The University of the State of New York

The State Education Department
State Review Officer
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No. 21-018

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 Office of Phillippe Gerschel, attorneys for petitioner, by Phillippe Gerschel, Esq.

Judy Nathan, Interim Acting General Corporation 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) which determined that her son was not entitled to a stay-put placement during the pendency of the underlying due process proceeding. 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

Due to the interlocutory nature of this appeal, the hearing record is sparse with respect to information regarding the student's educational history. According to the parent, the student had been found eligible for special education and related services as a preschool student with a disability during the 2015-16 school year (Parent Exs. A at p. 1; B at pp. 1, 2, 14). The parent reported that the student began attending a nonpublic school (NPS) at the age of three and began attending a different location of the school during the 2019-20 school year (Parent Ex. A at p. 1; see Tr. pp. 38-39).

On October 16, 2015, a Committee on Preschool Special Education (CPSE) convened to develop an IEP for the student (Parent Ex. B at p. 1). Having found the student eligible for special education and related services as a preschool student with a disability, the October 2015 CPSE recommended bilingual 10-month services consisting of five 60-minute sessions per week of

special education itinerant teacher (SEIT) services in a small group of 3:1 delivered in a general education classroom, and two 30-minute sessions per week of individual speech-language therapy delivered in a separate location (id. at pp. 1, 14).

A. Due Process Complaint Notice

In a due process complaint notice dated October 5, 2020, the parent asserted that she signed a withdrawal of consent for services "[o]n or about July 19, 2016… without understanding the nature" of the document (Parent Ex. A at p. 2). The parent alleged that she was unable to produce the student for the speech-language therapy services arranged by the district and "was told that she was required to sign the withdrawal of consent of services thereby removing [the student]'s entire recommendations. As such [the student] was no longer entitled to services after July 19[], 2016" (id.).

As relief, the parent requested that a CSE convene to evaluate the student and develop an IEP, and an award of compensatory educational services "for the past two school years in which [the student] should have been receiving services had [p]arent not been coerced into signing the above-mentioned withdrawal" (Parent Ex. A at p. 3). The parent further requested an order on pendency "based on the last agreed upon IEP, dated 10/16/2015" which provided for SEIT services and speech-language therapy (id. at p. 2).

B. Impartial Hearing Officer Decision

After a prehearing conference on November 9, 2020, the parties convened for a hearing on pendency on November 13, 2020 (Tr. pp. 1-46). In an interim decision dated November 24, 2020, the IHO determined that the "stay put doctrine" did not apply to the student "because there [wa]s no placement for the purpose of special education" (Interim IHO Decision at p. 5). The IHO noted that once the parent revoked consent for services, the student was no longer eligible for special education, nevertheless the parent could request an evaluation that would be "considered a request for initial evaluation" (id.). The IHO found that there was no basis for any pendency and the student was not currently eligible for any services (id. at p. 6).

IV. Appeal for State-Level Review

The parent appeals and asserts that "[t]he [p]endency [o]rder relied on the [w]ithrawal of [c]onsent which the [p]arent was swindled into signing" (Req. for Rev. at p. 4). The parent argues that the district told her that she was required to sign a withdrawal of consent for services in order to decline speech-language therapy from a particular provider. The parent contends that she would not have signed the form if she knew that she would no longer be able to obtain services in the future. The parent asserts that the withdrawal of consent for services should be deemed null and void. The parent next contends that the student should be entitled to pendency pursuant to the October 2015 CPSE IEP and that in failing to award the student pendency services, the IHO denied the student a FAPE. For relief, the parent requests that the withdrawal of consent be "disregard[ed]," that the IHO's interim order on pendency be vacated and that an SRO order the CSE to reconvene and develop a current IEP and issue an order on pendency based upon the October 2015 CPSE IEP.

In an answer, the district denies each of the parent's claims and requests that the parent's appeal be dismissed. Specifically, the district argues that the IHO correctly determined that the student was not entitled to pendency and that once the parent withdrew consent for special education services, the district could not continue to provide special education and related services to the student. The district contends that the parties agree that the parent revoked consent in writing on July 19, 2016. As a result, the district argues that it cannot legally provide services and the IHO correctly found the student was not eligible for special education. The district also asserts that the parent has not cited to any authority in her request for review to support her claim for pendency. The district further alleges that the parent's claim of coercion is unsupported by the hearing record. The district asserts that if the student was applying for initial admission to a public school, the student's pendency placement would be the recommended public school program. The district next contends that even if pendency could be based on the October 2015 CPSE IEP, the parent has abandoned the pendency placement by enrolling the student in an NPS and attempting to invoke pendency at her preferred site. Lastly, the district requests that the IHO's interim order on pendency be affirmed and the parent's request for review be dismissed.

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 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

The IHO determined that because the parent revoked consent for the district to provide special education and related services to the student, the student became a general education student and there was, in effect, no longer any special education placement to maintain as the student's status quo "stay-put" for pendency purposes. The IHO noted that the student's current educational placement was a general education classroom in a private school (IHO Decision at p. 5). Moreover, the IHO determined that the October 2015 IEP was developed for the student while he was in preschool and he had not received special education and related services for more than four years at the time the due process complaint notice was filed (id.). The parent's request for review rests solely on her allegation that the IHO erred in relying on the parent's revocation of consent in determining the student's pendency placement. Indeed, the parent contends that "[g]iven that the [w]ithdrawal [of consent] should be deemed null and void, [the student should be entitled to [p]endency on the CPSE IEP dated October 16th, 2016" and "[b]y denying [p]endency, the IHO effectively denied [the student] a FAPE" (Req. for Rev. at p. 4).

As an initial matter, the parties agree that the parent executed a form to revoke consent for special education and related services on or about July 19, 2016 (Req. for Rev. at p. 3; Answer ¶

2; see also Interim IHO Decision at pp. 3-4; Tr. pp. 25, 31; Parent Ex. A at p. 2).[1] State regulation provides that a revocation of consent for the provision of special education and related services must be in writing and the district must provide prior written notice before ceasing provision of special education programs and services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 C.F.R. 300.503; 8 NYCRR 200.5[a]). Additionally, upon a parental revocation of consent, the district is precluded from continuing to provide special education programs and services and from using mediation or due process procedures to obtain agreement or a ruling that the services may be provided to the student; additionally, a district shall not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure to provide the student with further special education programs and services (8 NYCRR 200.5[b][5][i]-[iii]; see 34 C.F.R. 300.300[b][4]). The district is also not required to convene a meeting of the CSE, develop an IEP for the student, or amend the student's education records to remove any references to the student's receipt of special education programs and services because of the revocation of consent (8 NYCRR 200.5[b][5][iv]-[v]; see 34 C.F.R. 300.300[b][4]). Once the district has properly discontinued the provision of special education and related services, the student becomes a general education student and the district may place the student in accordance with the placement procedures of general education students (see Parental Revocation of Consent for Special Education Services, 73 Fed. Reg. 73,011, 73,013 [Dec. 1, 2008]). The district must treat a subsequent evaluation request by a parent as a request for an initial evaluation (Letter to Cox, 54 IDELR 60 [OSEP 2009]).

Here, there is insufficient basis to depart from the IHO's determination that after the parent executed a revocation of consent to special education and related services and after four years passed where the student did not receive special education or related services, the student was a general education student with no special education status quo to maintain via pendency.[2] Moreover, the parent's due process complaint notice consisted of a pendency request, a request for a referral to the CSE, and a request for two years of compensatory educational services (Parent Ex. A at pp. 2-3). The due process complaint notice does not allege any specific violations of the IDEA (see id.). In his closing statement during the pendency hearing, the parent's attorney stated that the parent was not seeking compensatory relief (Tr. p. 42). As a result, it is not clear whether the parent's attorney intended to formally withdraw the parent's claim for compensatory educational services and if so, whether any requests for relief remain beyond the parent's request for the CSE to reconvene. Indeed, given the procedural posture of the matter, the due process complaint notice is perhaps more properly construed as a referral of the student to the CSE for an initial evaluation rather than as a vehicle for colorable claims related to the student's educational placement. Although the parent argues that the IHO's denial of her requested pendency placement for the student amounts to a de facto denial of a FAPE, a student's placement pursuant to the

[1] Neither the revocation of consent nor a prior written notice regarding the discontinuance of special education were submitted as evidence into the hearing record.

[2] It is not clear if the IHO intended to make a factual finding that the student was not eligible for special education within the meaning of IDEA or was merely stating that at the time that the parent attempted to invoke pendency, the student was enrolled as a general education student at an NPS and had not received special education services since the parent had revoked consent. In any event, a revocation of consent for provision of special education services does not alter the student's IDEA eligibility (A.A. v. Walled Lake Consol. Sch., 2017 WL 2591906 *9 [E.D. Mich. Jun. 15, 2017]).

pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered to the student (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"]). Pendency is also not a remedy in and of itself for a denial of FAPE or to remediate any other alleged violations of the IDEA on the part of the district. Rather, it is a vehicle for maintaining the student's educational status quo until an underlying dispute brought pursuant to the IDEA is resolved. Accordingly, to the extent the parent relies on the circumstances by which she withdrew consent for the provision of special education and related services in 2016 as the basis for an equitable award of pendency in 2020, such argument is unavailing and contravenes the purpose of the stay-put doctrine to provide stability and consistency in the education of a student with a disability (Honig, 484 U.S. at 323). While the validity of the parent's revocation of consent may be relevant to an award of compensatory educational services or other requested relief with respect to the underlying substantive IDEA claims in this matter, if any, the parent's challenge to the revocation after four years have passed since its execution cannot serve as the basis for the student's pendency during this proceeding.[3]

If in fact, the parent's attorney merely failed to think through any unintended consequences from his closing statement and the parties proceed with an impartial hearing, the parties should endeavor to address the omissions and contradictions in the hearing record. Notably, the hearing record does not include a copy of the parent's revocation of consent for services, procedural safeguards notice, prior written notice, subsequent IEPs, or evidence, if any, of the district's efforts to implement the October 2015 CPSE IEP or any other IEP for the student. Further, there is no information in the hearing record that would explain why the parent's withdrawal of consent was executed during the 2016-17 school year, while the parent's attorney asserted the scheduling issues were related to implementing the recommended speech-language therapy recommended for the 2015-16 school year.[4]

However, even if the parties proceed to an impartial hearing on the merits, there is no cause for further delay in commencing a referral of the student to the CSE for an initial evaluation. In the parent's October 5, 2020 due process complaint notice, the parent specifically requested that

[3] Although the IHO referenced a portion of the parent's testimony concerning her signing of the revocation of consent and subsequent realization approximately four years later that her son had been declassified (Tr. at 33, 35-36, 37, 41), she did not rely on such testimony in determining that the services in the October 2015 CPSE IEP did not constitute the student's pendency placement.

[4] The parent's attorney's position that the parent had intended to decline speech-language therapy services due to a scheduling issue—as argued in the due process complaint notice, during the pendency hearing, and in the request for review—is not consistent with the parent's testimony that the student was not receiving any services at the time she was presented with the withdrawal of consent for services form (compare Tr. p. 26; Parent Ex. A at p. 2; Req, for Rev. at pp. 2-3; with Tr. pp. 33, 34-35). The parent never testified that she had a scheduling problem with speech-language therapy, rather when questioned during the hearing, she indicated that the student was not receiving any services and that was the reason the district presented her with the withdrawal of consent form (Tr. pp. 31-32, 33). In addition, the October 2015 IEP is the only IEP in the hearing record and reflects that the student was recommended to receive 10-month services during the 2015-16 school year (Parent Ex. B). However, the parent's attorney asserted that the district had located a speech-language therapy provider in July 2016, after the start of the 2016-17 school year (Tr. pp. 25-26). There is no indication in the hearing record if the CSE convened for the 2016-17 school year or whether the student was recommended to receive 12-month services during the 2016-17 school year.

the CSE "reconvene in order to assess [the student's] current needs" (Parent Ex. A at p. 2). In addition, during the November 2020 hearing, the parent testified that she "reapplied for [the student] to get services again" in July or August of 2020 (Tr. pp. 35-36). At the close of the hearing both the parent's attorney and the district representative indicated that moving forward, the student should be evaluated (Tr. pp. 42-45). Now, on appeal, the district acknowledges that it is required to conduct an evaluation of the student upon the parent's request and that the parent, in her due process complaint notice, sought an IEP for the student (Answer ¶ 10). During the hearing, the parent's attorney indicated that "until lawyers got involved, this was a child who was basically lost in the shuffle" (Tr. p. 43). However, despite four months passing since the parent filed her due process complaint notice, and up to seven months passing since the parent reapplied for the student to get services, there is no indication here that the process for conducting an initial evaluation of the student has commenced.[5] The district cannot merely agree that the student should be evaluated, but should take immediate steps to rectify this situation.

VII. Conclusion

Based on the foregoing, there is insufficient reason presented on appeal to disturb the IHO's determination that the student was not entitled to a pendency placement based on the October 2015 CPSE IEP. Additionally, if the parties have not already done so, the student should be referred forthwith to the CSE for an initial evaluation consistent with State regulations (8 NYCRR 200.4[a][iv], [b]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 22, 2021

STEVEN KROLAK
STATE REVIEW OFFICER

[5] Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).