The University of the State of New York

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

No. 21-045

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by William M. Meyer, Esq. and Linda A. Goldman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, 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 interim decision of an impartial hearing officer (IHO) determining the student'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 2020-21 school year. The IHO determined that the student's pendency placement was the placement established pursuant to an unappealed IHO decision, dated June 8, 2020 (June 2020 IHO decision). 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[a]). 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

Given the limited scope of this appeal, a recitation of the student's educational history is unnecessary. Briefly, the student attended a 12-month school year program at a nonpublic school during the 2017-18 school year (see Parent Ex. B at pp. 4-5). At an impartial hearing held concerning the parents' allegation that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, the district conceded that it failed to offer the student a FAPE, and an IHO determined that the parents' unilateral placement of the student at

the nonpublic school was appropriate (id. at pp. 8-11). The IHO in that case ordered the district to reimburse the parents for the out-of-pocket costs of the student's unilateral placement for the 2017-18 school year, and further ordered the district to directly pay the nonpublic school for "all outstanding payments" for the 2017-18 school year (id. at p. 11).[1] Although sparse, the evidence in the hearing record reveals that the student attended the same nonpublic school from summer 2017 through summer 2019 (see Tr. p. 7; Parent Ex. C at p. 2; see generally Parent Ex. B).[2]

Thereafter, by letter dated August 21, 2019, the parents notified the district of their intention to unilaterally place the student at the Titus School (Titus)—a different nonpublic school—which the student began attending in September 2019 (see Parent Ex. A at p. 1; see also Tr. p. 7).[3, 4] The evidence in the hearing record indicated that the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year, and in the June 2020 IHO decision issued with respect to that allegation, an IHO concluded that the district failed to offer the student a FAPE for the 2019-20 school year and that the parents' unilateral placement of the student at Titus was appropriate (see Parent Ex. A at pp. 14-25, 28). According to the June 2020 IHO decision, the district did not present any documentary or testimonial evidence or "defend its failure to hold an IEP meeting or its failure to provide a school placement" at the impartial hearing (id. at p. 14). As relief, the IHO ordered the district, in part, to reimburse the parents for the costs of the student's attendance at Titus—and as paid pursuant to the terms of the enrollment contract—for the 2019-20 school year (id. at p. 27).[5] In addition, the IHO ordered the district to directly pay

[1] The IHO's decision concerning the 2017-18 school year was dated March 22, 2018 (March 2018 IHO decision) (see Parent Ex. B at p. 11). According to the evidence in the hearing record, the March 2018 IHO decision formed the basis for the student's pendency placement while the parents challenged whether the district offered the student a FAPE for the 2019-20 school year; as such, the student remained at the same nonpublic school during summer 2019—pursuant to a pendency placement—that he had been continuously attending since the 2017-18 school year (see Parent Exs. B at p. 4; C at p. 2).

[2] To be clear, any and all information gleaned from the impartial hearing transcript refers to statements made by either the parents' attorney or the district's attorney—as neither party presented witnesses in support of their respective positions to establish the student's pendency placement (see Tr. pp. 1-22).

[3] The hearing record does not include a copy of the parents' August 2019 letter (see generally Tr. pp. 1-22; Parent Exs. A-D).

[4] According to the evidence in the hearing record, during the 2018-19 school year the parents had grown increasingly concerned about the student's escalating behaviors at his then-current nonpublic school and whether that nonpublic school remained an appropriate educational setting for him (see Parent Ex. A at pp. 2, 15-16). For example, as noted in the hearing record, a spring 2019 neuropsychological evaluation of the student indicated that he presented "at times with oppositional behavior and, although socially inclined, ha[d] difficulty making friends, occasionally getting into fights" (id. at p. 2). Additionally, the evaluator determined that the student "required a program that provided intensive support in a small class setting, with a strong behavioral approach" (id. at p. 15). Thereafter, Titus was "identified as an appropriate placement" to meet the student's needs and as "recommended by the physician who conducted the most recent neuropsychological evaluation, based on [the s]tudent's behavior and his need for intensive one-on-one support, particularly with regard to his toileting and behavioral issues and his anxiety" (id. at pp. 15-16).

[5] The hearing record does not include a copy of the enrollment contract with Titus for the 2019-20 school year (see generally Tr. pp. 1-22; Parent Exs. A-D). According to the June 2020 IHO decision, the enrollment contract was executed in August 2019 (see Parent Ex. A at p. 25).

Titus for "any remaining balance of tuition" pursuant to the terms of the enrollment contract (id.). Neither party appealed the June 2020 IHO decision (see Tr. pp. 5-6).

Shortly after the issuance of the June 2020 IHO decision, the parents alleged in a due process complaint notice dated July 1, 2020 that the district failed to offer the student a FAPE for the 2020-21 school year (see Tr. p. 6; Req. for Rev. Ex. AA at pp. 4-5).[6] On January 5, 2021, the parties proceeded to an impartial hearing, and on that date, presented their respective positions concerning the student's pendency placement (see Tr. pp. 1-22; see generally Parent Exs. A-D). While both parties agreed that the unappealed, June 2020 IHO decision formed the basis for the student's pendency placement at Titus, the parties disagreed as to whether the same decision informed the IHO regarding whether the pendency placement was a 10-month or 12-month school year program (see Tr. pp. 5-7, 9-10; see also Parent Ex. A at pp. 27-28).[7] The district's attorney pointed out that, while "Titus [was] usually a 12-month program, the student was only enrolled for a 10-month school year" in 2019-20 and the IHO's reimbursement award for that school year was limited to the 10-month school year (Tr. p. 6).

The parents' attorney conceded that the student had only attended Titus for a 10-month school year program during the 2019-20 school year—i.e., September 2019 through June 2020—because he "did not gain enrollment" and was not "offered a spot to the program" until September 2019 (Tr. p. 7). In support of the position that the IHO should order the student's pendency placement on a 12-month school year basis, the parents' attorney pointed to extrinsic evidence entered into the hearing record, which, according to the parents' attorney, demonstrated that the student had been recommended for 12-month school year programs in the past (see Tr. pp. 7-9; see generally Parent Exs. B-D). Ultimately, the IHO indicated that, based on the unappealed, June 2020 IHO decision, the student's pendency placement consisted of a 10-month school year program because a 12-month school year program could not be "derive[d] from that decision" (Tr. p. 14). The IHO further noted that "pulling prior decisions which may have dealt with 12-month programs d[id] not change what [was] in [the June 2020 IHO decision]" (id. at pp. 14-15).

In an interim decision on pendency dated January 6, 2021, the IHO ordered the district to provide the following as the student's pendency placement: "tuition reimbursement for the Titus School, and reimbursement for five hours per week of 1:1 Behavioral Therapy, two hours per month of Parent Training, Extended School Day service three days per week, and Supplemental Educational Services" (Interim IHO Decision). The IHO ordered the student's pendency

[6] A copy of the parents' July 2020 due process complaint notice was not entered into evidence as an exhibit during the impartial hearing (see generally Tr. pp. 1-22; Parent Exs. A-D). The district also failed to submit a copy of the July 2020 due process complaint notice to the Office of State Review as part of the administrative hearing record (see 8 NYCRR 279.9[a]). To the extent that State regulation automatically considers a due process complaint notice as part of the administrative hearing record to be filed with the Office of State Review regardless of whether it was formally entered into the hearing record as evidence, the July 2020 due process complaint notice accompanying the parents' request for review (Req. for Rev. Ex. AA at pp. 4-7) will be accepted as part of the hearing record and will be cited to as "Req. for Rev. Ex. AA."

[7] The district elected not to enter any documentary evidence into the hearing record with respect to the student's pendency placement; instead, the district's attorney indicated that any documents provided through disclosure for the impartial hearing were intended solely for the "substantive hearing"—noting further that the disclosed documents, while provided to the parents' attorney, had not been provided to the IHO (Tr. pp. 5-6).

placement on a 10-month school year basis, and additionally ordered that the pendency decision was "nunc pro tunc to the filing date of the due process complaint" notice (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by limiting the student's pendency placement to the funding of a 10-month school year program at Titus rather than a 12-month school year program.[8]

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's interim decision regarding pendency.[9]

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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], cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; 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]).[10] 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

[8] The parents submitted additional documentary evidence for consideration on appeal (see generally Req. for Rev. Ex. AA). Having accepted the July 2020 due process complaint notice—which was one document sent with the request for review—the parents' request to accept and consider the remaining documents is denied, as those documents are not needed to issue a decision in this matter.

[9] The district also seeks to dismiss the request for review for the failure to comply with the page limit set forth in the practice regulations (i.e., 10-page limit) and objects to the consideration of the additional documentary evidence submitted with the request for review (see Answer ¶¶ 5-11). Upon review, although the parents' request for review violates State regulation because it exceeds the maximum page limit, a dismissal on this basis, alone, is unwarranted at this juncture.

[10] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), the Court 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, 959 F.3d at 532-36).

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

As explained herein, the IHO's interim decision regarding the student's pendency placement will not be disturbed.

In this case, the parties agreed at the impartial hearing that the unappealed, June 2020 IHO decision formed the basis for the student's pendency placement at Titus (see Tr. pp. 5-7, 9-10; see

also Parent Ex. A at pp. 27-28). The parties also agreed at the impartial hearing that, during the 2019-20 school year, the student only attended Titus for a 10-month school year program (see Tr. pp. 5-7, 9-10; see generally Parent Ex. A). In addition, the evidence reflects that, by virtue of the conclusion reached by the IHO in the June 2020 IHO decision, Titus was an appropriate unilateral placement for the student for the portion of the 2019-20 school year that he attended the program, as reflected by the IHO's award of tuition reimbursement and direct payment to Titus under the terms of the enrollment contract signed by the parents in August 2019 (see Parent Ex. A at pp. 27-28).

Notably, however, a review of the June 2020 IHO decision reveals no information regarding the appropriateness of Titus as a 12-month school year program (see generally Parent Ex. A). As an acknowledgement of this proposition, the parents' attorney pointed to other evidence at the impartial hearing to establish the student's entitlement to a 12-month school year pendency program in conjunction with the June 2020 IHO decision (see generally Parent Exs. A-D). However, the parents' reliance on this extrinsic evidence constitutes a thinly veiled attempt to transfer the student's previous entitlement to a 12-month school year pendency placement at one nonpublic school to a different nonpublic school—albeit, absent more direct evidence of, or more explicit arguments in support of, a substantial similarity theory—which the Second Circuit firmly rejected in Ventura de Paulino (959 F.3d at 519). For example, a review of the June 2020 IHO decision reveals that the impartial hearing concluded on or about May 27, 2020, and at that time, due to the ongoing COVID-19 pandemic, the student was receiving daily, remote instruction from Titus (see Parent Ex. A at pp. 15, 17-18). However, the hearing record is devoid of any evidence demonstrating where, if at all, the student received instruction—or whether he continued to attend Titus—since the issuance of the June 2020 IHO decision on June 8, 2020 or through summer 2020 (see generally Tr. pp. 1-22; Parent Exs. A-D; Req. for Rev. Ex. AA at pp. 4-7). Notably, at the impartial hearing held in this matter on January 5, 2021, the parents did not present any evidence regarding summer 2020, which should have been well known at that time (see Tr. pp. 1-22). Even assuming for the sake of argument that the hearing record included this information and the parents argued an entitlement to a 12-month school year pendency program based upon a substantial similarity theory, as noted, the parents' argument would fail under Ventura de Paulino.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's interim decision regarding pendency finding that the student was entitled to a 10-month school year pendency program based upon the unappealed, June 2020 IHO decision.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 1, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER