The University of the State of New York

The State Education Department
State Review Officer
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No. 24-455

Application of a STUDENT WITH A DISABILITY, by his 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 Group, Ltd., attorneys for petitioners, by Peter G. Albert, 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. 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), which declined to issue an updated pendency order 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

The student in this case has been the subject of five prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 24-359; Application of a Student with a Disability, Appeal No. 24-187; Application of the Dep't of Educ., Appeal No. 24-065; Application of a Student with a Disability, Appeal No. 22-062; Application of a Student with a Disability, Appeal No. 21-156). Accordingly, the parties' familiarity with the student's educational history is presumed.

Following the last administrative appeal, in a decision dated September 20, 2024, the matter related to the 2023-24 school year was remanded for further proceedings regarding the

appropriateness of the parents' unilateral placement of the student at iBrain and equitable considerations (Application of a Student with a Disability, Appeal No. 24-359).

As noted by the IHO, the parents filed three due process complaint notices within a few months of each other regarding the 2022-23 and 2023-24 school years, which the IHO declined to consolidate (see IHO Order on Consolidation).

A. April 21, 2023 Due Process Complaint Notice

On April 20, 2023, the parents filed a due process complaint notice alleging that the district denied a FAPE to the student for a portion of the 2022-23 school year and the 2023-24 school year (IHO Ex. VIII at pp. 2-3).[1] In a decision dated June 23, 2023, the IHO granted the district's motion to dismiss the parents' 2023-24 school year claim without prejudice because it rested on "contingent future events" and was therefore speculative in nature (IHO Ex. IV at p. 4). In a July 12, 2023 interim decision, the IHO held that the student's pendency placement, for the proceeding involving the April 20, 2023 due process complaint notice, was effective as of April 21, 2023, consisted of the student's continued placement at iBrain with the district to provide appropriate transportation (IHO Ex. V at p. 6).

B. June 24, 2023 Due Process Complaint Notice

In a due process complaint notice dated June 24, 2023, the parents alleged that the student was denied a FAPE for the 2022-23 school year (IHO Ex. VII).

C. July 5, 2023 Due Process Complaint Notice

In a due process complaint notice dated July 5, 2023, the parents alleged that the district denied the student a FAPE for the 2023-24 school year (see Parent Ex. A at pp. 1-2). The parents contended that the district's February 2023 IEP was not appropriate as the student required a small, structured classroom with 1:1 instruction, plus a full-time 1:1 paraprofessional and a full-time 1:1 nurse (id. at p. 3). As part of the due process complaint notice, the parents also requested pendency and asserted that the student's pendency entitlements included direct payment of tuition and costs for related services at iBrain plus direct payment for special transportation services based on a prior IHO's decision dated April 4, 2022 (id. at p. 2).

D. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 15, 2023 (Tr. pp. 1-31). During the initial hearing, parents' counsel argued that the student's placement for pendency was based on a June 4, 2021 IHO Decision (Tr. pp. 10-11). The district's counsel responded that the district was objecting to pendency, that he needed to

[1] The April 20, 2023 due process complaint notice covers the latter portion of the 2022-23 school year following the student's placement at iBrain on April 17, 2023 (IHO Ex. VIII at p. 4). The parents filed a separate due process complaint notice dated June 24, 2023, for the earlier portion of the 2022-23 school year, in which the parents sought direct funding and reimbursement for the costs of the student's placement at the International Academy of Hope (iHope) from July 11, 2022 through March 31, 2023 (IHO Ex. VII at pp. 1, 3).

review the decision to which the parents' counsel was referring, and that he was requesting a hearing on pendency (Tr. pp. 11-12).

A pre-hearing conference summary and order dated August 17, 2023 stated that the parents were requesting pendency, the hearing on the merits would occur on September 14, 2023, and the pendency hearing would be "immediately before the hearing on the merits" (IHO Ex. I at pp. 1-2).

Proceedings continued on five additional dates between October 11, 2023 and March 27, 2024 (see Tr. pp. 32-343). At the October 11, 2023 proceeding, the IHO addressed the parents' request for an order on pendency and "informed the [p]arent's counsel that the decision for the previous case was not issued and therefore pendency [wa]s still in effect, and pendency [wa]s an automatic right" (Tr. p. 33).

On July 1, 2024, an SRO issued a decision in regard to the parents' due process complaint notice filed on April 20, 2023 directing that the district fully fund the student's tuition, 1:1 nursing services, and special transportation from April 17, 2023 until June 23, 2023 and that funding for special transportation costs from June 24, 2023 to June 30, 2023 was excluded from the award (Application of a Student with a Disability, Appeal No. 24-187 at pp. 4, 11-12).

In a decision dated July 15, 2024 regarding the July 5, 2023 due process complaint notice, the IHO found that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 6, 11). The IHO did not address pendency in that decision (id.).

The IHO's July 15, 2024 decision was appealed and, in a decision dated September 20, 2024, an SRO held that the student was denied a FAPE because the February 2023 IEP indicated that the student needed a limited class size of no more than six students, but included a recommendation for placement in a 12:1+(3:1) special class; the SRO then remanded the matter to the IHO for a determination as to whether the unilateral placement of the student at iBrain was appropriate and whether equitable considerations weighed in favor of granting tuition funding and related expenses (see Application of a Student with a Disability, Appeal No. 24-359).

As of the date of this decision, the matter remains on remand and has not yet been decided.

In an e-mail dated September 26, 2024, the parents contacted the IHO in light of the SRO's September 20, 2024 decision and requested a remand hearing at the IHO's earliest availability; the parents also requested a pendency order based on the student's last agreed-upon placement, which the parents' counsel maintained was based on the SRO decision in Application of a Student with a Disability, Appeal No. 24-187 (SRO Ex. A at pp. 4-5).[2] The IHO responded with proposed dates for a conference and informed the parties that the remand hearing would be limited to those issues stated in the September 20, 2024 SRO decision and that she would not hold a pendency hearing (id. at pp. 3-4). Parents' counsel followed up with an e-mail on October 7, 2024 wherein counsel for the parents renewed their request for an updated pendency order (id. at pp. 1-2). Counsel for the parents argued that there was no controversy as to pendency and a hearing was not necessary

[2] After a request for email correspondence referred to in the parents' request for review in this matter, the district submitted a series of emails between counsel for both parties and the IHO between September 26, 2024 and October 7, 2024; these emails have been added to the hearing record and will be referred to as SRO Exhibit A (SRO Ex. A at pp. 1-6).

as the district did not deny the student's right to a pendency order, nor did the district object to a pendency order based on the September 20, 2024 SRO decision (id.). The IHO responded in an e-mail dated October 7, 2024 again indicating that she would only be addressing the issues as stated in the SRO decision (id. at p. 1).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in failing to order the district to implement pendency services for the student based on the SRO decision in Application of a Student with a Disability, Appeal No. 24-187 and request that the district be ordered to fund tuition, nursing, and special transportation in accordance with the respective contracts between the parents and the providers. Attached to the request for review is a proposed order of pendency which requests that pendency be made effective as of July 5, 2023 and remain in force and effect until the parents' withdrawal of the case or a final decision on the merits is rendered.

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

[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).

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 - Pendency

As noted above, the parents seek a pendency order, objecting to the IHO's October 7, 2024 email declining to address pendency at that time.

Initially, the IHO first addressed pendency in this matter at the October 11, 2023 hearing, at which time the IHO noted that the student was receiving pendency as part of separate proceeding that was ongoing at that time (Tr. p. 33). Review of the hearing record shows that on July 12, 2023, the IHO had issued a pendency decision in the proceeding involving the April 20, 2023 due process complaint notice (IHO Ex. V).[4] However, that proceeding was ultimately resolved by the issuance of an SRO decision on July 1, 2024 (Application of a Student with a Disability, Appeal No. 24-187).

[4] The IHO incorrectly referred to the due process complaint notice in that proceeding as being filed on April 21, 2023 while it was filed on April 20, 2023 (IHO Exs. V; VIII).

According to the parents, around July 5, 2024, counsel for the parents requested that the IHO issue an order on pendency based on the issuance of the July 1, 2024 SRO decision (Req. for Rev. ¶30). However, at that point in time, the IHO had already issued a final decision in this matter on June 15, 2024 and that decision was then appealed resulting in the September 20, 2024 SRO decision remanding the matter back to the IHO (Application of a Student with A Disability, Appeal No. 24-359). The parents then renewed their request for an order on pendency from the IHO; however, in their request the parents explicitly noted that "there [wa]s no controversy and there [wa]s no need for a hearing" (SRO Ex. A at p. 1).

Here, the hearing record indicates that as of the issuance of the July 1, 2024 SRO decision, the basis for pendency is the July 1, 2024 SRO decision and there is no indication in the hearing record that the district is unwilling to implement pendency pursuant to that decision as of that date. As there was no dispute as to what pendency consisted of, the IHO was correct to not issue an interim order on pendency as it would have been a waste of limited judicial resources. The parent points to no need for the IHO to issue an order further compelling the district to fund the student's pendency placement other than it appears that she simply wanted the student's pendency placement officially reduced to an order within the context of the due process proceeding; however, an order by the IHO under these circumstances was unnecessary because the automatic injunction pursuant to the statute was in place and the district was meeting its obligations.

There is no indication in the hearing record by the parent that the district was refusing to pay for pendency 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, 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, the District Court recently told the parent's attorneys that parents are not entitled to a pendency determination when pendency is not contested by the district and that they are not entitled to a specific timeline during which the district must make a pendency determination (Grullon v. Banks, 2023 WL 6929542 at *3-5 [S.D.N.Y. October 19, 2023]). The Court in that case specifically found that in a case in which the district had agreed iBrain was the student's pendency placement, the issue was moot because the relief sought was already provided (id. at *3-4). Further, the District Court also held that even when pendency payments were outstanding, a claim was not ripe when there was no evidence that the district was contesting the pendency placement or that the student would lose the placement at iBrain and, as such, a claim is not ripe unless and until the district violates its legal obligation (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 render a pendency order and the parent is not entitled to an order on pendency in this case at this time. Should the district

contest the student's pendency placement or fail to meet its pendency obligations, the parents may address this issue in the context of the remanded proceedings before the IHO or in another appropriate forum.

VII. Conclusion

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

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

CAROL H. HAUGE
STATE REVIEW OFFICER