



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-019

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Theresa Crotty, Esq., of counsel

Friedman & Moses, LLP, attorneys for respondents, Paula Rogowsky Cohen, Esq., of counsel

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 that portion of a decision of an impartial hearing officer (IHO) that ordered that the respondents' (the parents') son's pendency placement at Rebecca to be permanent. The appeal must be sustained.

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

In light of the limited scope of this appeal, the facts and procedural history of this case need not be recited in detail. On July 21, 2011, and May 3, 2012, the Committee on Preschool Special Education (CPSE) convened to develop the student's IEPs for the 2011-12 and 2012-13 school years, respectively (see Parent Exs. H at p. 1; B at p. 1). During the 2011-12 and 2012-13 school years, pursuant to the IEPs, the student attended an 8:1+2 special class in a preschool special education program (Parent Exs. U at p. 1; V at p. 1; BB at p. 1). On April 11, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (see Parent Ex. D at p. 1). The parents disagreed with the recommendations contained in the April 2013 IEP and, as a result, requested, among other things, that the district assign the student to attend a public school site that

would limit student's exposure to nuts because the student had a severe allergy (Parent Ex. Q at pp. 1-3; see Parent Ex. P at pp. 1-2; see also Tr. pp. 93-96, 392-93; Parent Exs. D at p. 3; N).

In a due process complaint notice, dated August 13, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years (Parent Ex. A at pp. 1-13). For relief, the parents requested, among other things, tuition reimbursement and/or direct funding for the cost of the student's attendance at a nut-free nonpublic school, "such as the Rebeca School," for the 2013-14 school year and compensatory education for the 2011-12, 2012-13, and 2013-14 school years (id. at pp. 12-13).¹

On August 22, 2013, an impartial hearing convened in this matter and concluded on November 18, 2014, after eight days of proceedings (Tr. pp. 1-418). By interim decision, dated September 11, 2013, the IHO determined that, consistent with the parties' agreement, the student's pendency (stay put) placement consisted of 12-month school year program in an 8:1+2 special class in a "nut-free" placement, along with related services consisting of speech-language therapy, occupational therapy (OT), physical therapy (PT), and home-based applied behavioral analysis (ABA) therapy, and speech-language therapy using PROMPT methodology, as well as limited travel time (Interim IHO Decision at p. 2). In a second interim decision, dated October 7, 2013, the IHO determined that the student's pendency placement should be implemented at Rebecca (Second Interim IHO Decision at p. 4; see Tr. pp. 29-30).²

In a final decision, dated January 13, 2015, the IHO determined that, except to the extent that the parents' claims were barred by the application statute of limitations, the district failed to offer the student a FAPE (IHO Decision at pp. 3, 11-12, 14).³ The IHO also found that Rebecca was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' requested relief (id. at p. 12). As relief, the IHO ordered the "pendency placement" for the student to "become permanent" (id. at p. 14). The IHO also ordered the district to, among other things, fund the cost of the student's tuition at Rebecca and provide the student with compensatory additional services (id. at p. 15).

IV. Appeal for State-Level Review

The district interposes a limited appeal asserting that the IHO erred insofar as he ordered that "[t]he pendency placement . . . shall become permanent" (IHO Decision at p. 14 [emphasis added]). The district argues that, to the extent that the IHO's decision could be interpreted to mean

¹ The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² On October 16, 2013, the parents executed an enrollment contract with Rebecca for the student's attendance during the remainder of the 2013-14 school year (see Parent Ex. JJJ at pp. 1, 5).

³ After issuance of the interim decisions, the then-presiding IHO recused himself, and a new IHO was appointed and rendered the decision at issue in this appeal (see IHO Decision at p. 3).

that the student's pendency placement is his permanent placement at district expense beyond the conclusion of these proceedings, such an award of relief was in error.⁴

V. Applicable Standards—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], 4410[7][c]; 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]; 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. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 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. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 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]; T.M., 752 F.3d at 170-71; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; see T.M., 752 F.3d at 171; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; 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"]).

VI. Discussion

In this case, the IHO erred in ordering the student's pendency placement to become "permanent" because the IDEA and State and federal regulations obligated the district to continue to fund the student's pendency placement as set forth in the October 2013 interim decision only through the conclusion of any administrative and/or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112, 125-27 [3d Cir. 2014] [finding that a district's obligation to maintain and fund a student's pendency placement remained in effect "through the final resolution of the dispute"]). There is no authority for an order that imposes a perpetual obligation on the district to annually fund the same educational placement without change without regard to whether a due process proceeding is requested or pending (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the

⁴ Although the parents requested extensions to the time period in which to respond to the district's petition, the parents ultimately did not file an answer to the petition. Notwithstanding that the parents have not responded to the petition, the entire hearing record has been examined, and an independent decision based on the entire hearing record has been rendered (20 U.S.C. § 1415[g]; 34 CFR 300.510[b][2][i]).

provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["[A] child's right to remain in the current educational placement attaches when a due process complaint is filed."]).

Thus, once the proceedings and appeals are concluded, the district's obligation to maintain the student in his pendency placement terminates (see Mackey v. Bd. of Educ., 386 F.3d 158, 161 [2d Cir. 2004]; Marcus I. v. Dep't of Educ., 2011 WL 1979502, at *1 [9th Cir. May 23, 2011] [explaining that pendency does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]). At that point any further right to remain in the unilateral placement stems from the equitable relief, if any, granted by the IHO on the merits. The pendency provisions do not confer upon an IHO the power to extend indefinitely an interim pendency determination beyond the conclusion of the proceedings which gave rise to the stay put right. Based upon the foregoing, the student's right to remain in the pendency placement under the October 2013 interim decision during the underlying administrative proceedings will lapse once the instant proceedings and any appeals are concluded.⁵

VII. Conclusion

In summary, the IHO erred in ordering the student's pendency placement to extend permanently beyond the termination of these proceedings. Because the IHO's remaining determinations and awarded relief have not been appealed by the district or cross-appealed by the parents, they have become final and binding on the parties (see Educ. Law § 4404[1]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 13, 2015, is modified by vacating that portion which ordered the student's pendency placement to become permanent.

Dated: **Albany, New York**
 April 3, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

⁵ This decision does not address the possibility that the student's placement could once again become subject to the pendency provision if the parties continue to disagree on the student's placement based on subsequent events, and a new due process proceeding is initiated to resolve that dispute. In that instance, any disputed issues regarding pendency would be resolved in that proceeding, not this proceeding.