHO Decision at p. 4) IHO II held that the September 2022 pendency order did not obligate the district to fund the contract between Sisters Travel and the parent, but only required the district to fund the student's transportation services for days the student attended iBrain (IHO Decision at p. 5).

IV. 2024 Appeal for State-Level Review

The parent appeals IHO II's August 27, 2024 decision, arguing that IHO II erred in his determination, that IHO II's decision should be reversed, and the district should be ordered to fund transportation costs pursuant to the June 2022 transportation agreement. In an answer, the district argues that the parent testified that the student was educated remotely by iBrain for the 2022-23 school year, that the parent failed to exhaust the matter by challenging the September 2022 interim decision in the first instance and that the parent is time-barred from doing so in the instant appeal, and requested that IHO II's decision be affirmed so that the district only be ordered to fund the student's pendency transportation services for the days the student physically attended iBrain. The

parent submitted a reply, asserting that IHO II's decision should be reversed because it is not based on the evidence in the hearing record.

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]).[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

[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).

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 this case, IHO II found that the district was obligated to fund only those transportation costs related to the days that the student attended iBrain based off of the September 26, 2022 order on pendency (IHO Decision at p. 4, see IHO Ex. VIII). IHO II determined that the September 2022 order on pendency "maintained the educational status quo by ordering the [district] to fund door-to-door special transportation, not fund the transportation contract entered into by the parent" (IHO Decision at p. 4).

As for the student's pendency placement, greater clarification is found the administrative due process hearing records for the student over the last several years. IHO I's September 2022 interim decision specified that the parties had agreed that the "legal basis for pendency for [the student] is the Order of Pendency on Consent issued by IHO John Farago in IHO Case No. 210742 on November 22, 2021" (IHO Ex. VIII at p. 1). The September 2022 interim decision further explains that IHO Farago's November 2021 "Order of Pendency is based on the un-appealed Findings of Fact and Decision ("FOFD") in IHO Case No. 196301, affirmed by SRO Decision 21-079…" (id.). Regarding the student's transportation to and from iBrain, SRO Decision 21-079 noted that "in discussing the transportation and related services, the IHO specifically noted that the parent was obligated 'to pay for all related services,' but indicated that because transportation was not utilized on a daily basis, payment was 'granted to the extent actually utilized by the student'" (see Application of the Dep't of Educ., Appeal No. 21-079).[4]

Application of the Dep't of Educ., Appeal No. 21-079 addressed the parties' challenges to IHO Harriet Gewirtz's February 7, 2021 final determination on the merits for the 2020-21 school

[4] During the impartial hearing on the merits held on February 22, 2023, the parent testified that the student has been homeschooled since the COVID 19 pandemic and has not physically attended iBrain since "COVID started" (Tr. p. 272).

year. IHO Gewirtz ordered the district "to provide payment for transportation for the student for 2020-2021 school year upon proof that the service was provided by issuing payment directly to iBrain for any balance due within two weeks of the submission of an affidavit setting forth the amount due" (February 7, 2021 IHO Decision at p. 10). The IHO further clarified in the February 2021 decision that the record reflected that "transportation to [iBrain] was not utilized on a daily basis therefore payment for transportation is granted to the extent actually utilized by the student" (id. at p. 8 [emphasis added]). For convenience, a duplicate copy of IHO Gewirtz's final determination, which was submitted to the Office of State Review during the State-level review in Application of the Dep't of Educ., Appeal No. 21-079, has been added to the administrative record in this proceeding.

Thus, the administrative hearing records for the student conclusively show that the IHO I's September 2022 interim decision on pendency was rooted in a February 2021 final decision on the merits which held that the student was not physically attending iBrain on a regular basis and explicitly directed the district to pay for the transportation only on those days that transportation was actually utilized by the student, and that IHO determination remained intact upon appeal for State-level review. Accordingly, I find no reason to disturb IHO II's findings that the September 2022 interim decision on pendency obligated the district to fund the student's transportation costs only on those days the student physically attended iBrain.

VII. Conclusion

Having determined that there is no reason to disturb IHO II's determination that the September 26, 2022 interim decision regarding pendency, as clarified herein, required the district to fund the student's transportation costs to and from iBrain only on those days that the student physically attended iBrain, the necessary inquiry and clarification as directed by the District Court is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 19, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER