The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-102

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 interim decision of an impartial hearing officer (IHO) determining her daughter'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 2020-21 school year. 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

The parties' familiarity with the detailed facts and procedural history of this matter and the IHO's decision is presumed and will not be recited in detail. The CSE convened on March 20, 2020, July 24, 2020 and August 12, 2020 to formulate the student's IEP for the 2020-21 school year (see generally Parent Exs. B at pp. 1-3; D at p. 40). The parent disagreed with the recommendations contained in the student's IEPs, and, as a result, notified the district of her intent to unilaterally place the student at the Sterling School (Sterling) (see Parent Ex. A). In a due

process complaint notice, dated September 11, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. B).

An impartial hearing convened on March 11, 2021, for a pendency hearing (Tr. pp. 1-38). In an interim decision dated April 2, 2021, the IHO determined that the student's pendency placement was the placement ordered in an unappealed IHO Decision dated July 2, 2020, which ordered in part that a CSE meet and develop an IEP including "[d]eferral to CBST for nonpublic school placement" (see Parent Ex. C at p. 6; IHO Decision at pp. 7-8).[1] The IHO in the present matter noted that a CSE convened in August 2020, and that the student was deferred to the "CBST" and was accepted at a particular nonpublic school which did not have an open seat for the student, and that another nonpublic school, Hawthorne Cedar Knolls School (Hawthorne), agreed to an "observation/interview" with the student (IHO Decision at p. 8). The IHO further noted that the district, in its "[l]etter [b]rief" had stated that if the parent wished to invoke the student's pendency program, the district requested that the parent notify the district and it would offer an "interim similar class placement" (id.). The IHO then held that the student's pendency placement was "[Hawthorne], or a similar placement recommended by the CBST, with both placements contingent upon the [s]tudent being accepted and there being a vacancy" (id. at pp. 8-9, 10). The IHO ordered the district to place the student at Hawthorne or a similar nonpublic school, and directed that if such a placement is not made, the parties may request a new pendency hearing (id. at pp. 9-10). Further, the IHO ordered the district to provide or fund related services for the student for the pendency of the proceeding based on an agreement between the parent and district; the related services consisted of physical therapy and assistive technology, as well as counseling, occupational therapy, and speech-language therapy (id. at pp. 3, 9-11). Lastly, with respect to the parent's request that pendency include transportation at district expense to Sterling, the IHO declined to grant the request, finding that the district would be obligated to provide the student with transportation set forth in the August 2020 IEP to "a nonpublic school recommended by the CBST pursuant to this IHO's pendency order, and subsequent IEP" which would not include Sterling (id. at p. 9).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and will not be recited in detail. However, the essence of the parties' dispute on appeal is whether the parent has the right to reject the nonpublic school selected by the district to implement pendency.

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

[1] Although not defined in the hearing record in this matter, CBST likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (see, e.g., Application of a Student with a Disability, Appeal No. 15-054; Application of a Student with a Disability, Appeal No. 15-051).

or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 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, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior

unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

VI. Discussion

A. Compliance with Practice Regulations

The district contends that the parent's appeal should be dismissed because her pleading and accompanying papers do not comport with State regulations governing the practice before the Office of State Review. As the district argues, the parent's filing, which consists of a "Notice of Intention to Seek State Review," a "Notice of Petition," and a pleading denominated as a "Verified Petition," does not comply with the current form requirements of Part 279 of the practice regulations. The regulations governing practice before the Office of State Review were amended over four years ago (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) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]). In addition, the parent served a notice of intention to seek review upon the district, but the notice of intention to seek review was not accompanied by a case information statement as required by State regulation, nor does it contain the language explicitly required by State regulation (8 NYCRR 279.2[a], [e]). Further, the notice of request for review accompanying the parent's pleading (incorrectly denominated as a "Notice of Petition") does not comply with the current regulation, but instead contains language from the old notice requirements in effect prior to January 1, 2017, including a statement of the incorrect time frame for the district to respond to the parent's pleading (see 8 NYCRR 279.3).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). While a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application

of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

The parent's attorney has previously been cautioned regarding her noncompliance with current practice regulations on a number of occasions. In Application of a Student with a Disability, Appeal 18-131 at p. 6, n.4, an SRO urged the parent's attorney, "as counsel . . . who appears regularly in this forum" to review Part 279, as amended and effective January 1, 2017, and to conform her practice to the regulations currently in effect. The SRO noted that counsel "ha[d] previously been alerted to this particular nonconformance in pleadings submitted on her clients' behalf," specifically referencing Application of a Student with a Disability, Appeal No. 18-079 and Application of a Student with a Disability, Appeal No. 18-055, and further cautioned parent's counsel that "repeated failures to comply with the practice requirements" could result in an SRO's exercise of his or her discretion to reject a request for review (Application of a Student with a Disability, Appeal 18-131 at p. 6, n.4). Similarly, in Application of a Student with a Disability, Appeal No. 19-097 at p. 7, n.9, and Application of a Student with a Disability, Appeal No. 19-111 at p. 9, parent's counsel was admonished for her noncompliance. The SRO in Application of a Student with a Disability, Appeal No. 19-111 noted that "repeated excusal of practice regulation violations without prejudice is not tenable indefinitely."

More recently still, in Application of a Student with a Disability, Appeal No. 19-120, I noted that given counsel's repeated violations of the practice regulations and the extent to which counsel had been directed to ensure future compliance, "counsel should be sufficiently warned of the potential (now likely) consequence of her repeated failures to conform papers submitted to the Office of State Review with the regulations currently in effect." Counsel for the parent was also warned "to prepare her submissions with more care in any future matters filed with the Office of State Review" and urged to review the current requirements of Part 279 of the State regulations and examine the requests for review and model forms that have been published as guidance by the Office of State Review (Application of a Student with a Disability, Appeal No. 19-120; see https://www.sro.nysed.gov/book/prepare-appeal).

At this point, parent counsel's continuing refusal to comply with the practice regulations cannot be allowed to continue without consequence. Accordingly, the parent's appeal is dismissed for noncompliance with the practice regulations.

Additionally, while policy considerations favoring a determination of matters on the merits, weigh in favor of an exercise of discretion to provide a parent with an opportunity to correct particular oversights by granting leave to serve and file pleadings after they are rejected that meet the form requirements of Part 279; as discussed in more detail below, even if I were to accept the parent's pleadings, the parent would not have received a favorable decision in this appeal.

B. Alternative Finding on Pendency

The parent's appeal makes only two explicit assertions with respect to the IHO's pendency determination. First, the parent asserts that pendency "does not lie in [Hawthorne]" because that placement was not "finalized" by the district and the parties have not agreed to pendency at Hawthorne. Second, the parent asserts that the IHO's determination that transportation ("busing") be provided only to Hawthorne must be overturned because the student "has been receiving busing

since September 2020 to the Sterling School. The parent has not appealed from the IHO's decision concerning other issues, such as the provision of pendency related services as agreed to by the parties.

The district, for its part, asserts that the IHO correctly determined that pendency was in a nonpublic school to be determined by the district, whether Hawthorne or another State-approved nonpublic school, and that the IHO correctly declined to find that Sterling was the student's pendency placement. Further, the district asserts that given that the IHO correctly determined that the student's pendency was at a school recommended by the CBST, it follows that the IHO correctly denied the parent's request for pendency transportation to and from Sterling.

It is clear that both parties and the IHO agree that the student's pendency arises from the July 2, 2020 IHO decision which directed the district to defer the student's placement to the CBST for placement in a nonpublic school (Req. for Rev. ¶12; Answer ¶9; Parent Ex. C; IHO Decision at pp. 7-8). The argument between the parties centers around which party is permitted to make the determination as to the school that will implement the student's program, with the parent asserting that when the district proposes a school to implement pendency, she has the right to reject it. In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519, 534 (2d Cir. 2020), the Second Circuit addressed whether a parent could unilaterally select a nonpublic school to provide the student's program and receive pendency funding for that program. The Court concluded that a parent could not effectuate a unilateral move away from a school the parent had previously received funding for through pendency since it is the district that is authorized to decide how (and where) a student's 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 533-35). However, the Second Circuit specifically declined to consider "any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child" (id. at 532 n. 65).

Based on the above, the IHO's determination—that the student's pendency placement shall be provided at Hawthorne "or a similar nonpublic school placement recommended by the CBST," and that if the district does not locate a similar nonpublic school, the parties may request a new pendency hearing—is consistent with the Second Circuit's decision in Ventura de Paulino. Accordingly, there is no basis on appeal for departing from the IHO's determination on this point.

Finally, with respect to the parent's claim that there is an agreement between the parties with respect to transportation under pendency, an agreement between the parties on the student's educational placement during the due process proceedings can modify and supersede a prior form of pendency, but under the circumstances presented, it does not require reversal of the IHO's pendency determination.

VII. Conclusion

Having determined that the parent's pleadings are dismissed for failure to comply with the practice regulations and having made the alternate finding that the IHO's interim decision on pendency need not be reversed or modified, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address

them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 25, 2021

STEVEN KROLAK
STATE REVIEW OFFICER