The University of the State of New York

The State Education Department
State Review Officer
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No. 18-133

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Karl J. Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, 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 2018-19 school year. The IHO determined that the student's pendency placement was the International Academy of Hope (iHope), established pursuant to an unappealed decision of an IHO, dated March 6, 2018, and denied the parents' request that the district to fund the cost of the student's tuition at the International Institute for the Brain (iBrain) during the pendency of this proceeding. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the disposition of this appeal on procedural grounds, a full recitation of the student's educational history is unnecessary. Briefly, the limited hearing record reflects that the student

attended iHope for the 2017-18 school year (Parent Ex. B at p. 4).[1] According to the parents, a district CSE convened on May 10, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended a "12:1+(3+1)" special class placement in a district school (Parent Ex. A at p. 2).[2]

A. Due Process Complaint Notice

The parents initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A at p. 1). The parents raised concerns about the adequacy of the CSE process and the student's IEP for the 2018-19 school year and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (id. at pp. 2-3). As relevant here, the parents asserted the student's right to a pendency placement was based on an unappealed March 2018 IHO decision (id. at p. 2; see Parent Ex. B). The parents requested an interim order on pendency requiring the district "to prospectively pay for" the full cost of the student's placement at iBrain, including "academics, therapies and a 1:1 professional" as well as special transportation services, including limited travel time (60 minutes), a wheelchair-accessible vehicle with air conditioning, a flexible pick up and drop off schedule and a paraprofessional (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing to determine the student's pendency placement was held on October 9, 2018 (see Tr. pp. 1-81).[3] On the same day, October 9, 2018, the IHO issued an interim decision on pendency, which determined that the student's program at iHope identified in the unappealed March 6, 2018 IHO decision was the student's pendency placement (Interim IHO Decision at p. 7; see Parent Ex. B at p. 12). With respect to the parents' claim that the program at iBrain was substantially similar to the program offered at iHope, the IHO found that "[a] substantially similar placement argument need only apply when the actual pendency placement is not available"; for instance, if the school had gone out of business (id. at pp. 2, 7). Thus, the IHO found that

[1] There are duplicate exhibits in the hearing record (compare Parent Ex. B, with Dist. Ex. 2). The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). The IHO is also reminded of her obligation to exclude from the hearing record any evidence she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Unless otherwise specified, where exhibits are duplicated, the corresponding parent exhibit will be cited.

[2] Due to the status of this matter as a dispute regarding a pendency determination, there has been little evidence entered into the hearing record and the factual background has generally been derived from factual allegations in the due process complaint notice and a prior IHO decision involving this student (see Parent Exs. A; B; Dist. Ex. 2).

[3] The parents submitted an affidavit from the clinical director at iBrain into evidence during the hearing (Tr. p. 63; Parent Ex. D). The exhibit is two pages in length and appears to consist of nine paragraphs, but part of paragraph five, as well as paragraphs six, seven, and eight were not included (Parent Ex. D). After the exhibit was entered into evidence, the IHO and the parents' attorney had a discussion with respect to the missing text (see Tr. pp. 67-68). The parents' attorney acknowledged that the exhibit was missing a page due to a "copying" error, and he agreed to be "bound by the two pages [as submitted into] evidence" (Tr. pp. 67-68).

substantial similarity was "not applicable . . . as the iHope program is available and is ready, willing and able to provide the [p]endency [p]lacement for this student" (id. at p. 8).

The IHO ordered the district to fund the student's placement at iHope retroactively as of the July 9, 2018 filing of the due process complaint notice, in a 6:1+1 special class with the following related services: five 60-minute sessions per week of individual occupational therapy (OT), four 60-minute sessions per week of individual speech-language therapy and one 60-minute session per week of speech-language therapy in a group, five 60-minute sessions per week of individual physical therapy (PT), two 60-minute sessions per week of assistive technology training, and the provision of an assistive technology device (Interim IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parents appeal, asserting that the district is obligated to fund the cost of the student's attendance at iBrain pursuant to pendency.[4] The parents argue that the IHO erred in failing to find that the term "educational placement" for purposes of pendency refers to the general program rather than the specific school location and that, in this case, the evidence in the hearing record demonstrates that the program the student receives at iBrain for the 2018-19 school year "matches up perfectly with the program" ordered in the March 6, 2018 IHO decision. The parents claim that the IHO erroneously found that the parents must first prove that iHope was no longer available to the student before applying the test for determining whether the program provided at iBrain was substantially similar to the program provided at iHope. The parents maintain that there is no legal authority to support this conclusion, and there is no burden on the parents to first prove that it was impossible for the student to continue attending iHope. According to the parents, the only legal standard is whether the programs were substantially similar and whether the student would receive the "same general type of . . . program." The parents assert that the evidence in the hearing record, specifically the testimony from the director of special education at iBrain, shows that iBrain satisfied "the test of 'substantial similarity.'"

The parents also claim that the IHO did not require the district to prove it had actually secured the student's pendency placement at iHope, or put forth evidence that iHope continued to provide or could implement the student's program, received during the 2017-18 school year. The parents maintain that it is the district's obligation to secure a pendency placement, and the district's failure to secure a placement "left [the] [p]arents with no choice but to select a school that . . . could implement" the student's pendency program. As a result, the parents claim that the IHO's decision should "be deemed reversible error," and the SRO should find that the programs offered at iHope and iBrain are substantially similar.

For relief, the parents request direct payment to iBrain, retroactively to July 9, 2018, which the parents assert includes academics in a 6:1+1 special class along with related services: five 60-minute sessions per week of individual OT and PT, four 60-minute sessions per week of individual

[4] The parents' request for review does not conform with the pleading requirements set forth in State regulation as it is not endorsed with the "name, address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). Although this is not an independent basis for dismissing the request for review in this matter, counsel for the parents is cautioned that future pleadings must comply with the pleading requirements expressly prescribed by State regulation or risk dismissal.

speech-language therapy and one 60-minute session per week of speech-language therapy in a group, and two 60-minute sessions per week of assistive technology training and the provision. The parents also request direct payment for a "Tobi Eye Gaze" AT device, a special assistive chair, a 1:1 paraprofessional during the school day, and transportation accommodations including limited travel time (60 minutes), a wheelchair-accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a paraprofessional's assistance during transport.

In an answer, the district generally denies the parents' allegations and argues that the IHO's interim decision be upheld. The district argues that there is no right to pendency when the parents unilaterally removed the student from the pendency placement at iHope and chose to enroll the student at iBrain simply because the parents desired a different school. The district further argues that the parents are seeking to create a new legal standard in arguing that "it was the [district's] responsibility to secure [the student] a seat at a school, iHope for example" and incorrectly cite to M.O. v. New York City Department of Education, 793 F.3d 236, 244 (2d Cir. 2015), for the proposition that the district "has an obligation to secure a private placement at a private school." The district maintains that M.O. involved a FAPE determination and should not be read to impose an obligation on the district regarding a student's pendency placement as pendency was not at issue in that case. The district also argues that iBrain cannot be considered the student's pendency placement because the parents failed to establish that the programs at iHope and iBrain are substantially similar. The district maintains that testimony from the director of special education at iBrain shows that the student was placed in a classroom with two 6:1+1 special classes at iBrain, "making the two programs substantially dissimilar."[5]

In a reply, the parents respond to the assertions made in the district's answer, largely by rearguing the claims set forth in the request for review, which is beyond the permissible scope of a reply as permitted by State regulation (see 8 NYCRR 279.6[a]).

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 T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; 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

[5] In two footnotes, the district asserts that the parents' failed to comply with practice requirements, by, among other things, failing to provide a clear and concise statement of the issues for review (8 NYCRR 279.8[c][2]), and objects to the parents' submission of Supplemental Exhibit AA on the basis that it could have been submitted during the hearing and is not necessary for the SRO to render a decision. Additionally, in a footnote in the request for review, the parents request that if the SRO determines that "pendency relief should not be granted with respect to any portion of [the student's] current educational program or related support services," that the SRO "grant pendency relief insofar as [the SRO] determines pendency is warranted for some services, as pendency relief is divisible by each individual service at issue." As these arguments are raised only in footnotes, they must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [arguments raised only in footnotes are insufficient to preserve an argument for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]).

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]).

VI. Discussion

As set forth below, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. 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]).[6] A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 18-027 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]; Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

In this proceeding, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's interim decision was dated October 9, 2018 and the parents were thus required to serve their request for review on the district no later than November 18, 2018, 40 days from the date of the interim decision (8 NYCRR 279.4[a]; Interim IHO Decision at p. 11). However, as November 18, 2018 fell on a Sunday, service could have been made one day later on the following Monday, November 19, 2018 (8 NYCRR 279.11[b]). The affidavit of service filed with the request for review reflects that the request for review along with the notice of request for review, memorandum of law, and affidavit of verification were

[6] A party who intends to appeal from the decision of an IHO must also serve a notice of intention to seek review on the opposing party within 25 days after the date of the IHO decision (8 NYCRR 279.2). A notice of intention to seek review was filed in this matter without an affidavit of service; however, the notice of intention is dated October 12, 2018, within the time frame it was required to be served upon the district pursuant to State regulation (8 NYCRR 279.2[b]). The notice of intention identifies that the IHO decision being appealed from was dated October 9, 2018.

served on November 21, 2018.[7] Accordingly, the request for review was untimely. Furthermore, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown, the reasons for the failure must be set forth in the request for review (see 8 NYCRR 279.13). The parents failed to assert good cause, or any reason, in their request for review for failure to timely initiate the appeal of the IHO's interim decision.

Accordingly, no good cause has been asserted or found to excuse the untimely service of the request for review on the district (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-cv-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [Feb. 28, 2006]). Consequently, the parents failed to comply with State regulations regarding service of a request for review, and the request for review is therefore dismissed (8 NYCRR 279.4[a]; 279.13).

I note that in addition to an appeal from an IHO's interim decision, pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. This does not mean that State regulation provides a party with an indeterminate extension of the 40-day timeline to file an appeal from an interim decision on the issue of pendency through the time to file an appeal from the IHO's final decision. The parents may appeal from the IHO's final decision and they may include an appeal of the IHO's interim decision on pendency with an appeal from the IHO's final decision. However, because the parents' appeal from the interim decision is untimely, they may not file an appeal until a final decision has been rendered in this matter (see Application of a Student with a Disability, Appeal No. 18-027; Application of a Student with a Disability, Appeal No. 13-041 & 14-008).

VII. Conclusion

Having found that the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 21, 2018

STEVEN KROLAK
STATE REVIEW OFFICER

[7] The affidavit of service does not indicate who was served.