The University of the State of New York

The State Education Department
State Review Officer
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No. 24-624

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:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioners, by Erik Paul Seidel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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) determining their son'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 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which ordered a specific tuition rate during pendency. The appeal must be sustained. The cross-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 student has previously been the subject of a State-level review related to the 2023-24 school year (Application of a Student with a Disability, Appeal No. 24-175). The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of this case and the IHO's decision will not be recited in detail. Briefly, a CSE convened on June 5, 2024, and found the student eligible for special education services as a student with multiple disabilities

(SRO Ex. A at p. 1; 51).[1, 2] The June 2024 CSE recommended an 8:1+1 special class placement at a district nonpublic day program and that the student receive 1:1 health paraprofessional services (id. at pp. 44-45). The June 2024 CSE also recommended four 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per month of parent counseling and training, five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of group speech-language therapy, and that the student receive a dynamic display speech generating device (SGD) as well as one 60-minute session per month of individual assistive technology services (id.).

On June 19, 2024, the parents signed an enrollment contract with the International Academy for the Brain (iBrain) for the student's attendance during the 2024-25 school year (Parent Ex. A-E at p. 6).[3] On June 15, 2024, the parents signed a contract with Sisters Travel and Transportation Services, LLC (Sisters) for the round-trip transportation of the student between his home and iBrain during the 2024-25 school year (Parent Ex. A-F at p. 7).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year on procedural and substantive grounds (see Parent Ex. A at pp.7-9). The parents alleged that the district failed to convene a CSE meeting for the 2024-25 school year, offer an appropriate school location for the 2024-25 school year, recommend or provide appropriate related services for 2024-25 school year, evaluate the student in all areas of suspected need, provide the parents with meaningful participation in the education process, recommend appropriate special education transportation services and accommodations, and consider alternative placement options at the June 2024 CSE meeting and instead engaged in impermissible predetermination (id. at pp. 7-9). The parents sought funding for the costs of the student's tuition at iBrain and transportation provided by Sisters as the student's pendency placement (id. at pp. 2, 10). As relief on the merits,

[1] With the request for review, the parents submit eleven documents as additional exhibits. These documents include: the corrected amended order on pendency for this matter; emails between parents' counsel and the IHO spanning dates between October 4, 2024 and November 20, 2024; emails between parents' counsel and the IHO spanning dates between December 12, 2024 and December 16, 2024; an order on pendency for the student dated March 1, 2024; Application of a Student with a Disability, Appeal No. 24-175; Application of a Student with a Disability, Appeal No. 23-271; and four orders on pendency from prior cases involving the student. The district submits one document as an additional exhibit, the student's June 2024 IEP. 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 No. 04-068). Here, the parents' proposed exhibits are not necessary to render a decision. The student's June 2024 IEP will be cited as "SRO Ex. A."

[2] The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] The Commissioner of Education has not approved iBrain as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

the parents also sought funding of the costs of the student's tuition and supplemental tuition to attend iBrain for the 12-month 2024-25 school year as well as funding for the costs of the student's special education transportation services pursuant to the parents' contract with Sisters (id. at p. 11). Additionally, the parents requested an order to compel the district to reevaluate the student and fund independent educational evaluations (id.).

The district filed a response to the due process complaint notice dated July 10, 2024, generally denying the allegations set forth in the due process complaint notice and asserting several defenses (Due Process Response).

On July 11, 2024, the district sent the parents a letter stating that the district's office of pupil transportation was prepared to transport the student to and from iBrain every school day in accordance with the student's June 2024 IEP at no cost to the parents, starting on July 1, 2024 (Dist. Ex. 1).

B. Impartial Hearing Officer Decision

After a prehearing conference on August 12, 2024, a pendency hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 21, 2024 (Tr. pp. 1-51). In an order on pendency dated December 12, 2024, the IHO found that the student's pendency placement arose out of Application of a Student with a Disability, Appeal No. 24-175, which awarded the parents full reimbursement for the student's tuition costs at iBrain and transportation costs from Sisters for the 2023-24 school year (IHO Decision at pp. 3-4).[4]

The IHO noted that the parents submitted a draft pendency order that required the district to fully reimburse the parents for the costs of the student's tuition and transportation for the 2024-25 school year pursuant to the parents' June 2024 enrollment contract with iBrain and June 2024 agreement with Sisters (IHO Decision at pp. 2-3). The IHO rejected the parents' position "that they can enter into a new contract for the new school year and bind the [district] to those provisions under a right to pendency[,]" finding that the parents do not have a right to the full payments that they sought until the matter is fully adjudicated (id. at p. 3). The IHO further explained that the costs of the student's iBrain tuition increased for the 2024-25 school year, but determined that the student "would receive the same general services at iBrain under pendency as he had during the 2023-2024 school year" so the increase in tuition was not a bar for the student's pendency (id. at p. 4). Accordingly, the IHO determined that the district must fund the student's "iBrain tuition on a pro rata basis during the pendency period, at the 2023-2024 rates" (id.). The IHO also found that the parents were not entitled to reimbursement under pendency for transportation costs beginning on July 11, 2024, because the district offered to provide the student with transportation and the parents had not availed themselves of the district's offer (id.). Therefore, the IHO determined that

[4] There are three variations of the order addressing pendency in the hearing record: an order on pendency dated December 12, 2024; an amended order on pendency dated December 20, 2024, and a corrected amended order on pendency dated December 23, 2024, the latter two of which address typographical errors and the IHO's denial of the parent's request reconsideration of the December 12, 2024 decision. For purposes of the appeal, the parents were required to timely serve a request for review upon the district as calculated from the IHO's interim decision dated December 12, 2024 and did so in this instance. For purposes of this decision, I will address the IHO's pendency determinations, corrected for typographical errors, and reference it as the "December 2024 interim decision."

the parents were entitled to reimbursement/direct funding under pendency for the costs of transportation "for school days from July 2, 2024, through July 10, 2024, on a pro rata basis, based on the 2023-2024 rates" (id.).

The IHO ordered the district to provide the student with transportation services of the same type found appropriate by the SRO in Application of a Student with a Disability, Appeal No. 24-175 during the pendency period; reimburse and directly fund the cost of transportation for the school days from July 2, 2024 through July 10, 2024, on a pro rata basis, based on the 2023-24 rates; and reimburse and directly fund the student's pendency placement at iBrain on a pro rata basis, based on the 2023-24 rates (id. at p. 5).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in ordering the district to provide transportation services to the student during the pendency period because the district offered to provide transportation on July 11, 2024 after the parents entered into a transportation contract with Sisters and after the start of the 2024-25 extended school year. The parents further argue that the IHO conflated the standards for determining pendency and a dispute on the merits regarding the appropriateness of an IEP, and that the district's offer to provide transportation goes more to the parties' underlying dispute than pendency. Additionally, the parents allege that the IHO erred in changing the student's pendency from the final, unappealed SRO decision in Application of a Student with a Disability, Appeal No. 24-175 by ordering the district to provide transportation to the student, rather than have the district fund the transportation services provided to the student by Sisters. Finally, the parents allege that the IHO erred in ordering pendency payments to be on a pro rata basis, based on the 2023-24 rates.

In its answer and cross-appeal, the district alleges that the IHO did not err in ordering the district to provide transportation services to the student because pendency does not dictate that the student must remain at a particular placement or receive services from a specific provider, it only guarantees the same general level and type of services that the student was receiving. The district asserts that the IHO correctly determined that from July 11, 2024 onward, the district was only required to make available and/or provide the student with transportation of the same type found appropriate by the prior SRO decision. According to the district, the parents contract with Sisters has no effect on how the district is required to implement pendency and the parents' rejection of the district's offer to provide transportation to the student goes more toward the underlying dispute between the parties than pendency. The district further asserts that the parents entered into a contract with Sisters at their own financial risk. The district cross-appeals the portion of the IHO's decision that found that the student's tuition to iBrain during pendency should be at the 2023-24 rate, arguing that the student's iBrain tuition should be funded without any specification as to the tuition rate.

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]).[5] 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. 46,709 [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

[5] 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).

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

The parties agree that pendency is comprised of the services listed in Application of a Student with a Disability, Appeal No. 24-175 (Tr. pp. 36-37, 43) and that the IHO erred in specifying a rate at which tuition to iBrain would be given during the pendency period. However, the parties disagree regarding the implementation of the pendency services in the IHO's order, particularly whether the district is permitted to decide how to implement the student's transportation services during the pendency period.

In Application of a Student with a Disability, Appeal No. 24-175, the SRO ordered the district to fully fund the costs of the student's tuition at iBrain and special transportation provided by Sisters for the 2023-24 school year, as set forth in the iBrain enrollment contract (Joint Ex. 1 at p. 28). In the prior SRO decision, the SRO addressed the district's arguments concerning excessive and unreasonable costs included in the iBrain and Sisters contracts, but the SRO found the hearing record was not sufficiently developed to support a reduction in tuition or transportation costs (id. at p. 27). In the present dispute, the parents' contract with iBrain specifies that the full tuition for the student for the 2024-25 school year is $314,826.60 (Parent Ex. A-E at p. 2). This is a $35,618.60 increase from the student's prior year's full tuition cost of $279,208.00 (compare Parent Ex. A-E at p. 2, with Dist. Ex. at p. 2). It is unclear from the contracts as to why there was such a significant increase to the cost of tuition, as the only difference between the 2023-24 and 2024-25 contracts is the increase in the price of tuition (compare Parent Ex. A-E, with Dist. Ex. 2). However, the IHO erred in ordering the district to fund the student's pendency at iBrain at the 2023-24 contract rate because by not ordering full funding of the student's pendency services, the IHO strayed from the student's then-current educational placement as set forth in Application of a Student with a Disability, Appeal No. 24-175, which ordered the district to "fully fund the cost of the student's tuition at iBrain" (Joint Ex. 1 at p. 28).

Additionally, the IHO erred in ordering the district to fund the student's tuition at iBrain on a pro rata basis. Given the payment scheme outlined in the iBrain contract, there is no effective means or argument to order payment on a "pro rata basis," given the terms of the pendency placement as set forth in Application of a Student with a Disability, Appeal No. 24-175.

Both the parents and the district cite to Ventura de Paulino throughout their arguments but come to diametrically opposed conclusions regarding the district's ability to decide how to implement pendency with respect to transportation. However, the parties' contrary positions with respect to Ventura de Paulino do not need to be resolved in this matter because the district failed to offer the student the requisite transportation services during the pendency period. I am not

persuaded by the district's argument on appeal that its July 11, 2024 letter to the parents demonstrates that the district "can and will implement pendency transportation to iBrain for the [2024-25] school year" (see Tr. pp. 28-29; Answer ¶ 7).[6] The district's July 11, 2024 letter did not reference pendency nor did it reference the parents' due process complaint notice dated July 2, 2024 (Dist. Ex. 1). Rather, the district's July 11, 2024 letter offered to provide transportation services to the student in accordance with the student's June 2024 IEP (id.). As the parents argue on appeal, the district's July 11, 2024 offer to provide transportation services in accordance with the student's June 2024 IEP goes more to the parties' underlying dispute regarding whether the district offered the student a FAPE than to pendency; thus, the record is devoid of any evidence that the district offered to provide the student with transportation services in accordance with the student's pendency program described in Application of a Student with a Disability, Appeal No. 24-175. Therefore, I will order the district to fund pendency services, beginning the date the due process complaint notice was filed on July 2, 2024 until the conclusion of the proceedings.

VII. Conclusion

Based upon the foregoing, the IHO correctly determined that the student is entitled to pendency based on Application of a Student with a Disability, Appeal No. 24-175; however, the decision must be modified to reverse those portions of the IHO's decision that ordered the district to provide the student's transportation services during the pendency period and directed the district to fund during the pendency period the iBrain and transportation services on a pro rata basis at the rates set forth in the parents' prior year's contracts.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's December 2024 interim decision is modified by reversing those portions that found that funding for tuition at iBrain should be provided on a "pro rata basis," that the district shall provide transportation services to the student for the pendency period, and that the district shall fund the costs of transportation from Sisters only through July 10, 2024 on a pro rata basis; and

IT IS FURTHER ORDERED that the district shall fund the total costs of the student's tuition at iBrain and the costs of the transportation services provided by Sisters as pendency.

Dated: **Albany, New York**
April 9, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[6] The district's reference to a June 24, 2024 IEP in its July 11, 2024 letter appears to be a typographical error as the student's IEP identifies a CSE meeting date of June 5, 2024 and an implementation date of June 21, 2024 (see Dist. Ex. 1; SRO Ex. A at pp. 1, 51). Regardless, in their request for review, the parents state that the district's July 11, 2024 letter claims that "it will implement transportation per the IEP that is being challenged" (Req. for Rev. at ¶ 43).