The University of the State of New York

The State Education Department
State Review Officer
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No. 24-513

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

The Law Offices of Anton G. Cohen, P.C., attorneys for respondents by Anton G. Cohen, 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 respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2022-23, 2023-24 and 2024-25 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, on May 19, 2023, a CSE convened, found the student eligible for special education as a student with autism, and developed an IEP for the extended 2023-24 school year (see Parent Ex. B).[1] The CSE recommended the following placement and services: placement in an 8:1+1 special class in a district specialized school; one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; three 30-minute sessions per week of individual

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

speech-language therapy; a behavior management plan; and special transportation (id. at pp. 9-10, 12). The CSE recommended that the student receive 12-month services with the same special education programming and services that were recommended during the 10-month portion of the school year (id. at pp. 10, 12).

On or about February 29, 2024, the parents received a prior written notice and a school location letter from the district that identified a specific public high school in Brooklyn at which the student's IEP would be implemented (the Brooklyn H.S.) (see Parent Ex. C). In a letter to the parent and principal of the Brooklyn H.S. dated April 8, 2024, the district advised that the student had been enrolled in the Brooklyn H.S., the student required special education services, and there was space available at the school (see Parent Ex. D). The parents accepted the recommended program and placement, and the student attended the 8:1+1 special class at the Brooklyn H.S. from April 8, 2024 through the end of the 2023-24 school year (Tr. pp. 12-13; Parent Ex A at p. 2).

Prior to the start of the 2024-25 school year, the district advised the parents that placement at the Brooklyn H.S. was no longer available as there were no available student spots (Tr. pp. 13-14; Parent Ex. A at p. 2).

In a due process complaint notice, dated September 17, 2024, the parents alleged that the district had failed to provide the student a FAPE for the 2022-23, 2023-24, and 2024-25 school years (Parent Ex. A at pp. 1-2). According to the parent, the CSE had recommended that the student be placed in a 12-month program in a State-approved nonpublic day school for the 2022-23 and 2023-24 school years but that the district had not effectuated the placement and the student had remained at home (Parent Ex. A at p. 2). In addition, the parents asserted that while the student had attended the Brooklyn H.S. for the conclusion of the 2023-24 school year, the parents were notified at the beginning of the 2024-25 school year that the location was no longer available (id. at p. 2). As the May 2023 IEP was implemented at the Brooklyn H.S., the parents asserted that it constituted the student's current educational placement (id. at p. 3). Accordingly, the parents requested an interim decision directing the district to place the student in the 8:1+1 special class in the Brooklyn H.S. (id. at p. 4).

An impartial hearing related to the student's pendency placement convened before the Office of Administrative Trials and Hearings (OATH) on September 30, 2024. In an interim decision dated October 2, 2024, the IHO determined that the student was entitled to pendency as a matter of law (IHO Interim Decision at p. 2). Turing to the placement of the student, the IHO held that the last agreed-upon educational placement for the student was his placement in the 8:1+1 special class at the Brooklyn H.S. (id. at p. 3). As such, the IHO ordered that during the pendency of the matter, the student be placed in the 8:1+1 special class at the Brooklyn H.S. and, retroactive to the filing of the due process complaint, the district was also obligated to fund the student's related services and provide special transportation (id. at p. 4).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in ordering the district to implement pendency specifically located at the Brooklyn H.S. The district asserts that it has offered to implement the student's pendency placement in an 8:1+1 special class in a district specialized school and that the proposed placement would not result in a fundamental change to the student's education programming (id. at p. 5). In an answer, the parents acknowledge that they have served

a late response to the district's request for review but allege that during this State-level appeal the district has failed to provide an alternative pendency placement that could satisfy the requirements of the IEP and that the late response should be excused. In a reply, the district asserts that the parents untimely answer should be rejected.

V. Discussion

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 T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the 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]). 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 (T.M., 752 F.3d at 170-71; Concerned Parents and 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 (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. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 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 [OSEP 2007]).

In this case, it is undisputed that the student is eligible for pendency and that the May 2023 IEP describes the type of programming that constitutes the student's pendency placement. Thus, the crux of this case is whether the district must deliver the services at the Brooklyn H.S. for the duration of the proceedings.

The Second Circuit has held that the term "educational placement" refers "only to the general type of educational program in which the child is placed," that is, "the classes, individualized attention and additional services a child will receive" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 536 [2d Cir. 2020], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). "Educational placement" means "the general type of educational program in which the child is placed" (Concerned Parents v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]), 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. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 [2d Cir. 2014]).[2]

Further, the selection of a location to provide a student special education and related services is an administrative decision within the discretion of the school district (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y, 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]).[3]

[2] Educational placement means "the general type of educational program in which the child is placed," not the bricks-and-mortar school location (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]).

[3] The stay-put provision "does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving" (Lee v. Banks and New York City Dep't of Educ., 2024 WL 1657908 at *2 [S.D.N.Y. April 17, 2024], quoting T.M., 752 F.3d at 171).

Based on the foregoing, the IHO erred in determining that the student's pendency placement must be implemented specifically at the Brooklyn H.S. as the student's assigned public school location, because the specific location of the services, for pendency purposes, rests in the discretion of the district despite the parents' desire for the student to remain at the Brooklyn H.S. During the impartial hearing, the parent testified that although she had been happy with having the student receive services at the Brooklyn H.S. during spring 2024, she was later notified that the school did not have a seat available for the next school year (Tr. p. 13). She further testified that she received a letter from the district sometime in September which assigned the student to a different school in Brooklyn but when she contacted that school, she was told that it only went up to the eighth grade (Tr. p. 14). During the pendency hearing, the parent's attorney argued that the district should be required to place the student at the Brooklyn H.S. as part of his pendency placement because he had done well there the prior spring, the school was near his home, and the district "should either open up an additional class, or [it] should seek a waiver to get additional student in the 8:1:1 class, but they can't just throw a kid out, given this is his last agreed-upon placement and also the least restrictive environment" (Tr. p. 9). While it is understandable that the parent would prefer that the district implement the student's pendency placement at the Brooklyn H.S. where, in her view, he had previously had a positive experience, the district is correct that its pendency obligation does not generally extend to providing a specific brick-and-mortar location. Accordingly, while the district is obligated to implement the student's pendency placement consisting of an 8:1+1 special class and related services in a district specialized school, it may do so at the brick-and-mortar location of its choice.

That being said, I am cognizant that, as of this appeal, the district there is doubt as to whether the district has identified a specialized school for the student for pendency purposes (Tr. pp. 13-14). After learning that a seat was unavailable at the Brooklyn H.S., the student was assigned to another school but, as older student, he may not have been eligible to attend that school because it provided educational services only through the eighth grade (id.). An email chain dated November 15, 2024, through November 20, 2024, provided by the district with its reply, shows that the parents assert through counsel that the most recent school site to which the student has been assigned may not have an 8:1+1 class available (the student is the ninth student) and may be unable to implement some of the student's related services (see SRO 2).[4] Accordingly, while the district is not obligated, as a matter of pendency, to implement the student's programming at a specific school site, its alleged failure to ensure that it has selected a specialized school has the space to receive the student and implement the student's stay-put placement during the pendency of the proceeding, is troubling, and the district is encouraged to confer with the parents forthwith and assign the student to a school location capable of implementing his pendency placement.

In addition in the event that any missed pendency services accrue as a result of the district's failure to implement the student's pendency placement, the parent may have a claim for compensatory education as remediation for any lapse in the provision of the student's pendency placement.

[4] It is not clear whether the district sought a variance from the State Education Department for the latest site.

VI. Conclusion

Based upon the foregoing, the IHO correctly determined that the student is entitled to pendency based on the May 2023 IEP a ; however, the decision must be modified to reverse that portion of the IHO's decision that ordered the district to implement the student's pendency at the Brooklyn H.S., a school site which the evidence indicates is unavailable to provide the services in accordance with the mandates.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision dated October 2, 2024 is modified by reversing that portion which directed the that the student's pendency placement be implemented specifically at the Brooklyn H.S.

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

JUSTYN P. BATES
STATE REVIEW OFFICER