The University of the State of New York

The State Education Department

State Review Officer

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No. 20-067 & 20-090

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

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:

Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter G. Albert, Esq. and John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an impartial hearing officer's (IHO) refusal to determine their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2019-20 school year. After the parents commenced their appeal, the IHO issued an interim order and determined that the student's pendency placement was at the International Academy of Hope (iHope), a private school, and ordered the district to fund the student's placement at the International Institute for

the Brain (iBrain) for the pendency of this proceeding after finding that iBrain was substantially similar to iHope.

Under a separately initiated appeal, the district appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from the interim decision of the IHO that found the student's pendency placement could be implemented at iBrain.[1] The parents' appeal must be dismissed. The district's 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]).

[1] The parties initiated separate appeals with respect to the student's pendency placement as a part of the same impartial hearing. The parents' appeal from the IHO's failure to issue a pendency order has been assigned Appeal No. 20-067. The district's appeal from the IHO's interim order on pendency has been assigned Appeal No. 20-090. As a matter of discretion, the two appeals have been consolidated for purposes of this decision. The parties' answers and other responsive pleadings to the respective appeals have been received and considered.

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

III. Facts and Procedural History

Due to the nature of the proceedings a full recitation of the student's educational history is unnecessary. The facts and procedural history will be provided as it pertains to the issues on appeal.

Following a prior impartial hearing regarding the program recommended for the student for the 2017-18 school year, an IHO, in a decision dated March 6, 2018, found that the district conceded it did not offer a free appropriate public education (FAPE) for that school year and awarded the parent reimbursement or direct funding for the cost of tuition and related services at iHope for the 2017-18 school year (Parent Ex. B at pp. 8-12). The 2017-18 IEP from iHope recommended a 6:1+1 special class 35 times per week and 12-month services, as well as an array of related services provided in 60-minute sessions (Parent Ex. C at pp. 28-29).

The student attended iBrain for the 2018-19 school year (see Parent Ex. D). The parents filed a due process complaint notice regarding the program recommended for the student for that school year and requested that the district be required to fund the student's attendance at iBrain pursuant to pendency; the request for pendency at iBrain was denied by an IHO, the district court, and an SRO in that matter, amid ongoing litigation (see Application of a Student with a Disability, Appeal No. 20-070; see also Dist. Ex. 2; 3).[2]

An IEP for the 2019-20 school year was created by iBrain on April 9, 2019 (see generally Parent Ex. E). The 2019-20 IEP from iBrain recommended a 6:1+1 special class 35 times per week and 12-month services, as well as an array of related services provided in 60-minute sessions (id. at pp. 36-38).

[2] An SRO recently issued a decision regarding the merits of the parents' due process complaint notice regarding the student's program for the 2018-19 school year and determined that although the district did not offer a FAPE and the parent's unilateral placement was appropriate, the hearing record supported the IHO's determination that equitable considerations barred any relief (Application of a Student with a Disability, Appeal No. 20-070).

On May 20, 2019, a CSE convened and developed an IEP for the student for the 2019-20 school year (Dist. Exs. 15; 16).

On June 21, 2019, the parents sent the district a notice of their intention to place the student at iBrain for the 2019-20 school year and to seek public funding for the placement (Parent Ex. M).

A. Due Process Complaint Notice and Impartial Hearing

By due process complaint notice dated July 9, 2019, the parents asserted that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A). Relevant to this appeal, the parents requested an interim order of pendency to be issued immediately (Parent Ex. A at pp. 1-2). The parents asserted that the basis for pendency was an "unappealed" finding of fact that arose from a prior impartial hearing relating to the 2017-18 school year (id. at p. 2). The parents argued that based on this prior decision the district should "prospectively pay for the student's Full Tuition at iBrain (which includes academics, therapies and a 1:1 professional during the school day) and pay for his special transportation" (id.).

The parties proceeded to impartial hearing on January 24, 2020 and conducted two additional hearing dates on March 10, 2020 and April 7, 2020 (Tr. pp. 1-31). At the April 7, 2020 hearing date, the IHO remarked that, "[t]his is the case where I reserved decision on the issue of pendency until we heard from the Second Circuit with respect to the case that they heard oral argument on in January, correct?" (Tr. pp. 25-26). The IHO stated that he thought it would be best to wait "another week to see if there's a decision from the Second Circuit. It doesn't make sense, honestly, to issue a decision that turns out might be the wrong decision based on bad law or a law that's not really settled" (Tr. p. 28). The IHO expressed agreement with parents' counsel that "eventually" the issue of pendency had to be resolved and told counsel that if the Second Circuit had not issued a decision "a week from now" he should communicate that to the IHO and the IHO would address the decision on the issue of pendency, and parents' counsel responded, "Okay. Fair enough" (id.).

On April 20, 2020, the parents initiated an appeal of the IHO's failure to issue a pendency order (Parent Req. for Rev.).

B. Impartial Hearing Officer Decision

The parties convened a fourth hearing date on April 15, 2020, wherein the IHO confirmed that because the Second Circuit had not issued a decision relevant to the matter of pendency in the intervening week, he would issue a pendency order as discussed in the hearing date conducted on April 7, 2020 (Tr. pp. 32-40).

In an interim order on pendency dated April 15, 2020, the IHO initially indicated that "[w]hile a pendency program is not always a brick and mortar location, if a student's educational program changes, the new program must be 'substantially and materially the same' as the student's prior educational program" (April 15, 2020 Interim IHO Decision at p. 5). The IHO went on to find that the student's program during the 2017-18 school year at iHope "consisted of 6:1:1 self-contained classes for an extended school day on a 12-month basis" (id. at p. 6). Additionally, the IHO noted that iHope provided the student with OT, PT, speech-language

therapy, assistive technology and a full-time 1:1 paraprofessional (id.). Comparatively, the IHO found that the student's program at iBrain also consisted of "6:1:1 self contained classes with related services of occupational therapy, speech and language services, physical therapy available to the student" (id.). Based on this, the IHO concluded that "the program at iHope and the program at iBrain are substantially similar[]" (id.).

The IHO noted that "'placement' is the student's program, not the location of services" and, therefore, that the parent was entitled to funding for the student's "placement at iBrain under pendency" (April 15, 2020 Interim IHO Decision at p. 6). The IHO indicated that the district had asserted that iHope was the student's pendency placement but that "there [was] nothing in the record to suggest that the [district] did anything to facilitate the student's placement at iHope under pendency" and that, therefore, the student would not have had a pendency placement (id.).

Finally, the IHO acknowledged that "the issue of whether the parent can unilaterally place a student in a different program under pendency" based on "the 'substantially similar' doctrine [was] still unsettled in the Second Circuit," but found that "without further direction, and under the specific facts of this case, that the parent may do so" (April 15, 2020 Interim IHO Decision at pp. 6-7). Lastly, the IHO determined that the doctrine of res judicata did not apply in this matter, because the issue of pendency decided by the district court with respect to this student, which was then pending before the Second Circuit, related to the 2018-19 school year, and the matter before the IHO concerned the 2019-20 school year (id. at p. 7). The IHO directed the district to fund the student's placement at iBrain for the 2019-20 school year under pendency, retroactive to the date of the due process complaint notice (id.).

IV. Appeal for State-Level Review

The district initiated an appeal from the IHO's interim order on pendency, arguing that a recent decision of the Second Circuit Court of Appeals (Ventura de Paulino Navarro Carrillo v. New York City Department of Education, 2020 WL 2516650 [2d Cir. May 18, 2020]) held that it is the district, and not the parents, that has the authority to determine how and where a student's most recently agreed upon educational program is to be provided during the pendency of a student's IEP dispute.[3] The district contends, the Second Circuit decision also holds that regardless of whether iBrain provided the student's last agreed-upon educational placement in a manner substantially similar to iHope, when the parents unilaterally enrolled the student at iBrain, the parents did so at their own financial risk. Accordingly, the IHO's application of a "substantial similarity" analysis between iHope and iBrain in the interim order on pendency was error and the decision should be reversed.

The district also asserts that the IHO erred in finding that the student would not have a pendency placement because there was nothing in the hearing record showing that the district did

[3] The district also submitted an answer to the parents' request for review. In its answer the district asserted that the parents' request for review was moot as the request for review had alleged that the IHO failed to make a pendency finding and the IHO subsequently issued an interim order on pendency. The parents submitted a reply to the district's answer, in which they argued the appeal was not moot because the IHO's order on pendency did not direct the district to immediately fund the student's tuition at iBrain.

anything to facilitate the student's placement at iHope. Rather the district asserts that its obligation here was to fund the student's pendency placement at the pendency program, iHope, had the parents placed the student there.

In an answer, the parents contend that the district's request for review should be dismissed as untimely because the parents had already filed a request for review regarding pendency in this matter. The parents further argued that the Second Circuit's decision in De Paulino has been "effectively stayed" pending the outcome of a petition for rehearing or rehearing en banc made in that matter. The parents request that the IHO's interim order on pendency be upheld, but modified to require the district to immediately fund the student's placement at iBrain.[4]

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; 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 (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

[4] There have been additional pleadings and submissions made in both Appeal No. 20-067 and Appeal No. 20-090All of the arguments properly raised by the parties in both Appeal No. 20-067 and Appeal No. 20-090 have been considered and addressed to the extent required herein (see 8 NYCRR 279.6[a]).

location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

Initially, I note that the district's appeal of the IHO's May 15, 2020 interim decision was timely brought, and I decline to dismiss it as requested by the parents (see generally 8 NYCRR 279.4[a]). Both the parents' and district's requests for review involve two distinct actions by the IHO. The parents appealed from the IHO's decision to reserve making a pendency decision, highlighting a March 18, 2020 email from the IHO to the parties and the transcript of the April 7, 2020 hearing (see Parents Req. for Rev. ¶¶ 12-16). On May 15, 2020, approximately one month after the IHO issued his order on pendency, the district answered the parents' request for review asserting that the matter was moot. The parents replied and argue the appeal was not moot because there is a 'live' controversy regarding the IHO's order on pendency, in that it did not direct the district to immediately fund the student's tuition at iBrain. Under these circumstances, the district is correct; because the parents' request for review appealed from the IHO's decision not to address pendency, and the IHO subsequently addressed pendency in an interim decision, the parents' request for review is moot (see K.C. v. New York City Dep't of Educ., 2015 WL 5784905, at *13–15 [S.D.N.Y. Sept. 30, 2015][action to compel SRO to issue decision deemed moot after issuance of SRO decision]).

After the district submitted an answer to the parents' request for review, 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 Second Circuit 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).

On May 26, 2020, the district served the parents with a request for review challenging the IHO's April 15, 2020 interim order on pendency on the basis that the Second Circuit's decision in Ventura de Paulino should apply to this proceeding and that the district should not be obligated to fund the parents' placement of the student at iBrain during the pendency of this proceeding.

To the extent that the parents allege the district's request for review is untimely, an appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). Additionally, if the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). In this instance, the IHO decision is dated April 15, 2020; 40 days after the date of the interim order on pendency fell on May 25, 2020, which was a legal holiday. Accordingly, the last day for the district to timely serve the request for review was May 26, 2020. Based on the above, the district's appeal was timely served on May 26, 2020.

In their answer to the district's request for review, the parents' argue 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. As recently pointed out by my colleague in another State level proceeding, "the petition for rehearing or rehearing en banc would not affect the applicability of the Second Circuit's decision in Ventura de Paulino in the present matter" (Application of a Student with a Disability, Appeal No. 20-069).[5] 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 to 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

[5] Rule 41 of the Federal Rules of Appellate Procedure 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]).

was whether the parents could unilaterally move the student to iBrain and still receive pendency funding (id.). The Court concluded that 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 pendency services (id. at *10-*12). Overall, the parents have not pointed to a persuasive argument in support of their position that the Second Circuit's pendency determination on a similar legal issue and essentially identical facts should not apply in the present matter.

VII. Conclusion

The parents' appeal is dismissed as moot and the district's appeal is sustained based on controlling authority.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision on pendency, dated April 15, 2020, is reversed in its entirety.

Dated: **Albany, New York**
June 15, 2020

STEVEN KROLAK
STATE REVIEW OFFICER