The University of the State of New York

The State Education Department
State Review Officer

No. 20-069

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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 parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an impartial hearing officer's (IHO's) deferral of a decision regarding the student's pendency (stay put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2019-20 school year. The appeal must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the student's educational history and the prior due process proceedings is assumed and will not be repeated here in detail, except as relevant.[1]

[1] Due to the status of this matter as an interim appeal disputing the IHO's deferral of a pendency determination, at the time of the parent's request for review, there had been very little evidence received at the impartial hearing; accordingly, the factual background is derived from factual points set forth in their briefs to the IHO regarding pendency, as supported by exhibits attached thereto (see generally Tr. pp. 1-37; Parent Pendency Br. [with affidavit of the director of special education at iBrain and exhibits A, B, and D through G]; Dist. Pendency Br. [with exhibit 1]; Dist. Supp. Pendency Br. [with exhibits 2 through 6]).

Briefly, the hearing record reflects that the student attended a nonpublic school, the International Academy of Hope (iHope), for the 2017-18 school year (see Parent Pendency Br., Ex. B). The parent's unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior due process impartial hearing (id.). At the conclusion of the impartial hearing concerning the student's 2017-18 school year, an IHO issued a decision, dated April 11, 2018, finding that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services and transportation, for the 2017-18 school year (id. at pp. 5-14).

For the 2018-19 school year, the parents unilaterally placed the student at the International Institute for the Brain (iBrain) and filed a due process complaint notice challenging the district's recommended program and placement (Parent Pendency Br., Ex. D). The IHO appointed to conduct an impartial hearing issued an interim decision on pendency dated November 22, 2018, which found that iBrain was the student's pendency placement, "not[ing] that the record indicate[d] the 'iBrain' school offer[ed] a program that [wa]s substantially similar to the one the student had at the 'iHope' school" (id. at pp. 8-9).[2]

For the school year at issue in the present matter, the 2019-20 school year, the parent continued the student at iBrain (see Parent Pendency Br., Ex. G).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated July 8, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year "by committing many substantive and procedural errors under the IDEA and state law" (Parent Pendency Br., Ex. A at pp. 1, 2). As relevant here, the parent requested that an interim order on pendency be issued immediately (id. at p. 1). The parent asserted that the basis for pendency was the unappealed interim decision on pendency in the prior administrative hearing issued on November 22, 2018 (id. at p. 2). The parent indicated the "specific pendency request" was for the district to "prospectively pay for the student's [f]ull [t]uition at iBrain (which includes academics, therapies and a 1:1 professional during the school day), a 1:1 nurse during the school day, and pay for his special transportation accommodations which include: limited travel time of 60 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule and a 1:1 nurse for transportation" (id.).[3]

Prior to the matter proceeding to an impartial hearing, the parent filed an action seeking relief related to pendency for the 2019-20 school year in the District Court for the Southern District of New York on September 24, 2019 (see Dist. Supp. Pendency Br., Ex. 2), which was stayed on

[2] The IHO in the matter concerning the 2018-19 school year issued a decision dated September 2, 2019, finding that the parent's claim for tuition reimbursement and transportation for the 2018-19 school year had been rendered moot, as the parent received all of the relief sought at the impartial hearing for the 2018-19 school year under pendency (Dist. Pendency Br., Ex. 1 at pp. 7, 13).

[3] As the request for review is limited to a review of the IHO's failure to issue an order on pendency, a full discussion of the parent's allegations is unnecessary (see Parent Pendency Br., Ex. A at p. 2).

October 23, 2019 pending the outcome of the resolution of three cases pending before the Second Circuit involving a similar issue (see Dist. Supp. Pendency Br., Ex. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing related to pendency on January 16, 2020 (Tr. pp. 1-7). On that date, the IHO and the parties agreed that the parties would proceed by submitting briefs, along with affidavits and/or exhibits, to set forth their positions regarding the students' pendency placement (Tr. pp. 2-5).

In a brief dated January 23, 2020, the parent argued that the basis for pendency was the November 2018 interim decision from the prior impartial hearing regarding the 2018-19 school year, which found that the student's stay-put placement during the pendency of that proceeding was iBrain (Parent Pendency Br. at p. 2). The parent noted that the November 2018 interim decision found that iBrain was the student's pendency placement based upon the April 2018 final decision in the proceedings relating to the 2017-18 school year, which ordered the district to fund the student's attendance at iHope, and evidence that the student's placement at iBrain for the 2018-19 school year was substantially similar to his placement at iHope during the 2017-18 school year (id.). Thus, the parent argued that the student was entitled to pendency at iBrain for the 2019-20 school year (the year at issue in this proceeding) as it was "substantially similar" to the student's placement at iBrain during the 2018-19 school year as well as the student's placement at iHope during the 2017-18 school year (id. at pp. 2-3, 5, 12-13). Alternatively, the parent argued that iBrain was the operative placement for the purposes of pendency for the 2019-20 school year (id. at pp. 3, 12).

In a brief dated January 30, 2020, the district argued that pendency lay in the April 2018 final decision in the proceedings relating to the 2017-18 school year, which ordered the district to fund the student's attendance at iHope (Dist. Pendency Br. at pp. 1, 2). The district argued that pendency could not lay in an interim decision and, therefore, that the November 2018 interim decision in the proceedings relating to the 2018-19 school year could not form the basis for pendency (id. at p. 1, 3-5). The district further contended that the parent could not unilaterally move the student from one nonpublic school placement to another nonpublic school preferred by the parent and assert a right to pendency and, as such, any similarly between the programs was "moot" (id. at pp. 1-2, 5-7). The district further contended that there was no evidence that iHope was no longer an available placement for the student such that it was necessary for the district to propose an alternative pendency placement (id. at p. 8).

During a hearing date held on March 3, 2020 (see Tr. pp. 8-15), the district represented that it had just become aware of the matter pending in federal court and, therefore, the IHO provided the parties an opportunity to supplemental their previous submission on the issue of pendency (Tr. pp. 10-12). In a supplemental brief dated March 10, 2020, the district contended that the "[p]arent should not be permitted to seek pendency in two parallel actions" (Dist. Supp. Pendency Br. at p. 2). As such, the district argued that the IHO "should not render a decision on pendency pending the outcome of this federal court action" (id.).

On March 18, 2020, via email to the parties, the IHO stated that "[t]he issue of pendency before me will be reserved until issue of pendency regarding the subject student in [f]ederal [c]ourt

is resolved" (Req. for Rev. Ex. A). By email dated March 19, 2020, the parent's counsel objected to the IHO's "decision to reserve . . . decision on the issue of pendency" (Req. for Rev. Ex. B). During a hearing date on March 26, 2020 (Tr. pp. 16-37), the parent's counsel again stated objections to the IHO's deferral on the issue of pendency, raising concerns regarding the statutory timeline for the IHO to render a determination in a case, the uncertainty of when the Second Circuit would render a decision in the matters pending there, and the fact that the matters before the Second Circuit did not involve the student who was the subject of the proceedings in the present matter (Tr. pp. 21-24). The parent's counsel further stated his preference that the matter not move forward on the merits until the IHO issued a decision on pendency (Tr. pp. 27-28).

The IHO reiterated his intention to defer on issuing a decision regarding pendency given the pendency of the federal court matter involving the same student, as well as the matter in the Second Circuit, would "directly affect the pendency issue" (Tr. pp. 29-30). However, the IHO emphasized that he would not "stay this in perpetuity" and would not "wait forever" (Tr. p. 30). Therefore, the IHO put the matter on the calendar for a date in April 2020 for a "status" and indicated that, if there had not been "decisions . . . from the federal court" by then, he would "figure out what to do from there" (Tr. p. 31; see Tr. pp. 35-36).

IV. Appeal for State-Level Review and Subsequent Events

The parent appeals and argues that the IHO erred by failing to issue an interim decision on pendency.[4] Specifically, the parent argues that pendency provision is essentially an automatic preliminary injunction, which is an immediate right upon the filing of a due process complaint notice not subject to discretion on the part of a court or an IHO. The parent also alleges that there is no legal basis for the IHO to reserve his decision on pendency. For relief, the parent requests a finding that the student is entitled to an order of pendency at iBrain until the present matter is fully adjudicated.[5]

In an answer, the district responds to the parent's allegations with admissions and denials and requests that the parent's appeal be denied. The district argues that, in order to be entitled to

[4] With her appeal, the parent submits two documents identified as exhibits "A" and "B." They are the March 18 and March 19, 2020 emails between the IHO and the parties regarding the IHO's decision to defer on the issue of pendency, as summarized above (see Req. for Rev. Exs. A-B). During the impartial hearing, the IHO indicated that parent's counsel should send him the emails that he wished to be made part of the hearing record as supplementary exhibits to the parent's pendency brief (see Tr. p. 34). It is unclear whether the parent did so, but, in any event, I will consider the emails on appeal as they represent communications between the IHO and the parties regarding the disposition of the present matter.

[5] The matter below continued with another hearing date on April 14, 2020, after the parent served her request for review (Tr. pp. 38-50). The IHO reviewed the procedural history of the matter before him thus far and acknowledged that an appeal had been filed from his decision to defer a determination on pendency (see Tr. pp. 39-42). The parent's counsel confirmed his preference that the hearing not move forward on the merits until after a pendency decision was made, although the district was prepared to begin presenting its evidence (Tr. pp. 42-43). In response to parent's counsel's objection to an extension of the timeline, the IHO stated his understanding that parent's counsel was "asking not to go forward until the pendency appeal [i]s resolved" (Tr. p. 44). The parent's counsel then re-stated his position that the IHO should proceed and decide the issue of pendency (Tr. pp. 44-46). Ultimately, the IHO acknowledged the parent's objection and indicated that the IHO and the parties would have "one more status" at which time they would "figure out what we'll do on that date" (Tr. p. 49).

pendency at iBrain, the parent has to meet the traditional standard for injunctive relief since there is no meaningful threat to the student's education and that the parent cannot meet that standard because there is no risk of irreparable harm. In addition, the district alleges that, assuming an SRO were to reach the question of pendency, the parent failed to show that iBrain was substantially similar to iHope. Finally, the district argues that an SRO is without jurisdiction to make a determination on pendency since the same issue is pending before federal court and that the IHO "acted appropriately in similarly declining to address pendency at this juncture."

The parent submits a reply, responds to the district's arguments, and asserts that an SRO should issue a decision on the issue of pendency.

After the current appeal was submitted in full, the Second Circuit issued a decision in Ventura de Paulino v. New York City Department of Education, 2020 WL 2516650 (2d Cir. May 18, 2020). 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, 2020 WL 2516650, at *9-*11).

Given the recent legal developments, the undersigned provided the parties with an opportunity to brief how, or if, the Court's decision should be applied to the facts of this appeal. The district argues that the Court addressed and rejected the arguments raised by the parent in the present matter and, therefore, requests that the parent's appeal be denied. The parent argues that, because the petitioner(s)/appellant(s) in the matter decided by the Second Circuit filed a petition for rehearing or rehearing en banc, the Second Circuit decision has been stayed and, therefore, may not be deemed controlling in the instant matter.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 2020 WL 2516650, at *8; 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 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 (Ventura de Paulino, 2020 WL 2516650, at *9; 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 (Ventura de Paulino, 2020 WL 2516650, at *9; 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 pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 2020 WL 2516650, at *9; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; 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]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). 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 Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197).

VI. Discussion

A. Jurisdiction

The parent argues there was no legal basis for the IHO to defer his decision on pendency. The district, on the other hand, argues that the IHO correctly deferred. The district asserts that the issue of pendency for this matter is currently before the District Court for the Southern District of New York and, therefore, neither an IHO nor an SRO has jurisdiction to consider the pendency question.[6]

Citing Application of the Department of Education, Appeal No. 19-117, the district contends that the IHO acted appropriately in declining to address pendency and argues that the SRO should do the same. However, the posture of Appeal No. 19-117 differs from this appeal. In that matter, the district court had already issued a decision denying the parents' requested relief.[7] Here, the district court stayed the matter pending before it (see Dist. Supp. Pendency Br., Ex. 3) and, as of the date of this decision, the court has not lifted the stay (see generally 19-cv-08870).

With that said, having the proceeding pending simultaneously in two forums at the same time leaves the matter in an awkward posture. This posture comes about because, unlike most matters under the IDEA, some courts have indicated that a parent may bring an action for pendency without first exhausting administrative remedies (Ventura de Paulino, 2020 WL 2516650, at *8 [finding that "where 'an action alleg[es a] violation of the stay-put provision,' such action 'falls within one, if not more, of the enumerated exceptions' to the IDEA's exhaustion requirement"], quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2d Cir. 2002] [noting that the administrative process is inadequate given the time sensitive nature of stay-put rights]). I considered whether or not it was appropriate to uphold the IHO's decision to defer on making a decision on the student's pendency, as the district court's decision on the pendency issue for this student will ultimately supersede a decision from an IHO or an SRO; however, some authorities suggest that where there is jurisdiction or even concurrent jurisdiction, there may still be value in issuing a final administrative decision and, consequently, I am remanding this matter with instructions to the IHO to issue a decision on pendency (Brock v. Pierce Cnty., 476 U.S. 253, 259-60 & n.7, 266 [1986]; Shaw v. New York Dep't of Corr. Servs., 451 Fed. App'x 18, 21 [2d

[6] As noted above, the matter in district court was stayed pending resolution of the three cases pending before the Second Circuit Court of Appeals (see Dist. Supp. Pendency Br., Ex. 3).

[7] To the extent the district also relies Application of a Student with a Disability, Appeal No. 19-089, that matter is also distinguishable for the reasons set forth in Application of the Department of Education, Appeal No. 20-033.

Cir. Dec. 15, 2011]; 40 West 75th Street LLC v. Horowitz, 25 Misc. 3d 1230(A), at *5 [Civ. Ct., New York County Nov. 19, 2009]).[8]

As of the date of this decision, the merits of the parties' dispute regarding pendency in this matter is still pending in district court; however, as noted above, since the IHO deferred on the issue, the Second Circuit in Ventura de Paulino spoke directly on the point of law at issue in this matter. Under these circumstances there is little or no danger of the IHO issuing a decision in conflict with any future ruling from the district court involving this student's pendency, and I see little prejudice to the parties before me in this proceeding resulting from the issuance of an administrative decision on pendency, particularly since the administrative decision will ultimately remain subject to judicial review. Accordingly, the district's request that I uphold the IHO's decision to defer or that I abstain from making a decision is denied and the IHO is ordered to issue a decision consistent with the following.

B. Pendency

The substance of the parties' pendency dispute in this proceeding focuses on the question of when a parent may unilaterally transfer a student from one nonpublic school (iHope), which was being funded by the district, to another nonpublic school (iBrain) and continue to have the student's tuition funded by the district pursuant to pendency. The Second Circuit's issuance of its decision in Ventura de Paulino makes review of the underlying dispute one of a matter of law. Therefore, the matter will be remanded to the IHO to issue a decision consistent with that precedent.[9]

First, however, I will address the parent's argument that the Second Circuit's decision should not be applied in this matter because the plaintiff(s)/appellant(s) in the matter decided by the Second Circuit filed a petition for rehearing or rehearing en banc. The parent cites Rule 41 of

[8] Further, considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and should promptly address a pendency dispute, whenever raised (see "Questions and Answers on Impartial Due Process Hearings for Students with Disabilities," at p. 15, Office of Special Educ. [Jan. 2018] [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 and prior to determining any other issue"], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/impartial-hearing-guidance-jan-2018.pdf; "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. [Rev. Sept. 2016] [same], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf).

[9] I considered entering the order outright without remand; however, to dismiss the parent's appeal without remand may have left the status of the matter unclear given the IHO's deferral on the issue of pendency. Further, as the proceedings are ongoing and the IHO expressed that he did not intend to defer on the issue of pendency for long (see Tr. p. 30), it is possible that, since the last hearing date for which the district filed a transcript as part of the hearing record (i.e., April 14, 2020), the IHO may have revisited the issue of pendency. As of this date, neither party has contacted the Office of State Review with any information indicating that the IHO has taken action in this matter that would affect the current appeal. Nevertheless, in the event an interim decision was issued before or contemporaneously with the issuance of the present decision, on remand, the IHO is directed to modify or supersede such interim decision as necessary in order to align with the remand instructions in the present decision. Without the present matter being remanded, any such interim decision issued by the IHO which conflicted with the current decision would add further confusion to the already complex procedural posture of this matter.

the Federal Rules of Appellate Procedure, which provides that a "mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later" (Fed. R. App. P. Rule 41[b]). However, "[t]he issuance of the mandate is relevant only to the transfer of jurisdiction from the Circuit to [the district court] . . . it has nothing to do with an opinion's precedential authority" (S.E.C. v. Amerindo Inv. Advisors, Inc., 2014 WL 405339, at *4 [S.D.N.Y. Feb. 3, 2014] [also noting that "if the mere possibility of reversal were enough to make authority non-binding, no precedent would ever control"], affd sub nom., 639 Fed. App'x 752 [2d Cir. Feb. 26, 2016]). Accordingly, the Second Circuit's decision in Ventura de Paulino is controlling authority.

Turning to the substance of the Second Circuit's decision, the Court in Ventura de Paulino, was confronted with a set of facts similar the present matter in that the IHOs had concluded that iHope was an appropriate unilateral placement for the students for prior school years and the district did not appeal those rulings, meaning that the district, by operation of law, consented to the students' placements at iHope (2020 WL 2516650, at *9). The issue presented was whether the parents could unilaterally move the student to iBrain and still receive pendency funding (id.). The Court concluded the parents could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) the students' pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at *10-*12). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at *10). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at iBRAIN is substantially similar to the one offered at iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN for the 2018-2019 school year, they did so at their own financial risk" (id.). The Court also rejected the argument posed by the parent in the present case; to wit, that iBrain constituted the student's operative placement at the time the due process proceedings were initiated (id. at *12).

In the present case, the last agreed upon placement is based on the April 2018 unappealed IHO decision in the proceedings concerning the 2017-18 school year, which ordered the district to

fund the student's unilateral placement at iHope (see Parent Pendency Br., Ex. B).[10] Applying Ventura de Paulino to the instant dispute, when the parent unilaterally enrolled the student at iBrain for the 2019-20 school year, she did so at her own financial risk (2020 WL 2516650, at *10).

VII. Conclusion

Based on the foregoing, the matter is remanded to the IHO to issue an interim decision on pendency consistent with the Second Circuit's decision in Ventura de Paulino. Therefore, absent an agreement between the parties to the contrary, the IHO should deny the parent's request for pendency at iBrain. In the event that the IHO issued an interim decision before or contemporaneously with the issuance of the present decision, on remand, the IHO is directed to modify or supersede such interim decision as necessary in order to align with the remand instructions in the present decision.

IT IS ORDERED that the matter is remanded to the same IHO who presided over the impartial hearing thus far to issue an interim decision on pendency consistent with the body of this decision.

Dated: **Albany, New York**
June 5, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[10] During the impartial hearing, the parent argued that the basis for pendency was the November 2018 interim decision from the prior impartial hearing regarding the 2018-19 school year, which found that the student's stay-put placement during the pendency of that proceeding was iBrain (Parent Pendency Br. at p. 2). However, a pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding because, in order to represent an agreement between the parties, the unappealed decision upon which pendency may be based must be a decision on the merits, including a determination of the appropriateness of the unilateral placement (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2]; see also Ventura de Paulino, 2020 WL 2516650, at *9; Schutz, 290 F.3d at 484-85; Letter to Hampden, 49 IDELR 197). The proceedings for the 2018-19 school year did not result in a final decision on the merits (see Dist. Pendency Br., Ex. 1 [finding the matter moot based on the operation of pendency]).