The University of the State of New York

The State Education Department
State Review Officer
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No. 16-020

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:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, Courtney Haas, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 parent) appeals, pursuant to 8 NYCRR 279.10(d), from an interim decision of an impartial hearing officer (IHO) determining her son's placement during the pendency of a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2015-16 school year. The IHO determined that the student's pendency placement was the placement set forth in the student's February 11, 2015 individualized education program (IEP). 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 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 student has received a diagnosis of autism (Parent Ex. A at p. 1).[1] The hearing record reflects that a district Committee on Preschool Special Education (CPSE) convened on February 11, 2015, to conduct an annual review to develop an IEP for the student for the remainder of the 2014-15 school year, as well as for July and August 2015 (Parent Ex. B at pp. 1, 2). The CPSE

[1] The student's eligibility for special education programs and services is not in dispute in this proceeding (34 CFR 300.8[c]; 8 NYCRR 200.1[zz]).

recommended an 8:1+2 special class center-based program in a State-approved nonpublic special education preschool (NPS) (id. at pp. 1, 15-16).[2] The CPSE further recommended that the student receive three individual speech-language therapy sessions per week for 30 minutes each, three individual OT sessions per week for 30 minutes each, three individual PT sessions per week for 30 minutes each, two individual counseling sessions per week for 30 minutes each, and the services of a 1:1 aide (id.).

According to the parent, a district CSE convened on March 31, 2015, to develop an IEP for the student's 2015-16 (kindergarten) school year (Parent Ex. A at p. 2). The March 2015 CSE recommended a 6:1+1 special class in a special school with related services and a 1:1 crisis paraprofessional (id.). By notice dated June 12, 2015, the district identified the particular public school site to which the district assigned the student to attend for the 2015-16 school year (id. at p. 3).

On August 11, 2015, the parent visited the assigned school site and after speaking with school personnel, concluded that the assigned school could not implement the March 2015 IEP (Parent Ex. A at p. 3). The record reflects that on September 1, 2015, the parent executed an enrollment contract for the student's attendance at the NPS for the 2015-16 academic school year (Parent Ex. C).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated September 21, 2015, the parent alleged that the district failed to offer the student a free appropriate public education for the 2015-16 school year (Parent Ex. A). As relevant here, the parent asserted the student's right to a pendency placement consisting of the services recommended in the February 2015 CPSE IEP, implemented in "a small school comparable to [the student's] preschool placement," (id. at p. 4).

B. Impartial Hearing

1. Interim Decision on Pendency

A hearing to determine the student's pendency placement was held on October 16, 2015 (Tr. pp. 1-10). The parties agreed that the student's placement for pendency purposes was that set forth in the February 2015 IEP (Tr. p. 5). By decision dated October 26, 2015, the IHO issued an interim order on pendency finding that the February 2015 IEP was the last agreed-upon IEP and that the program set forth therein constituted the student's pendency placement (Oct. 26, 2015 Interim IHO Decision at p. 4). The IHO, after noting that the student attended a State-approved nonpublic preschool program at the NPS, ordered that the student receive the services mandated by the February 2015 IEP, including an 8:1+2 special class in the NPS (id. at pp. 2, 4).

[2] The Commissioner of Education has approved the NPS as a preschool program to provide special education programs and related services to preschool students with disabilities (Educ. Law § 4410[9][a]; 8 NYCRR 200.1[nn]; 200.7; 200.16).

[3] The Commissioner of Education has not approved the NPS as a school with which school districts may contract for the instruction of school-age students with disabilities (see 8 NYCRR 200.1[d], 200.7).

2. Amended Due Process Complaint Notice

By amended due process complaint notice dated February 11, 2016, the parent, as relevant to this decision, provided additional detail regarding the student's placement at the NPS (Amended Due Process Complaint Notice at p. 5).[4] In particular, the amended due process complaint notice reflected that pursuant to the February 2015 IEP the student had attended a State-approved preschool program at the NPS, while during the 2015-16 school year the student attended the school-age program at the NPS, which was not State-approved (id.). The parent asserted that the school-age program at the NPS was the student's pendency placement and requested that the district fund the cost of tuition for the NPS school-age program, which was higher than the cost of tuition for the State-approved preschool program (id.).

3. Second Interim Decision on Pendency and Termination

The parties reconvened on February 16, 2016, for a second hearing on pendency (Tr. pp. 11-28). The IHO noted that the district had accepted the amended due process complaint notice (Tr. pp. 13-14). Counsel for the parent requested that the IHO direct the district to pay the school-age tuition rate at the NPS, rather than the preschool tuition rate (Tr. pp. 15-19). Counsel for the district asserted that the district met its pendency obligation by paying the cost of tuition for the State-approved preschool program at the NPS (Tr. pp. 16-17). The district argued that the NPS school-age program was not substantially similar to the preschool program, in part because the preschool program at the NPS was State-approved while the school-age program was not (Tr. pp. 16-19). In addition, counsel for the district argued that the cost of the school-age program was significantly higher (Tr. pp. 16-17, 19). The hearing transcript also reflected that the parent withdrew the student from the NPS during the 2015-16 school year (Tr. pp. 20-21).[5]

After receiving memoranda from the parties, by decision dated March 15, 2016, the IHO issued a second interim order on pendency reiterating his findings set forth in the October 2015 interim order on pendency, that the student's pendency placement consisted of the services set forth in the February 2015 IEP (Mar. 15, 2016 Interim IHO Decision at p. 3; see Parent Ex. E; Dist. Ex. 1). The IHO noted that the hearing record did not establish the content of the school-age program at the NPS (Mar. 15, 2016 Interim IHO Decision at p. 3). Finding that the dispute was one over implementation of the initial pendency order, the IHO denied the parent's request that the district pay the tuition rate for the school-age program at the NPS under pendency (id. at pp. 3-4).

On March 16, 2016, counsel for the parent informed the IHO that the parent had withdrawn her due process complaint notice and, on March 17, 2016, the IHO issued an order of termination (IHO Decision at p. 1).

[4] The copy of the amended due process complaint notice submitted to the Office of State Review is missing page 4. However, because of the posture of this case, the portion received contains all the claims relevant to this appeal.

[5] The hearing record indicates that the parent withdrew the student from the NPS effective February 12, 2016 (Parent Ex. E at p. 5).

IV. Appeal for State-Level Review

The parent appeals from both of the IHO's interim decisions, asserting that the district is obligated to pay the school-age tuition rate to the NPS pursuant to pendency. The parent also submits the student's March 2015 IEP as additional evidence.

In an answer, the district denies the parent's allegations and argues that the parent lacks standing to pursue this appeal and that the IHO's second order on pendency should be upheld. With regard to the IHO's second order on pendency, the district argues that its counsel agreed to continue placement at the NPS and to provide the program and services set forth on the February 2015 IEP, but claims that it did not agree to pay the school-age tuition rate, nor did it agree to change the student's placement to a school-age program. The district also submits additional evidence.

In a reply, the parent denies that she lacks standing

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], 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]; Mackey v. Bd. of Educ., 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, 246-48 [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. 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 (Zvi D., 694 F.2d at 906; 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] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student must remain in a particular site or location (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]).

The Second Circuit has described three variations on the definition of "then-current educational placement": (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 2016 WL 3548246, at *2 [2d Cir. June 27, 2016]; Doe v. E. Lyme Bd. of Educ., 790 F.3d 440 452 [2d Cir. 2015]; Mackey, 386 F.3d at 163). The United States Department of Education has opined that a student's then-current educational placement would "generally be taken to mean current special education and related services provided in accordance

with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]).

VI. Discussion

A. Additional Evidence

The parent has submitted the student's March 2015 IEP as additional evidence arguing that it is relevant because it is the subject of the underlying due process complaint notice. The parent also argues that the March 2015 IEP was known to the district and in its possession and therefore should be admitted now as additional evidence before an SRO.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 15-026; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The March 2015 IEP does not meet the criteria for consideration. The parent does not argue that the additional evidence is necessary for an SRO to render a decision and concedes it was available at the time of the hearing. Even if relevance alone was a sufficient ground for consideration of additional evidence, the parent's argument must fail because the underlying due process complaint notice was withdrawn and the IHO terminated the impartial hearing. Therefore, the March 2015 IEP annexed to the parent's petition is not relevant or necessary to the disposition of the parties' arguments. As such, I decline to accept the additional evidence proffered by the parent.

The additional evidence submitted by the district, although apparently not available at the time of the impartial hearing, is neither relevant nor necessary to the issues before me. Accordingly, it has not been considered.

B. Pendency Placement

Initially, neither party has appealed from the IHO's determination that the February 2015 IEP established the student's placement for purposes of pendency.

The parent argues that the IHO erred by rejecting her request to order the district to pay for the student's tuition at the NPS at the school-age tuition rate pursuant to pendency and that in doing so, the IHO superseded an agreement between the parties. The district argues that there was no agreement between the parties with regard to tuition rates or placement in an unapproved school and that the student's pendency program derives from the last agreed-upon IEP.

The parent asserts that the district agreed to pendency in the school-age program at the NPS during the October 16, 2015 hearing on pendency. Specifically, the parent points out that her counsel mentioned during the hearing that the continuation of the student's program at the NPS was not an approved program. The hearing record reflects that counsel for the parent requested that the student's placement in the NPS be continued (id. at pp. 6-7). However, when counsel for

the parent began to state that the NPS was not an approved program, the IHO interjected (Tr. p. 7). Counsel for the parent then stated that the parent was "seeking direct funding so that the student can continue at the same placement," to which counsel for the district did not object (id.).

In his first order on pendency, the IHO determined that the student's pendency placement was established by the February 2015 IEP, including placement at the NPS without reference to it being the school-age program or being unapproved (Oct. 26, 2015 Interim IHO Decision at p. 4). In his second order on pendency, the IHO reiterated that the student's pendency was "based upon services mandated in [the student's] February 11, 2015 CPSE IEP" (Mar. 15, 2016 Interim IHO Decision at p. 3). The IHO found that "it was not established" at the first hearing on pendency that the student would attend a school-age program at the NPS, or that the school-age program included an increase in tuition (id.). The IHO further found that the February 2015 CPSE IEP mandated an approved preschool program that could have been implemented in a preschool classroom at the NPS or another approved program (id.). The IHO held that he had already determined the student's pendency program and placement in his prior order and characterized the current dispute as an argument over implementation of his pendency order and over "the mechanics and amount of payment" (id.).

Based on the above, the parent's assertion that the district agreed to fund the unapproved school-age placement at the NPS is unavailing. Nevertheless, pursuant to the stay-put provisions, the district is still obligated to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). The parties agree, and the IHO determined, that the student's last agreed-upon IEP was developed by a district CPSE on February 11, 2015 (Tr. pp. 4-5, 13; Parent Ex. B at pp. 1, 2; see Oct. 26, 2015 Interim IHO Decision at p. 4; Mar. 15, 2016 Interim IHO Decision at p. 3). As recently reaffirmed by the Second Circuit, "the term 'educational placement' refers only to the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753; see T.M., 752 F.3d at 171). It is well settled that the pendency provision does not dictate that a student must remain in a particular site or location, or receive services from a particular provider; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756; see 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. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]). Accordingly I review the hearing record to determine whether the student's placement at the NPS was a continuation of the placement established by the February 2015 IEP.

However, the hearing record does not include any documentary or testimonial evidence regarding what special education, related services, and additional supports the student received in the school-age program at the NPS. The parent's position is essentially that an enrollment contract and tuition statement from the NPS, as well as the exchanges between the parties during the two pendency hearing dates, demonstrates that the February 2015 IEP was implemented in a school-age classroom at the NPS and that the district agreed to fund whatever tuition rate was associated with the school-age program.

Despite having the opportunity to supplement the hearing record with information regarding the student's placement at the NPS to support her argument that the student's placement

in the school-age program was substantially similar to his placement in the preschool program, counsel for the parent submitted only the contract specifying the amount of the student's tuition and an affidavit establishing that she had made no payments toward the cost of his tuition (Parent Exs. C; D). Notably, the contract provides no details about the student's program (Parent Ex. C). Furthermore, no testimony was proffered regarding the special education program and related services provided to the student at the NPS. Accordingly, although counsel for the parent asserts that the student's placement at the school-age program in the NPS was the same as his placement in the preschool program at the NPS, the hearing record does not support such a conclusion. In particular, although counsel for the parent asserted during the impartial hearing that the student-to-teacher ratio in the school-age program was identical to that in the preschool program (Tr. pp. 19-20), there is no evidentiary basis in the hearing record to evaluate the accuracy of this statement, and counsel for the parent further indicated that the parent withdrew the student from the NPS because "the student was not necessarily receiving all of his services" (Tr. pp. 20-21). The parent's position is further belied by her denial in her reply that she has sufficient knowledge to form a belief as to whether the student received special education services in accordance with the February 2015 IEP. Accordingly, it is impossible to find on this record that the student's placement in the school-age program was substantially similar to the preschool program or that it was the student's placement for purposes of pendency.[6]

With respect to the district's contention that the programs are not substantially similar because of the disparity in cost between the preschool and school-age programs at the NPS, the district has not provided, nor have I found, any authority for the proposition that a difference in cost establishes a change in educational placement. Nevertheless, although the parent in her due process complaint notice indicated it would have been permissible for the district to implement the student's pendency placement in a program "comparable" to the student's preschool program (Parent Ex. A at p. 4), the parent unilaterally enrolled the student in the school-age program at the NPS on September 1, 2015, several weeks prior to filing her due process complaint notice and invoking the student's right to pendency (Parent Exs. A; C). Under the circumstances of this case, where the district was not given the opportunity to implement the student's pendency placement prior to her placement in the school-age program at the NPS, it appears the parent may have taken "responsibility for the cost of obtaining [pendency] services from private providers" (T.M., 752 F.3d at 172, citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 373-74 [1985]; see Doe v. E. Lyme, 790 F.3d at 453-54). The district thereafter agreed to provide the student's pendency placement as set forth in the February 2015 IEP; by funding his placement in a State-approved nonpublic preschool program at the NPS (Tr. pp. 5, 7). Furthermore, while the district has not explained why cost alone constitutes a change in educational placement, whether the programs were substantially similar is a valid enquiry, and the hearing record does not sufficiently explain why the school-age program would be significantly more expensive than the preschool program if, in fact, it were providing substantially similar services to the student.

Because of my resolution of this matter based on insufficient evidence regarding the services provided at the NPS, it is unnecessary to also address whether the transition of the student

[6] Although the student is not required to remain in a preschool program now that he is no longer a preschool student with a disability (8 NYCRR 200.16[h][3][i]), the district is required to ensure that the student receives services which are "substantially and materially the same" (Letter to Fisher, 21 IDELR 992 [OSEP July 6, 1994]; see Application of a Student with a Disability, Appeal Nos. 13-041 & 14-008).

from a State-approved program to an unapproved program alone would have constituted a change in educational placement for purposes of pendency (but see, e.g., Z.H. v. New York City Dep't of Educ., 107 F. Supp. 3d 369, 374-76 [S.D.N.Y. 2015] [discussing the disparate treatment of State-approved and unapproved schools under the IDEA and State law]).

VII. Conclusion

Having determined, as did the IHO, that the student's pendency placement is the program set forth in the February 2015 IEP, the necessary inquiry is at an end. While I considered remanding this issue to the IHO to take additional evidence regarding the services actually provided to the student in the school-age program at the NPS, under the circumstances of this case it would not benefit the parties (see Doe v. E. Lyme, 790 F.3d at 455, citing Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2002] [noting that parties need not exhaust administrative remedies with respect to pendency claims]). The parent remains free to submit additional evidence regarding the student's pendency placement in a civil action (20 U.S.C. § 1415[i][2][C][ii]; 34 CFR 300.516[c][2]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 1, 2016

STEVEN KROLAK
STATE REVIEW OFFICER