The University of the State of New York

The State Education Department
State Review Officer
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No. 17-058

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

Appearances:
Costello, Cooney & Fearon, PLLC, attorneys for petitioner, by Melinda B. Bowe, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2016-17 school year. The IHO found that the student's pendency placement included the provision of certain special transportation services. 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]).[1] 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's eligibility for special education as a student with autism is not in dispute (see

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

Admin. Rec. 1; 4; 17 Ex. 1 at p. 4; 39; see also 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).[2] Due to the narrow scope of this appeal, a full recitation of the student's educational history is not necessary. However, the student in this appeal has been the subject of a prior appeal to this office and some of the facts of the prior appeal must be recited to provide a complete picture of the instant dispute (see Application of a Student with a Disability, Appeal No. 16-035).

The student was first recommended to receive special transportation—in the form of an adult attendant on the school bus—under an IEP developed for the 2015-16 school year (see Application of a Student with a Disability, Appeal No. 16-035). During the 2014-15 school year, the student rode on buses to which monitors had been assigned for the benefit of other students; there were fewer students on the bus the student rode in the afternoon (see id.).

Following the SRO's decision in Application of a Student with a Disability, Appeal No. 16-035 in August 2016, a CSE convened on August 31, 2016, to develop an IEP for the 2016-17 school year (see Admin. Rec. 14, Ex. 2; 38, Ex. 2 at File 1). Relevant to this appeal, the CSE recommended, among other things, that the student continue to be provided with special transportation (Admin. Rec. 14, Ex. 2 at pp. 1, 16, 20, 23; 38, Ex. 2 at File 1, File 2). The special transportation was listed as "Adult supervision – Bus with an Attendant" and "Vehicle and/or equipment needs – Student requires use of Personal Devices"; the recommended personal device was clarified in other portions of the IEP as an MP3 player that was designated for use on the morning bus ride only (Admin. Rec. 14, Ex. 2 at pp. 1, 16, 20, 23).

The CSE reconvened on December 13, 2016 (Admin. Rec. 17, Ex. 1 at pp. 4-28). Relevant to the issue in this instant appeal, the resultant December 2016 IEP continued the recommendation for special transportation from the August 2016 IEP; the MP3 player was again designated for use during the morning bus ride only (id. at pp. 4, 21, 26, 28).

A. Initial Due Process Complaint Notices and Subsequent Events

On February 1, 2017, the parent filed a due process complaint notice (Admin. Rec. 1). The IHO originally appointed to hear the matter (IHO 1) was appointed by the district pursuant to operation of 8 NYCRR 200.5(j)(6)(iv) because she had been appointed to preside over a due process complaint notice filed by the parent in January 2016, which was withdrawn in March 2016

[2] The impartial hearing on the merits had not occurred at the time of the filing of this instant appeal, and no documents were entered into evidence by the IHO. In the task of assembling the administrative record as required by State regulations, the district gathered and numbered the documents that constituted the hearing record, apparently in chronological order (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). As none of the documents were entered into evidence, they are cited herein as "administrative record" (e.g., Admin. Rec. 1 at pp. 1-3). Of the 44 documents submitted, a majority have attachments, which are largely unpaginated and were labeled by the district as exhibits. Citation to the attachments will be first to the administrative record document, then exhibit, and if needed, the page(s) (e.g., Admin. Rec. 14, Ex. 2 at pp. 16, 23). Administrative record document 38 attachment 2 consists of a CD containing a digital recording of a CSE meeting. The meeting is broken up into two MP3 files, which will be cited to as (Admin. Rec. 38, Ex. 2 at File 1, File 2). Further, the administrative record filed by the district demonstrates that the parties submitted an unreasonably large amount of duplicative documentation to the IHO. Although understandable that no exhibits have yet been admitted into evidence because no hearing dates have been held, it would have been better practice for the IHO to require the parties to discuss what documents were required to resolve the instant dispute, and it would have simplified reference to the submissions, as well as prevented duplication, if they had been marked as IHO exhibits for identification.

(Admin. Rec. 2). IHO 1 determined that the issues presented in the February 1, 2017 due process complaint notice were sufficiently dissimilar from the issues raised in the January 2016 due process complaint notice such that the district was required to appoint a different IHO in accordance with its rotational selection procedure (id. at pp. 2-4). A second IHO (IHO 2) was assigned on or before February 10, 2017 (Admin. Rec. 3 at p. 3). On February 11, 2017, the parent filed a second due process complaint notice (Admin. Rec. 4). By order dated February 24, 2017, the two February 2017 due process complaint notices were consolidated for hearing by IHO 2 (Admin. Rec. 7).

A prehearing conference occurred on March 7, 2017, at which IHO 2 denied the parent's request for an interim order on pendency, finding that the pendency request actually raised an issue relating to implementation of the student's IEP (Admin. Rec. 10 at pp. 30-36).

The district filed a due process complaint notice on March 13, 2017 which, among other things, requested the appointment of a guardian ad litem (Admin. Rec. 13). The parent responded to the district's due process complaint notice and, as relevant here, requested that the IHO issue a written determination on pendency or that a new IHO be appointed to do so (Admin. Rec. 14). IHO 2 subsequently recused herself, and a third IHO (IHO 3) "was appointed to this matter on March 17, 2017" (Admin. Rec. 21 at p. 2).

By letter motion to IHO 3 dated March 29, 2017, the parent sought an interim determination on pendency (Admin. Rec. 15). The district filed a response to the parent's motion on April 5, 2017 (Admin. Rec. 17). By written decision dated April 10, 2017, IHO 3 determined that the parent's request for an order on pendency was a claim relating to implementation of the student's December 2016 IEP, and denied the request for a pendency order (Admin. Rec. 21 at p. 5).[3]

By motion to dismiss dated April 6, 2017, the parent asserted that the claims raised in the district's due process complaint notice were barred by res judicata and collateral estoppel, and that the IHO lacked jurisdiction to decide them (Admin. Rec. 19). In a decision dated May 4, 2017, IHO 3 denied the parent's motion to dismiss, as well as the district's request for the appointment of a guardian ad litem (Admin. Rec. 28).

In a letter to IHO 3 and counsel for the district dated May 4, 2017, the parent asserted that the IHO was "not impartial or fair" and was "working in concert with the district" (Admin. Rec. 29 at p. 2). The parent accordingly indicated that she was withdrawing her consolidated due process complaints "without prejudice," and was withdrawing consent for the provision of special education services (id. at pp. 1-2). By email correspondence of the same date, the district asserted that the parent had filed six due process complaints at the beginning of the school year which were substantially similar to the currently pending complaints, "which she withdrew on the cusp of hearing," and that the parent filed two additional "complaints of the same nature that she withdrew in January" 2017, which were then followed by the two February 2017 due process complaint notices (id. at p. 3). Accordingly, the district requested that any withdrawal be with prejudice (id.). IHO 3 subsequently indicated that he would reverse his written decision denying the district's request for an appointment of a guardian ad litem, and that as a result, the parent's due process

[3] The IHO issued a number of other interim decisions on matters not relevant to the instant appeal (see Admin. Rec. 23; 24; 40).

complaint notices were not withdrawn on the student's behalf (id.). The parent objected, asserting that IHO 3 did not have the authority to reverse his decision, and requesting that IHO 3 recuse himself (id. at p. 7).

By email dated May 4, 2017, the parent rescinded her withdrawal of her complaints pending review by the guardian ad litem (Admin. Rec. 29 at p. 23). In a letter dated May 5, 2017, the parent stated that she "agreed to rescind her withdrawal under duress" and requested clarification relating to the scope of the guardian ad litem's authority (Admin. Rec. 30 at p. 2). By letter dated May 7, 2017, the parent notified the district and IHO 3 that she was again voluntarily withdrawing her due process complaint notices, without prejudice (Admin. Rec. 31).

In an interim order dated May 22, 2017, IHO 3 found that, based on the parent's course of action during the 2016-17 school year, her interests were "opposed with those of the student," and ordered that a guardian ad litem be appointed to protect the student's interests (Admin. Rec. 33 at pp. 3-5). The IHO indicated that, "[o]n or about May 8, 2017," the district's due process complaint notice was consolidated with those filed by the parent (id. at p. 3).

B. Due Process Complaint Notice—Transportation and Pendency

On May 24, 2017, by email to the district's director of student services (director), the parent indicated that she received a phone call from the district's transportation department notifying her that the student's afternoon transportation arrangements had been changed, and the student would begin riding the same bus in the afternoon as he rode in the morning (Admin. Rec. 34 at p. 4). The parent asserted that this constituted a unilateral change in the student's program in violation of his stay put rights, to which the director responded that the district was providing the student with transportation in accordance with his IEP (id.). By motion dated May 24, 2017, the parent requested that IHO 3 issue a written pendency order directing the district to return the student to the bus that he had been riding in the afternoon since May 2015 (or an equivalent bus with seven or eight students and an aide) (id. at pp. 2-3).

By email to the parties dated May 24, 2017, the IHO indicated because the parent had withdrawn the complaints on her behalf, she no longer had standing to file motions on behalf of the student; however, because the request involved the student's entitlement to pendency, he would address the application "once the [guardian ad litem] is appointed" (Admin. Rec. 35, Ex. 2 at p. 9). The IHO thereafter inquired of the district whether the busing arrangements for the student had changed; to which the district responded that transportation was "being provided in accordance with the [s]tudent's 2016-17 IEP" but that the bus the student rode in the afternoon had been changed (id. at pp. 6-8). The IHO asked the district to confirm that the student was riding "the same size bus with supervision," to which the district replied that "there were less kids on the bus in the afternoon" (id. at pp. 5-6). By email dated May 26, 2017, the IHO informed the district that "[t]he student's bus schedule must remain the way it was when this matter began" and directed the district to "reinstate the student's busing until we can address this issue at the hearing" (id. at p. 4). The district objected to this order, asserting that reinstating the student's prior busing "would require significant reconfiguration," and requested an opportunity to be heard on the record (id. at p. 1).

On May 30, 2017, the parties held a prehearing conference, as a result of which IHO 3 reaffirmed his order directing the district "not to change anything" pending the impartial hearing and indicating that his order would remain in effect until he could review the parties' papers and issue a written decision (Admin. Rec. 37 at pp. 15-16). In a written response to the parent's motion, the district asserted that the student was being provided with the services recommended on his IEP (Admin. Rec. 35).

On May 31, 2017, the parent filed another due process complaint notice, asserting that the failure of the district to place the student's transportation services on his IEP violated the IDEA and that the district unilaterally changed the student's placement with respect to the provision of afternoon school bus transportation, and requested that the May 2017 due process complaint notice be consolidated with the then-pending proceeding (Admin. Rec. 39).[4] By order dated June 9, 2017, IHO 3 consolidated the parent's May 2017 due process complaint notice with the complaints then pending before him (Admin. Rec. 43).

C. Impartial Hearing Officer Decision

In an interim decision dated June 12, 2017, IHO 3 determined that the student's operative placement for purposes of pendency was a bus with a small number of students for the afternoon bus ride (June 12, 2017 Interim IHO Decision at pp. 4-12). In particular, while the IHO acknowledged that the December 2016 IEP did not explicitly reference the number of students on the afternoon bus, the student "ha[d] been provided with an afternoon bus with the small number of (approximately seven) students since the beginning of the 2016-2017 school year, as well as during the 2015-2016 school year," and the August 2016 CSE had discussed the matter and agreed that it was appropriate for the student to ride a bus with a smaller number of students in the afternoon (id. at pp. 10-11). The IHO ordered the district to "continue to provide the student with an afternoon bus with the smaller number of students," as had been provided since the beginning of the 2016-17 school year (id. at pp. 11-12).

IV. Appeal for State-Level Review

The district appeals, asserting that IHO 3 erred in determining that the student's pendency placement for purposes of the provision of special transportation on the afternoon bus consisted of a bus with a smaller number of students. The district asserts that the student continued to receive a bus with a monitor, as called for by the student's August 2016 and December 2016 IEPs. The district next asserts that IHO 3's June 2017 interim decision conflicted with his April 2017 interim decision on pendency, in which the IHO determined that the student's last agreed upon placement was the December 2016 IEP, which did not include a recommendation for a smaller bus size. The district also asserts that the IHO improperly relied on the fact that the student rode an afternoon bus with fewer students when deciding what the student's transportation pendency placement consisted of, rather than the clear language of the IEP, and that the IHO erred in relying on extrinsic information without holding a hearing. Finally, the district asserts that IHO 3 erred in relying on

[4] The question of whether the IHO properly determined that the parent's February 2017 due process complaint notices were not withdrawn on the student's behalf is not at issue in this appeal, and the issue of the student's pendency is properly before me as a result of the district's March 2017 and the parent's May 2017 due process complaint notices.

the decision issued by IHO 1 in the impartial hearing underlying Application of a Student with a Disability, Appeal No. 16-035, as that decision did not affect pendency and the SRO determined on appeal that the recommended transportation services were appropriate.

In an answer, the parent generally argues to uphold the IHO's decision. The parent further asserts that the request for review should be dismissed because she was not provided with a copy of the administrative hearing record, despite requesting one. The parent also asserts that a guardian ad litem has been appointed and that the district failed to serve the request for review on the guardian ad litem.

V. Initial Matters

Before reaching the issue of pendency, several preliminary issues must first be addressed.

First, as to the parent's assertion of timely service upon the guardian ad litem, an appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). IHO 3's interim decision was dated June 12, 2017 (June 12, 2017 Interim IHO Decision at p. 12). The district was therefore required to serve the request for review no later than July 22, 2017 (8 NYCRR 279.4[a]). The administrative hearing record shows that the guardian ad litem was personally served on July 21, 2017 (see July 21, 2017 Dist. Aff. of Service). Accordingly, the district timely served the request for review upon the guardian ad litem, and the parent's assertion to the contrary is without merit.

As to the parent's assertion concerning the district's failure to provide her with a copy of the hearing record, or an index thereto, the materials submitted by the district to the Office of State Review consisted of documents of which the parent was in possession (see Admin. Rec. 1-44). To the extent the parent objects that she did not receive a copy of the index to the documents used by the district, impeding her ability to cite to the record, the index was apparently created by the district solely for the purpose of referencing the documents that are required in this appeal by State regulation. When creating such a reference, a better practice would be to provide a copy to all parties; however, the fact that the parent did not receive a copy of the district's index enumerating the documents is not explicitly violative of the practice regulations and it did not prevent her from articulating responses to each of the district's challenges to the IHO's decision. Accordingly, the district's failure to provide the parent with a copy of the index to the hearing record does not merit dismissal of the request for review in this matter. Nonetheless, the district is cautioned that submitting a hearing record containing a proprietary nomenclature for referencing the administrative record may have the effect of precluding a parent from being able to respond to a request for review, thereby necessitating dismissal on the basis that the parent's participation in the due process proceedings contemplated by the IDEA and State law was impeded. Consequently, the better practice is to always provide a copy of such a proprietary index to all parties when serving a request for review.

As to the district's assertion that the issue of pendency was determined in IHO 3's April 2017 interim decision, a review of the April 2017 interim decision on pendency reveals that it did not address the issue of transportation (see April 10, 2017 Interim IHO Decision). Furthermore,

as noted by the IHO, the action that triggered the parent's request for determination on pendency with respect to special transportation had not yet occurred at the time the April 2017 interim decision was rendered. The district has cited to no authority for the proposition that an IHO cannot revisit an interim determination on pendency upon being made aware of additional facts not known at the time of the initial determination—in this instance, that the district had modified the student's transportation arrangements.

Finally, the district asserts that it was not provided with a hearing on the merits of the issue of the student's transportation services for purposes of pendency. First, the regulations do not expressly require, nor does the district point to a regulation otherwise, that an IHO is mandated to hold a formal hearing for the purpose of rendering a determination on pendency. Such matters are within the IHO's discretionary authority. Second, the documentation belies the district's assertion that it was not provided with the opportunity to be heard. As noted above, the parties were given opportunity to be heard on May 30, 2017 (Admin. Rec. 37). The district responded to the parent's motion on pendency (Admin. Rec. 35). The parties were then allowed to submit further papers on the issue prior to IHO 3 issuing his written decision (see Admin. Rec. 36; 38). Under these circumstances, the district was provided with a sufficient opportunity to be heard, and, given the nature and scope of the dispute, I find insufficient reason to disturb the IHO's discretionary determination to decide the issue upon written submissions rather than a formal evidentiary hearing.[5]

VI. Applicable Standards and Discussion—Pendency

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

[5] The district's argument that more proof was required is difficult to accept where, as here, the district did not submit any additional evidence with its request for review for consideration by an SRO (e.g., an offer of proof). Rather, the district's argument reduces to an assertion that the IHO's determination was not supported by the hearing record and, as such, is addressed below.

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). Once a proceeding commences, a student's pendency placement can be changed in one of two ways: (1) by agreement between the parties, or (2) by a state-level administrative (i.e., SRO) decision that agrees with the student's parents that a change in placement was appropriate (20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484-85 [2d Cir. 2002]; A.W. v Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; 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]). 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 Evans, 921 F. Supp. at 1189 n.3). 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]). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). This serves the core purpose of the pendency provision: "to provide stability and consistency in the education of a student with a disability" (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Evans, 921 F. Supp. at 1187, quoting Ambach, 612 F. Supp. at 233; see also Doe v. E. Lyme, 790 F.3d at 452).

The parties disagree as to what standard the IHO should have applied when determining the student's pendency placement with respect to his afternoon bus ride. The district asserts that the IHO should have relied on the plain reading of the December 2016 IEP, which was the most-recently implemented IEP when the parent filed her due process complaint notice. The parent asserts that the IHO correctly found that the "operative" placement was a school bus with a small number of students, as the district had been providing that service since the start of the 2015-16 school year. A student's right to pendency automatically attaches as of the filing of the due process complaint notice (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46,710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]) and, considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and generally should promptly resolve a pendency dispute (see Murphy, 297 F.3d at 199-200; see also 8 NYCRR 276.1[c]; "Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Revised Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible"] [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf).

With regard to the facts underlying the IHO's determination, the district is correct, and the parent does not dispute, that the December 2016 IEP was the student's most recently-implemented IEP at the time the impartial hearing was invoked (see Admin. Rec. 17, Ex. 1). The district also correctly notes that the December 2016 IEP did not contain any references to the number of students who would be on the student's afternoon bus. Rather, the December 2016 IEP indicated that the CSE recommended the student receive special transportation accommodations and services including "Adult supervision – Bus with an Attendant" and "Vehicle and/or equipment needs – Student requires use of Personal Devices" (id. at p. 28). The student's use of a personal device was clarified in other portions of the IEP, which noted that the student would be permitted to use an MP3 player—on the morning bus route only—"to minimize the effect of the noise of the bus on him" (id. at pp. 4, 21, 26). Nonetheless, the hearing record reflects that subsequent to the filing of the parent's initial due process complaint notice on February 1, 2017, until May 24, 2017, the district maintained the student's previously-existing transportation on the same afternoon bus with a small number of students (Admin. Rec. 35 at pp. 3-4). Accordingly, to the extent the district provided the student with a transportation arrangement not required by his IEP after the commencement of the impartial hearing, the district has failed to establish why this provision of transportation should not be construed as an agreement by the district that altered the student's pendency placement on a going forward basis (see 20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m][1]).

Next, the district asserts that when it removed the student from the bus he had been riding in the afternoon, it provided him with the services called for by the December 2016 IEP. However, the district reinstated the student to the bus he had previously ridden in the afternoon—with a smaller number of students—on May 31, 2017, in response to the IHO's verbal order from the prior day (Admin. Rec. 38, Ex. 2 at pp. 1-2). Analogous to this case, in M.G. v. New York City Dep't of Educ., an IHO issued an interim order directing the school district to fund an increased level of services during the impartial hearing, which the district began providing (M.G., 982 F.

Supp. 2d. at 243-44). Consequently, the court found that the district deviated from the services required to be provided under the student's IEP once it began providing services pursuant to the IHO's interim order, such that the services ordered by the IHO became part of the student's pendency placement (id., at 247-48). The court acknowledged the "potentially perverse incentives" in finding that compliance with an interim IHO decision could open a district "to being forced to maintain the provision of these services throughout the pendency of plaintiffs' administrative complaint and appeals," but found that the IDEA's "clear intent to avoid undue disruption" in a student's educational programming outweighed any potential burden on the district (id. at 248-49). Here, the IHO ordered the district to place the student back on the bus with a smaller number of students he rode in the afternoon prior to May 24, and the district did so the next day, thus, under the theory of M.G., establishing a new pendency placement that includes the bus with a small number of students.

In addition, other theories of pendency support the IHO's determination.[6] While the district asserts that it provided the student with the services listed on his IEP, this assertion is in conflict with the basis of the special transportation recommendation. As noted above, the August 2016 and December 2016 CSEs recommended special transportation to address the student's needs, including the use of an MP3 player on the morning bus ride (see Admin. Rec. 14, Ex. 2; 17, Ex. 1; 38, Ex. 2 at File 1, File 2). However, for reasons not specifically described in the hearing record, the MP3 player was recommended for use only during the morning bus ride (Admin. Rec. 14, Ex. 2 at pp. 1, 16, 20, 23; 17, Ex. 1 at pp. 4, 21, 26).

To understand why the student was only recommended to be allowed to use an MP3 player on the morning bus ride, the transcript of the May 2015 CSE meeting is illuminating. During that meeting, the district apparently conceded that the student should not be on the same school bus in the afternoon as in the morning, and should remain on an afternoon bus with a smaller number of (six or seven) students (see Admin. Rec. 34 at pp. 114, 230-31). A review of the August 2016 CSE meeting shows that to address the parent's concerns regarding issues of the noise level on the bus, and the resultant anxiety and stress experienced by the student during the morning bus ride, the CSE recommended that the student have access to an MP3 player for the morning bus ride; however, the CSE did not discuss changing the student's transportation arrangement in the afternoon (see Admin. Rec. 14, Ex. 2; 38, Ex. 2 at File 1, File 2). Neither party submitted any documentation, if any exists, that provides any further insight into the decision of the December 2016 CSE to continue the same special transportation recommendation as were found on the August 2016 IEP.

Given that the CSE did not specifically provide for a mechanism—i.e., an MP3 player—to address the student's deficits on the afternoon bus as it found necessary to do for the morning bus, it appears that the district and parent agreed on a course of action to address the student's transportation needs by continuing to provide him with a bus with a monitor and a smaller number

[6] One difference I have with the IHO that does not affect the outcome of the case is the IHO's use of the term "operative placement," which tends to be one of the tests for stay-put that is employed when there is, for one reason or another, no valid IEP that is relevant to the stay-put issue (see Drinker, 78 F.3d at 867; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990]). As discussed herein, there is a relevant IEP in effect, but I reject the district's argument that the text of that IEP sufficiently frees it from the obligation to continue providing a bus with a small number of students as the student's then-current educational placement.

of students on the afternoon bus, as had been provided the student for the 2015-16 and 2016-17 school years, prior to the filing of the February 2017 due process complaint notices. The most recently implemented IEP called for special modifications and accommodations to create an environment that reduced anxiety and stress for the student. The provision of a monitor, use of personal electronic devices, and a different bus having a reduced number of students are all actions that address the student's need for special transportation—needs that were identified in the IEP—and can be characterized as part of the student's placement. Pendency requires that the placement remain the same and the district has not persuaded me that the status quo remains the same for this student if, in light of his anxiety and stress, he is moved in the afternoon from a bus environment with a small number of students to a noisier bus environment with a large number of students. Moreover, the district maintained the student's placement in the environment having a small number of students even after the due process commenced and pendency attached. The district's actions in maintaining the environment with a small number of students can be interpreted as an agreement with regard to pendency. These actions were also intertwined with and not in contravention of the December 2016 IEP that was in effect at the time. In short, the district has not convinced me that, under these circumstances with this student, the change eliminating the bus with a small number of students in the afternoon was not a change in the character of the services constituting an impermissible change in placement.

The determination herein does not, and should not be read to, reach the merits of any transportation issues currently remaining before the IHO. The determination herein applies only to what the student's pendency placement consisted of with respect to the afternoon bus ride.

VII. Conclusion

Based on the above, I find no reason to disturb IHO 3's interim order on pendency, finding that the student's special transportation service for the afternoon bus ride consisted of a bus with a monitor and a smaller number of ("approximately 7") students.[7] I have considered the parties' remaining contentions and find that they are without merit or that I need not address them in light of the findings made herein.

Finally, as noted by the SRO in the prior matter involving this student, there appears to be a contentious relationship between the parties (Application of a Student with a Disability, Appeal No. 16-035). It appears that the parties' contentious relationship has further deteriorated and that the parent distrusts the CSE (see generally Admin. Rec. 1-6; 8-9; 12-14; 16-20; 22; 25-26; 32; 34-36; 38-39; 41). I strongly encourage the parties to put past actual or perceived points of conflict behind them, and work toward the goal of the IDEA—to provide the student with appropriate educational services that meet his unique needs and are reasonably calculated to enable him to receive educational benefits (20 U.S.C. § 1400[d][1][A]; Endrew F. v. Douglas County Sch. Dist.

[7] To the extent the IHO's decision could be read to imply that the district is required to continue the student's placement on the same bus, with the same students, as he rode in the afternoon at the time the impartial hearing was commenced by the February 2017 due process complaint notices (Admin. Rec. 44 at pp. 11-12), the Second Circuit has stated 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 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" (T.M., 752 F.3d at 171).

RE-1, 580 U.S. ___, 137 S. Ct. 988, 1001-02 [2017]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 23, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER